A

DIGEST OF INDIAN LAW CASES

CONTAINING

HIGH COURT REPORTS

AND

PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA, FROM 1910 TO 1921, INCLUSIVE

BEING A SUPPLEMENT TO THE CONSOLIDATED DIGEST OF INDIAN LAW CASES 1836 1909

COMPILED UNDER THE ORDERS OF THE GOVERNMENT OF INDIA

BY

S WEBB JOHNSON, LL B (Hons)

SOLICITOR OF THE SUPREME COURT OF JUDICATURE AND ASSISTANT SOLICITOR TO THE GOVERNMENT OF INDIA

IN TWO VOLUMES

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THIS work is publishe(a supplement to the Consolidated Digest 1836 1909 compilec Mr B D Bose It contains the cases published in the Calcuttambay, Madras and Allahabad Series of the Indian Law Reports, the Reports Indian Appeals, and the Calcutta Weekly Notes, from 1910 n the Indian Law Reports, Lahore Series and the Patna Law Journce they were first published in 1920 and 1915 respectively to 1921 ve and Volume XXVI of Calcutta Weekly Notes 1922

For easy reference, a r of words and phrases, which are expounded in the judgmentited, are given in a separate list, in alphabetical order, under tding "Words and Phrases"

S WEBB JOHNSON

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The 31st August 1922

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———— *Hindu Law—Reversioner s suit to set aside an alienation by widow whether survives to his legal representatives* A suit by a reversioner to declare that deed of relin quishment executed by a widow is invalid as against his reversionary rights abates on the death of the plaintiff and cannot be continued by his legal representatives *Sakyahani Ingle Rao Sahib* v *Bhavani Boi Sahib I L R 27 Mad 588* followed *Muthusami Mudaliyar* v *Masilamani I L R 33 Mad 342* distinguished *Chiruvolu Punnammah* v *Chiruvolu Perraju I L R 29 Mad 390 Umar Khan* v *Niaz ud din Khan 22 Mad L J 240* and *Tribhuwan Bahadur Singh* v *Rameshar Bakhsh Singh I L R 28 All 727 (P C)* s c *L R 33 I A 156* referred to CHINNA VEERAYYA v LAKSHMINARASAMMA (1914) **I L R 37 Mad 406**

ABDICATION

See MAHANT **I L R 43 Calc 707**

ABDUCTION

See PENAL CODE S 361 **4 Pat L J 74**

ABDUCTION—*con t*

———————— *Abduction of married woman with intent to compel her to marry another—Marry meaning of—Penal Code (Act XLV of 1860) s 366—Lead Marriage* S 366 of the Penal Code applies to the case of abduction of a married woman with intent to compel her to marry The word marry therein implies as in s 494 going through a form of marriage whether the same is in fact valid or not TAHER KHAN AND OTHERS v EMPEROR (191)
I L R 45 Calc 641

ABETMENT

See ABETMENT OF AN ABETMENT

See BYE LAW

See CONSPIRACY I. L. R. 41 Calc. 754

See MAHOMEDAN LAW—BIGAMY
I. L. R 39 Calc 409

See PENAL CODE—

s 34 107 46 I L R 36 Bom 524

s 107 108 121 121A
I L R 34 Bom 394

s 361 366 I L R 38 All 664

s 467 15 C W N 565

See PUBLIC PROSECUTOR DUTY OF
I L R 42 Calc 422

———— advice whether amounts to

See PENAL CODE 107
5 Pat L J 129

———— of Murder—

See AUTREFOIS ACQUIT
I L R 41 Calc 1072

———— of an abetment—

See PENAL CODE s 108
22 C W N 1045

———— of supply—

See TRADING WITH ENEMY
I L R 42 Calc 1094

———————— The abetment sections of the Penal Code apply to an offence created by bye law framed under the Calcutta Municipal Act PROBODH CHANDRA DAS v CORPORATION OF Calcutta 24 C W N 195

———————— *Instigating a public servant to instigate a Magistrate to accept a bribe—Magistrate not instigated—Penal Code (Act XLV of 1860) ss 107 108 Expl (2) (4) 109 116 and 161* The words when the abetment of an offence is an offence do not mean when an abetment of an offence is actually committed but that when the abetment of an offence is by definition or description an offence under the Penal Code that is when an abetment of an offence is punishable under s 109 or s 116 or other provision of the Code then the abetment of such abetment is also an offence Where S instigated A a bench clerk in the Court of M a Presidency Magistrate to instigate the latter to accept an illegal gratification for acquitting an accused in a case pending before him and granting sanction against the complainant in the case and A received such gratification as a police spy and intending to get S arrested and did not in fact instigate M to accept the same *Held*

ABETMENT—*con t*

that S was guilty of the abetment of bribery under 161 read with s 116 of the Penal Code It is immaterial to the guilt of the abettor whether or not the person first abetted falls in with the plan of the former knowing his criminal purpose but intending to cause its detection *Empress v Troyluckho Nath Choudhry I L R 4 Calc 366* referred to SRILAL CHAMARIA v EMPEROR (1918)
I L R 46 Calc 607

ABISHEGAM

———— effect of—

See MUTT I L R 40 Mad 177

ABKARI LAW

See BENGAL EXCISE ACT

See BOMBAY ABKARI ACT V OF 1878

See MADRAS ABKARI ACT I OF 1886

ABSCONDING OFFENDER

See CRIMINAL PROCEDURE CODE s 512
I L R 38 All 29
I L R 41 All 60

See SEARCH WITHOUT WARRANT
I L R 38 Calc 304

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 88
I L R 39 Mad. 831

ABSCONDING SUSPECT

———— return of—

See SECURITY FOR GOOD BEHAVIOUR
I L R 39 Calc 458

ABSENCE

See COMPLAINANT I L R 42 Calc 365

ABSENCE OF CHARGE

See CRIMINAL TRESPASS
I L R 41 Calc 662

ABSENT PROPRIETORS

———— liability of—

See PUBLIC NUISANCE
I L R 46 Calc 515

ABSENT WITNESSES

See WITNESS I L R 47 Calc 758

ABSOLUTE ESTATE

See HINDU LAW—WILL
14 C W N 458

ABSOLUTE GIFT

See HINDU LAW—WILL
I L R 42 Calc 561

ABSOLUTE INAM

———————— The resumption of an absolute inam by Government and the grant by them of a Ryotwari patta does not put an end to the occupancy rights acquired by tenants VENKATAPPA CHARYOLU v POYAPA REDDI
I L R 44 Mad 550

ABSOLUTE TITLE

——— purchaser of—

See HINDU LAW—ENDOWMENT
I L R 38 Calc 526

ABWAB

See ILLEGAL CESS I L R 45 Calc 259

See LEASE I L R 39 Calc 663

See LANDLORD I L R 45 Calc 836

See REGULATION VIII of 1819
26 C W N 634

——— Ultarayan—Income Tax if payable on—

See INCOME TAX ACT s 2
25 C W N 83

1 ——— *Illegal cess—Rent—Bengal Tenancy Act (VIII of 1885) s 74—Regulation VIII of 1793 ss 54 and 55—Contract* If upon a fair interpretation of the terms of the contract the sum claimed can be deemed part of the actual rent the tenant is bound to pay it if on the other hand the sum claimed can only be regarded as an imposition in addition to the actual rent the stipulation for its payment is void Under a lease of certain lands the yearly rent was specified as assessed at a certain rate and at the end of the lease in a clause entirely distinct from the one wherein the rent was assessed a provision was made for the delivery of husk which was not expressly or by implication made part of the rent The plaintiffs brought a suit for arrears of rent on the basis of this lease claiming a deduction of a certain sum of money for unculturable land and seeking to recover arrears of rent besides husk They further claimed cesses upon the amount stated to be rent and not upon the amount claimed as price of the husk : *Held* that the sum claimed as the value of the husk did not form part of the consolidated rent but was an independent item falling within the description of an imposition in addition to the actual rent *Sonnum Sookul* v *Shaikh Ilahee Buksh 7 W R 143 Ram Narain Mitra* v *Iamna Chand Singh 7 C W N 203 Gyratullah Sardar* v *Girish Chandra Bhaumick 1. C W N 175 Krishna Chandra Sen* v *Susila Soondary Dassee I L R 26 Calc 611 Sreekanta Prasad* v *Irshad Ali Sircar 10 C L J 22* approved *Lalit Charan Pal Chaudhury* v *Bolak Chandra Ghose I L R 31 Cal 831* distinguished *Lilak Dhari Singh* v *Chulhan Mahton I L R 17 Calc 131 Lalha Prasad Singh* v *Bal Kowar Keeri I L R 17 Calc 726* referred to MATHURA PRASAD v TOTA SINGH (1912)
I L R 40 Calc 806

2 ——— *Reg V of 1812 s 3—Whether each of several sums mentioned as payable in a lease recoverable as rent—Every sum which is considered to form part of rent—Full Bench decision on point not arising in the case but accepted for years as good law if may be departed from by Division Bench* A kabuliyat after stating that the annual rent was to be Rs 3 3 1 4 proceeded — Besides this I shall continue to pay in the month of Bhadro every year the sum of Rs 10 as the mamuli (usual) for the Iswar Thakur at your house at Azimgunj If I fail to pay the aforesaid sum annually then you shall deduct the same from the money remitted to me as the rent or sue for the amount along with or separately from the arrears of rent I shall not take objections thereto *Held* on the construction of the kabuliyat that the sum of Rs 10 was not intended by the parties to be part of the consideration for the use and occupation of the land or as part of the rent and being an *abwab* was irrecoverable *Per* SANDERSON C J—The rule that has been followed in this Court is that each case must depend upon the proper construction of the contract before the Court and if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land i e if it is really part of the rent although not described as such the landlord can recover it The opinion of the majority in *Lalla Prasad Singh* v *Lal Kowar Keeri I L R 17 Calc 726* even though not strictly necessary for the decision of the case having been acted upon since 1890 should not be departed from by Division Benches of the Court BIJOY SING DUDHURIA v KRISHNA BEHARY BISWAS (1917)
21 C W N 959

ACCELERATION

——— by the widow to next reversioners—

See HINDU LAW—WIDOW
I L R 41 Bom 93

See HINDU LAW—REVERSIONER
I L R 44 Bom 255

ACCEPTANCE

See BILL OF EXCHANGE
I L R 41 Bom 566
I L R 46 Calc 584

See CONTRACT I L R 47 Calc 583

See LAND ACQUISITION
I L R 44 Bom 797

See OFFER

——— by creditor—

See LIMITATION
I L R 38 Mad 374

——— by Pleader—

See VAKALATNAMA
I L R 43 Calc 884

ACCESSORY EASEMENT

See EASEMENTS ACT (V OF 1882) s 24
I L R 42 Bom 529

ACCIDENT

——— plea of—

See PENAL CODE s 80
19 C W N 1043

ACCOMMODATION PARTY

See CONTRACT I L R 47 Calc 583

ACCOMPLICE

See CONSPIRACY TO WAGE WAR
I L R 38 Calc 559

See CRIMINAL PROCEDURE CODE 1898 s 337
I L R 1 Lah 102

See EVIDENCE ACT ss 25 114 133 157
I L R 35 Mad 397

1 ——— *Corroboration—Material particulars—Identity of accused* Before the testimony of an accomplice can be acted on it must be corroborated in material particulars

ACCOMPLICE—*contd*

There must be corroboration not only as to the crime but also as to the identity of each one of the accused. This is no technical rule but one founded on long judicial experience EMPEROR v LALIT MOHAN CHUCKERBUTTY (1911)
I L R 38 Calc 559

2. ——————— *Spy or detective associating with a wrong-doer for the purpose of discovery and disclosure of an offence—Necessity of corroboration—Evidence Act (I of 1872) ss 114 133* A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence either before associating with wrong doers or before the actual perpetration of the offence is not an accomplice but a spy detective or decoy whose evidence does not require corroboration though the weight to be attached to it depends on the character of each individual witness in each case But a person who is associated with an offence with a criminal design and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration *Rex v Despard 8 How St Tr 316 Reg v Dowling 3 Cox C C 509 Reg v Mullins 3 Cox C C 526 Rex v Bickley 2 Cr App Rep 53 73 J P 239 Reg v Sharkar Shobag Patin unreported Cr Ca 478* approved of *Queen Empress v Javecharam I L R 19 Bom 363* distinguished by HOLMWOOD J and dissented from by DOS J EMPEROR v CHATURBHUJ SAHU (1910)
I L R 38 Calc 96

3 ——————— *Accomplice Testimony of—Corroboration* Under s 133 of the Evidence Act a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice To justify the High Court in setting aside the conviction it is necessary to show not only that there is no corroboration but that the Judge taking all the evidence together was wrong in acting on it Where immediately after a dacoity and before the arrival of the police one of the accused who had been caught made a confession to a private person naming the other persons concerned in it except two one of whom he named two days after in his confession to the Magistrate which agreed with the evidence subsequently given by the informer both the confessions being afterwards retracted and another accused made a confession naming all the persons mentioned by the approvers the two accused and the latter having been arrested at different times and places and there was evidence that some of the dacoits were seen in company together shortly before the dacoity and that they were absent from their homes shortly after it *Held* that the confessions of the two accused and the other facts were sufficient corroboration of an approver who had been believed by the Judge and assessor as against the co accused who had not made confessions LALAN MALLIK v KING EMPEROR (1911)
16 C W N 669

4 ——————— *Testimony of Accomplice Spy or Informer—Corroboration Per* HARINGTON J —The testimony of persons who have been members of a criminal conspiracy or else have joined it for the purpose of betraying its secrets must be very carefully scrutinised and much weight cannot be attached to it unless it is corroborated by other circumstances *Per* MOOKERJEE J —Where a witness has made himself an agent for the prosecution before associating with the wrong doers or before the actual perpetration of the offence he is not an accomplice but he may be if he extends no aid to the prosecution until after the offence is committed A mere detective or decoy is not therefore an accomplice nor an original confederate who betrays before the crime was committed Yet an accessory after the fact would be an accomplice if he had before betrayal rendered himself liable as such As the crime of conspiracy is complete the moment there is concerted intention members of the conspiracy who after such agreement have out of fear or repentance transformed themselves into spies and informers do not thereby cease to be accomplices and their evidence requires corroboration of the same extent and character as in the case of accomplices LALIT BEHARI DAS v KING EMPEROR (1911) 16 C W N 1105

5 ——————— *Accomplice competency of as witness—Corroboration required nature of* An accomplice is a competent witness and there is no absolute rule of law which enacts that the conviction on the evidence of an accomplice is bad but there is an established practice founded on the judicial experience of generations which requires corroboration by some untainted evidence and that in a material particular pointing not only to the crime but to the participation of the accused in that crime SIAR NOWIA v KING EMPEROR (1913) 18 C W N 559

6 ——————— *Evidence of* The Appellant who was the station master of a railway station was prosecuted along with another person who was the goods clerk on a charge of criminal breach of trust as servant The goods clerk was further charged with having committed an offence under s 477A and the Appellant with abetment thereof The facts appeared to be that *G* the servant of a firm of merchants loaded a consignment of goods on behalf of the firm at the Appellant s station but less than the actual weight was entered in the books of the Railway Company and the freight credited to the Company was based on the false weight and a sum of Rs 2 more was alleged to have been paid by *G* and appropriated by the accused *Held per* NEWBOULD J That *G* was not an accomplice within the meaning of that word as used in ss 114 (*b*) and 133 of the Indian Evidence Act even if he was a party to a conspiracy to defraud the Railway Company in as much as he was not concerned in the offence under enquiry and the Sessions Judge did not misdirect the Jury when he told them that they should hold the Appellant to be guilty of misappropriation if *G* s evidence be believed without warning them that it was unsafe to convict on his evidence unless it was corroborated in material particulars An indication of the meaning of the word accomplice (which is not defined in the Evidence Act or any other Indian Statute) may be found in s 337 Criminal Procedure Code *Ramaswami Gounden v Emperor I L R 27 Mad 271* at p 277 (1904) referred to *Per* CHAUDHURI and SHAMSUL HUDA JJ That the facts alleged disclosed an offence either of receiving a bribe or that of criminal breach of trust and the Sessions Judge misdirected the Jury as to the evidence of *G* and the misdirection was such as vitiated the trial *Per* SHAMSUL HUDA J That to constitute

ACCOMPLICE—*contd*

an accomplice there need only be the intention of assisting in the commission of a crime but he need not know exactly what crime was being committed *Carter Cratchley 9 Cr App Rep 232 (1913)* referred to That even if *G* was not an accomplice in the technical sense of the term, his evidence was no better than that of an accomplice and should have been dealt with on that footing The *Queen v Chando Chandalinee 24 W R (Cr) 55 (1875) Alimuddin v Queen Empress I L R 23 Calc 361 (1895)* and *Ishan Chandra Chandra v Queen Empress I L R 21 Calc 328 (1893)* referred to That the learned Sessions Judge should have explained to the Jury what an accomplice was and should have asked them to say upon the facts before them whether *G* was or was not an accomplice The Jury should further have been told that if *G* was a party to the conspiracy to cheat the Railway Company he was an accomplice and it was not safe or proper to convict upon his evidence without corroboration in material particulars The Judge should have also explained to the Jury what was the nature of corroboration necessary in such cases SURJA KANTA BHATTACHARJEE *v* KING EMPEROR 24 C W N 119

ACCORD AND SATISFACTION

See CIVIL PROCEDURE CODE O XXIII, R 3 I L R 45 Bom 245

ACCOUNT

See ACCOUNTS

See CIVIL PROCEDURE CODE (ACT V OF 1908 O I R 8
I L R 40 Bom 158

See COMMISSIONER
I L R 41 Bom 719

See CONTINUOUS ACCOUNT

See DECREE (EXECUTION)
I L R 34 Bom 260

See DEKKHAN AGRICULTURISTS RELIEF ACT (XVII OF 1879) S 13
I L R 41 Bom 453
I L R 45 Bom 216 323

See HINDU LAW—PARTITION
I L R 43 Calc 459

See LIMITATION ACT IX OF 1908 SCH I
ART 62 I L R 45 Bom 313
ART 106 I L R 34 Bom 515

See MINOR I L R 43 Mad 429

See PARTNERSHIP (12)
I L R 43 Calc 733

See SUIT FOR ACCOUNT

——— adjustment of—

See PARTNERSHIP 15 C W N 882
I L R 37 Bom 158

——— by Guardian

See GUARDIANS AND WARDS ACT (VIII OF 1890) SECS 34 (*a*) 35
I L R 44 Bom 852

——— current mutual—

See LIMITATION ACT (XV OF 1877 SCH II ART 85 I L R 32 All 11

ACCOUNT—*contd*

——— suit for—

See ADMINISTRATOR PENDENTE LITE
I L R 39 Calc 587
I L R 41 Calc 771

See CIVIL PROCEDURE CODE (ACT V OF 1908) S 92 I L R 40 Bom 439

See COMMON MANAGER
I L R 40 Calc 150
I L R 44 Calc 800

See COURT FEES I L R 39 Mad 725
ACT S 7 I L R 45 Calc 634

See DEKKHAN AGRICULTURISTS RELIEF ACT SS 2 13 15D 16
I L R 34 Bom 161
I L R 35 Bom 204
S 15 I L R 34 Bom 158
I L R 37 Bom 614
S 13 I L R 39 Bom 73

See HINDU LAW—PARTITION
I L R 38 Mad 556

See LIMITATION ACT 1877 SCH II ARTS 89 115 116 132
14 C W N 121

See PARTNERSHIP I L R 40 All 446

See PRINCIPAL AND AGENT
I L R 43 Calc 248
I L R 41 Mad 1

1 ——— *Administrator pendente lite accounts of when not objected to by parties and passed by Court if may be re opened in the absence of fraud or omission—Principle on which commission is charged objection as to proper time for taking objection* When accounts submitted by an administrator *pendente lite* have been passed by the Court in the presence of parties entitled to call on him to account and such parties have had an opportunity of being heard he cannot there after be called upon to account again to such parties or their representatives unless fraud or mistake or omission on the part of such administrator *pendente lite* is proved in such accounts An administrator *pendente lite* discharges his duties of accountability when his accounts are complete and honest and do not contain false or fraudulent entries or omissions If the parties had any objection to the principle on which he charged his commission on the assets they should have objected to it when the account was before the Court KHITISH CHANDRA ACHARYA CHOWDHURY *v* OSMOND BEEBY (1911)
15 C W N 832

2 ——— *Suit for account—Civil Procedure Code (Act XIV of 1882) ss 12 13—Suit for account against agent—Cross suit by agent—Separate trial if illegal—One suit if should be stayed pending decision in the other —Res judicata* C being sued as agent to account for moneys given to him instituted a separate suit claiming to recover a certain sum which he alleged was due to him from the principal over and above the amount in respect of which account was sought from him *Held* that the decision in the former suit cannot operate as a bar to the trial of the latter on the principle of *res judicata* That though it was desirable that the two suits should have been tried together there was no legal bar to their being tried separately though the same ground might have to be traversed over again Section 12

ACCOUNT—*contd*

Civil Procedure Code has no application to suits of this kind CHANDRA KUMAR MAJUMDAR *v* PRAMATHO NATH RAY (1911) 15 C W N 930

3 ———————— *Principal and Agent —Proprietor appointed by the co proprietors as Common Manager for payment of joint debts whether an agent of the heirs and of the heirs of a deceased proprietor—Limitation—Limitation Act (IX of 1908) Sch I Art 89—Plea of Limitation under the Act taken on remand after previous unsuccessful plea of limitation under Act VIII of 1869 s 30* A proprietor appointed by the other co proprietors of an estate as common manager thereof for the purpose of realizing its profits and appropriating them to the payment of their joint debt is an agent of the other proprietors and of the legal representatives of a proprietor since deceased within Art 89 of the Limitation Act (IX of 1908) and the period of limitation of a suit for accounts brought by the latter against such manager is governed thereby Where repeated demands for accounts were alleged in the plaint to have been made but the dates were not mentioned nor proved and the demands appeared to have continued to the termination of the agency it was *held* that limitation commenced to run from the date of the termination of the agency A plea of limitation under the Limitation Act may be raised on the hearing after the remand of a case by the High Court notwithstanding the failure of a similar plea taken only under s 30 of Act VIII 1869 on the first hearing in the Court below CHANDRA MADHAB BARUA *v* NOBIN CHANDRA BARUA (1912) I L R 40 Calc 108

4 ———————— *Continuous—Cause of action* Where there are dealings between two parties which give rise to a continuous account so that one item if not paid shall be united with another and form one continuous demand the whole together forms but one cause of action and cannot be divided *Bonsey* v *Wordsworth 18 C B 325* .. *t* followed KEDAR NATH MITRA *v* DINOBANDHU SHAHA (1916)

19 C W N 724
I L R 42 Calc 1043

5 ———————— *Account suit for costs of suit pending reference for account* In a suit for account where the defendant resisted plaintiff's claim for an account costs were awarded to the plaintiffs up to and including the hearing by the decree directing reference for an account HYAM *v* BENGAL STONE Co (1916) 20 C W N 368

6 ———————— *Limitation Act (XV of 1877) Sch II Art 89 and s 8—Principal and Agent—Death of Principal leaving sons some of whom were minors—Proprietor appointed by co proprietors manager of estate for payment of joint debts—Omission to bring cross appeal to High Court or file cross objections under s 561 Civil Procedure Code 1882—Bar to decree for claim in full on appeal to Privy Council* In this case which was an appeal from the decision of the High Court in *Chandra Madhub Barua* v *Nobin Chandra Barua I L R 40 Calc 108* their Lordships of the Judicial Committee found that there was no evidence of any kind that a demand for and refusal of accounts was made after the death of the plaintiffs (appellants) father and that there was nothing in the plaint to justify the inference drawn by the High Court in that respect adversely to the plaintiffs. *Held* that the minor plaintiffs being entitled to

ACCOUNT—*contd*

the benefit of s 8 of the Limitation Act 1877 and Art 89 of Sch II of that Act being applicable to the suit there was nothing in the provisions of that Article to protect the defendant (respondent) against the liability to render accounts from July 1896 (as decreed by the Subordinate Judge) and limit his liability to do so only from August 1901 (as decided by the High Court) In the absence of any cross appeal by the plaintiffs to the High Court or any cross objections filed by them under s. 561 of the Civil Procedure Code 188 they could not obtain on this appeal a decree for accounts for the whole period of the agency but they were entitled to the restoration of the order of the Subordinate Judge for accounts for the longer period NOBIN CHANDRA BARUA *v* CHANDRA MADHAB BARUA (1916) I L R 44 Calc 1

7 ———————— *Circumstances in which accounts settled between parties may be re opened—Fraud—Substantial error* Accounts settled between parties may be re opened on the ground of substantial error or fraud If the errors are sufficient in number and importance whether they are caused by mistake or by fraud the Court has a right to open the accounts But when the account is between persons in a fiduciary relation and the person who occupies the position of accounting party—that is the trustee or agent is the defendant it is easier to open the account than it is in cases where persons do not occupy that position that is to say that a less amount of error will justify the court in opening the account *Williamson* v *Barbour L R 9 Ch D 529* and *McKellar* v *Wallace 5 Moo I A 3*.. followed BHAGWAN BAKHSH SINGH *v* JOSHI DAMODARJI I L R 42 All 230

8 ———————— *Payment by debtor—Appropriation to principal or interest* A creditor to whom principal and interest are owed is entitled to appropriate against the interest any sum which the debtor pays stipulating that it is to be appropriated against the principal If the debtor on paying a sum stipulates that it shall go in discharge of principal the creditor can refuse to accept it on that condition but if he accept it he is bound by the appropriation Where a creditor receives a sum which the debtor does not appropriate to interest and the creditor believing that compound interest is payable makes an entry in an account book showing the amount due at a certain date by crediting the sum received with interest to that date he is not precluded from afterwards appropriating the sum to interest when the account is taken on the basis that simple interest is payable Judgment of the Court of the Chief Commissioner is reversed NEMI CHAND *v* LATHA KISSEN (1921) I L R 48 Calc 839

9 ———————— *Restitution—Principal interest—Appropriation of payments—Rate of interest—Discretion of High Court—Code of Civil Procedure (V of 1908) s 144* In taking an account of principal and interest due the ordinary rule as to payments by the debtor unappropriated either to principal or interest is that they are first to be applied to the discharge of in[illegible] A creditor under the belief that interest was [illegible] able with yearly rests prepared a statement [illegible] which payments by the debtor were [illegible] ward to the end of the year with [illegible] amounts so found were then credited [illegible] total sum due Upon this a court [illegible]

ACCOUNT BOOK—*contd*

simple interest *Held* that the creditor had not by this statement appropriated the payments against the principal so as to be precluded from applying the rule stated above The discretion of the High Court when making an order for restitution under s 144 of the Code of Civil Procedure 1908 to fix the rate of interest payable will not be lightly interfered with Where in the case of restitution of money paid out by a Receiver under a decree the Court ordered restitution to the opposite party with interest at a rate higher than the Bank rate an appeal was dismissed VENKATADRI APPA RAO v PARTHASARATHI APPA RAO (1921) I L R 44 Mad (P C) 570

ACCOUNT BOOK.

——— entries in as evidence—

See MAHOMEDAN LAW—MARRIAGE I L R 45 Calc 878

See RES JUDICATA I L R 1 Lah 83

——— presumption to be drawn from—

See PRINCIPAL AND AGENT (ACCOUNTS) I L R 43 Calc 527

——— production of—

See MAGISTRATE POWER OF I L R 38 Calc 68

——— title page of—

See MAGISTRATE POWER OF I L R 38 Calc 68

ACCOUNT STATED

See LIMITATION ACT 1908 s 19 5 Pat L J 371

ACCOUNTS

See ACCOUNT

See DISSOLUTION OF PARTNERSHIP I L R 42 Calc 914

See LIMITATION ACT 1908 ART 89 26 C W N 61

See MORTGAGE (REDEMPTION) I L R 48 Calc 22

See PROBATE I L R 48 Calc 1051

See RESIDUARY LEGATEE I L R 41 Calc 271

——— re opening of—

See PRINCIPAL AND AGENT (ACCOUNTS) I L R 41 All 635

——— suit for—

See DEKKHAN AGRICULTURIST RELIEF ACT (XVII OF 1879) s 13(d) I L R 43 Bom 1

See PARTNERSHIP I L R 2 Lah 351

——— Defendant refusing to produce papers—*Presumption against him—Evidence Act (I of 1872) s 114 (b—Commissioner's report accepted by trial Court may be reviewed on appeal—Costs of whole enquiry may be ordered against obstructive Defendant—Defendants may be transferred to category of Plaintiffs after preliminary decree—Decree may be awarded in favour of non appealing party—Civil Procedure Code (Act V of 1908*

ACCOUNTS—*contd*

O 1 r 10 O XLI rr 4 and 33 DEBENDRO NARAIN SINHA v NARENDRO NARAIN SINHA 24 C W N 110

——— *Defendant dismissed and papers seized* In a suit for account the Defendant's plea that he was preparing the account when he was dismissed and a superior officer took possession of all the papers without giving him any receipt for the same was proved *Held* that it was impossible for the Defendant to render an account without the Plaintiffs producing the papers that were with them JATINDRO NATH DUTTA v SURESH CHANDRA ROY CHOWDHURY 24 C W N 942

——— A[illegible]ent Collector employed under a regular agreement was called upon to render accounts up to 1[illegible]th April on or before 13th May 1914 No accounts were rendered and on 11th October 1915 he was dismissed and a suit for accounts instituted on 27th August 1918 *Held* that Arts 115 and 116 of the Limitation Act did not apply and to be made applicable it must be shown that the suit was not specifically provided for in the schedule IBRAHIM MOOKERJEE v MAHARAJ KUMAR 26 C W N 61

ACCOUNTS AND ADMINISTRATION

——— suit for—

See COURT FEES ACT (VII OF 1870) s 7 CL IV (F) AND s 11 I L R 39 Bom 545

ACCOUNTANT GENERAL

See EXECUTION OF DECREE I L R 44 Calc 1072

ACCRETION

See ALLUVION I L R 40 Mad 1083

See BENGAL ALLUVION ACT XI OF 1825 5 Pat L J 1

See LANDLORD AND TENANT (MISC) 14 C W N 681

——— *Island formed in the mouth of a river subsequently becoming joined to the mainland ownership of* Where an island is formed in the mouth of a river which subsequently becomes part of the mainland through the drying up of the intervening channel the increase being perceptible or sudden the land which formed the island is not an accretion to the mainland but merely an adjunction and the owner of the mainland obtains no proprietary rights therein as against Government SURIYA RAO BAHADUR v THE SECRETARY OF STATE FOR INDIA (1913) I L R 3[illegible] Mad 57

ACCUMULATION

See WILL (27) I L R 47 Calc 76

ACCUSED PERSON

See CHARGE I L R 42 Calc 957

See CRIMINAL PROCEDURE CODE ss 110 200 437 I L R 35 Bom. 401

s 342 I L R 45 Bom 672

See CROSS EXAMINATION I L R 42 Calc 957

See PRACTICE I L R 40 Bom 220

See REVIEW I L R 38 Calc 82

ACCUSED PERSONS—*contd*

See WITNESS I L R 45 Calc 720

—— examination of—

See CHARGE I L R 42 Calc 957

See CRIMINAL PROCEDURE CODE s 43 4 9 25 C W N 609

See JURY RIGHT OF TRIAL BY I L R 37 Calc 467

See JURY TRIAL I L R 41 Calc 7

—— rights of—

See CONTEMPT OF COURT I L R 41 Calc 173

—— statements by—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) ss 16 288 I L R 34 Bom 599

See DEFAMATION I L R 40 Calc 433

See WITNESS I L R 46 Calc 700

—— value of statements by—

See CAUSING DEATH BY RASH OR NEGLIGENT ACT I L R 39 Calc 855

—— questions to by Court—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) *s* 342 I L R 39 Mad 770

—— Right of to recall and cross examine prosecution witnesses—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) *s* 256 I L R 39 Mad 503

—— statement of—

See CRIMINAL PROCEDURE CODE s 364 I L R 39 All 399

ACKNOWLEDGMENT

See ADMINISTRATOR PENDENTE LITE I L R 41 Calc 771

See ACKNOWLEDGMENT OF DEBT

See DEBTOR AND CREDITOR I L R 41 Calc 137

See HATCHITTA I L R 46 Calc 746

See LEASE I L R 40 Mad 910

See LIMITATION ACT (XV OF 1877) s 19

See LIMITATION ACT (IX OF 1908)— ss 16 19 I L R 35 Bom 383

s 19

s 20

SCH I ARTS 116 60 s 19 I L R 38 Bom 177

See MAHOMEDAN LAW—GIFT I L R 38 All 627

See MAHOMEDAN LAW—LEGITIMACY I L R 46 Calc 259 I L R 48 Calc 8 6

See MORTGAGE I L R 38 All 540

See REGISTRATION ACT (III OF 1877) s 1 (n) I L R 35 All 202

See STAMP ACT (II OF 1899)— ss 2 (23) 62 AND 63 I L R 35 All 290

ACKNOWLEDGMENT—*contd*

12 SCH I ART 1 AND 5 I L R 41 All 169

—— By father of a son by a female slave—

See MUHAMMADAN LAW I L R 1 Lah 229

—— conditional operation of—

See LIMITATION ACT (IX OF 1908) s 19 I L R 40 Mad 701

—— In pleas of another case—

See LIMITATION ACT 1908 s 19 I L R 1 Lah 357

—— of legitimacy—

See MAHOMEDAN LAW 23 C W N 50

—— of claim against Ward—

See LIMITATION ACT (IX OF 1908) s 19 I L R 44 Bom 871

—— *Unstamped Acknowledgment whether acknowledgment of debt—Stamp Act (II of 1899) Sch I Art 1—Evidence—Limitation Act (IX of 1908) s 19—Stamp duty* In an account between the parties headed Account current kept by the plaintiff the defendant was debited with advances made by the plaintiff together with interest on sums due from time to time and credited with payments made by the defendant the balances being carried forward half yearly On the account being adjusted and stated a certain sum F & O E was shown due by the defendant the plaintiff appended the words I accept this correct and the defendant subscribed his signature thereto The account was continued the said sum being carried forward and further sums were debited to the defendant but there were no further items of credit *Held* that in the circumstances of the case the instrument was not an acknowledgment of debt within the meaning of Art 1 of Sch I of the Stamp Act and was admissible in evidence without being stamped *Brojender Coomar* v *Bromomoyee Chowdhrani I L R 4 Calc 885 Brojo Gobind Shaha* v *Goluck Chunder Shaha I L R 9 Calc 127* and *Nund Kumar Shaha* v *Shurnomoyi I L R 15 Calc 162* followed GALSTAUN v HUTCHISON (1912) I L R 39 Calc 789

ACKNOWLEDGMENT OF DEBT

See ACKNOWLEDGMENT

See COURT OF WARDS I L R 43 Calc 211

See LIMITATION ACT s 19 AND 20

See PRINCIPAL AND SURETY I L R 44 Calc 978

—— Limitation Act (IX of 1908) s 19 Where the principal sum advanced on a mortgage bond was Rs 5,000 and on payment of Rs 1,751 an endorsement was made on the back of the bond in the following term — Paid on account of the principal as per separate accounts Rs 1,751 only *Held* that the endorsement constituted a valid acknowledgment debt within the meaning of s 19 of the Limitation Act Shearman v Fleming 5 B L R 619 distinguished PRASANNA KUMAR ROY v NIRANJAN ROY (1921) I L R 48 Calc 1046

ACKNOWLEDGMENT OF SON

See ACKNOWLEDGMENT

See MAHOMEDAN LAW—ACKNOWLEDGMENT OF SON I L R 40 Bom 28

ACKNOWLEDGMENT OF TITLE

See MORTGAGE I L R 42 All 575

ACQUIESCENCE

See ADMINISTRATOR PENDENTE LITE I L R 41 Calc 771

See ADVERSE POSSESSION I L R 40 Calc 173

See CIVIL PROCEDURE CODE 1908 O XXI r 66 15 C W N 428

See CUSTOM I L R 39 Calc 418

See EVIDENCE ACT (I OF 1872) s 115 I L R 35 Bom 182

See HINDU LAW ALIENATION I L R 40 Calc 966; I L R 41 Calc 793

See PARTITION SUIT FOR I L R 38 Calc 681

See PROBATE I L R 42 Calc 480

See SETTLEMENT CONSTRUCTION OF I L R 39 Calc 1

———— by Government—

See ACTIO PERSONALIS MORITUR CUM PERSONA I L R 35 Bom 12

1 ———— Order of demolition of unauthorised erections—Disobedience—Negotiations for compromise—*Re assessment of the whole premises including the unauthorised portions and receipt of rates and taxes for the same—Calcutta Municipal Act (Beng III of 1899) ss 449 580* Where after the passing of an order of demolition under s 449 of the Calcutta Municipal Act negotiations have been going on between the person directed to demolish an unauthorised erection and the Corporation the receipt of rates and taxes by the latter on re assessment of the whole premises including the portions objected to during the period of such negotiations is not an acquiescence on their part in the continued disobedience to the order so as to disentitle them from proceeding with the prosecution for such disobedience after the failure of the negotiations LACHMI NARAYAN MAHTO v CORPORATION OF CALCUTTA (1910) I L R 37 Calc 833

2 ———— *Possession for many years by co sharer—Presumption—Consent* When one co sharer has been in exclusive possession of a particular plot for a very long time and has made constructions thereon the presumption is that he is in possession with the consent of the other co sharers The other co sharers cannot after lying by for many years come in and ask to have the constructions demolished LAHASO KUAR v MAHABIR TIWARI (1915) I L R 37 All 412

3 ———— *when knowledge comes after act* There can be no acquiescence without full knowledge both of the right infringed and the acts which constitute the infringement There is a distinction between acquiescence occurring while the act acquiesced in is in progress and acquiescence taking place after the act has been completed for a mere delay to take legal proceedings cannot by itself constitute a bar to such proceedings unless the delay on his part after he has acquired full knowledge has affected or altered the position of his opponent SYAMA CHARAN BAISYA v PRAFULLA SUNDARI GUPTA (1914) 19 C W N 882

4 ———— *what amounts to—Doctrine not to be invoked in favour of party taking possession of land by wrongful means* The plaintiff sued for recovery of possession of land on declaration that it was included within his tenancy under the defendants landlords who had induced him to give up possession of the land upon a promise to pay consideration for it or in exchange to give lands situated elsewhere neither of which however was given to the plaintiff *Held* that the plaintiff did not stand by in such a manner as to induce the defendants to believe that he assented to the acts of the defendants and the doctrine of acquiescence had no application in the circumstances of the case That the defendants acquired no title to the land and the Court should not assist them in disregard of the principles of justice equity and good conscience to retain possession of land which they had seized by questionable methods That a Court of Equity will not have recourse to the doctrine of estoppel or acquiescence for the benefit of a party who does not come into Court with clean hands JAHARADDI MANDAL v DEBNATH NATH CHAUDHURY (1915) 20 C W N 657

5 ———— *Estoppel—Joint property sold by one of three brothers—other brothers standing by for years and allowing vendee to spend large sums on building operations* One A C died in 1907 leaving to his three sons a business and immovable property including an *ahata* and some *kucha* buildings in Lyallpur which he had purchased for Rs 1?? In July 1909 S M his second son sold this *ahata* and *kucha* buildings to one G M for Rs 2 600 G M immediately began to build and spent some Rs 3 000 on erecting a two storeyed house on the site In 1913 he sold this house to the Punjab National Bank and they spent Rs 207 on alterations In July 1916 the youngest brother and the sons of the eldest brother (then deceased) sued for possession of the property on the ground that S M had no right to sell it without their consent *Held* that the plaintiffs long silence coupled with the fact that they knew all along of the building operations and abstained from asserting their own rights showed that they acquiesced in the sale and that they were consequently estopped from asserting those rights *Gopi Chand* v *Ram Chand (177 P W R 1911) Hope Mills* v *Sir Cowasji J Readymoney (13 Bom L R 162) Syama Charan* v *Profulla (19 Calc W N 882)* and *Deua Singh* v *Haku (39 P W P 1910)* followed *Jaharaddi Mandal* v *Debnath Nath (20 Calc W N 657) Fatehyab Khan* v *Muhammad Yusuf (I L R 9 All 431) Naunihal Bhagat* v *Rameshar Bhagat (I L R 16 All 28* and *Beni Ram* v *Kundan Lal (I L R 21 All 496 P C)* cited DHANPAT RAI v GURANDITTA MAL I L R 2 Lah 258

ACQUISITION

See LAND ACQUISITION

———— by landlord—

See MADRAS ESTATES LAND ACT (I OF 1908) s 6 subs (6) s 8 I L R 39 Mad. 944

ACQUISITION—*cont*

——— by tenant—

See MADRAS ESTATES LANDS ACT ss C 8 I L. R. 39 Mad. 944

——— compensation is payable to a person whose land is acquired ... by adverse p... on ... SAHAY v PAI MAHABIR PRASAD (1916) I Pat L. J 258

ACQUITTAL.

See CRIMINAL PROCEDURE CODE—
s ... I L R 41 All. 433
... 1 Pat L J 264
s 403 I L R 40 Bom. 97
ss 403 423 AND 439 I L. R. 36 All. 4
ss 421 233 AND 3.. I L. R. 39 Mad. 527
ss 423 AND 439 I L R 37 Mad. 119
I. L. R 31 All. 115
s 438 I L R 38 Mad. 1028
s 439 42.. AND 423 I L. R 39 Mad. 505
I. L R 41 Bom 560

See CRIMINAL TRESPASS I L. R 41 Calc 662

See PRESIDENCY MAGISTRATE

See PREVIOUS ACQUITTAL.

See SANCTION FOR PROSECUTION I L R 44 Calc. 970

——— appeal from—

See PUBLIC PROSECUTOR I L R 41 Calc 425

——— by Jury—

See AUTREFOIS ACQUIT I L R 41 Calc 1072

——— effect of—

See COMPLAINANT I L R 42 Calc 365

See CONSPIRACY I L R 41 Calc 754

See CONSPIRACY TO WAGE WAR I L R 38 Calc 559
15 C W N 646

——— of criminal lunatic—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 471 I L R 43 Bom 134

———Order of on Revision by High Court—

See CRIMINAL PROCEDURE CODE s 435 25 C W N 609

——— power to alter finding of—

See DACOITY I L R 41 Calc 350

——— power to revise an order of at the instance of private party—

See JURISDICTION OF HIGH COURT I L R 38 Calc 786

——— revision of orders of—

See WRONGFUL CONFINEMENT I L R 47 Calc 818

1 ——— Previous acquittal—*Acquittal under s 182 of the Penal Code—Subsequent complaint under s 500 by the person defamed in respect of the same statement—Subsequent prosecution not barred—Criminal Procedure Code (Act V of 1898) s 403* An acquittal under s 182 of the Penal Code in respect of false information contained in a petition to the manager of an estate is no bar to a subsequent prosecution for defamation under s 500 of the Penal Code on the same statements *Sharbekhan Gohain v Emperor 10 C W N 85* distinguished PAMSEBAK LAL v MUNESWAR SINGH (1910) I L R 37 Calc 604

2 ——— *Previous acquittal plea of—Acquittal of some accused charged with rioting grievous hurt and murder—Liability of others to be tried for the same offences—Prosecution story found to be false as to the grievous hurt and murder —Criminal Procedure Code (Act V of 1898) s 403* An acquittal of some of the accused on charges of rioting armed with deadly weapons grievous hurt and murder is no bar under s 403 of the Criminal Procedure Code to the trial of others concerned in the same offences Where the Sessions Judge was of opinion at the original trial that the prosecution story as to the manner in which the deceased met his death did not represent the truth and acquitted the accused though he did not disbelieve the fact of a rioting having occurred while one of the Assessors believed the whole story —*Held* that the High Court would not interfere with a pending prosecution against others for the same offences *Bishun Das Ghosh v King Emperor 7 C W N 493* distinguished KOKAI SARDAR v MEHER KHAN (1910) I L R 37 Calc 680

3 ——— *Inquiry under Workmen s Breach of Contract Act (XIII of 1859) s 2—Hearing concluded—Case adjourned for judgment—Absence of complainant on date of judgment—Power of Magistrate to acquit—Criminal Procedure Code (Act V of 1898) s 247* Section 247 of the Criminal Procedure Code does not apply when the hearing has concluded and the case is adjourned only for judgment without the attendance of the complainant having been specially directed and an order of acquittal on the ground of the absence of the complainant on the date of judgment is therefore illegal GIRISH CHANDRA DAS v BHUSAN DAS (1919) I L R 46 Calc 867

4 ——— *Charge of conspiracy —Whether a person acquitted can be charged with same offence as part of a conspiracy* Where a person has been tried for a specific offence and acquitted and he is subsequently charged with conspiracy of which that offence is alleged to from a part *Held* that an acquittal is conclusive and it would be very dangerous principle to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates *Rex v Plummer [1902] 2 K B 339* referred to EMPEROR v LALIT MOHAN CHUCKERBUTTY (1911) I L R 38 Calc 559

5 ——— A judgment of not guilty against an accused person fully establishes his innocence and the incident in respect of which the charge was brought cannot be used against the acquitted person in a subsequent trial for conspiracy *Emperor v Nani Gopal 15 C W N 591* followed. PULIN BEHARI DAS v KING EMPEROR (1911) 16 C W N 110

ACQUITTAL—*contd*

6 ———————— *Revision—Practice—Interference by High Court in revision with an order of acquittal on the application of a private party—Criminal Procedure Code (Act V of 1898) s 439* The High Court has jurisdiction under s 439 of the Criminal Procedure Code to set aside an order of acquittal, but it has now become a settled practice that it will not ordinarily interfere in revision in such cases at the instance of a private prosecutor *Queen Empress* v *Sheikh Saheb Badrudin I L R 8 Bom 197 Heerabai* v *Framji Bhikaji I L R 15 Bom 349 Thandavan* v *Perianna I L R 14 Mad 363 Queen Empress* v *Ala Baksh I L R 6 All 484 Queen Empress* v *Prag Dat I L R 20 All 459 In the matter of Shaikh Aminuddin I L R 24 All 346 Qayyum Ali* v *Faiyaz Ali I L R 27 All 359* In re *Municipal Committee of Dacca* v *Hingoo Raj I L R 8 Calc 895* and *Deputy Legal Remembrancer* v *Karuna Baistobi I L R 22 Calc 161* followed *Pakhal Das Roy* v *Kailash Bannu 11 C L J 113* explained by JENKINS *C J* FAUJDAR THAKUR *v* KASI CHOWDHURY (1914)
I L R 42 Calc 612
19 C W N 184

7 ———————— *Reference therefrom to High Court by District Magistrate—Revision hearing of on evidence whether appeal—Appeal from acquittal by the Local Government—Criminal Procedure Code (Act V of 1898) ss 417 435 438—Jurisdiction—Practice* In the case of an acquittal, when the Local Government has not preferred an appeal under s 417 of the Criminal Procedure Code the High Court ought not to interfere in revision on a reference under s 438 where it cannot do so without practically hearing the case on the evidence as an appeal in order to satisfy itself that the opinion of the referring Court is correct though it has jurisdiction to intervene in revision in such cases *Faujdar Thakur* v *Kasi Choudhuri I L R 42 Calc 612 19 C W N 184* referred to HRISHIKESH MANDAL *v* ABADHAUT MANDAL (1916) I L R 44 Calc 703

ACT

———— 1817—VII—
See MADRAS REGULATION ACT

———— 1827—II
See BOMBAY REGULATION

———— 1838—XIX
See COASTING VESSELS ACT (BOMBAY)

———— 1839—XXXII
See INTEREST ACT

———— 1840—V
See OATHS ACT

———— 1841—XIX
See SUCCESSION (PROPERTY PROTECTION) ACT

———— 1846—I
See PLEADERS ACT

———— 1847—XX
See COPYRIGHT ACT

IX
See BENGAL ALLUVION AND DILUVION ACT

ACT—*contd*

———— 1850—XVIII
See JUDICIAL OFFICERS PROTECTION ACT

XXI
See FREEDOM OF RELIGION ACT
See CASTE DISABILITIES REMOVAL ACT

———— 1852—XVIII
See PLEADERS LOWER PROVINCES ACT

———— 1855—XIII
See FATAL ACCIDENTS ACT

———— 1856—XV
See HINDU WIDOWS REMARRIAGE ACT

———— 1857—III
See CATTLE TRESPASS ACT

———— 1858—I
See MADRAS COMPULSORY LABOUR ACT

XXXV
See LUNACY ACT

———— 1859—I
See MERCHANT SEAMEN ACT

VIII
See CIVIL PROCEDURE CODE

XI
See REVENUE SALE LAW
See SALE FOR ARREARS OF REVENUE
See BENGAL LAND REVENUE SALES ACT

XIII
See WORKMEN'S BREACH OF CONTRACT ACT

XIV
See LIMITATION ACT 1859

———— 1860—XXVIII
See BOUNDARIES ACT

XXI
See SOCIETIES REGISTRATION ACT

XLV
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———— 1861—V
See POLICE ACT

———— 1863—XX
See RELIGIOUS ENDOWMENTS ACT

XXIII
See WASTE LANDS ACT

———— 1864—II
See ADEN COURTS ACT

———— 1865—III
See CARRIERS ACT

X
See SUCCESSION ACT

XV
See PARSI MARRIAGE AND DIVORCE ACT

XX
See PLEADERS MUKHTEARS AND REVENUE AGENTS ACT

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——— 1866—XXVII.

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TRUSTEES AND MORTGAGEES POWERS ACT

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See ... ACT

XXV

See ... PRESS AND NEWSPAPERS ACT

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XIX.

See OUDH ... ACT

——— 1869—IV

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——— 1870—VII

See COURT FEES ACT

XXI.

See HINDU WILLS ACT

——— 1871—I

See CATTLE TRESPASS ACT

IX.

See LIMITATION ACT

X

See EXCISE ACT

XXIII

See PENSIONS ACT

——— 1872—I.

See EVIDENCE ACT

IV

See PUNJAB LAWS ACT

IX.

See CONTRACT ACT

XV

See CHRISTIAN MARRIAGE ACT

——— 1873—X

See OATHS ACT 1873

XII

See GENERAL REPEALING ACT

——— 1874—II

See ADMINISTRATOR GENERAL'S ACT

III

See MARRIED WOMEN'S PROPERTY ACT

VI

See PRIVY COUNCIL APPEALS ACT

XIV

See SCHEDULED DISTRICTS ACT

——— 1875—IX

See MAJORITY ACT

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See PRESIDENCY BANKS ACT

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X

See BOMBAY REVENUE JURISDICTION ACT

See REVENUE JURISDICTION ACT

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See SPECIFIC RELIEF ACT

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VII

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VIII

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XI

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XVIII

See OUDH RENT ACT

——— 1879—XVII

See DEKKHAN AGRICULTURISTS RELIEF ACT

XIV

See HACKNEY CARRIAGE ACT

XVIII

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XXI

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——— 1880—III

See CANTONMENTS ACT

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XVIII

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XXVI

See NEGOTIABLE INSTRUMENTS ACT

——— 1882—II

See TRUSTS ACT

IV

See TRANSFER OF PROPERTY ACT

V

See EASEMENT ACT

VI

See COMPANIES ACT

VII

See POWERS OF ATTORNEY ACT

XIV

See CIVIL PROCEDURE CODE 1882

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XV

See PRESIDENCY SMALL CAUSE COURTS ACT

——— 1883—XIX

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——— 1885—XVII

See CENTRAL PROVINCES GOVERNMENT WARDS ACT

VIII

See BENGAL TENANCY ACT

——— 1886—II

See INCOME TAX ACT

VI

See REGISTRATION OF BIRTHS DEATHS AND MARRIAGE ACT §

XI

See TRAMWAYS ACT

XXII

See OUDH RENT ACT

——— 1887—VII

See SUITS VALUATION ACT

IX

See PROVINCIAL SMALL CAUSE COURTS ACT

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See CIVIL COURTS ACT

XIII

See SECURITIES ACT

——— 1888—V

See INVENTIONS AND DESIGNS ACT

——— 1889—II

See PRIVATE FISHERIES ACT

IV

See MERCHANDISE MARKS ACT

VII

See SUCCESSION CERTIFICATE ACT

XIII

See CANTONMENTS ACT

——— 1890—VIII

See GUARDIANS AND WARDS ACT

IX

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XI

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——— 1893—IV

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——— 1896—IX

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See STAMP ACT

VIII

See PETROLEUM ACT

IX

See ARBITRATION ACT

X

See CARRIERS ACT

XI

See COURT FEES AMENDMENT ACT

——— 1900—II

See TRANSFER OF PROPERTY AMENDMENT ACT

XI

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XIII

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——— 1901—VI

See ASSAM LABOUR AND EMIGRATION ACT

——— 1903—XV

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——— 1904—VII

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VIII

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——— 1905—VI

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See Limitation Act 1908

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——— 1909—III.

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VII

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——— 1910—I.

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II.

See Paper Currency Act

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——— 1911—II.

See Patents and Designs Act

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XII

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——— 1912—II.

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IV

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V

See Provident Insurance Societies Act

VI

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XIII

See Delhi Laws Act

——— 1913—VI

See Mussalman Wakf Validating Act

VII

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——— 1914—III

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VIII

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X

See Repealing and Amending Act

——— 1915—I.

See Emergency Legislation Continuance Act

IV

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——— 1916—X.

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——— 1918—X

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VII

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——— 1919—XVI

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X

See Excess Profits Duty Act

——— 1920—V

See Provincial Insolvency Act

——— 1922—II

See Income Tax Act

ACT OF LEGISLATURE

See Estoppel I L R 38 Calc 512

ACT OF STATE

——— *Acts done by Government in exercise of its sovereign rights—Status of non feudatory zamindars in Central Provinces—Withdrawal from non feudatory zamindars the Police Excise and Cattle pounds administration—Withdrawal of other rights in wajib ul arz or administration paper—Police Act (V of 1861)—Excise Act (X of 1871)—Cattle Trespass Acts (III of 1857 and I of 1871)—Central Provinces Land Revenue Act (XVIII of 1881)* The plaintiffs in these appeals were members of a group of non feudatory zamindars in the Central Provinces whose status was in 1864 determined by the Government to be that of ordinary British subjects When they first came by conquest or cession under British rule the management of their estates and the judicial and administrative powers exercised by them were left in their hands as a matter of convenience or economy of administration and in no case were they recognised as entitled to independent powers or as possessing any sovereign rights In 1874 sanads giving them proprietary rights in the soil were granted but subsequently at various times the Government withdrew from them the Police and Excise administration and also the rights they had exercised in respect of cattle pounds and in 1903 they were required by the settlement officials to execute (which they did under protest) *wajib ul arzes* containing provisions restricting their rights in various ways which they considered prejudicial to their interests and prestige In suits brought by them against the Secretary of State in which they complained that they had been illegally deprived of rights to which they had been indefeasibly entitled from time immemorial and that the contents of the *wajib ul arzes* were in derogation of their undoubted privileges *Held* that in the exercise of the Police and Excise functions the plaintiffs were acting not as of right but either by sufferance or by delegation and that the resumption of those functions by the Government was an act done by the Government in the exercise of its sovereign powers and consequently the suits were not maintainable in the Civil Courts The maintenance of private cattle pounds was incompatible with the provisions of the Cattle Trespass Act and their establishment under the superintendence and control of Government as being under the circumstances essential for the maintenance of law and order and the peace and

ACT OF STATE—*contd*

good government of the country was an act of the executive Government with which it was not competent for the Civil Court to interfere BIR BIKRAM DEO *v* SECRETARY OF STATE FOR INDIA (1912) I L R 39 Calc 615

ACTIO PERSONALIS MORITUR CUM PERSONA

See MAHOMEDAN LAW—PRE EMPTION I L R 36 Bom. 144

——— *Maxim applies to actions in tort—No application to actions where contractual obligation implied by law—Government—Employment of shroff to accept Pabashai coins—Shroff accepting Shikkai coins instead—The coins accepted by Mint officers—Loss to Government—Measure of damages—Acquiescence or ratification by Government* On the occasion of calling in the Babashai coins from the British villages in the Kaira District the plaintiff was employed by Government as a shroff to examine and accept the Babashai coins only The plaintiff worked for about a month during which period he passed 12 170 Shikkai coins as Babashai coins At that date *the Shikkai coins were not current and had only* bullion value *The coins were finally sent to H* M s Mint where they were melted Government alleged that by the shroff s neglect in accepting Shikkai coins they suffered a loss of R1 758 15 1 which they asked the shroff to pay The shroff paid R1 0 5 To recover the remaining R663 15 1 Government filed a suit against the shroff. The shroff also filed a counter suit against Government to recover R1 095 which he alleged were wrongfully recovered from him Both suits were heard together The District Judge dismissed both suits holding that Government had suffered a loss by the shroff s action but it was compensated by the money already paid by the shroff Against this decision both parties appealed While the appeals were pending in the High Court the shroff died and his son was brought on the record as his legal representative —*Held* that the maxim *actio personalis moritur cum persona* did not apply to the case as there was an obligation implied by law The shroff undertook to pass only Babashai coins *and it was an implied term of that contract* that if he passed any other and Government suffered loss he should make it good (s 211 of the Indian Contract Act 1872) *Held* further that the fact that Government had kept and had the benefit of Shikkai coins was not sufficient by itself to raise any presumption of either estoppel or acquiescence or ratification on the part of Government *Held* also that the action of the Mint officers in accepting the Shikkai coins could bind Government only so far as they had derived benefit from the action of the Mint officers that that benefit made them liable only so far that it was to be taken into account in measuring the damages for the loss sustained by Government in consequence of the shroff s deviation from the directions given to him and the purpose of this employment *Held* therefore that in estimating the loss suffered by Government owing to the shroff s action the bullion value of the Shikkai coins must be taken into account for they had on the date they were accepted ceased to be current coin It is a principle that nominal damages are awarded only where there is failure to prove any appreciable damage in fact CHUNI LAL *v* SECRETARY OF STATE FOR INDIA (1910) I L R 35 Bom 12

ACTION

——— *Ex Contractu*—

See CANTONMENTS ACT (XIII OF 1889) s 80 I L R 34 Bom. 583

——— *Ex Delicto*—

See CANTONMENTS ACT (XIII OF 1879) s 80 I L R 34 Bom. 583

——— In Rem—

See ARREST OF SHIP I L R 42 Calc 85

——— In Tort—

See CAUSE OF ACTION I L R 38 Calc 797

——— survival of—

See MAHOMEDAN LAW—PRE EMPTION I L R 36 Bom 144

ACTIONABLE CLAIM

See TRANSFER OF PROPERTY ACT (IV OF 1882 AS AMENDED BY ACT II OF 1900) s 130 I L R 37 *Bom.* 198

——— nature of—

See MORTGAGE I L R 40 Mad. 683

——— purchase of, by a pleader—

See LEGAL PRACTITIONERS ACT (XVIII OF 1879) s 13 I L R 37 Mad. 238

ACTIONABLE INTERFERENCE

See EASEMENT L R 41 I A 180

ACTS AND DECLARATIONS OF GOVERNMENT

See INAM I L R 40 Mad. 268

ADDITION

See EMBANKMENT I L R 46 Calc 825

See DEMOLITION OF BUILDING I L R 37 Calc 585

——— *of party*—

See CIVIL PROCEDURE CODE 1908 ss 107, 151 3 Pat L J 409

ADDITIONAL SESSIONS JUDGE

See CRIMINAL PROCEDURE CODE s 195 I L R 44 Bom 877

See JURISDICTION I L R 41 Calc 866

See TRANSFER I L R 48 Calc 53

ADDITIONAL EVIDENCE

See APPEAL I L R 42 Calc 675

See CIVIL PROCEDURE CODE 1908 O XLI r 27 5 Pat L J 263 I L R 38 All 191

See CRIMINAL PROCEDURE CODE s 195 I L R 44 Mad 47

ADDITIONAL DISTRICT MAGISTRATE

S APPEAL I L R 48 Calc 874

ADEN COURTS ACT (II OF 1864)

———— s 3—

See DIVORCE ACT (IV OF 1869) s 3 (2)
I L R 37 Bom 57

———— s 8—

See ASSESSMENT I L R 42 Bom 692

———— ss 8 and 15—*Court fees Act (VII of 1870) s 7 sub s 4 cl (c) and (d)—Suits Valuation Act (VII of 1887) s 8—Civil Procedure Code (Act XIV of 1882) s 551—Civil Procedure Code (Act V of 1908) s 115—Valuation for the purposes of Court fees and jurisdiction—Suit for declaration and injunction—Rejection of plaint as not properly stamped—Appeal—Application to state a case to High Court—Summary dismissal of appeal—Application for revision—Jurisdiction* The plaintiff brought a suit in the Court of the Assistant Resident at Aden for a declaration of heirship and an injunction with reference to certain property of the value of upwards Rs50 000 The claim being for declaration and injunction was under the provisions of the Court fees Act (VII of 1870) s 7 sub s 4 cls (c) and (d) valued by the plaintiff at R130 upon which the prescribed Court fee stamp was R10 only The Assistant Resident rejected the plaint on the ground that it was not properly stamped. Against the order of the Assistant Resident the plaintiff appealed to the Resident at Aden and on the 23rd September 1903 presented an application under s. 8 of the Aden Act (II of 1864) to state a case to the High Court upon certain questions specified in the application The Resident however on the next day that is on the 24th September summarily dismissed the appeal under s 551 of the Civil Procedure Code (Act XIV of 1882) The judgment dismissing the appeal was read out to the plaintiff on the 7th October following when she attended the Court The plaintiff thereupon preferred an application for revision to the High Court praying that the order dismissing the appeal might be quashed and that the Resident be required to state a case A question having arisen as to whether the High Court had jurisdiction to interfere in revision with any order passed by the Resident in the exercise of his Civil jurisdiction under the Aden Act (II of 1864) *Held* that with regard to questions which might arise regarding cases to be stated by the Resident for the decision of the High Court under the provisions of s 8 of the Aden Act (II of 1864) the Resident s Court is subordinate to the High Court Under s 15 of the Aden Act (II of 1864) as the Court of the Resident is to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter and in the High Court in the exercise of its jurisdiction as a Court of Appeal from those Courts the provisions of the Suits Valuation Act (VII of 1887) are the law for the time being for the valuation of claims in the Courts of the Resident of Aden *Held* further that the plaintiff s claim being valued at R130 according to the law for the valuation of claims for the time being in force and according to the rulings of the Bombay High Court it did not fulfil the requirements of s 8 of the Aden Act (II of 1864) so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in the suit RHIMBAI JAMALBHOY v MARIAM BINTE ABDUL (1903) I L R 34 Bom 267

ADEN SETTLEMENT REGULATION (VII OF 1900)

———— s 13—*Municipal affairs at Aden—Executive Committee—Rating of property for purposes of taxation—Rating value fixed by the Resident at Aden in a rating appeal—Finality of the decision of the Resident as to value—Jurisdiction of Civil Courts to examine the value in a civil suit—Rule made under the Regulation to give finality to the Resident s decision in rating appeal is ultra vires* The Aden Settlement Regulation (VII of 1900) provided for the establishment of an Executive Committee for the Municipal Government of Aden and its clause 13 authorised the Resident subject to the previous sanction of the Local Government to make rules to provide for the assessment and collection of any toll cess tax or other impost imposed under the Regulation The rules so made provided *inter alia* for the preparation of an assessment list containing the annual letting value or other valuation on which the property is assessed for complaints to the Executive Committee where any property was for the time being entered in the list or in which the entered rateable value had been increased and for appeals against any rateable value to the Judge of the Resident s Court Rule 12 provided that after appeals if any were decided and the results noted in the assessment list all rateable values so entered in the list were final The lower Courts held on a construction of the above rule that it made the decision of the Judge of the Resident s Court in a rating appeal conclusive and that the aggrieved party could not question it by a civil suit *Held* that the rule 1 read as it had been by the lower Courts was *ultra vires* inasmuch as a distinct unequivocal enactment was required for the purpose of either adding to or taking away the jurisdiction of a Court ABDULLABHAI LALLJEE v THE EXECUTIVE COMMITTEE ADEN (1916)
I L R 40 Bom 446

ADHLAPI

———— Transaction—whether a sale—
See PRE EMPTION I L R 2 Lah 199

AD INTERIM PROTECTION

See INSOLVENCY 14 C W N 586

ADJOURNMENT

See CIVIL PROCEDURE CODE 1908 s 47
O XVII r – 5 Pat L J 70
5 Pat L J 672
O XVII r 6 5 Pat L J 390

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 344 I L R 42 Bom 254
See EX PARTE DECREE
I L R 41 Cal 956

———— application for—
See LIMITATION ACT (IX OF 1908) Sch I ART 179 I L R 38 Mad. 695
See TRANSFER I L R 41 Calc. 719

———— for judgment—
See ACQUITTAL I L R 46 Calc 387

———— for production of document—
See CRIMINAL PROCEDURE CODE s 145
25 C W N

ADJOURNED HEARING

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XVII R 2 AND O IX R 3 I L R 44 Bom 767

ADJUDICATION

See INSOLVENCY I L R 44 Calc 899

See PROVINCIAL INSOLVENCY ACT 1907 ss 4 5 6 ETC I L R 36 Mad 402

———— date of—

See INSOLVENCY I L R 46 Calc 991

———— effect of—

See INSOLVENCY I L R 40 Calc 78

———— in England—

See INSOLVENCY I L R 38 Calc 542

———— order for—

See INSOLVENCY I L R 44 Calc 535

See PROVINCIAL INSOLVENCY ACT s 15 (2) 15 C W N 244

———— petition for what to contain—

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909) s 9 (d) (iii) I L R 37 Mad 555

———— plea of—

See EXECUTION OF DECREE I L R 37 All 531

———— annulment of—*Payment in full of a disputed debt—Judgment debt carrying interest at 6 p c —Interest paid up to the date of adjudication order if payment in full—Presidency Towns Insolvency Act (III of 1909) s 21* On an application by an insolvent for the annulment of adjudication under s 21 of the Presidency Towns Insolvency Act (III of 1909) on the ground that the debts of the insolvent have been paid in full it appeared that the insolvent had not paid interest on judgment debts carrying interest at 6 per cent up to the date of payment but had paid only up to the date of the adjudication order —*Held* that the insolvent did not bring himself within the terms of s 21 and that the application must be refused A A HAILES *In re* I L R 47 Calc 914

ADJUSTMENT

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 258 I L R 34 Bom 575 O XXI R 2 O XXXII R 7 I L R 45 Bom 91 5 Pat L J 379

———— uncertified—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 47 O XXI R 2 I L R 43 Bom 240 I L R 45 Bom 91

ADJUSTMENT OF ACCOUNT

See PARTNERSHIP 15 C W N 882

ADJUSTMENT OF SUIT

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 89 O XXIII R 3 I L R 40 Bom 386

ADMINISTRATION

See ADMINISTRATION SUIT

See TRANSFER OF PROPERTY ACT 1882 s 6 I L R 33 All 414

———— order of—

See INSOLVENCY I L R 44 Calc 1016

1 ———— *Court fees—Inventory—Proceedings to amend Valuation—Limitation—Probate and Administration Act (V of 1881) s 98—Court fees Amendment Act (XI of 1899) s 19 H sub s (4)* The six months within which the Collector may move under the Court fees Amendment Act s 19 H to obtain an amended valuation of an estate in respect of which letters of administration have been granted runs from the date of the exhibition of an inventory to satisfy the Probate and Administration Act 1881 s 98 and from the date when the District Judge holds that a sufficient inventory has been exhibited Documents filed in another suit cannot be taken in conjunction with lists exhibited by an administratrix for the purpose of constituting a sufficient inventory RAMESHWAR KUMAR v COLLECTOR OF GAYA (1913) I L R 41 Calc 556 L R 40 I A 236

2 ———— *Crown debt priority of—Still head duty—English mortgage of immoveables—Fixtures—Hypothecation of moveables and shares* The owner of a distillery died leaving a certain debt due to Government as still head duty in respect thereof as also two mortgages (in the English form) on the land and premises together with the buildings and structures thereon constituting the distillery the first mortgage being in favour of the Alliance Bank of Simla Ld and the second in favour of the Delhi and London Bank Ld The moveables appertaining to the distillery were similarly hypothecated to the said Banks and certain shares registered in the deceased's name were hypothecated to and deposited with the Alliance Bank *Held* that so far as the immoveable properties were concerned including the fixtures the Crown was not entitled to priority that the Alliance Bank as first mortgagee ranked first but the Delhi and London Bank as second mortgagee was not entitled to priority over the Crown *Dost Muhammad Khan* v *Maniram I L R 29 All 537 Rama Chandra* v *Pitchai Kanni I L R 7 Mad 434 Ibrahim Khan Sahib* v *Pangasami Naicken I L R 28 Mad 490* followed *Mersey Steel and Iron Co* v *Naylor Benzon & Co L R 9 Q B D 648 L R 9 A C 434 The Secretary of State for India* v *Bombay Landing and Shipping Co 5 Bom H C R (O C) 23 Giles* v *Grover 9 Bing 128 The King* v *Cotton (1751) Parker 112 Ganpatputaya* v *The Collection of Kanara I L R 1 Bom 7 Puthia Valapil Barga* v *Veloth Assenar I L R 25 Mad 733 Gayanada Bala Dassee* v *Butto Kristo Bairagi I L R 33 Calc 1040 The Collector of Moradabad* v *Muhammad Daim I L R 2 All 196* referred to *Re Henley and Co L R 9 Ch D 469 New South Wales Taxation Commissioners* v *Palmer [1907] A C 179 Rex* v *Wells 16 East 278* distinguished So far as the moveable properties and the shares were concerned the Alliance Bank did not have priority over the Crown *Harrold* v *Plenty [1901] 2 Ch 214* followed BANK OF UPPER INDIA v THE ADMINISTRATOR GENERAL OF BENGAL (1917) I L R 45 Calc 653

ADMINISTRATION BOND

——— *Letters of administration—Probate and Administration Act 1881 ss 78 79 86—Administration bond in favour of District Judge—Assignment of the bond by the District Judge—Second assignment—Appeal—Memorandum of appeal treated as petition for revision* Under s. 79 of the Probate and Administration Act 1881 a District Judge has no authority to assign an administration bond again to a person so long as a previous assignment of the said bond to another person is in force No appeal lies against an order passed by the District Judge assigning a bond under s. 79 of the Act but where the District Judge passes an order which he has no authority to do the High Court may interfere treating the memorandum of appeal as an application for revision *Uma Charan Das* v *Muktakeshi Dasi I L R 28 Calc 149* discussed KALI RUDDIN v MEHARUI (1912) I L R 39 Calc 563

ADMINISTRATION SUIT

See CIVIL PROCEDURE CODE 1908 s 33 O XX r 6 7
I L R 34 Bom 182

s 92 I L R 40 Bom 439 541

See COSTS I L R 48 Calc 352

See COURT FEE I L R 45 Calc 634

See HINDU LAW—WILL.
I L R 42 Calc 561

See RES JUDICATA
I L R 48 Calc 499

See SOLICITOR S LIEN FOR COSTS
I L R 35 Bom 352

——— Parties—*Practice—Civil Procedure Code (Act V of 1908) o I r 8—Suit filed by plaintiff representing body of creditors—Application to be made party—Administration suit* Where a suit has been filed on behalf of a body of persons and an individual member of that body applies to be made a party he must show that his interests will be seriously prejudiced if he is not allowed to come in He must show that the conduct of the suit is not in proper hands or that action prejudicial to his interest is being taken by those who purport to represent him In an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason The willingness of the applicants to bear their own costs does not counterbalance the delay caused by the addition of a party and the consequent increase in the costs of other parties VASSONJI TRICUMJI & Co v ESMAILBHAI SHIVJI (1909)
I L R 34 Bom 420

——— Valuation of suit—*Creditor s action against trustee for administration of trust and for accounts—Plaintiff representing body of creditors—Jurisdiction—Civil Procedure Code (Act V of 1908) O XXI r 13 App A Nos 41 and D Nos 17 20—Court fees Act (VII of 1870) ss 7 (iv) (f) II Sch II Art 17 (vi)—Suits Valuation Act (VII of 1887) s 8* An administration suit by a creditor is an action for account within the meaning of s 7 (iv) (f) of the Court fees Act In such a suit the plaintiff is entitled to place his own valuation on the relief claimed On the analogy of s 11 of the Court fees Act after the preliminary decree has been made in a creditor s suit for administration and the other creditors have been invited to establish their claim if any against the debtor each creditor who puts forward a claim not already transformed into a judgment debt may well be required to pay court fees *ad valorem* on his application as if it were a plaint in a suit for the recovery of the sum he claims The valuation for the purpose of jurisdiction must be identical under s 8 of the Suits Valuation Act with the valuation for the purpose of court fees Where a suit is valued on the basis of the claim of the plaintiff and instituted in the Court of the lowest grade of pecuniary jurisdiction and a claim is thereafter preferred by a creditor who could in respect of his claim institute a suit only in a Court of higher grade the remedy will be the transfer of the suit at that stage from the Court of the lowest grade to the Court competent to try a claim of enhanced value SHASHI BHUSHAN BOSE v MANINDRA CHANDRA NANDY (1916)
I L R 44 Calc 890

——— Costs of an intervener—*Discretion of Court—Intervention propriety of* In an administration suit one S S was allowed to prove an alleged claim against the estate of the deceased and the Receiver of the estate was given liberty to contest it Consequently on the application of one P C he was given liberty at his own risk as to costs to oppose the claim of S S against the estate *Held* that P C s intervention did not change the character of the proceeding or alter the scope of the suit and as he voluntarily came into it as a prudent measure not of immediate protection but of possible personal benefit hereafter it would be clearly unjust to make the claimant S S pay an additional bill of costs of the intervener *In re* WATTS 22 *Ch D* 5 (1879) and *In re Schnabacher (1907) 1 Ch 719* followed *William* v *Buchanan (1891) 7 T L 226 Hanbury* v *Upper Inny Drainage Board (1883) L R 12 Ir 216* and *In re* SALMON *42 Ch D 351 (1889)* referred to SOURENDRO MOHAN SINHA v MURAFILAL SINHA
24 C W N 888

——— *A Mahomedan dying intestate—Heir entitled to bring a suit for account and administration of the estate—Heir not bound to file a suit for partition—Mahomedan law* One Gulam Husain a Mahomedan died leaving among other heirs his father and mother They having died their shares passed to their son the plaintiff The plaintiff filed a suit for an account and administration of the estate of Gulam Hussain. Both the lower Courts dismissed the suit on the ground that an administration suit did not lie and that the only suit that could lie was for partition On appeal to the High Court *held* that the plaintiff having an interest in the estate of Gulam Hussein he was entitled to come to Court and ask for a preliminary decree for the administration of that estate and that he was not bound to file a suit for partition ESSAFALLY v ABDEALI
I L R 45 Bom 75

——— Report by administrator—*Defendant in possession of the estate—Defendant contending that the Court had no jurisdiction to deal with certain properties in his possession not belonging to the estate of the deceased—Duty of the Court to direct inquiry* In an administration suit filed by the plaintiff against the defendant who was in possession of the whole of the property of the deceased, a preliminary decree was passed directing an account to be taken of the estate of the deceased. An administrator was appointed to take evidence

ADMINISTRATION SUIT—*contd*

and to report as to the nature of the properties and rights of the parties thereto The administrator filed the report Objections were raised by the parties to the report the defendant contending that the Court had no jurisdiction to deal with certain properties in his possession on the ground that the properties did not belong to the estate of the deceased The Subordinate Judge upheld the contention and refused to direct an enquiry regarding the said properties On an application being made to the High Court *Held* setting aside the order that the Court should have directed an enquiry with regard to the objections raised by the defendant to the administrator s report as the assets were in the possession of the defendant and there was no reason why the Court should not decide between the parties to the suit whether those assets belonged to the estate of the deceased or not MOTIBHAI SHANKERBHAI v NATHABHAI NAPANBHAI (1920) **I L R 45 Bom 1053**

ADMINISTRATOR

See ADMINISTRATORS—

——— *Suit against administrator of minor s father s estate—Limitation date from which runs—Trustee whether administrator is —Acquisition of property with trust funds—right beneficiary—Misjoinder of causes of action* The period of limitation for a suit against an administrator whose administration is limited by the letters of administration to the minority of the beneficiary begins to run from the day on which the beneficiary attains his majority An Administrator in whom no special trust is vested for a specific purpose is not trustee within the meaning of S 10 of the Limitation Act 1908 Where in one suit the plaintiff prayed for an order directing the administrator of his father s estate to render an account of his administration and also for recovery of immoveable property in the hands of third parties *held* that the suit was in contravention or O II r 4 of the Code of Civil Procedure 1908 Where a trustee makes a profit by the improper employment of trust money he is liable to make good to the beneficiary the amount of that profit in addition to the money improperly employed But the beneficiary is not entitled to claim a title in the property acquired by the trustee by the improper use of trust funds Even if the beneficiary in such a case is entitled to claim either the money used with interest or the property acquired with the money limitation for the exercise of such an option would be the limitation prescribed for recovery of the money used JANARDHAN PRASAD THAKUR v JANKIBATI THAKURAIN **2 Pat L J 642**

ADMINISTRATOR PENDENTE LITE

See ACCOUNT **15 C W N 832**

——— *Discharge order of—Passing of accounts—Suit for account whether subsequently maintainable—Civil Procedure Code (Act V of 1908) O XIV r 6* An order discharging an administrator *pendente lite* from further acting as such upon passing his accounts and the consequent passing of his accounts in the circumstances of the case did not constitute a bar to a suit for an account brought against him KHITISH CHANDRA ACHARJYA CHOWDHURY v OSMOND BEEBY (1912) **I L R 39 Calc 587**

ADMINISTRATOR PENDENTE LITE—*contd*

——— *Commission— As ets come into his hands meaning of—Pledge—Action for account—Estoppel—Evidence Act (I of 1872) s 115—Acquiescence—Laches—Partition* Where part of the estate of which the defendant was appointed administrator *pendente lite* consisted of Government promissory notes which had been pledged with certain Banks as security against advances and those Government promissory notes were subsequently sold by the Banks under instructions from the defendant and the sale proceeds applied towards satisfying the indebtedness to the Bank and the surplus money paid to the defendant *Held* that the defendant under the order of his appointment which provided for his remuneration by the allowance of a commission of 2 per cent on the assets that will come into his hands was not entitled to charge commission on the gross value of the Government promissory notes but only on the surplus moneys which he actually received after the indebtedness to the Banks had been satisfied *Scott* v *Franklin 15 East 428* referred to Where an administrator *pendente lite* had retained as his remuneration more than he was entitled to claim and his accounts showing such amounts had been passed by the Court with the knowledge of the plaintiffs and without any objection being taken by them and a suit was subsequently brought by the plaintiffs to recover from him such excess within the time allowed by law *Held* that such suit was not barred by estoppel acquiescence or laches *Pedgrave* v *Hurd L R 20 Ch D 1* referred to The part of the estate to which the administrator *pendente lite* was appointed was the undivided share of one out of four brothers in a joint family estate the mother being alive and subsequently by a decree in a partition suit the mother was held entitled to a one fifth share *Held* that the administrator *pendente lite* was entitled to charge his commission as on a one fourth share OSMOND BEEBY v KHITISH CHANDRA ACHARJYA CHOWDHURY (1914) **I L R 41 Calc 771**

ADMINISTRATORS

See ADMINISTRATOR

See MAHOMEDAN LAW—PRE EMPTION **I L R 41 Bom 636**

See MORTGAGEE **I L R 38 Calc 342**

——— Directions to—

See SUCCESSION ACT (X OF 1865) SS 264B AND 239 **I L R 44 Bom 682**

——— disagreement between—

See LETTERS OF ADMINISTRATION **I L R 40 Calc 50**

ADMINISTRATRIX

See VENDOR AND PURCHASER **I L R 40 Bom 69**

ADMINISTRATOR GENERAL'S ACT (II OF 1874)

——— ss 20 52 and 54— *Grant of Letters of Administration to the Administrator General—Vesting of the estate in him—Sale by him of lands for his commission without sanction of Court validity of* A grant of Letters of Administration under s. 20 of Administrator General s Act to the the Administrator General in respect of the estate

ADMINISTRATOR GENERAL'S ACT (II OF 1874)—*contd*

——— ss 20 52 and 54—*contd*

of a deceased Hindu vests the estate in the Administrator General and enables him to dispose of immovable property without the consent of the Court The administration cannot be treated as closed until every act necessary for its completion has been done Hence a sale by the Administrator General of some immovable property of the deceased for the purpose of realising the commission due to him under the Act is a valid sale in the course of administration and it takes precedence over a prior sale effected by the heir of the deceased. ALWAR CHETTY v CHIDAMBARA MUDALI (1914) I. L. R 38 Mad 1134

——— ss 28, 34 and 35—*Civil Procedure Code (Act V of 1908) O XX r 13—Suit to recover assets improperly paid by the Administrator General—Not a suit for administration by Court—Priority of creditors—Construction of instrument of agreement—Creditor to be paid out of cheques or monies received from a third party for work done by the creditor—Charge on such cheques or monies received after Letters of Administrations granted—Specific fund meaning of—Equitable assignment—Payment out of a fund and Payment when a fund is received difference between* S 28 of the Administrator General s Act (II of 1874) directs the Administrator General to distribute the assets and contains a provision that nothing contained in the section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively When Probate or Letters of Administration have been granted to the Administrator General there is no machinery for the administration of the insolvent estate of a deceased debtor under the law of insolvency The practice in Bombay and Calcutta is the same as in Madras O XX rule 13 of the Civil Procedure Code (Act V of 1908) does not apply to a suit brought by a creditor of a deceased debtor against the Administrator General (to whom Letters of Administration had been granted) and some other creditors to recover assets alleged to have been improperly paid by the Administrator General to such creditors in priority to the plaintiff When an agreement contained a clause as It is agreed that you should have a lien or charge over cheques or monies received for works done with your capital the instrument operated to create a charge on cheques or monies payable for work done after the instrument although the cheque was not given or payment made until after letter of administration had been granted to the Administrator General *Collyer* v *Isaacs 19 Ch D 342* and *Tailby* v *Official Receiver 13 A C 523* followed *Bhansidhar* v *Sant Lal I L R 10 All 133* referred to *Ex parte Nicholas In re James 22 Ch D 782* and *Ex parte Moss In re Toward 14 Q B D 310* explained When an instrument refers to specific funds out of which the claims of a creditor are to be satisfied the creditor has a charge on such fund When a creditor is to be paid out of the fund as distinguished from when the assignor gets the fund a valid equitable assignment is created provided the transaction is for value Fisher on Mortgage, page 126 White and Tudor s Leading Cases 8th Edition Volume I page 114 *Field* v *Megaw L R 4 C P 660* distinguished *Ramsidh Pande* v *Baijobind I L R 9 All 158* referred to NAVAJEE v THE ADMINISTRATOR GENERAL, MADRAS (1913) I L R 38 Mad 500

ADMINISTRATOR GENERAL'S ACT (II OF 1874)—*contd*

——— ss 28 34 and 35—*contd*

——— s 36—

——— *Hindu Wills Act (XXI of 1870) ss 2 and 5—Indian Succession Act (X of 1865) s 187—Administrator General s Act (II of 1874) s 36—Will made in Bombay—Property worth less than Rs 1 000—Probate—Administrator General s certificate* A Will made in Bombay is subject to the provisions of the Hindu Wills Act (XXI of 1870) and a person claiming as a legatee under the will is not entitled to sue without taking out probate as he would be bound by s 187 of the Indian Succession Act (X of 1865) which is incorporated in the Hindu Wills Act (XXI of 1870). The provision of the Administrator General s Act (II of 1874) is not affected by the incorporation in the Hindu Wills Act (XXI of 1870) of s 187 of the Indian Succession Act (X of 1865) NARAYAN SHRIDHAR v PANDURANG BAPUJI (1910) I L R 34 Bom 506

ADMINISTRATOR GENERAL'S ACT (III OF 1913)

——— s 11—*applicability of—Meaning of the word succession* The admission by the applicant that there is a valid Will does not prevent him from taking recourse to s 11 of the Administrator General s Act The word succession in s 11 should not be read as meaning intestate succession only IN THE GOODS OF PASUPATI MUKERJI 24 C W N 326

——— Costs of an intervener—*Discretion of Court—Intervention propriety of* In an administration suit one S S was allowed to prove an alleged claim against the estate of the deceased and the Receiver of the estate was given liberty to contest it Subsequently on the application of one P C he was given liberty at his own risk as to costs to oppose the claim of S S against the estate *Held*—That P C s intervention did not change the character of the proceeding or alter the scope of the suit and as he voluntarily came into it as a prudent measure not of immediate protection but of possible personal benefit hereafter it would be clearly unjust to make the claimant S S pay an additional bill of costs of the intervener *In re Watts 22 Ch D 5 (1879)* and *In re Schaubacher (1907) 1 Ch 719* followed *Williams* v *Bicharan (1891) 7 T L R 226 Hanbury* v *Upper Inny Drainage Board (1883) L R 12 Ir* and *In re Salmon 42 Ch D 351 (1889)* referred to SOURENDRO MOHAN SINHA v MURARI LAL SINHA 24 C W N 888

ADMIRALTY COURT ACT 1861 (24 VIC C 10)

——— s 5—

See ARREST OF SHIP I. L. R 42 Calc 85

ADMIRALTY JURISDICTION

See ARREST OF SHIP I. L. R 42 Calc 85

ADMIRALTY JURISDICTION—*contd*

———— *Collision case—Decision of trial Judge weight to be attached to—Trial with aid of Nautical Assessors* In collision cases no rule is better established than this that when questions of fact alone arise a Court of Appeal should be most chary of interfering with the decision of a trial Judge who has seen the witnesses and had the opportunity of forming his estimate of them by their demeanour Only in exceptional cases and for special reasons should a Court which has not had this advantage reverse the judgment of the trial Judge on questions of fact RIVERS STEAM NAVIGATION COMPANY v THE HATHOR STEAMSHIP COMPANY LD (1916)
20 C W N 1022

ADMIRALTY OFFENCES (COLONIAL) ACT (12 & 13 VIC C 96)

See HIGH SEAS I L R 42 Bom 234

ADMISSIBILITY

See CONSTRUCTION OF DOCUMENT I L R 37 Mad 480

See DEPOSITION I L R 45 Calc 825

See EVIDENCE I L R 47 Calc 671

ADMISSION

See CONTEMPT OF COURT I L R 41 Calc 173

See DIVORCE I L R 38 Calc 907

See EVIDENCE ACT (I OF 1872)
s 58 I L R 42 Bom. 352
s 70 I L R 38 All. 1

See MALICIOUS PROSECUTION 4 Pat L J 676

See PARTIES I. L. R 45 Calc 159

See TRANSFER OF PROPERTY ACT s 107 I L R 36 Bom 500

———— by defendant—

See EVIDENCE I L R 44 Calc 130

———— By Pleader—

See PENSIONERS ACT 1871 s 6 I L R 39 Bom 352

See VAKALATNAMA 24 C W N 385

———— In a compromise—

See HINDU LAW—JOINT FAMILY 1 Pat L J 509

———— Throws onus of proving untrue on person who makes it—

See SECOND APPEAL I L R 2 Lah 249

———— to police—

See JURY RIGHT OF TRIAL BY I L R 37 Calc 467

1 ———— What constitutes—*Admission* To constitute an admission the document needs not to be written by the party against whom it is used it is sufficient if it is found in his possession and his conduct thereto creates an inference that he was aware of its contents and admitted their accuracy but unless this is done the document cannot be used against him as proof of its contents What conduct would properly gives rise to such inference depends on the facts of each case The mere fact of possession of letters is not of much value unless it is shown that their contents were recognized and adopted by the replies elicited or the conduct inspired by them BARINDRA KUMAR GHOSE v EMPEROR (1909) I L R 37 Calc 467

2 ———— By a defendant—*A plaintiff may rely on the admissions of defendant as to his title in proof of his claim just as much as on any other evidence* and if a defendant goes into the witness box and admits his title there is no further onus upon him to prove it at least as against such defendant An erroneous statement made without knowledge in an affidavit filed as a matter of routine by a person whose authority to make it was not proved could not bind a party to a proceeding nor affect the character of a sale held in such proceeding under the provisions of s 124 (Beng Act I of 1879) so as to confer upon the auction purchaser a right which he could not obtain by the sale itself *Janardan Singh v Maharajah Pertap Uday Nath Sahi Deo R A No (of 1880 Per CUNNINGHAM AND PRINSEP JJ* referred to KALI SANKAR SAHAI v UDAI NATH SAHI DEO (1911) 16 C W N 683

3 ———— Effect of—*Declaratory suit to safeguard plaintiff's rights as a reversioner—Specific Relief Act I of 1877 s 42 Held* that what a party admits to be true may reasonably be presumed to be so and until the presumption is rebutted the fact admitted must be taken to be established *Chandur Kunuar v Chaudhri Narpat Singh (I L R 29 All 184 P C)* and *Lal Shah v Hira Lal (106 P R 1917 p 418)* referred to *Held also* that a brother may sue for a declaration that his brother (a lunatic) is entitled to a share in a mortgage acquired by the two defendants in their own names (one of them being the manager of the lunatic) where the plaintiff is entitled to succeed on the death of the lunatic as one of his heirs VIR SINGH v HARNAM SINGH
I L R 1 Lah 137

4 ———— Statement by accused—*Pointing out places of crime by others and of his subsequent concealment and houses visited for help—Exculpatory statements as to the occurrence—Admission of blood stains on clothe worn by the accused—Admissibility of such statements—Useful test of admissibility of statements to the police—Admissibility of previous deposition when witness cannot be found—Sufficiency of evidence that he could not be found—Evidence Act (I of 1872) ss 25 and 33—Circumstantial evidence rule of* S 25 of the Evidence Act does not exclude all statements by an accused to the police but only confessions There is a distinction between mere admissions and confessions which are statements either directly admitting guilt or suggesting the inference of guilt of the crime charged The general rule in the section is further subject to that which admits statements leading to discovery whether they amount to confessions or not Statements by an accused to police officers pointing out the places where the offence was committed by others or where he concealed himself thereafter and the houses to which he went for assistance whether regarded as information leading to discovery or as statements made by him as part of his defence are admissible in evidence as admissions Exculpatory statements by an accused to the police as to what according to his case actually

ADMISSION—*concld*

happened on the occasion of the commission of the offence and put forward by way of defence are admissible as admission notwithstanding that they are shown by other evidence to be untruthful. So where the accused told the police that certain other persons had killed the deceased described the occurrence and stated that he was seized by them but escaped and concealed himself in a paddy field that he went to the houses of several people for assistance against the murderers but was turned away as a mad man and that he then went and slept at the house of another person *Held* that the statements were admissible in evidence. A useful test as to the admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution. If the prosecution relies on the statements as true they may and probably in many cases will be found to amount to confessions. If they are relied on not because of their truth but of their falsity and as a circumstance thereby tending to prove the guilt of the accused they are admissible as admissions. But a statement by the accused to the police that a mark found in the *dhoti* which he was wearing at the time of the occurrence was a blood stain was *held* under the circumstances (re the distance he was from the place of the murder and his prevarication as to the nature of the mark) to be of an incriminating character from which an inference might possibly though not necessarily be drawn. Where the only evidence that a witness could not be found was the statement of a police officer that search had been made for him to summon him but he could not be found that a warrant was also issued and that he was a man of another district but no warrant was produced and there was no evidence of any attempt to serve it or if so of what was done for the purpose. *Held* that sufficient ground had not been established for the admission of the previous deposition of the witness under s 33 of the Evidence Act. To justify the inference of guilt from circumstances the inculpating facts must be shown to be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of guilt. EMPEROR v KANGAL MALL (1905)

I. L. R 41 Calc 601

5 ———— Retracted confession—*Evidence Act (I of 1872) ss 21 30—Relevancy.* For a conspiracy to wage war no act or illegal omission is necessary the agreement of two or more will suffice. While admissions which include confessions are by s 21 of the Evidence Act 1872 declared *relevant* and may be proved as against the persons making them all that s 30 of the Evidence Act provides is that the Court *may* take them into consideration as against other persons. This distinction of language is significant and shows that the Court can only treat a confession as lending assurance to other evidence against a co accused and a conviction on the confession of co accused alone would be bad in law. Moreover under s 30 that only can be taken into consideration which is a confession in the true sense of the term so that to place any reliance on a retracted confession against a co accused would be most unsafe. *Yasin v Emperor I L R 28 Calc 689* referred to. A retracted confession cannot ordinarily take the place of legal proof. EMPEROR v LALIT MOHAN CHUCKERBUTTY (1911)

I. L R 38 Calc 559

ADMISSION IN PLEADINGS

See EVIDENCE ACT (I OF 1872) s 92 AND PROV (2) I. L R 39 Bom 399

ADMISSION OF EXECUTION

See MORTGAGE I L R 37 All 426

ADMISSION OF LEGITIMACY

See MAHOMEDAN LAW—LEGITIMACY I L R 46 Calc 259

ADOPTED SON

See GUARDIANS AND WARDS ACT s 17 15 C W N 558

See HINDU LAW—ADOPTION 24 C W N 905

See HINDU LAW—ALIENATION I L R 40 Calc 966

See HINDU LAW—WIDOW I. L R 41 Bom 93

See PARTIES—RELIGIOUS ENDOWMENT I. L R 40 Calc 323

———— of a Sudra share of on partition—

See HINDU LAW—PARTITION I L R 40 Mad. 632

———— rights of——

See HINDU LAW—STRIDHAN I L R 43 Calc 944

ADOPTION

See AGRA TENANCY ACT (ACT II OF 1901) s 22 I L R 34 All. 658

See BURMESE BUDDIST LAW I L R 45 Calc 1

See CUSTOM

See ESTOPPEL I L R 34 All 398

See JURISDICTION I L R 35 Bom 264

See HINDU LAW —ADOPTION 23 C W N 177; I L R 42 All. 382

See HINDU LAW—IMPARTIBLE ESTATE I L R 37 Mad 199

See HINDU LAW—PARTITION I L R 40 Bom. 270

See HINDU LAW—STRIDHAN I L. R 43 Calc 944

See HINDU LAW—WIDOW I L. R 47 Calc. 466

See HINDU LAW—WOMAN'S ESTATE. L R 46 I A. 259

See JURISDICTION I L R 35 Bom. 264

See LIMITATION ACT (IX OF 1908) SCH I ARTS 118 119

See NAIKINS I. L. R 37 Bom. 116

———— by an adopted son of his brothers—

See CUSTOM (ADOPTION) I. L. R. 1 Lah. 39

———— by minor widow—

See HINDU LAW—ADOPTION I. L. R. 40 Mad. 925

ADOPTION—*contd*

———— by widow—

See APPEAL TO PRIVY COUNCIL
I L R 38 Mad. 406

See HINDU LAW—ALIENATION
I L R 41 Mad 75

See HINDU LAW—ADOPTION
24 C W N 57

See HINDU LAW—ADOPTION
24 C W N 294

———— by widow—not succeeding a heiress—
See HINDU LAW—ADOPTION
24 C W N 57

———— by widow in contravention of Husband s directions—

See HINDU LAW—WILL.
24 C W N 274
L R 47 I A 203

———— Consent of Supindas—when necessary—

See HINDU LAW—ADOPTION
24 C W N 905

———— By Sudra—

See HINDU LAW—ADOPTION—
I L R 45 Bom 459 829 754 1167

See HINDU LAW—JOINT FAMILY
26 C W N 1

———— Dvyamushayana form—

See HINDU LAW—ADOPTION
I L R 42 Bom 277

———— During life time of a son adopted by her husband—

See HINDU LAW—ADOPTION
I L R 44 Bom 627

———— evidence of—

See HINDU LAW—ADOPTION
I L R 44 Calc 201

———— Husband dying in union with co parceners—Widow succeeding as heir to her unmarried son after partition—Power of widow to adopt—

See HINDU LAW—ADOPTION
I L R 44 Bom 297

———— Widow of a co parcener adopting after the death of surviving co parcener—

See HINDU LAW—ADOPTION
I L R 44 Bom 483

———— Junior daughter in law adopting a son with the consent of her father in law—

See HINDU LAW—ADOPTION
I L R 44 Bom 508

———— payment for—

See ADOPTION L R 35 Bom 169

———— not in *Dattaka* form—whether adoptee entitled to collateral succession—

See HINDU LAW—ADOPTION
I L R 1 Lah. 588

———— object of—

See HINDU LAW—ADOPTION
I L R 46 Calc 749

ADOPTION—*contd*

———— of brother's daughter's son—

See CUSTOM (ADOPTION) (1)
I L R 1 Lah 15

———— of Daughter's son—

See CUSTOM (ADOPTION)
I L R 2 Lah 193

———— of an Orphan—

See THE HINDU LAW—ADOPTION
I L R 44 Mad. 260

———— of stranger—

See CUSTOM (ADOPTION) (2)
I L R 1 Lah 31

———— subsequent completion of by testator—

See HINDU LAW—WILL
I L R 39 Mad 107

———— suit to set aside—

See RES JUDICATA 23 C W N 326

———— validity of—

See HINDU LAW—ADOPTION
I L R 39 Mad 77

1 ———— Suit by reversioner to set aside—*Previous suit by adoptive mother binding effect of—Civil Procedure Code (1908) s 11* A Hindu widow as such brought a suit to set aside an adoption of a son made by her on the ground that she was not vested with authority from her husband to adopt The suit was contested by the adopted son and it was decided by the Court in India on the ground of estoppel It was however *held* by the Privy Council that the adoption was valid and that the adoptive mother had authority from her husband to adopt After the death of the widow the present suit was brought by an alleged reversioner to the estate of her husband for a declaration that the adoption was invalid and for possession of the estate *Held* per BANERJI and CHAMIER JJ (RICHARDS C J dissenting) that widow represented the estate and the interest of the reversioners to her husband and as the Privy Council had held in the previous suit that the widow had full authority to make the adoption that decision was binding on the reversioners and the present suit was not maintainable *Per* RICHARDS C J (*contra*) the decision in the suit of the widow was not binding on the reversioners and the present suit was maintainable RISAL SINGH *v* BALWANT SINGH (1915)
I L R 37 All 496

2 ———— By Widow of twelve years of age—*Adoption invalid*—A Hindu widow of twelve years of age who has not reached puberty cannot make a valid adoption MURGEPPA *v* KALAWA
I L R 44 Bom 327

3 ———— Valuation of suit for—*Suit to set aside Adoption—Munsif jurisdiction of—Forum Practice* According to a long standing practice a suit to set aside an adoption is for the purposes of jurisdiction incapable of valuation and it is competent to the plaintiff in such a suit to value the relief claimed and that valuation determines the forum to decide the suit *Alkemannessa Bibi v Mahomed Hatem I L R 31 Calc 849* commented on *Jan Mahomed Mandal v Mashar Bibi I L R 34 Calc 352* referred to PRAHLAD CHANDRA DAS *v* DWARKA NATH GHOSE (1910)
I L R 37 Calc 860

ADOPTION—*contd*

4 ———— **Limitation**—*Limitation Act (XV of 1877) Sch II Art 118 141—Adoption alleged invalid—Suit by reversioner for possession—Limitation—Limitation Act (IX of 1871) Sch II Art 129—Adverse possession in widow's lifetime plea of—Gift of orphan boy to be adopted by elder brother—Validity—Factum valet—Will—Construction—Authority to adopt son—Successive adoptions valid—Gift to widow of absolute title* When a plaintiff a Hindu seeks to recover possession as reversioner on the allegation that his rights have not been affected by an adoption made by the deceased widow of the last male holder and alleged by him to be invalid the limitation applicable is that provided by Art 141 of Sch II of the Limitation Act of 1877 and not Art 118 The limitation runs from the death of the widow when the cause of action arises entitling the plaintiff to sue for possession Art 118 could not be applied to this case where the reversioner had brought a suit during life time of the widow praying amongst other reliefs for a decree declaring the adoption void (as contemplated by Art 129 of Act IX of 1871 and within the period provided therein) but the Court virtually decided that the plaintiff had no cause of action for such a suit until the succession opened to him and his alleged right to recover possession of the property accrued The alleged adopted son could not claim to have acquired title by adverse possession during the widow's life time A will conferring on the widow power to adopt son and containing no special words restricting that power to one adoption authorised the widow to adopt a second son on the death during minority of the first adopted son Where an adoption made 48 years ago was attacked on the ground that the gift of the boy was not properly made in that it was made by his brother both his parents being then dead *Held* that the doctrine of *factum valet* applied and the adoption the setting aside of which would deprive the adopted child of his status after it had been accepted for 48 years should be upheld *Rooma Dnee* v *Goloolanund Dass I L R 3 Calc 587* *Chinna Gaundan* v *Kumara Gaundan 1 Mad H C R p 54* *Raja Vyankataav* v *Jayavantrav 4 Bom H C Rep A C 191* *Janokee Debea* v *Gopaul Acharya I L R 2 Calc 365* applied. *Held* on the construction of the will that the intention of the testator was that on the death of the adopted son and failure of any issue the entire moveable and immovable properties of the testator would pass to his widow absolutely so that on the death of the first adopted son the property vested in the widow as her *stridhan* BHAGWAT PERSHAD v MURARI LALL (1910) **15 C W N 524**

5 ———— **Suit for declaration of invalidity of an adoption**—*Suit dismissed as time barred—Plaintiff debarred from obtaining a decree for possession on title* When the setting aside of an adoption is essential to the granting of a decree for possession of immoveable property the fact that a suit to set aside the adoption has become time barred is a bar to the granting of a decree for possession on title *Lachman Lal Chowdhri* v *Kanhaya Lal Mowar I L R 22 Calc 609* referred to *Nathu Singh* v *Gulab Singh I L R 17 All 167* and *Chandania* v *Salig Ram I L R 26 All 40* distinguished CHUNNI LAL v SITA RAM (1911) **I L R 34 All 8**

ADOPTION—*contd*

6 ———— **Custom**—*Agarwal Banias of Zira Punjab—Custom—Adopted person an orphan and married—Adoption by declaration of adoption and subsequent treatment of adoptee as adopted son—Privy Council practice of—Concurrent decisions on fact* In this case in which the plaintiff sued for a declaration of his adoption the parties were Agarwal Banias of Zira in the Punjab and the plaintiff being an orphan and married the validity of the adoption if made depended upon whether they were governed by custom or by the Hindu law Their Lordships of the Judicial Committee considered that the Courts below had concurrently found that among the class to which the parties belonged the rules of Hindu Law as to adoption did not apply and that by the custom applicable to that class an unequivocal declaration by the adopting father that a boy had been adopted and the subsequent treatment of that boy as the adopted son was sufficient to constitute a valid adoption and that in fact the defendant had so adopted the plaintiff and treated him as his adopted son In accordance therefore with the usual practice as to such concurrent decisions *Held* that the adoption had been established Owing however to the limited nature of the evidence as to custom among the Agarwal Banias of Zira the effect of the decision should be confined to the particular circumstances of the case CHIMAN LAL v HARI CHAND (1913) **I L R 40 Calc 879**

6 (a) ———————In this case where the issue was as to whether Plaintiff had been adopted the onus being on the Plaintiff the Judicial Committee held he had not discharged that onus and condemned the Indian practice of advocates not putting their own Clients in the Witness Box but trying to force their opponents to do so that they can cross examine their own clients LAL KUNWAR v CHIRANJI LAL **I L R 32 All 104**

7 ———— **Under Will**—*Hindu law—Construction of will—Power of adoption conferred upon the two widows of the testator* A Hindu died leaving him surviving two widows By his will he left all his property to the widows and conferred on them authority to adopt in the following terms —

They (the widows) may if necessary adopt a boy of good family according to their necessity *Held* that the authority so given must be exercised by both the widows jointly and that an adoption made by one of the widows after the death of the other was of no effect *Narasimha Appa Row* v *Parthasarathy Appa Row I L R 37 Mad 199* referred to LACHHMI PRASAD v MUSAMMAT PARBATI **I L R 42 All 266**

8 ———— **Son subsequently born to adoptive father**—*Rights of adopted and natural born son inter se—Agreement by adoptive father with father of adopted son that adopted son shall share in inheritance with natural born son equally* Agreement binds debottar property if agreement shows that it was the father's intention **24 C W N 794**

9 ———— **Sons of Sudras in Madras** are entitled to an equal share with the after acquired son on partition. ARUMILLI PERRAYU v ARUMILLI SUBBARAYADA **26 C W N 1**

10 ———— **What amounts to** It is not necessary to give *direct* evidence of adoption where it has been publicly recognized for a long time JAGANNATH MARWARI v SA CHANDRI BIBI **26 C W N 65**

ADULTERATION

See CALCUTTA MUNICIPAL ACT (BENG III OF 1899) s 495A — 22 C W N 745

See GHEE — I L R 47 Calc 633

See UNITED PROVINCES PREVENTION OF ADULTERATION ACT (VI OF 1912) ss 4 6 — I L R 40 All 661

——————— *Adulterated Ghee sale of—Master and servant—Sale by servant or partner —Liability therefor of master or co partner of a firm of Commission Agent —Calcutta Municipal Act (Beng III of 1899) ss 494 and 574* Section 495 of the Calcutta Municipal Act imposes a positive prohibition against the sale of adulterated articles of food or drink and covers the case of an agent or firm as well as that of a master and servant A master is liable under the section for sale by his servant of such as adulterated articles at his shop without his connivance The partners of a firm carrying on business as agents of the manu facturers of *ghee* in shops bearing their names are each responsible for everything sold therein in contravention of the section *Brown* v *Foot 17 Cox C C 509* followed SEW KARAN v CORPORATION OF CALCUTTA (1912) I L R 39 Calc 682

ADULTERY

See DIVORCE — I L R 44 Calc 1091
I L R 47 Calc 1068

See DIVORCE ACT

———— admission of—

See DIVORCE — I L R 38 Calc 907

AD VALOREM COURT-FEE

See DECLARATION — I L R 38 Mad 922

ADVANCEMENT

See MARRIED WOMEN'S PROPERTY ACT (III OF 1874) s 6 — I L R 37 Mad 483

See BENAMIDAR — L R 47 I A 275

ADVERSE ENJOYMENT

See EASEMENTS ACT (V OF 1882) s 15 — I L R 38 Mad 1

ADVERSE POSSESSION

See ATTACHMENT — I L R 45 Bom 1020

See BENGAL FERRIES ACT 1885 — 5 Pat L J 500

See BOMBAY LAND REVENUE ACT 1879 s 121 — I L R 45 Bom 67

See BHAGDARI AND NARWADARI TENURES ACT (BOM V OF 1862) s 3 — I L R 39 Bom 358

See BOMBAY DISTRICT MUNICIPAL ACT (BOM ACT III OF 1901) ss 113 122 — I L R 38 Bom 15

See CO OWNERS — 24 C W N 1057

See DILUVIATED LAND — I L R 44 Calc 858

ADVERSE POSSESSION—*contd*

See EASEMENT ACT 1882

See ENCROACHMENT — I L R 38 Bom 15

See ESTOPPEL — I L R 44 Calc 145

See EVIDENCE — I L R 39 All 696

See GRANT — I L R 37 Calc 674

See GUJARAT TALUKDARS ACT (BOM ACT VI OF 1888) s 31 — I L R 37 Bom 390

See HEREDITARY OFFICES ACT (BOM III OF 1874) s 5 — I L R 39 Bom 587
ss 11 11A I L R 37 All 498

See HINDU LAW—ENDOWMENT — L R 46 I A 204

See HINDU LAW—ALIENATION BY WIDOW — I L R 43 Calc 417

See IDOL — I L R 36 Bom 135

See KHOTI SETTLEMENT ACT 1880 s 8 — I L R 45 Bom 1001

See LANDLORD AND TENANT — I L R 33 All 757
I L R 45 Calc 756

See LICENSEE — I L R 41 All 669

See LIMITATION — I L R 37 Calc 885
I L R 39 Calc 459
I L R 37 Bom 224, 231
L R 46 I A 197 285
I L R 39 Mad 617
I L R 44 Mad 883

See LIMITATION ACT XV OF 1877 SCH II ARTS 127 132 144 149 — I L R 35 Bom 438
I L R 37 Bom 84

SCH II ARTS 137 142 144 — I L R 33 All 224

ART 141 — I L R 33 All 312

ARTS 142 AND 144 — I L R 35 Bom 79

See LIMITATION ACT (IX OF 1908)

s 18 (SCH I ART 124) — I L R 39 All 636

(SCH I ART 144) — I L R 30 All 461
I L R 42 Bom 714
I L R 1 Lah 210

(SCH I ART 120) — I L R 42 Bom 333

SCH I ART 123 — I L R 45 Bom 519

SCH I ARTS 134 144 AND 148 — I L R 43 All 164

SCH I ACT 141 — I L R 42 Bom 714

SCH I ART 142 — 2 Pat L J 506
I L R 45 Bom 570

See MINERAL RIGHTS — 5 Pat L J 273

See MORTGAGE — I L R 34 All 289 & 640
I L R 38 All 411
I L R 39 All 423

See OCCUPANCY HOLDING — 14 C W N 68

ADVERSE POSSESSION—*contd*

See P... ...

See REVENUE SALE LAW 3...
15 C. W N 706

See SALE FOR ARREARS OF REVENUE
I. L. R. 43 Calc ...9

See SARANJAM I. L. R 40 Bom. 606

See SHEBAIT I. L. R. 39 Calc. 887

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 4 AND ...
I. L. R 38 Mad. 1158

See TENANT 23 C W N 201

See WILL 3 Pat L. J 199

———— against a Hindu widow—

See HINDU LAW—JOINT FAMILY
I L. R 42 Bom 69

———— against a person not entitled to present possession—

See CENTRAL PROVINCES LAND REVENUE ACT 1881 1 Pat L J 293

———— against Government—

See MUNICIPAL COUNCIL.
I L. R 38 Mad 6

———— by mortgagee—

See TRANSFER OF PROPERTY ACT (IV OF 1882) ss ...4 118
I L. R 37 Mad 423

———— by one co owner against another—

See CO OWNERS 24 C W N 1057

———— End of by the passing of the decree—

See LIMITATION
I L. R 44 Bom 934

———— Entitling to Land Acquisition Compensation—

See ACQUISITION OF LAND
1 Pat L J 258

———— Entry in Revenue records more than 12 years old—

See EQUITY OF REDEMPTION
I L R 1 Lah 549

———— In two Capital Cities—

See LANDLORD AND TENANT
I L R 37 Calc 709

———— tacking of—

See EVIDENCE ACT (I OF 1872) ss 107 108 I L R 37 Mad 440

———— to Auction Purchaser—

See CRIMINAL PROCEDURE CODE s 145
25 C W N 743

———— Under decree—

See MORTGAGE I L R 2 Lah 53

1 ———— Government against Court of Wards representing private persons—*Court of Wards position of—Chur land suit to recover—Gradual formation—Proof that any portion formed within period of limitation—Onus* The Government and the Court of Wards are not identical bodies nor can the latter be regarded as merely a department of the former The latter is a statutory body and the mere fact that in this province the Board of Revenue as the Court of Wards does not make the possession by Government of newly formed *chur* land during the time the claimants property was under the direction of the Court of Wards possession by the latter on behalf of the claimants *Held* on the evidence that Government was in adverse possession of the disputed land as against the Court of Wards representing the claimants *Chowdhree Sheoraj Singh v The Collector of Moradabad 2 N W P 3 9* approved In a suit for recovery of possession of *chur* land which commenced forming more than 12 years before the suit the onus is on the plaintiffs to prove that any portion of the *chur* formed within 12 years of the suit *Kumar Panjit Singh v Schœne 4 C L R 319* referred to GURU DAS KUNDU CHOWDHURY v KUMAR BASANTA KUMAR ROY (1909) 14 C W N 317

2 ———— Suit for profits—*Limitation—Profits collected by co sharers—Suit by other co sharers to recover their shares* Co sharers who collect profits for other co sharers are in a position similar to that of a lambardar Where no adverse title has been set up the mere fact that a co sharer plaintiff has not received profits for more than twelve years before suit will not bar his claim *Raj Bahadur v Bharat Singh I L R 27 All 348* and *Mohan Lal v Badri Prasad I L R 27 All 436* followed HARACHARAN v BINDU (1910)
I L R 32 All 389

3 ———— Saranjam—Inam—*Claim to hold as Mirasi tenant—Limited interest* Where in an ejectment suit by an Inamdar it was shown that the defendants for more than twelve years before the suit openly asserted their claim to hold as permanent Mirasi tenants *Held* that the defendants had acquired a title to the limited interest claimed by them and could not be ejected TRIMBAK RAMCHANDRA v SHEKH GULAM ZILANI (1909) I L R 34 Bom 329

4 ———— Ghatwali tenure—*Non payment or discontinuance of payment of rent—Estoppel—Acquiescence—Misrepresentation—Grantor and grantee—Homestead land—Sale by the Collector under the Public Demands Recovery Act (XI of 1859)—Sale certificate—Title of auction purchaser—Limitation Act (IX of 1908) s 2 (8) Sch I Art 144—Transfer of Property Act (IV of 1882) s 4...—Evidence Act (I of 1872) s 115* At an execution sale under the Public Demands Recovery Act the right title and interest in a certain homestead land forming part of a *ghatwali* tenure was sold in 1878 by the Collector In the sale certificate granted to the auction purchaser the land was described as rent free and as a matter of fact no rent was ever paid to the *ghatwal* or anybody by the judgment debtor or after him by the auction puchaser In 1888 the plaintiff an infant of 4 years of age succeeded as *ghatwal* on the relinquishment of the office by his father Thereafter by an agreement between the young *ghatwal* the Maharajah of Burdwan who was the superior zemindar and the Government the young *ghatwal* relinquished the office on condition that the property should be treated as resumed by the State to be settled permanently with the Maharajah by whom it would be granted in *mokarari* to the retiring *ghatwal* This arrangement was carried out and in 1895 the plaintiff obtained the *mokarari* settlement from the Maharajah In 1902 the plaintiff attained majority and in 1904 he brought a suit to eject the representatives

ADVERSE POSSESSION—*contd*

of the auction purchaser from the homestead land and to recover possession of the same *Held* that mere non payment of rent or discontinuance of payment of rent did not by itself constitute adverse possession *Madan Mohan Gossain* v *Kumar Rameswar Malia 7 C L J 615 Troyluckha Tarinee Dossia* v *Mohima Chunder Mutluck 7 W R 400 Rungo Lall Mundal* v *Abdool Guffor I L R 4 Calc 314 Poresh Narain Roy* v *Kassi Chunder Talukdar I L R 4 Calc 661 Musyatulla* v *Noor ahan I L R 9 Calc 808 Prem Sukh Das* v *Bhupia I L R 2 All 517* referred to *Held* also that in a suit of this description Article 144 of the Limitation Act must be applied and the plaintiff as *ghatwal* did not claim through his father as his predecessor within the meaning of section 2 of the Limitation Act *Ram Chander Singh* v *Madho Kumari I L R 12 Calc 484 L R 12 I A 188* referred to *Held* further that the plaintiff when he succeeded as *ghatwal* was an infant and as he commenced the present suit within three years from the attainment of majority the plea of limitation could not be sustained *Held* further that no title by estoppel accrued in favour of the purchaser at the certificate sale There was no estoppel in this case as against the decree holder and the appellants as representatives of the purchaser at the certificate sale could not avail themselves of any possible estoppel against the Secretary of State or against the plaintiff as grantee from him through the Maharajah of Burdwan *Held* further that even if there had been any estoppel available against the Secretary of State there could have been none against the plaintiff none was created by reason of what happened in 1888 because the estate did not then vest in the Crown to be granted afresh to the plaintiff nor was any created by reason of what happened in 1895 because the so called after acquired title of the Secretary of State was acquired by him on condition that a clear title would be granted to the Maharajah of Burdwan as zemindar and to the plaintiff as *mokararidar* under him The doctrine of estoppel does not apply where an after acquired title is taken by the grantor under a conveyance made to him as a conduit and for the purpose of vesting the title in a third person PRASANNA KUMAR MOOKERJEE v SRIKANTHA ROUT (1912)

I L R 40 Calc 173

5 ———— **Chur land**—*Posting of bamboo accompanied by beat of drum if constitutes adverse possession* Where the only act of possession exercised was the posting of a bamboo accompanied by beat of drum *Held* that that was not by itself sufficient to enable a person to acquire as against the rightful owner a title by adverse possession Adverse possession to be effective must be actual visible exclusive hostile and continuous for the statutory period TARA CHAND POY v SECRETARY OF STATE FOR INDIA (1919) 23 C W N 380

6 ———— **Possession adverse to mortgagor**—*if adverse to mortgagee out of possession* The possession of a mortgaged property by a person claiming adversely to the mortgagor is not adverse against the mortgagee until the mortgagee has the right to possess the property KALI KRISHAN CHOWDHURY v TARA PROSANNA CHONDAR (1918) 23 C W N 815

7 ———— **Title against Crown**—*Burden of proof—What facts prove adverse possession—Entry as poramboke not sufficient to prove title of Crown* In mirasi tracts the gathering of wild flowers and fruits from poramboke lands and the gathering of fish from small tanks will not indicate ownership as such acts are permitted by Government It is otherwise where large sums are spent on tanks by mirasidars in clearing silt and in constructing masonry dams Such acts are indicative of ownership and when they are proved to have been done for 30 or 40 years the presumption will be that they have been done for more than the statutory period and the burden will be on the Crown to explain such acts and prove possession within the statutory period Mere entry as poramboke in the *pymash* and settlement registers is insufficient to prove the title of Government without proof of acts of ownership VENCATARAMA IYER v SECRETARY OF STATE FOR INDIA (1909) I L R 33 Mad 362

8 ———— **Plea of acquisition of title by**—Where no case of acquisition of title by adverse possession is made in the plaint nor is the question raised directly or indirectly in the issues the plaintiff ought not to be allowed to succeed on such a case *Joytara* v *Mobaruck I L R 8 Calc 975 Sundari* v *Mudhoo Chandra I L R 14 Calc 592 Ananda Hari* v *Secretary of State 3 C L J 316* referred to But where the question reduces itself to one of law upon facts admitted or proved it is not only competent to the Court but also expedient in the interests of justice to entertain the plea of adverse possession if such a case arises on the facts stated in the plaint and the defendant is not prejudiced or taken by surprise *Lilabati* v *Bishun Chobey 6 C L J 621* referred to NEPEN BALA DEBI v SITI KANTA BANERJEE (1910)

15 C W N 158

9 ———— **Cantonment land**—*Limitation—Land situate in a cantonment—Presumption as to title* Certain land situate in the cantonment of Dehra Dun was appropriated in the beginning of the nineteenth century by the predecessor in title of the defendant for the purpose of building a house The land was held subject to the rules from time to time applicable to cantonments by various occupiers until the year 1874 when the cantonments were handed over to the civil authorities In 1890 the Secretary of State sued the then occupant for a declaration of title and assessment of ground rent or in the event of the defendant refusing to pay rent for possession *Held* that the circumstances of the case warranted the presumption that the title to the land in suit was vested in the Crown and that the possession thereof could not be regarded as adverse until at the earliest the year 1874 when the land in suit ceased to be a part of the cantonment *Secretary of State for India* v *Jagan Prasad I L R 6 All 648* referred to BANK OF UPPER INDIA v THE SECRETARY OF STATE (1910)

I L R 33 All 229

10 ———— **Mortgaged property**—*Limitation—Purchaser of a decree on a mortgage allowing a puisne mortgagee to pay him off—Such position inconsistent with a claim to be in adverse possession of the mortgaged property* *Held* that when the purchaser of a decree for sale on a mortgage accepted from a puisne mortgagee the amount due under the decree which he had purchased he by so doing admitted the validity of the puisne mort

ADVERSE POSSESSION—contd

gave and his possession was not consistent with a claim to be in adverse possession of the mortgaged property *Fatma Bibi v Sadiq Ali* ... *Bom* ... referred to JAGDIP NARAIN SINGH v TILAK SINGH (1911) I. L. R. 33 All. 463

11 ———— What title affected by—*Possession adverse to mortgagee—adverse possession against mortgagor does not affect rights under a mortgage executed before adverse possession began* Possession adverse to the mortgagor is not adverse to and does not affect the right of a simple mortgagee not entitled to possession when such adverse possession commenced when such mortgage was granted prior to the commencement of such possession *Aimadar Mandal v Makhan Lal Day I L R 33 Calc 1015* followed The interest in immoveable property which is acquired by adverse possession can only be that interest which the person entitled to immediate possession had at the time that adverse possession began. It will attach against the whole of the interest of the person so entitled to possession notwithstanding that he has subsequent to the commencement of the adverse possession alienated the whole or any part of such interest provided possession continued uninterrupted PARTHASARATHY NAICKER v LAKSHMANA NAICKER (1911) I. L. R 35 Mad. 231

12 ———— Against Mortgagee *Quære* — Whether adverse possession against the mortgagee for the statutory period operates to extinguish the rights of the mortgagee under a previously executed mortgage NANDA KUMAR DEY v AJODHYA SAHU (1911) 16 C W N 351

13 ———— Co-sharers inter se—*Non participation for a long time effect of* In order to establish adverse possession by one tenant in common against his co tenants there must be exclusion or ouster and the possession subsequent to that must be for the statutory period Mere non participation of rents and profits would not necessarily of itself amount to exclusion but such non participation or non possession may in the circumstances of a particular case amount to an adverse possession What the circumstances may be which may have to be considered in determining the question of ouster discussed AJEMENNESSA BIBI v SHEIKH ISUF (1912) 16 C W N 849

14 ———— Hypothecation—Stranger in adverse possession *for 12 years as against mortgagor—Effect of on mortgagee's rights—Payments of interest and acknowledgment by mortgagor effect of* Adverse possession by a stranger for more than 12 years of a property which is subject to a hypothecation not only extinguishes the rights of the mortgagor but bars also those of the mortgagee though the rights of the mortgagee may have been kept alive by payments or acknowledgments made by the mortgagor *Prannath Roy Chowdry* v *Rookea Begum 7 Moo I A 323 355 Karan Singh* v *Bakar Ali Khan I L R 5 All 1 Ammu* v *Pamakrishna Sastri I L R 2 Mad 226 229 Ram Coomar Sein* v *Prossunno Coomar Sein 1 W R 375* and *Sheoumber Sahoo* v *Bhowanee deen Kulwar 2 N W P H C 223* followed *Aimadar Mandal* v *Makhan Lal Day I L R 33 Calc 1015* and *Second Appeal No 682 of 1909* (unreported) not followed *Heath* v *Pugh L R 6 Q B D 345* and *on appeal Pugh* v *Heath L R 7 A C 235* distinguished *Per* Curiam The rights of the mortgagee would be extinguished in such a case even where he is not entitled to possession under the mortgage as the mortgagee is not without remedy against the trespasser and could protect his interests by proper proceedings A mortgage is merely a security for the debt and a mortgagee's right is to sell the interest of the mortgagor in the land and a mortgage decree under which the land is attempted to be sold cannot bind persons who do not derive their title from the mortgagor and were not parties to the suit in which the mortgage decree was passed but claim a statutory title adversely to the mortgagor RAMASWAMI CHETTI v PONNA PADAYACHI (1913) I L R 36 Mad 97

15 ———— By agent collecting rent—*Agent paying over the rent to the landlord—Agent setting up his own title and keeping the rent to himself during continuance of lease—Landlord's right to land at determination of tenancy* In 1887 certain land belonging to defendant No 2's family was leased to a tenant for 18 years by a registered lease by the plaintiff's family who acted as agents of the defendant No 2's family and collected the rent and paid it over to them The rent was so paid till 1893 when the plaintiff's family set up their own title to the land and ceased paying over the rent to the defendant No 2 The tenant remained in possession of the land till the determination of the tenancy in 1905 and then attorned to defendant No 2 In 1908 the plaintiff sued to recover possession of the land alleging that the title of defendant No 2 to the land was lost by the adverse possession of the plaintiff The lower Courts decreed their claim On appeal by defendant No 2 *Held* reversing the decree that so long as the tenant held the land under the tenancy he held it as the tenant of defendant No 2's family and their rights were just as good at the end of the tenancy as they were at the beginning and were absolutely unaffected in any particular by the reiterated assertions made by the plaintiff of an adverse title or by the fact that the rents were retained by the plaintiff KRISHNADIXIT v BALDIXIT VAMANDIXIT (1913) I L R 38 Bom 53

16 ———— Absence of intention to acquire absolute interest—*Limitation* In a suit to recover possession by an adopted son against the lessees of the deceased adoptive mother who was in possession where the plaintiff believed that the adoptive mother was entitled to remain in possession for life and she shared that belief and so remained in possession while the plaintiff took no steps to disturb her *Held* that the plea of adverse possession by the adoptive mother could not arise there being no intention to hold adversely so as to acquire an absolute estate PIRSAB VALAD KASIMSAB v GURAPPA BASAPPA (1913) I. L R 38 Bom 227

17 ———— Trustee—*Animus possidendi determines nature of right prescribed—Estoppel—Landlord and tenant* When a person purports to hold property as a trustee he cannot by such possession acquire a right to the property by prescription for himself against the beneficiaries The character in which possession is held and the animus possidendi of the holder determines the right which the possession would confer *Madhava* v *Narayana I L R 9 Mad 244 Thakore Fatesingji* v *Bamanji A Dalal I L R 27 Bom*

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515 Secretary of State for India v *Krishnamoni Gupta I L R 29 Calc 518 Lyell* v *Kennedy L R 14 A C 437* and *Soar* v *Ashwell [1893] 2 Q B 390* referred to The plaintiff s father claiming to be the trust e of a temple demised temp e lands in 1866 on kanom to the first defendant and the second defendant was the ultimate assignee of the kanom interest at the date of suit The plaintiff s claim to the trusteeship was negatived by decree of Court in 1894 when a third party was declared to be the trustee It was found that the plaintiff was not the trustee at the date of the present suit instituted by the plaintiff for recovery of possession of the kanom lands from the second defendant *Held* that the suit must fail as the plaintiff was not the trustee *Held* further that the second defendant was not estopped from denying the plaintiff s right on the ground that he was no longer the trustee though he would be estopped from denying the title of the temple THUPPAN NAMBUDRIPAD v ITTICHIRI AMMA (1914)

I L R 37 Mad 373

18 ———— **Mortgagor and mortgagee agreeing that latter's possession should be as absolute owner**—*Effect of* Where a mortgage deed provided that in default of payment of the mortgage amount within the stipulated period the mortgagee should take possession of the mortgaged property and enjoy the same as absolute owner and accordingly the mortgagor after the said period and in consideration of a further payment of Rs 250 by the mortgagee relinquished the mortgaged property to be held by the mortgagee as absolute owner and had the patta transferred to his name *Held* that the possession of the mortgagee under the circumstances for over twelve years was adverse to the mortgagor whose right to redeem consequently became barred by limitation An unregistered agreement between the mortgagor and the mortgagee that the mortgagee shall hold possession as owner will not confer an immediate title on the mortgagee but is valid in so far as it has the effect of changing the legal character of the possession of a mortgagee into possession as owner A mortgagee cannot by a mere assertion of his own or by any unilateral act on his part convert his possession as mortgagee into possession as absolute owner *Ali Muhammad* v *Lalta Buksh I L R 1 All 655* referred to *Kurri Veerareddi* v *Kurri Bapireddi I L R 29 Mad 336 Sri Raja Papamma Rao* v *Sri Vira Pratapa H V Ramachandra Ra u I L R 19 Mad 249* and *Dasharatha* v *Ayahalchand I L R 16 Bom 131* distinguished. USMAN KHAN v DASANNA (1914)

I L R 37 Mad 545

18(a) ———————— The question of adverse possession is a mixed question of fact and law The facts found by the Judge must be accepted but the conclusion drawn from them namely whether the possession was adverse or not is a question of law

To prove dispossession of one co sharer by another it must be shewn that there was exclusion or ouster to the knowledge of the former and this principle is applicable to all cases of co owners and is not confined to cases where the co owners were persons who at one time had formed members of a family

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The possession of one co owner is the possession of all for the purpose of limitation.

There can be no dispossession by one joint tenant in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy and if no notice is given to the co sharer of of the denial of his right the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of the co owner sought to be ousted and of laches if he fails to discover and assert his rights JOGENDRA NATH MUKHERJEE v RAJENDRA NATH BHATTACHARJEE

26 C W N 890

19 ———— **Ex proprietary tenant**—*Right acquired by*—*Semble* That although a leasehold or an ex proprietary interest can be acquired by adverse possession as against the person who is the lessee or the ex proprietary tenant yet where there never has been a lessee or an ex proprietary tenant it is not possible to become such by adverse possession BASDEO *v* ULFAT RAI (1914)

I. L R 37 All 22

20 ———— **Co owners—Notice of hostile claim if necessary**—*Possession hostile at commencement—Subsequent accrual of title as co owner—Possession continued not hostile—Limitation Act (IX of 1908) Sch II Arts 134 and 144* The plaintiff and the third defendant were the reversionary heirs of one *O* who had mortgaged the suit properties to one *P* The third defendant s father purchased the properties from *P* in 1893 without notice of the mortgage and has been in possession of the same ever since The widow of *O* died on the 6th September 1900 The plaintiff brought this suit on the 2nd September 1912 to redeem the properties The third defendant pleaded that the suit was barred by limitation *Held* that the suit was not barred by limitation Possession held by one of the co owners will not be adverse to the others until they have notice of the hostile claim Though possession was hostile when it commenced still such possession will not continue to be hostile on the accrual of a peaceful title before the completion of the adverse possession VELAYUTHAM v SUBBAPOYA (1915) **I L R 39 Mad. 879**

21 ———— **Simple mortgage**—*Dispossession of mortgagor after mortgage not adverse to the mortgagee* The possession of a trespasser who has dispossessed a mortgagor the mortgage being simple is not adverse to the simple mortgagee *Parthasarathy Naicker* v *Lakshmana Naicker I L R 35 Mad 231* followed RAMASAMI CHETTI v PONNA PADAYACHI *I L R 36 Mad 97* overruled VYAPURI *v* SONAMMA BOI AMMANI (1915) **I L R 39 Mad. 811**

22 ———————— *Simple Mortgage—Adverse possession against mortgagor whether adverse against mortgagee in case of simple mortgag — Limitation—Limitation Act (IX of 1908) s 28 Sch I Art 144* Adverse possession against the mortgagor is not *per se adverse* also against the mortgagee in the case of a simple mortgage *Per* SANDERSON *C J* Adverse possession affects the interest which the person who was entitled to immediate possession had at that time *Per* MOOKERJEE *J* S 28 of the Limitation Act clearly contemplates that the person whose right is extinguished by lapse of time is a person entitled to institute a suit for possession of the property

ADVERSE POSSESSION—

[illegible] I L R [illegible] and [illegible] Hall [illegible] distinguished [illegible] *Ca* 10 [illegible] 10 C W N [illegible] *Lal* [illegible] I L R [illegible] referred to [illegible] I L R [illegible] referred to. [illegible] (1916)

I. L. R. 41 Calc 425

2. ———— **A[illegible] necessary to constitute**— [illegible] The [illegible] for declaration of their title to and [illegible] of a certain tank which the plaintiffs claimed they held under a lease granted to them in 1883 by some persons who were in possession of a *putnid* under the first defendant whose case on the other hand was that the tank was included in a different *putni* held under them by different *putnidars* and that in 1899 he purchased the *putni* right of the latter and was consequently entitled to take possession of the tank. It was found that the tank in question was not included in the *putni* of the plaintiffs lessors but in the other *putni* as alleged by the defendant but since the date of their lease the plaintiffs had been in occupation of the tank on the basis of their lease and had in assertion of their right let it out to sub-tenants from time to time mortgaged it and re-excavated it. *Held* that the acts exercised by the plaintiffs in respect of the disputed tank constituted adverse possession and were sufficient to extinguish the title of the defendant's vendors on the date of the purchase by the defendant who consequently did not by his purchase acquire any title to the tank in dispute and could not successfully resist the claim of the plaintiffs for declaration of title and recovery of possession. BIJAY CHAND MAHATAP BAHADUR *v* ISWAR CANDRA DAS (1916) **21 C W N 199**

23(a) ———— **Inamdar**—*Decree against Inamdar—Court Sa[illegible]—Right title and interest of Inamdar purchased at the Court sale—Suit by Inamdar to levy assessment—Indian Limitation Act (IX of 1908) Sch I Art 131—Jud[illegible]—Inamdar remiss in recovering assessment—No obligation on occupancy tenant to pay [illegible]—Indian Contract Act (IX of 1872) s 69* In 1874 defendant purchased at a Court sale the right title and interest of the then Inamdar in the suit lands in execution of a money decree against him. Since then the defendant remained in possession of the property and no attempt was made by the Inamdar or his successor to levy assessment or to recover possession until 1916 when plaintiff as Inamdar sued to recover assessment from the defendant as an inferior holder contending that it was a periodically recurring right under Art 131 of the Limitation Act 1908. *Held* that Art 131 of the Limitation Act did not apply and that the suit was barred as the defendant had established his right to hold land free of assessment by adverse possession. *Ganesh Vinayak v S[illegible] (1916) 41 Bom 159* distinguished. BHIMABAI *v* SWAMIRAO **I L R 45 Bom 638**

24 ———— **Trespasser's possession during currency of lease**—*if adverse to lessor if gives rise to equity when his case that he held bona fide under person whom he believed to be owner found false.* *Held* on a review of authorities that where property has been let out on lease the possession of a trespasser does not become adverse as against the lessor until the termination of the lease. Trespassers whose case that they bona fide held the land under a person whom they believed to be the owner thereof is found to be false are not entitled in equity to protection against ejectment. HAJRA SARDARA *v* KUNJA BEHARY [illegible] AO CHOWDHURY (1917) **21 C W N 1001**

25. ———— **of holders portions of estate in Revenue Sale**—*effect of on purchaser of estate at revenue sale.* On the failure of an owner to pay the Government assessment his estate or interest in the land is forfeited or rather determined and the purchaser at a Revenue sale purchases not the interest of the defaulting owner but that of the Crown subject to the payment of the Government assessment and as against a person who claims title to any portion of the estate by adverse possession the time limited by the Limitation Act commences to run from the date of the sale. SURJA KANTA ACHARJYA *v* SARAT CHANDRA ROY CHOWDHURY (1914) **18 C W N 1281**

25 (a) Though a tenant is put in possession of land by a mortgagee his possession cannot become adverse against the mortgagor until the mortgage is reduced and the mortgagor becomes entitled to immediate possession. CITABAI *v* KRISHNA MALHARI

I L R 45 Bom 661

26 ———— **Co sharers**—In order to establish adverse possession between co-sharers there must be evidence of an open assertion of a hostile title by one with the knowledge of the others. Mere non partition in profits by one and exclusive occupation by others is not sufficient. JAGANNATH MARWARI *v* SRI CHANDRI BIBI **26 C W N 65**

27 ———— **Partition decree**—*Property remaining in possession of Judgment debtor—Limitation.* The defendant obtained in 1890 a decree against the Plaintiff to recover his share in lands by partition. He applied in 1899 and 1902 to execute the decree but the land remained in possession of Plaintiff. In 1911 defendant managed to get possession. Plaintiff sued in 1915 to recover possession. *Held* dismissing the suit that though the Defendant went in possession without intervention of the court his possession would be ascribed in the decree and plaintiff could turn him out if she could show she had acquired a good title against the world before he got possession. RAKHMABAI *v* RAM CHANDRA **I L R 45 Bom 943**

28 ———— **Trespasser**—Where the original title is unknown and both parties in a suit for ejectment give evidence of possession the Court will be justified in deciding in favour of one party or the other by a comparison of the evidence judged in the light of probabilities. Such possession has to be interpreted according to the fairest view of what the property itself (in this case forest land) was capable of in the way of possession and what upon a broad view would be considered an adequate assertion of title by sufficient occupation.

But where the Plaintiff has succeeded in proving a clear title the onus lies on the Defendant to prove adverse possession for the statutory period and possession to be adverse must have all the

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qualities of adequacy continuity and exclusiveness

When the holder of title proves that he too has been exercising during the currency of his title various acts of possession then the quality of these acts even though they might have failed to constitute adverse possession as against another may be quite sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds KRISHNAN (ALIAS KUTHALITI) MOOTHAVAR *v* PERINGATI KUNHABANKUTTY HAJI 26 C W N 666

ADVERTISEMENT

See TRADE MARK I L R 37 All 446

ADVICE

———— improper to client—

See PROFESSIONAL MISCONDUCT I L R 40 Mad 69

ADVOCACY

———— The Practice of advocate on each side seeking to force his opponent to produce his own client as a witness in order that he may have an opportunity of cross examining that client condemned as one that must embarrass and perplex judicial investigation and as being unworthy of a high toned or reputable system of advocacy LAL KUNWAR *v* CHIRANJI LAL (1909) 14 C W N 285 I L R 22 All 104

ADVOCATE

See DEFAMATION I L R 41 Calc 514

See HIGH COURT JURISDICTION OF I. L R 44 Bom 418

See LEGAL PRACTITIONER

———— Advocate as witness—*Professional ethics—Counsel retained by party if may be exempted as witness* It is a rule of professional ethics of almost universal application that having taken up the position of an advocate a counsel should refrain from testifying on a trial which is being conducted by him PEARY MOHAN DAS *v* WESTON (1911) 16 C W N 145

ADVOCATE GENERAL

See CHARITABLE TRUST I L R 48 Calc 124

See CIVIL PROCEDURE CODE 1908 s 92 I L R 36 Bom 168

See COSTS I L R 40 Bom 588

———— sanction of—

See PUBLIC CHARITIES 14 C W N 932

———— consent of—

See PUBLIC RELIGIOUS TRUST I. L. R 41 Calc 749

AFFIDAVIT

See CRIMINAL PROCEDURE CODE ss 244 540 I L R 36 All. 13

See MUNICIPAL ELECTION I L. R 46 Calc 119

AFFIDAVIT—*contd*

———— Practice—*Grounds of belief—Civil Procedure Code (Act V of 1908) order XIX rule 3—Jurisdiction—Re hearing* The provisions of order XIX rule 3 of the Code of Civil Procedure must be strictly observed every affidavit should clearly express how much is a statement of the deponent s knowledge and how much is a statement of his belief and the grounds of belief must be stated with sufficient particularity The Court has inherent jurisdiction to re hear a matter before the order passed by the Court at a previous hearing has been perfected PADMABATI DASI *v* RASIK LAL DHAR (1909) I L R 37 Calc 259

———— Scandalous matter—*Civil Procedure Code (Act V of 1908) order XIX rule 3—Statements on information and belief when source of information not indicated if admissible—Allegations of dishonesty not relevant to relief prayed* Scandalous matter should be avoided in pleadings and if a statement of this character is inserted in an affidavit it may be ordered to be taken off the file or the particular passage may be directed to be expunged The Court may take action of its own motion or upon the application of the aggrieved party Allegations of dishonesty are scandalous but they cannot be treated as such if they are relevant to the issue *Fishers* v *Owen 8 Ch D 645 653 Millington* v *Loring 6 Q B D 196* referred to If in future an affidavit is filed in which allegations are made on belief without a statement on the grounds for such belief the Court will be prepared if objection is taken to enforce the strict rule laid down in order XIX rule 3 of the Civil Procedure Code *In re Young Manufacturing Co [1900] 2 Ch 753* referred to GOBIND MOHON DAS *v* KUNJA BEHARI DAS (1909) 14 C W N 153

AFFIDAVIT OF DOCUMENTS

See DISCOVERY I L R 38 Calc 428

See DOCUMENT 25 C W N 99

AFFREIGHTMENT

———— contract of—

See SALE OF GOODS I L R 45 Calc 28

AFTERBORN SON

———— whether he succeeds from date of conception—

See HINDU LAW—WIDOW I L R 1 Lah 128

———— suit for declaration by—

See LIMITATION ACT 1908 s 6 I L R 1 Lah. 558

AGARWAL BANIAS OF ZIRA

See ADOPTION I L R 40 Calc 879

AGENCY

See PAKKI ADAT TRANSACTIONS I L R 39 Bom 1

See SCOPE OF AGENCY

———— termination of—

See LIMITATION ACT (IX OF 1908) SCH I ART 89 I L R 39 Mad. 376

AGENCY—*contd*

See PRINCIPAL AND AGENT
I L R 41 Mad 1

———— **Joint principals**—*Joint power of attorney—Execution of mortgage in pursuance of the authority—Death of one of the principals effect on the power of attorney—Position of the parties object of the power and the nature of the property whether material in construing the power—Members of a Mitakshara family—Indian Contract Act (IX of 1872) s 201* S P R K and R S three brothers executed a joint power of attorney in favour of P P the fourth brother (all the brothers living jointly as members of a Mitakshara family) and thereby authorized him to borrow money on their behalf and as security for the loan to mortgage their joint property Subsequently P S died without issue After his death a mortgage was executed by P I and P K on their own behalf and by R P as attorney for S P A second mortgage was executed of the same properties by R I on his own behalf and as attorney for P K and S P A third mortgage of the same properties was executed by R P on his own behalf and as attorney for S P P K having died previously to the execution of the third mortgage leaving certain minor sons and R P also purported to execute the third mortgage as guardian of these minor sons of R K *Held* that the intention of the parties was that the power of attorney should continue as long as the property remained undivided and so the deaths of P S and R K did not revoke the power of attorney *Held* also that consequently the mortgages were valid and binding on the joint properties *Per* MOOKERJEE J —We cannot hold as an inflexible rule of law that whenever two principals appoint an agent to take charge of some matter in which they are jointly interested the death of one of them terminates the authority of the agent not merely as regards the deceased but also as regards the surviving principal We have in each case to determine the true intention of the parties to the contract from the terms thereof and from the surrounding circumstances SITAL PROSAD *Re* (1916) **21 C W N 620**

AGENCY RULES OF GODAVARI DISTRICT

———— **rr 8 and 16**—*Dismissal of suit for default by Assistant Agent—Order of Agent restoring suit—Revision petition to High Court maintainability of—Decree under rule 8 construction of—Order setting aside dismissal without notice to defendant validity of—Petition to Government necessity for* An order passed by a Government Agent directing that a suit dismissed by an Assistant Agent for default of appearance of the plaintiff be restored to file is not a decree within the meaning of rule 8 of the Agency Rules for the Godavari district and is not revisable by the High Court by a petition filed directly in the High Court *Sri Pedda Vikrama Deo Garu* v *The Mahraja of Jeypore (1916) 4 L W 499* followed VENKATA NAGABUSHANAM v MAHALAKSHMI (1917)
I L R 41 Mad 325

AGENCY TRACTS

See CONTRACT ACT (IX OF 1872) ss 69 AND 70 **I L R 39 Mad 795**

AGENT

See ADVERSE POSSESSION
I L R 38 Bom 53

See COMPANIES ACT (VI OF 1882) ss 76 77 **I L R 36 All 416**

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881) ss 26 27 28
I L R 41 Mad 815

See PRINCIPAL AND AGENT
I L R 41 Mad 1

See TRADING WITH ENEMY
19 C W N 1239

———— **acceptance of bribe or commission by**—

See PRINCIPAL AND AGENT
I L R 37 Calc 81

———— **acts of**—

See RIOTING **I L R 39 Calc 834**

See ACCOUNT SUIT FOR
I L R 40 Calc 108

———— **damages for negligence of**—

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 6 (e) **I L R 38 Mad 138**

See CARRIERS **I L R 41 Calc 80**

———— **duty of**—

See PRINCIPAL AND AGENT
I L R 43 Calc 248

———— **fraudulent conduct of**—

See PRINCIPAL AND AGENT
I L R 43 Calc 511

———— **knowledge of**—

See PRINCIPAL AND AGENT
L R 46 I A 250

———— **liability of to principal**—

See LIMITATION ACT (IX OF 1908) SCH I ART 89 **I L R 39 Mad 376**

———— **trading by**—

See TRADING WITH THE ENEMY
I L R 42 Calc 1094

———— **Hindu Family Manager**—

See LIMITATION ACT 1908 SCH I ART 62 **I L R 45 Bom 313**

AGENT AND PRINCIPAL

See COMPANY **I L R 42 Bom 159**

AGGREGATE SENTENCE

See APPEAL **I L R 40 Calc 631**

See CRIMINAL PROCEDURE CODE—
ss 35 408 **I L R 35 All 154**
3 Pat L J 138

s 413 **15 C W N 734**

AGGRIEVED PARTY

———— **remedies of**—

See DECREE **I L R 44 Calc 627**

AGNATES

See CUSTOM **I L R 44 Calc 749**

AGRAHAR GIFT

——— Condition necessitating residence treated as recommendatory—

See HINDU LAW—GIFT I L R 44 Bom 304

AGRADANI BRAHMIN

See HINDU LAW—GIFTS
14 C W N 1005

AGRA TENANCY ACT (II OF 1901)

See JURISDICTION OF CIVIL AND REVENUE COURTS
I L R 42 All 412

——— s 4— *Land Resumption of rent free grants—Grove land—Suit for resumption of grove land not maintainable in Revenue Court Held* that grove land not being land held for agricultural purposes within the meaning of s 4 (2) of the Agra Tenancy Act 1901 nor land within the meaning of Chapter X of the Act no suit will lie in a Revenue Court for resumption of rent free grant of grove land *Sheo mangal* v *Sardar Singh 6 A L J 749* and *Megh Singh* v *Nasar Fatima Select decisions of 1911 No 4* referred to HADI HASAN KHAN *v* PATI RAM (1913) I L R 35 All 209

——— ss 4, 19——*Question of proprietary title—Jurisdiction—Civil and Revenue Courts—Res judicata* In a suit for ejectment in a Revenue Court (Assistant Collector) the defendants pleaded that the plaintiff brought them from their villages and established them in the property promising that they should have the property in suit The Revenue Court found that these were the true facts and came to the conclusion that the defendants were rent free holders of the land in suit which was given to them in gift by the plaintiff The plaintiff appealed to the Commissioner who confirmed the finding of the Assistant Collector *Held* that the plaintiff could not reopen in a Civil Court the question of the defendants right to the land inasmuch as the decision of the Assistant Collector had become final no appeal having been made to the proper Court namely the District Judge *Shahzade Singh* v *Muhammad Mehdi Ali Khan I L R 39 All 8 Bed Saran Kunwar* v *Bhagat Deo I L R 33 All 453* and *Beni Pandey* v *Raja Kausal Kishore I L R 29 All 160* referred to SUNDAR KUNWAR *v* DINA NATH (1915)
I L R 37 All 280

——— ss 4 58 and 63—*Civil and Revenue Courts—Jurisdiction—Suit for ejectment from land used for grazing purposes Held* that a suit to eject the defendants from certain land which they held of the plaintiffs on rent primarily as pasture land and incidentally for the sake of a certain kind of long grass which grew there was a suit which would lie in a Court of Revenue and not in a Civil Court *Abdul Qayum* v *Fida Husain 13 A L J 851* overruled. *Rameshar Singh* v *Madho Lal I L R 42 All 35* followed PARAM HANSMAN TIWARI *v* DASRATHMAN TIWARI
I L R 43 All 465

——— ss 4 95 167 197

See JURISDICTION OF CIVIL COURTS
I L R 34 All 358

——— ss 4, 167—*Grove—Suit by zamindar for part of produce of grove—Rent—Civil and Revenue Courts—Jurisdiction* Where a zamindar permits a person to plant a grove in his zamindari upon the condition of the grove holders paying yearly to the zamindar a fixed proportion of the produce thereof the part of the produce paid to the zamindar is rent and a suit for the recovery of the same lies in a Revenue and not in a Civil Court PAGHUBIR RAI *v* MADHO (1917) I L R 39 All 605

AGRA TENANCY ACT (II OF 1901)—*contd*

——— ss 4 167—*contd*

——— ss 5 18 20 57

See TRANSFER OF PROPERTY ACT s 91
I L R 33 All 111

——— s 9— *Fixed rate tenancy—Entry of name of tenant in revenue records— Conclusive proof* The entry mentioned in s 9 of the Agra Tenancy Act 1901 is conclusive proof only as to the nature of the tenancy as between the zamindar and the tenant and does not apply to questions as to the title to the tenancy as between rival claimants thereto *Mulai Singh* v *Rajwant Singh All Weekly Notes 1906 p 58* overruled JAINATH PATHAK *v* KALKA UPADHYA (1912)
I L R 34 All 285

2 ——— *Entry of land claimed at last settlement as fixed rate tenancy—Suit between rival claimants— Conclusive proof* The matter in dispute being whether the land claimed by the plaintiff was his *mufia* or the fixed rate holding of the defendant it was *held* that the entry of the names of the predecessors in title (vendors) of the defendant as fixed rate tenants at the last settlement prior to 1901 was in virtue of s 9 of the Agra Tenancy Act 1901 conclusive as to the title of the defendant and it was not open to the plaintiff to plead that the entry was in fact due to a mistake *Jai Nath Pathak* v *Kalka Upadhya I L R 34 All 285* distinguished RAJ SARAN CHAUBE *v* RAM BHAWAN UPADHYA
I L R 43 All 615

——— s 10—*Ex proprietary tenant—Contract to pay a higher rate of rent than that prescribed by law invalid Held* that a proprietor who becomes by the operation of section 10 of the Agra Tenancy Act 1901 an ex proprietary tenant cannot enter into a valid agreement to pay rent for his ex proprietary holding at a higher rate than that prescribed by the section PRAG *v* SITAL PRASAD (1914) I L R 36 All 155

2 ——— *Ex proprietary tenant—Contract to pay a higher rate of rent than that prescribed by law invalid Held* that the provisions of s 10 of the Agra Tenancy Act 1901 are mandatory and it is not competent to an ex proprietary tenant to contract himself out of the section and agree to pay a rent in excess of that laid down thereby *Prag* v *Sital Prasad I L R 36 All 156* followed MANSA RAM *v* GANGA RAM
I L R 42 All 334

——— ss 10 20 83—*Sale of zamindari—Agreement to surrender ex proprietary rights—Possession not delivery—Suit for damages for breach of* those rights shall vest in the other party or a sale of zamindari property coupled with an agreement to relinquish the ex proprietary rights of the vendor is void so far as the relinquishment of ex proprietary rights is concerned *Bhikham Singh* v *Har Prasad I L R 19 All 35 Murlidhar* v *Pem Raj I L R 22 All 205 Kashi Prasad* v *Kedar Nath Sahu I L R 20 All 219 Raghubans Sahai* v *Brijnandan Lal 6 All L J 477 Bharath Singh* v *Debi Dayal Singh 6 All L J 555* and *Khurshed*

AGRA TENANCY ACT (II OF 1901)—*contd*

———— s 10 20 83—*contd*

[illegible] All J [illegible] S referred to IKRAMULLAH KHAN v MOTI CHAND (*1911*)
I L R 33 All 695

2 ———————— *Attempt to evade the provisions of the law as to the alienation of sir land—Mortgage and relinquishment of ex proprietary rights effected by two separate documents of even date* Certain zamindars appurtenant to whose proprietary share was a considerable area of *sir* land executed on the same day in favour of creditors to whom they were indebted to the extent of Rs 9 000 two documents By one of these the proprietors covenanted to mortgage with possession 30 bighas of land forming part of their *sir* land They recited that they had put the mortgagee in actual possession of the land in question surrendering all their rights in the *sir* and *khudkasht* They further covenanted that if the mortgagees should fail to obtain possession or if the mortgagors should after all not give up the *sir* land from their own cultivation or should set up any claim to hold it as ex proprietary tenants then the mortgagees should be entitled to sue for their mortgage money with heavy interest and to enforce the same by sale of the proprietary rights of the mortgagors not merely in the 30 bighas of *sir* land but in a total area of 63 bighas and odd belonging to the mortgagors The consideration of this document was stated at a sum of Rs 8 000 A further attempt was made to *safeguard the mortgagees* by the insertion of a covenant that they should further be entitled at any time to sue for the principal of their mortgage debt and to bring to sale the proprietary rights of the mortgagors in this area of 30 bighas which was formally hypothecated as security for the debt The other document was a deed of relinquishment by which the mortgagors under the former deed purported to surrender or to relinquish in favour of the mortgagees in return for a consideration of Rs 1 000 their rights as ex proprietary tenants in the 30 bighas of *sir* land in question *Held* that the whole transaction was but a single one effected under cover of two deeds and was nothing more than an attempt to evade by an ingenious device the provisions of sections 10 and 20 of the Agra Tenancy Act 1901 *Moti Chand* v *Ikram ullah Khan I L R 39 All 173* and *Dipan Rai* v *Ram Khelawan I L R 32 All 383* followed *Lekhraj* v *Parshadi 6 A L J 713* discussed MIR DAD KHAN v RAMZAN KHAN (1918)
I L R 40 All 449

3 ———————— *Sale of zamindari—Agreement to surrender ex proprietary rights—Suit for damages for breach of contract to deliver possession—Contract void as contravening policy of Act—Contract Act (IX of 1872) ss 23 65* In this appeal their Lordships of the Judicial Committee affirmed the decision of the High Court at Allahabad in the case of *Ikram ullah Khan* v *Moti Chand I L R 33 All 69* holding that an agreement by the defendants for relinquishment of all their *sir* and *khudkasht* lands and ex proprietary rights therein to the plaintiff none of whom were at the execution of the agreement proprietors landholders or co sharers in the land to be relinquished and agreeing to pay damages for any breach of the contract by them was illegal and void as being in contravention of the policy of Act II of 1901 (Agra Tenancy Act) MOTI CHAND v IKRAM ULLAH KHAN (1916)
I L R 39 All 171

———— ss 10 202—*Exchange of lands on partition—Ex proprietary tenant—Suit for possession in Civil Court—Res judicata—Procedure* By s 10 of the Agra Tenancy Act 1901 where there is a transfer by private alienation no rights of ex proprietary tenants accrue if the alienation is by gift or by exchange between co sharers Where circumstances exist to which s 202 of the same Act applies the Court has no option but is bound to adopt the procedure laid down in that section KURA SINGH v CHHALLU (1911)
I L R 33 All 501

———— ss 11 et seq —*Occupancy holding—Mahant—Mahant capable of acquiring occupancy rights for the benefit of the math which he represents* *Held* that the Mahant of a *math* just as much as any other tenant who holds for his own personal benefit can acquire occupancy rights under the provisions of the Agra Tenancy Act 1901 for the benefit of the *math* which he represents PARMANAND SINGH v MAHANT RAMANAND GIR
I L R 35 All 474

———— s 16—*Landlord and tenant—Agreement by landlord to treat tenant as an occupancy tenant—Estoppel* *Held* that it is not illegal for a landlord to enter into an agreement with a tenant that the tenant shall have the right not to be ejected so long as he pays the rent and observes the conditions of his tenancy BHOLA NATH TIWARI v SURAJ BALI RAI (1918)
I L R 41 All 221

———— s 18 and 20—

See TRANSFER OF PROPERTY ACT s 91
I L R 33 All 111

———— ss 18 and 88—*Landlord and tenant—Occupancy tenant by agreement with the zamindar converting part of holding into a grove—Effect of such conversion on tenancy* The zamindar gave permission to an occupancy tenant to plant a grove on his holding Trees were planted and grew up and the land ceased entirely to be used for agricultural purposes *Held* that the legal effect of this agreement between the zamindar and the occupancy tenant was that the land over which the trees were planted ceased to be an occupancy holding and became grove land and liable to the incidents appropriate to such land The methods provided by s 18 of the Agra Tenancy Act 1901 for the extinction of an occupancy tenancy are not exhaustive but such tenancy may be implied between the zamindar and the occupancy tenant The principles deducible from various rulings relating to groveland explained JALESAL SAHU v RAJ MANGAL **I L R 43 All 606**

———— s 19—

See s 4 **I L R 27 All 280**
I L R 43 All 445

———— ss 19 20—*Contract Act (IX of 1872) s 65—Usufructuary mortgage of sir lands—Possession not delivered to mortgagee—Suit to recover possession not maintainable* To secure repayment of money advanced to them by the plaintiff the defendants executed a usufructuary mortgage of certain *sir* land but did not [illegible]

AGRA TENANCY ACT (II OF 1901)—*contd*

——— ss 19, 20—*contd*

possession The mortgagee sued to recover possession of the land or to realize the mortgage debt by sale *Held* that neither relief was open to him but he could treat the mortgagees as ex proprietary tenants and get rent assessed against them *Murlidhar* v *Pem Raj I L R 22 All 205* followed *Jijibhai Laldas* v *Nagji Gulab 11 Bom L R 693* distinguished DIPAN RAI *v* RAM KHELAWAN (1910) I L R 32 All 383

——— ss 19 and 58—*Tenant of grove land paying an annual rent therefor—Non occupancy tenant—Suit for ejectment*—*Held* that a rent paying holder of grove land is a non occupancy tenant within the meaning of s 19 of the Agra Tenancy Act 1901 and liable to ejectment as such tenant under the provisions of s 58 of the Act RAMESHAR SINGH *v* MADHO LAL I L R 42 All 36

——— s 20—

See s 10 I L R 33 All 695
I L R 40 All 449
I L R 39 All 173

1 ——— *Occupancy holding of*—A mortgage of an occupancy tenancy executed prior to the coming into operation of the Agra Tenancy Act is a perfectly valid transaction and is not affected by the subsequent passing of that Act *Babu Lal* v *Ram Kali All Weekly Notes (1906) 28* referred to *Harnandan Rai* v *Nakchedi Rai All Weekly Notes (1906) 302* distinguished RAM PARGAS UPADHIA *v* SUBA UPADHIA (1910) I L R 32 All 628

2 ——— *Civil Procedure Code 1882 s 266—Occupancy holding—Mortgage of occupancy holding and appurtenant house—Mortgaged property not saleable* Where an occupancy tenant purported to mortgage (i) a grove which was his occupancy holding and (ii) a house appurtenant to such holding *Held* that having regard to s 20 (2) of the Agra Tenancy Act 1901 and s 266 of the Code of Civil Procedure 1882 neither the grove nor the house could be sold in execution of a decree on the mortgage RAM DIAL *v* NARPAT SINGH (1909) I L R 33 All 136

3 ——— *Occupancy holding—Mortgage—Sub mortgage by mortgage of occupancy holding—Rights of sub mortgagees* Where the usufructuary mortgagee of an occupancy holding purported to sub mortgage his mortgagee rights *Held* that the sub mortgagees were entitled to a money decree against their sub mortgagor for the money advanced by them BALGOBIND BHAGAT *v* NAGINA MISIR (1913) I L R 35 All 405

4 ——— *Occupancy holding—Transfer—Mortgage executed before the Act came into force—Execution of decree* A usufructuary mortgage of an occupancy holding executed before the coming into force of the Agra Tenancy Act 1901 is a good mortgage *Babu Lal* v *Ram Kali 3 All L J 40* and *Harbans Rai* v *Sri Niwas Rao 8 All L J 1301* followed Where therefore the mortgagee not having obtained possession the judgment debtor cannot set up s 20 of the Act as a bar to its execution RANG LAL KUNWAR *v* KISHORI LAL (1915) I L R 37 All 278

5 ——— *Occupancy holding—Execution of decree—Court not competent to sell an occupancy holding even in execution of a mortgage decree specifically directing the sale thereof* In view of the provisions of s 20 of the Agra Tenancy Act 1901 a court executing a decree cannot order an occupancy holding to be sold no matter whether the decree is a decree directing the sale of the holding or is a simple money decree *Madho Lal* v *Katwari I L R 10 All 130* overruled *Bhola Nath* v *Musammat Kishori II L R 34 All 25* referred to KATWARI *v* SITA RAM TIWARI I L R 43 All 547

AGRA TENANCY ACT (II OF 1901)—*contd*

——— s 20—*contd*

6 ——— *Occupancy tenancy acquired by a member of a joint Hindu family—Profits thrown into common stock—Member of joint family other than the tenant allowed to cultivate* A special Statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu Law in certain matters Where a zamindar admitted as an occupancy tenant a person who was a member of a Joint Hindu family it was *held* that such tenant did not by throwing the profits derived from this land into the common stock of the joint family cause the tenancy to become part of the joint family property nor did he by allowing another member of the joint family to cultivate specific plots forming parts of the holding effect anything more than the creation of a subtenancy in favour of such member KALLU *v* SITAL (1918) I L R 40 All 314

——— s 21—*Occupancy holding—Mortgage—Suit by mortgagor to recover possession—Illegal contract—Restitution of benefit* *Held* that the mortgagor of an occupancy holding who has put the mortgagee in possession cannot recover possession upon the ground merely that the mortgage is void under the provisions of the Agra Tenancy Act 1901 without repaying to the mortgagee the money which he has received from him *Fasih ud din* v *Karamat ullah All Weekly Notes (1888) 128* followed BAHORAN UPADHYA *v* UTTAMGIR (1911) I L R 33 All 779

——— s 22—*Occupancy holding—Succession—Hindu Law* An occupancy tenant died before the coming into operation of the Agra Tenancy Act leaving two daughters one indigent and the other rich and was succeeded by the former After the Tenancy Act came into operation the indigent daughter died *Held* that the rich daughter was entitled to inherit the holding upon the death of her sister in preference to the latter s son her right which had accrued on the death of her father having been merely postponed during the lifetime of the indigent daughter DULARI *v* MUL CHAND (1910) I L R 32 All 314

——— *Lineal descendant—Adopted son* *Held* that an adopted son is a lineal descendant within the meaning of s 22 of the Agra Tenancy Act 1901 LALA *v* NAHAR SINGH (1912) I L R 34 All 658

2 ——— *Succession—Special rule of succession exclusive of personal law of parties* *Held* that the rule of succession which is laid down by s 22 of the Agra Tenancy Act 1901 is independent and exclusive of the personal law of the parties to whom the section applies Consequently the grandsons of a deceased occupancy tenant as his male lineal descendants would be entitled to share in the tenancy jointly with the sons of the late tenant *Bhura* v

AGRA TENANCY ACT (II OF 1901)—contd

——— s 22—contd

Shafat ud-din I L R 30 All 1S followed ALI BAKHSH v BARKATULLAH (1912)
I L R 34 All 419

3 ——— *Occupancy holding*—*Succession*—*Hindu law* One B an occupancy tenant died while the Rent Act of 1881 was in force leaving a widow and a daughter him surviving The widow entered into possession and died after the present Tenancy Act had come into force The present suit was brought by the brothers and nephews of B to eject the daughter and to get possession of the holding *Held* that the plaintiffs had no title either under s 22 of the Agra Tenancy Act or under Hindu Law NATHU v GOKALIA (1915)
I L R 37 All 65

4 ——— *Occupancy holding*—*Succession*—*Lineal descendant*—*Hindu law*—*Adoption* *Held* that as regards the right of succession to an occupancy holding a Hindu who has been adopted ceases to be the lineal descendant of his natural father for the purposes of s 22 of the Agra Tenancy Act 1901 *Lalu v Nahar Singh I L R 31 All 358* followed *Nandan Tewari v Raj Kishore Lal* Select Decisions 1904 No 5 approved *Ali Bakhsh v Barkatullah I L R 34 All 419* distinguished THAMMAN SINGH v DAL SINGH (1914) **I L R 37 All 7**

5 ——— *Occupancy holding*—*Hindu female in possession as heir of occupancy holder*—*Succession* There is nothing in the Agra Tenancy Act to enlarge the estate in an occupancy holding of a Hindu female in possession at the time the Act of 1901 was passed beyond the ordinary estate of a Hindu female The Act not having provided for the devolution of the interest in an occupancy holding where it was at the passing of the Act in the possession of a Hindu female as such the rights of the parties claiming such holding on the death of the last female occupant must be ascertained according to the ordinary Hindu Law BISHESHAR AHIR v DUKHARAN AHIR (1916)
I L R 38 All 197

6 ——— *Occupancy holding*—*Succession*—*Holding owned by a joint Hindu family* An occupancy holding owned by a joint Hindu family does not devolve at the death of the last surviving member of the joint family on that member's widow MAHABIR SINGH v BHAGWANTI (1916) **I L R 38 All 325**

7 ——— *Succession to tenancy*—*Status of illegitimate son of Kshatriya by Sudra woman*—*Hindu law* The illegitimate son of a Kshatriya by a Sudra woman is not a Sudra but of a higher caste called Ugra *Brindavana v Radhamani I L R 12 Mad 72* followed JWALA SINGH v SARDAR (1919) **I L R 41 All 629**

8 ——— *Occupancy holding*—*Holding owned by a joint Hindu family*—*Death of one member gives rise to no interest in his widow* When the tenant of an occupancy holding is a joint Hindu family and one member thereof dies his widow takes no share in the holding *Mahabir Singh v Bhagwanti I L R 38 All 325* followed MENDYA v JHURIA **I L R 42 All 668**

——— ss 25 31 57 Sch IV (c) Art 18—*Civil and Revenue Courts*—*Jurisdiction*—*Appeal*—*Suit to eject ex proprietary tenant* Plaintiffs sued in a Revenue Court to eject certain ex proprietary tenants and their lessee upon the ground that the tenants had given a sub lease of their holding for a period of more than five years in contravention of section 25 of the Agra Tenancy Act 1901 The lessee pleaded that his document of title was in fact not a lease but a mortgage which having been executed before the coming into force of the Agra Tenancy Act 1901 was valid and gave him a good title to possession The Court of Revenue overruled this plea and gave the plaintiffs a decree for ejectment of the defendant *Held* that the suit as brought being one falling within article 18 of group (C) of the fourth schedule to the Agra Tenancy Act no appeal lay to the District Judge *Deo Narain Singh v Sidh Bakhsh Singh* S A No 4 9 of 1915 referred to UMRAT SINGH v EWAZ SINGH (1918)
I L R 41 All 270

——— ss 28 29 30 34—*Ex proprietary tenant*—*Mortgagee from ex proprietary tenant holding over after ejectment of mortgagor*—*Rent not fixed by agreement or by a decree of the Court*—*Right of zamindar to recover rent* G and H were Zamindars who owned some sir land and an occupancy holding They executed a usufructuary mortgage of their sir land and occupancy holding in favour of A and the predecessor of J In execution of a money decree against G and H their zamindari rights were sold and P purchased the same Subsequently in execution of a decree for arrears of rent P got G and H ejected by the Revenue Court Later on P got A and J the mortgagees also ejected by the Revenue Court P then brought a suit against A and J for arrears of rent for the period between the ejectment of G and H and their own ejectment *Held* that P was not entitled to recover the rent in regard to the period of time between the two ejectments as the rent had not been fixed either by agreement between the parties or by a decree of Court KAMTA PRASAD v KANNA LAL (1912) **I L R 35 All 123**

——— s 31—

See s 25 **I L R 41 All 270**

——— s 32—

See CIVIL PROCEDURE CODE O XX r 18 **I L R 36 All 461**

——— *Suit for possession of portion of holding*—*Suit maintainable* All that s 32 of the Tenancy Act provides against is the splitting up of a holding or the distribution of the rent so as to bind the landholders Cl 2 does no more than enact that a suit brought for such a purpose shall not be entertained by a Civil or Revenue Court but where a plaintiff sues for possession of a portion of a fixed rate tenancy alleging that he is owner thereof and the defendant is a trespasser such a suit is not barred by the provisions of s 32 of the Agra Tenancy Act 1901 *Najibullah v Gulsher Khan I L R 23 All 66* followed KEDAR v DEO NARAIN (1915)
I L R 37 All 656

——— s 34—

See s 28 **I L R 35 All 123**

1 ——— *Defendant in possession of land without consent of owner*—*Ejectment of defendant through Revenue Court*—*Subsequent suit for rent*—*Cause of action*—*Misjoinder of causes of action*—*Civil Procedure Code 1908 Order II*

AGRA TENANCY ACT (II OF 1901)—*contd*

——— s 34—*contd*

rule 2 On a partition of certain revenue paying property some land which fell to the plaintiff s share remained in possession of the defendant who refused to vacate it The plaintiff sued the defendant for ejectment in the Revenue Court The defendant pleaded that he was an ex proprietary tenant but the Court held him to be a non occupancy tenant and ejected him The plaintiff then brought the present suit under s 34 of the Agra Tenancy Act 1901 for rent of the land held by the defendant during the period prior to his ejectment as land occupied by the defendant without the plaintiff s consent *Held* that the defendant being in occupation of the land without the consent of the plaintiff was liable to pay rent therefor under s 34 of the Agra Tenancy Act and further that the claim could be maintained notwithstanding that the defendant was not in possession at the date of the suit *Sheo Gopal Pande* v *Thakur Baldeo Singh 8 All L J 1087* distinguished *Held* further that the suit was not barred by reason of the plaintiff having in his previous suit for ejectment treated the defendant as a tenant *Held* also that the plaintiff s cause of action under s 34 of the Agra Tenancy Act was no part of his cause of action to recover possession of the property and could not be joined in the previous suit and the present suit was therefore not barred by the provisions of the Code of Civil Procedure O II r 2 NANDAN SINGH v GANGA PRASAD (1913) I L R 35 All 512

——— *Person occupying land without consent of landlord—Ejectment—Non occupancy tenant—Usufructuary mortgagee entitled to possession* The plaintiffs were the usufructuary mortgagees entitled to possession of the mortgaged property The defendant having acquired a part of the equity of redemption asserted a right to the possession of some of the sir lands comprised in the mortgage without tendering the mortgage money and somehow managed to get into possession of certain plots *Held* that s 34 of the Agra Tenancy Act 1901 applied and the defendant could be regarded as a person in possession of a land without the consent of the landlord and ejected as if he were non occupancy tenant *Balli* v *Ranbat Singh 9 A L J 771* followed JAGARDEO SINGH v ALI HAMMAD (1918) I L R 40 All 300

——— s 41—

See UNITED PROVINCES LAND REVENUE ACT (III OF 1901) s 36 I L R 39 All. 318

——— s 56—*Jurisdiction—Civil and Revenue Courts—Suit for ejectment of a tenant in Revenue Court—Subsequent suit in Civil Court against the same defendant as trespasser* Where the plaintiff had previously sought to eject the defendant by suit in the Revenue Court on the plea that he was the plaintiff's sub tenant but had failed on the finding that the defendant was an occupancy tenant it was *held* that the plaintiff could not thereafter sue the defendant in the Civil Court to evict him as a trespasser NARAIN SINGH v GOBIND RAM (1911) I L R 33 All 523

——— s 57—

See S 2o I L R 41 All 270

AGRA TENANCY ACT (II OF 1901)—*contd*

——— s 57—*contd*

See TRANSFER OF PROPERTY ACT 1882 s 91 I L R 33 All 111

——— ss 57 65 167—

See CIVIL AND REVENUE COURTS I L R 40 All 646

——— s 58—

See s 4 I L R 43 All 445

——— ss 58 167—*Suit for ejectment—Decision of first Court as to defendant s tenancy—Appeal—Order by District Judge returning plaint for presentation to proper Court—Revision* In a suit for ejectment before a Court of Revenue the defendant pleaded that no relation of landlord and tenant subsisted between the parties The Court however found that the defendant was the plaintiff s tenant and decreed his ejectment On appeal by the defendant to the Court of the District Judge that Court held that no appeal lay to it and returned the memorandum of appeal for presentation to the proper Court *Held* that no revision lay against this order to the High Court *Damber Singh* v *S Dass 31 All 445 followed* I L R 41 All 28

——— ss 58 177(e)—*Suit for ejectment—Question of proprietary title—Appeal—Jurisdiction* In a suit for ejectment under section 58 of the Tenancy Act defendant denied the plaintiff s title and set up another man as his landlord The Court of first instance decreed the claim *Held* that an appeal from his decision lay to the District Judge under 177 (e) of the Act inasmuch as the question of the plaintiff s proprietary title was put in issue in the Court of first instance and was a matter in issue in the appeal GANGA PRASAD v HAR NARAIN (1916) I L R 38 All 465

——— ss 58 200—*Appeal—Question of proprietary title—Defendants setting up a title as mortgagees of the proprietary rights* In a suit for ejectment under s 58 of the Agra Tenancy Act 1901 the defendants pleaded that they were not tenants but mortgagees of the proprietary rights of which the plaintiff was alleged to be the purchaser of the equity of redemption *Held* that this amounted to a distinct claiming of a proprietary title or at least of a portion of the bundle of rights which go to make up a proprietary title and the appeal would lie to the District Judge KALYAN MAL v SAMAND (1913) I L R 35 All 157

——— s 63—

See s 4 I L R 43 All 445

——— *Civil Procedure Code 1908 s 11 Expln I—Suit for ejectment in Revenue Court—Question of title decided by Assistant Collector—Decision allowed to become final—Res judicata* In a suit for ejectment in the Revenue Court the defendants to that suit pleaded title in themselves and the Assistant Collector determined that question and held that the plaintiff had failed to prove title as against them This decision became final In a subsequent suit in the Civil Court for declaration of title against the former defendants and also certain others *Held* that the decision of the Revenue Court operated as *res judicata* so far as concerned those persons who had been defendants to the previous suit but not as against those who were no parties to the suit *Behari* v *Sheobalak I L R 29 All 601* referred to BED SARAN KUNWARI v BHAGAT DEO (1911) I L R 33 All 453

AGRA TENANCY ACT (II OF 1901)—*contd*

——— s 65—

See CIVIL AND REVENUE COURT
I L R 40 All 646

——— ss 74 to 76— *Crops or other products —Jamun and Lela plants* Held that jamun and lela plants come under the category of crops or other products within the meaning of ss 74 75 and 76 of the Agra Tenancy Act 1901 *Sheo Prasad Tiwary v Musammat Moleema Bebee N W P H C Rep 108* and *Abdul Latif v Lalita Prasad All Weekly Notes (1893) 24* referred to RAM DYAL AND BHAGAL v SUPA LAL (1910) I L R 32 All 458

——— s 76—

See s 74 I L R 32 All 458

——— s 79—*Fixed rate holding—Purchase of holding at auction sale in execution of a decree—Formal possession obtained—Suit for physical possession—Jurisdiction* The purchasers of a fixed rate holding at an auction sale held in pursuance of a decree on a mortgage applied for and obtained formal possession of the holding the zamindar however refused to allow them to cultivate and in consequence thereof they instituted in a Civil Court a suit for possession of the holding *Held* that the position of the plaintiffs was that of tenants who had been wrongfully ejected by the zamindar to which s 79 of the Agra Tenancy Act 1901 applied and that no suit would lie in a Civil Court *Collector of Benares v Sham Das 13 All L J 509* distinguished ABDUL HASAN v MAKHDUM BAKHSH (1916) I L R 39 All 455

——— ss 79 95—*Jurisdiction—Landholder and tenant—Occupancy holding—Suit for declaration that plaintiff is heir of deceased occupancy tenant and for possession of holding—Practice—Useless declaration refused* The son of a deceased occupancy tenant filed a suit against the zamindar in the Civil Court (i) to have it declared that he was the son and lawful heir of the late tenant and (ii) for possession of the occupancy holding held by him The plaintiff had been ejected more than two years before suit *Held* that although so far as the first relief claimed was concerned the suit might be cognizable by a Civil Court so far as the second relief was concerned the plaintiff s remedy was by suit under s 79 of the Agra Tenancy Act and inasmuch as the time for filing such a suit had long since expired there was no object to be gained by granting the first relief The entire suit was accordingly dismissed *Dori Lal v Sardar Singh 5 All L J 514* referred to BIRHAM KHUSHAL v SUMERA (1913)
I L R 35 All 299

——— s 83—

See s 10	I L R 33 All 695
	I L R 39 All 873
	I L R 40 All 449

——— s 95—

See JURISDICTION I L R 34 All 3 8

See s 79 I L R 35 All 299

——— s 95—*Civil and Revenue Courts—Jurisdiction—Dispute between two rival claimants to a tenancy* Held that the question of title to a tenancy arising between rival claimants to that tenancy is a question which is cognizable by a Civil Court and is not a matter coming within the purview of s 95 of the Agra Tenancy Act

AGRA TENANCY ACT (II OF 1901)—*contd*

——— s 95—*contd*

1901 *Bhup v Ram Lal I L R 33 All 79* followed *Zubeda Bibi v Sheo Charan I L R 22 All 83* and *Hamid Ali Shah v Wilayat Ali I L R 22 All 93* referred to JAGAN NATH v AJUDHIA SINGH (1912) I L R 35 All 1

2 ——— *Scope of section—Power to fix rent not given* It was never intended that the Court in proceedings under s 95 of the Agra Tenancy Act 1901 was to fix the amount of rent Under s 95 it was intended that the Court should ascertain what in fact was the rent payable RAM CHARAN LAL v KARIMUNNISSA BIBI (1914) I L R 37 All 1

3 ——— *Jurisdiction—Civil and Revenue Courts—Res judicata—Dispute between two rival claimants to a holding* A sued B for ejectment in a Court of Revenue alleging that B was his sub tenant and obtained a decree B then sued in the Civil Court for a declaration that he was the owner of a certain occupancy holding and for possession if he was found not to be in possession *Held* (i) that B s suit was properly triable by a Civil Court and not by a Court of Revenue and (ii) that the previous judgment of the Court of revenue ejecting B could not operate as *res judicata* Neither was the suit barred by s 95 of the Agra Tenancy Act 1901 That section deals with questions arising between landlord and tenant and not between rival claimants to a tenancy *Jagannath v Ajudhia Singh I L R 35 All 14* followed *Diwan Singh v Bandhera 12 All L J* overruled KANHAI RAM v DURGA PRASAD (1915) I L R 37 All 223

ALSO *See* COURT FEES ACT (VII OF 1870) SCH II ART 5 s 7 xi
I L R 40 All 358

See UNITED PROVINCES LAND REVENUE ACT (III OF 1901) ss 142 43 146
I L R 39 All 711

——— ss 95 167—*Civil and Revenue Courts—Jurisdiction—Dispute between rival claimants to a tenancy* S 95 of the Tenancy Act was not intended to apply to the case of disputes between rival claimants to a tenancy It was intended to apply to questions arising between the landlord on the one side and the tenant on the other *Primâ facie* the Civil Court is the proper Court to try all questions and it is only when suits are expressly excluded from its cognizance that its jurisdiction is ousted *Kali Charan v Musammat Ulmi 7 All L J 658* referred to BHUP v RAM LAL (1911) I L R 33 All 785

2. ——— *Jurisdiction—Civil and Revenue Courts—Suit for ejectment of tenant—Decision of incidental question by Revenue Court—Suit in Civil Court with the object of defeating the Revenue Court s decree—Res judicata* In a suit for ejectment of a tenant filed in a Court of Revenue the defendants pleaded that they held under an unexpired lease granted by the plaintiffs *karinda* The plaintiffs replied that the *karinda* had no authority to grant the lease The Court of Revenue decided the issue thus raised in favour of the defendants and dismissed the suit The plaintiffs then sued in a Civil Court asking for a declaration that the lease was without authority and was not binding on them *Held* that the suit would not lie The Court of Revenue in a suit the main object of which was the ejectment of

AGRA TENANCY ACT (II OF 1901)—*contd*

——— ss 95 167—*contd*

the defendants had jurisdiction to decide the question of the validity of the lease and the suit was barred by the operation of ss 95 and 167 of the Agra Tenancy Act 1901 *Gomti Kunwar* v *Gudri I L R 25 All 138* distinguished *Rai Krishn Chand* v *Mahadeo Singh All Weekly Notes 1901 49* RAM SINGH v GIRRAJ SINGH (1914) **I L R 37 All 41**

——— **ss 95 167 Sch IV, group C No 34**—*Jurisdiction—Civil and Revenue Courts—Occupancy holding—Succession* On the death of an occupancy tenant a person alleging herself to be his widow applied in the Revenue Court for mutation of names in her favour This application was resisted by the zamindars who denied that the applicant was legally the wife of the deceased tenant The Revenue Court rejected the application for mutation and the applicant thereupon filed her suit in the Civil Court asking for a declaration that she had been legally married to the deceased tenant and was the rightful heir to his estate in occupancy holding No other property of the deceased was specified *Held* that in the circumstances the relief claimed fell within the purview of section 95 of the Agra Tenancy Act 1901 and that the suit was not cognizable by a Civil Court *Birham Khu al* v *Sumera I L R 35 All 299* referred to RAM CHARITRA RAI v JINSI AHIRIN (1913) **I L R 36 All 48**

——— **ss 95 177 (f)**—*Civil and Revenue Courts—Jurisdiction—Appeal* A party to a suit in a Revenue Court cannot merely by formally raising an absolutely untenable plea of jurisdiction remove the case from the Revenue Court to a Civil Court DEO NARAIN SINGH v SITLA BAKHSH SINGH (1916) **I L R 40 All 177**

2 ——— *Suit for declaration of status of tenant—Plea that plaintiff was not a tenant at all—Question of jurisdiction decided—Appeal* In a suit which was framed as a suit under s 95 of the Agra Tenancy Act 1901 asking for a declaration of the plaintiff s status as an occupancy tenant the defendant zamindar pleaded that the plaintiff was a mere trespasser and further stated that there was no allegation in the plaint regarding the jurisdiction of the Court as was required under the law An issue was framed— Is the suit under s 95 Act II of 1901 maintainable and cognizable by this Court —upon which the decision was— S 95 of the Tenancy Act is the only section under which suits can be brought The suit is maintainable under s 95 and as such is cognizable by the Court *Held* that it could not be said that in these circumstances a question of jurisdiction had been decided within the meaning in s 177 (f) of the Agra Tenancy Act 1901 and the appeal lay to the Commissioner and not to the District Judge PATAN SINGH v PRAN SUKH **I L R 43 All 368**

——— **s 97**—*Attestation of instrument by Revenue Court or Officer—Registration Act (XVI of 1908) s 47* *Held* that where a lease has been attested by a Revenue Court or Officer under s 97 of the Agra Tenancy Act 1901 such attestation in the same way as registration under the Indian Registration Act relates back to the date of execution of the document BANWARI LAL v KHUBI RAM (1914) **I L R 37 All 59**

AGRA TENANCY ACT (II OF 1901)—*contd*

——— **ss 102 198**—*Landlord and tenant—Suit for rent—Jus tertii—Intervenor to whom tenant has not actually paid rent* *Held* that s 198 of the Agra Tenancy Act 1901 does not apply to the case of an intervenor whose *jus tertii* the tenant defendant in a suit for rent has set up and who has been made a party to the suit but to whom the tenant has not actually and in good faith paid rent SHEO DIHAL SINGH v BADRI NARAIN SINGH (1905) **I L R 33 All 61**

——— **s 124**—*Distress—Attachment—Removal by tenants of distrained crops—Theft—Penal Code (Act XLV of 1860) s 379* A distress legally carried out according to the provisions of the Agra Tenancy Act 1901 takes priority over the rights of a decree holder who has attached the crops distrained and this notwithstanding that the distress may be the result of collusion between the landlord and his tenants When therefore certain cultivators acting under section 124 (1) of the Agra Tenancy Act cut and stored certain crops which had been distrained by their landlord but which had also been previously attached by a decree holder *Held* that they had committed no offence EMPEROR v RAM DAYAL (1915) **I L R 38 All 40**

——— **ss 142 199**—*Usufructuary mortgage—Lease by mortgagee in favour of mortgagor—Distraint for arrears of rent—Suit to contest distraint—Subsequent suit by mortgagee for possession of property mortgaged—Res judicata* A usufructuary mortgagee of certain zamindari gave a lease of the mortgaged property to the mortgagors Subsequently the lessor distrained for rent due under the lease The lessees instituted a suit under section 142 of the Agra Tenancy Act disputing the validity of the distraint on the ground that the mortgage debt had been discharged and the lease had therefore come to an end In this suit the Court of Revenue found that the mortgage had been discharged Thereupon the mortgagee instituted the present suit in a Civil Court against the mortgagors claiming possession of the mortgaged property upon the ground that the mortgage still subsisted *Held* that the decision of the Court of Revenue could not operate as *res judicata* Section 199 of the Agra Tenancy Act 1901 did not apply to a suit by an alleged tenant against an alleged landlord but only to a suit by landlord against a tenant SURAJ KUMAR v CHET RAM (1919) **I L R 41 All 369**

——— **s 150**—*Resumption of muafi— Proprietor —Perpetual lessee entitled to resume* In substitution for a monthly cash payment which the Maharaja of Benares used to make to the lessees the Maharaja granted to them a perpetual lease of a certain muafi village He transferred to the lessees all rights of every kind reserving only to himself an annual sum payable as rent with a right to re enter in case of default of payment *Held* that in the circumstances the lessees must be regarded as proprietors within the meaning of s 150 of the Agra Tenancy Act 1901 and were entitled to sue for resumption of the muafi MATA BADAL SINGH v GOURISH NARAIN SINGH (1918) **I L R 40 All 656**

——— **ss 154 158**—*Muafi land—Suit for resumption—Portion of muafi grant converted into a grove but restored to the position of agricultural land before suit* Where a certain area had been held

AGRA TENANCY ACT (II OF 1901)—*contd*

———— ss. 154 158—*contd*

rent free for fifty years and by two successors to the original grantee but part of the area had at one time been occupied by a grove which however had ceased to exist some fifteen years before suit it was *held* on suit for resumption that there was no justification for drawing a distinction between that part of the area which had at one time been a grove and the rest which had all along been cultural land and that as a lot of the Agra Tenancy Act 1901 did not apply no portion of the area could be resumed MUHAMMAD ISA KHAN v MUHAMMAD KHAN (191) I L R 40 All 60

———— ss. 154 177—*Suit for resumption of rent free land—Question of proprietary title in issue—Civil and Revenue Court —Jurisdiction* In a suit for resumption of rent free land under s 154 of the Agra Tenancy Act the defence was that the land was not resumable and that it had been held rent free for fifty years and by two successors to the original grantee The Court of first instance (Assistant Collector) holding that the land was resumable passed a decree for ejectment The defendants appealed to the Commissioner before whom it was pleaded *inter alia* that the lower Court should have proceeded under s 158 of the Tenancy Act but it did not appear that any finding was arrived at or any evidence given or arguments addressed upon this question before the Commissioner *Held* that in the circumstances it did not appear that a question of proprietary title was in issue in the Court of first instance and also in the Court of Appeal so as to give appellate jurisdiction to the Civil Court and oust the jurisdiction of the Courts of Revenue KALEHRU v MATHURA PRASAD (1919)

I L R 41 All 318

———— s 158—

See s 154 I L R 40 All 60

1 ———— *Definition— Successor —Transferee from a rent free grantee* *Held* that a transferee from a rent free grantee is a successor of the grantee within the meaning of s 158 of the Agra Tenancy Act 1901 SUNDER SINGH v THE COLLECTOR OF SHAHJAHANPUR (1911)

I L R 33 All 553

2 ———— *United Provinces Land Revenue Act (III of 1901) s 34—Muafi grant —Resumption—Grant to mahant of temple* *Held* that s 158 of the Agra Tenancy Act 1901 and s 34 of the United Provinces Land Revenue Act 1901 apply to land granted rent free for charitable purposes to the *mahant* of a temple Where therefore land so granted has been held for more than fifty years and by two or more successors to the original grantee it cannot be resumed BHARAT DAS v NANDRANI KUNWAR (1917) I L R 39 All 689

———— ss 158 167—*Civil and Revenue Courts —Jurisdiction—Suit for declaration of plaintiff's proprietary title in land originally muafi* *Held* that a suit brought under the provisions of s 158 of the Agra Tenancy Act 1901 for a declaration that plaintiffs have acquired proprietary rights in respect of land originally a muafi grant is a suit exclusively within the jurisdiction of a Court of Revenue *Baldeo Singh* v *Mardan Singh* 7 *A L J* 818 followed NANHU v SRI THAKURJI MAHARAJ (1918) I L R 41 All 37

AGRA TENANCY ACT (II OF 1901)—*contd*

———— s 159— *Co sharer —Owner of specific plots of land assessed to revenue—Suit by lambardar to recover revenue paid on behalf of such person* The word co sharer in s 159 of the Agra Tenancy Act means a person holding proprietary rights in the mahal who is jointly and severally liable for land revenue with other proprietors in the mahal and whose revenue is payable through the lambardar under the provisions of s 141 of the United Provinces Land Revenue Act 1901 MURLIDHAR v BABU RAM

I L R 42 All 311

———— s 164—

See CIVIL PROCEDURE CODE (1908) O XXXI rr 9 16 17 18

I L R 39 All 694

1 ———— *Lambardar and co sharer—Suit for profits—Decree to be either on gross rental or actual collection but not on both —Finding as to negligence of lambardar a mixed finding of law and fact* In a suit for profits by a co sharer against a lambardar the decree must be based either on the gross rental or on the actual collections It cannot be based partly on one and partly on the other *Nand Kishore* v *Ram Ratan* W N 1887 p 250 referred to *Held* also that a finding of negligence or misconduct on the part of a lambardar is a mixed finding of fact and law and is not exempt from reconsideration by the High Court in second appeal CHHABRAJI KUNWAR v GANGA SINGH

I L R 43 All 29

2 ———— *Suit by co sharer against lambardar for share of profits—Burden of proof* In a suit by a co sharer against a lambardar for his share of profits under s 164 of the Tenancy Act if the co sharer gives general evidence to show that the rents are greatly in arrear that the tenants are solvent and that there are no special circumstances why the rents should not have been collected the *onus* is shifted on to the defendant of showing that for some reason not connected with his own negligence or misconduct he was unable to collect the rents *Mithan Lal* v *Moraji Lal* 10 *All L J* 552 followed SHIVA CHANDAR SINGH v RAM CHANDAR SINGH (1915)

I L R 37 All 595

3 ———— *Jurisdiction—Civil and Revenue Courts— Profits —Income derived from land and houses in the abadi* *Held* that the income derived from land and houses in the abadi could not properly be regarded as profits of the mahal in respect of which a suit was cognizable exclusively by the Court of Revenue under section 164 of the Agra Tenancy Act 1901 *Baldeo Singh* v *Beni Singh* 1899 *All Weekly Notes* 5 referred to DIGBIJAI SINGH v HIRA DEVI (1916)

I L R 38 All 223

4 ———— *Suit against lambardar for profits—Sir and khud kasht land held by co sharers to be taken into account* *Held* that in a suit for profits brought by a co sharer against a lambardar under s 164 of the Agra Tenancy Act 1901 the plaintiff is entitled to have taken into account the profits of *sir* and *khud kasht* land held by the other co sharers in the village *Bishambhar Nath* v *Bhullo* *I L R* 34 *All* 98 discussed *Gulari Mal* v *Jai Ram* *I L R* 36 *All* 441 referred to GANGA SINGH v RAM SARUP (1916)

I L R 38 All. 223

AGRA TENANCY ACT (II OF 1901)—*contd*

——— ss 95 167—*contd*

the defendants had jurisdiction to decide the question of the validity of the lease and the suit was barred by the operation of ss 95 and 167 of the Agra Tenancy Act 1901 *Gomti Kunwar v Gudri I L R 25 All 138* distinguished *Rai Krishn Chand v Mahadeo Singh All Weekly Notes 1901 49* RAM SINGH v GIRRAJ SINGH (1914) I L R 37 All 41

——— ss 95 167 Sch IV group C No 34—*Jurisdiction—Civil and Revenue Courts—Occupancy holding—Succession* On the death of an occupancy tenant a person alleging herself to be his widow applied in the Revenue Court for mutation of names in her favour This application was resisted by the zamindars who denied that the applicant was legally the wife of the deceased tenant The Revenue Court rejected the application for mutation and the applicant thereupon filed her suit in the Civil Court asking for a declaration that she had been legally married to the deceased tenant and was the rightful heir to his estate *ie* occupancy holding No other property of the deceased was specified *Held* that in the circumstances the relief claimed fell within the purview of section 95 of the Agra Tenancy Act 1901 and that the suit was not cognizable by a Civil Court *Birham Khusal v Sumera I L R 35 All 229* referred to RAM CHARITRA RAI v JINSI AHIRIN (1913) I L R 36 All 48

——— ss 95 177 (*f*)—*Civil and Revenue Courts—Jurisdiction—Appeal* A party to a suit in a Revenue Court cannot merely by formally raising an absolutely untenable plea of jurisdiction remove the case from the Revenue Court to a Civil Court DEO NARAIN SINGH v SITLA BAKHSH SINGH (1916) I L R 40 All 177

2 ——— *Suit for declaration of status of tenant—Plea that plaintiff was not a tenant at all—Question of jurisdiction decided—Appeal* In a suit which was framed as a suit under s 95 of the Agra Tenancy Act 1901 asking for a declaration of the plaintiff s status as an occupancy tenant the defendant zamindar pleaded that the plaintiff was a mere trespasser and further stated that there was no allegation in the plaint regarding the jurisdiction of the Court as was required under the law An issue was framed— Is the suit under s 95 Act II of 1901 maintainable and cognizable by this Court —upon which the decision was— S 95 of the Tenancy Act is the only section under which suits can be brought The suit is maintainable under s 95 and as such is cognizable by the Court *Held* that it could not be said that in these circumstances a question of jurisdiction had been decided within the meaning of s 177 (*f*) of the Agra Tenancy Act 1901 and the appeal lay to the Commissioner and not to the District Judge RATAN SINGH v PRAN SUKH I L R 43 All 368

——— s 97—*Attestation of instrument by Revenue Court or Officer—Registration Act (XVI of 1908) s 47* *Held* that where a lease has been attested by a Revenue Court or Officer under s 97 of the Agra Tenancy Act 1901 such attestation in the same way as registration under the Indian Registration Act relates back to the date of execution of the document BANWARI LAL v KHUBI RAM (1914) I L R 37 All 59

AGRA TENANCY ACT (II OF 1901)—*contd*

——— ss 102 198—*Landlord and tenant—Suit for rent—Jus tertii—Intervenor to whom tenant has not actually paid rent* *Held* that s 198 of the Agra Tenancy Act 1901 does not apply to the case of an intervenor whose *jus tertii* the tenant defendant in a suit for rent has set up and who has been made a party to the suit but to whom the tenant has not actually and in good faith paid rent SHEO DIHAL SINGH v BADRI NARAIN SINGH (1905) I L R 33 All 61

——— s 124—*Distress—Attachment—Removal by tenants of distrained crops—Theft—Penal Code (Act XLV of 1860) s 379* A distress legally carried out according to the provisions of the Agra Tenancy Act 1901 takes priority over the rights of a decree holder who has attached the crops distrained and this notwithstanding that the distress may be the result of collusion between the landlord and his tenants When therefore certain cultivators acting under section 124 (*1*) of the Agra Tenancy Act cut and stored certain crops which had been distrained by their landlord but which had also been previously attached by a decree holder *Held* that they had committed no offence EMPEROR v RAM DAYAL (1915) I L R 38 All 40

——— ss 142 199—*Usufructuary mortgage—Lease by mortgagee in favour of mortgagor—Distraint for arrears of rent—Suit to contest distraint—Subsequent suit by mortgagee for possession of property mortgaged—Res judicata* A usufructuary mortgagee of certain zamindari gave a lease of the mortgaged property to the mortgagors Subsequently the lessor distrained for rent due under the lease The lessees instituted a suit under section 142 of the Agra Tenancy Act disputing the validity of the distraint on the ground that the mortgage debt had been discharged and the lease had therefore come to an end In this suit the Court of Revenue found that the mortgage had been discharged Thereupon the mortgagee instituted the present suit in a Civil Court against the mortgagors claiming possession of the mortgaged property upon the ground that the mortgage still subsisted *Held* that the decision of the Court of Revenue could not operate as *res judicata* Section 199 of the Agra Tenancy Act 1901 did not apply to a suit by an alleged tenant against an alleged landlord but only to a suit by landlord against a tenant SURAJ KUMAR v CHET RAM (1919) I L R 41 All 369

——— s 150—*Resumption of muafi— Proprietor —Perpetual lessee entitled to resume* In substitution for a monthly cash payment which the Maharaja of Benares used to make to the lessees the Maharaja granted to them a perpetual lease of a certain *muafi* village He transferred to the lessees all rights of every kind reserving only to himself an annual sum payable as rent with a right to re enter in case of default of payment *Held* that in the circumstances the lessees must be regarded as proprietors within the meaning of s 150 of the Agra Tenancy Act 1901 and were entitled to sue for resumption of the *muafi* MATA BADAL SINGH v GOURISH NARAIN SINGH (1918) I L R 40 All 656

——— ss 154, 158—*Muafi land—Suit for resumption—Portion of muafi grant converted into a grove but restored to the position of agricultural land before suit* Where a certain area had been held

AGRA TENANCY ACT (II OF 1901)—contd

———— ss. 154 155—*contd*

rent free for fifty years and by two rucce [illegible] to the original grantee but part [illegible] at [illegible] time been occupied [illegible] which however had ceased to exist [illegible] fifteen year before suit it was [illegible] that there was no justification for drawing a distinction between that part of the area which had at one time been a grove and the rest which had all along been cultivated land and that [illegible] Agra Tenancy Act [illegible] apply no portion of the area could be resumed. MUHAMMAD [illegible] KHAN v. MUHAMMAD [illegible] KHAN (1917) **I L R 40 All 60**

———— ss. 154 1[illegible]—*Suit for resumption of rent free land—Question of proprietary title in [illegible]—Civil and Revenue Court—Jurisdiction* In a suit for resumption of rent free land [illegible] of the Agra Tenancy Act the defence was that the land was not resumable and that it had been held rent free for fifty years and by two successors to the original grantee. The Court of first instance (Assistant Collector) holding that the land was resumable passed a decree for ejectment. The defendant appealed to the Commissioner [illegible] who [illegible] that the lower Court should have proceeded under [illegible] of the Tenancy Act but it did not appear that any finding was arrived at or any evidence given or arguments addressed upon this question before the Commissioner. *Held* that in the circumstances it did not appear that a question of proprietary title was in issue in the Court of first instance and also in the Court of Appeal as to give appellate jurisdiction to the Civil Court and oust the jurisdiction of the Courts [illegible] KAPEHRU v. MATHURA PRASAD (1918)

I L R 41 All 318

———— s 158—

See s 154 **I L R 40 All 60**

1 ———————— *Definition— Successor —Transferee from a rent free grantee* Held that a transferee from a rent free grantee is a successor of the grantee within the meaning of s 158 of the Agra Tenancy Act 1901. BENI [illegible] SINGH v. THE COLLECTOR OF SHAHJAHANPUR (1911)

I L R 33 All 653

2 ———————— [illegible] *Land Revenue Act (III of 1901)* [illegible] Held that s 158 of the Agra Tenancy Act 1901 and s 34 of the United Provinces Land Revenue Act 1901 apply to land granted rent free for charitable purposes to the [illegible]. Where therefore land so granted has been held for more than fifty years and by two or more successors to the original grantee it cannot be resumed. BHAGAT DAS v. NANDRANI KUNWAR (1917) **I L R 39 All 680**

————ss 158 167—*Civil and Revenue Courts—Jurisdiction—Suit for declaration of plaintiff's proprietary title in land or [illegible] muafi* Held that a suit brought under the provisions of s 158 of the Agra Tenancy Act 1901 for a declaration that plaintiffs have acquired proprietary rights in respect of land originally a [illegible] grant is a suit exclusively within the jurisdiction of a Court of Revenue. *Bilho Singh v. Martin Singh* 7 [illegible] *L J 818* followed. NANNHE v. SRI THAKURJI MAHARAJ (1918) **I L R 41 All 37**

AGRA TENANCY ACT (II OF 1901)—contd

———— s. 159— [illegible] Held [illegible] the Agra Tenancy Act [illegible] proprietors [illegible] in the [illegible] severally [illegible] payable [illegible] s 164 of the United Provinces Land Revenue Act 1901 MUHAMMAD [illegible] **I L R 42 All 311**

———— s 164—

See CIVIL PROCEDURE CODE (1908) O XXXI [illegible] **I L R 39 All 694**

1 ———————— *Limitation* [illegible] In a suit [illegible] against a lambardar [illegible] decree [illegible] either on the [illegible] or on the actual collection. It cannot be based partly on one and partly on the other. [illegible] Held that a finding of [illegible] on the part of a lambardar [illegible] from [illegible] only the High Court [illegible] second appeal. CHHATTAR KUNWAR v. [illegible] SINGH **I L R 43 All 29**

2 ———————— [illegible] In a suit by a [illegible] against a lambardar [illegible] but [illegible] to show that the rents were partly in arrear [illegible] tenants are absent and that [illegible] circumstances why the rents [illegible] the [illegible] of [illegible] *Held* [illegible] SINGH v. RAM CHANDAR SINGH (1915) **I L R 37 All 603**

3 ———————— *Jurisdiction* [illegible] in the [illegible] exclusively [illegible] Court of Revenue [illegible] 164 of the Agra Tenancy Act 1901 [illegible] to DHARMRAJ SINGH v. [illegible] **I L R [illegible]**

4 ———————— *Lambardar for profits—Suit by co-sharers [illegible]* a suit for profits brought [illegible] lambardar under s 164 [illegible] 1901 the plaintiff [illegible] account the profits [illegible] by the other co-sharers [illegible] *Nath v. [illegible]* *Gulzari Mal v. [illegible]* referred to [illegible] [illegible] of High Court [illegible] on the [illegible] inquiry into [illegible] *Gajadhar* DAULATIA v. [illegible] P 43 All [illegible] *jurisdiction* *jurisdiction*

AGRA TENANCY ACT (II OF 1901)—*contd*

——— ss 164, 166—*Lambardar and co sharer—Suit for profits against lambardar—Death of defendant pending suit—Liability of representative for sums not collected owing to negligence of lambardar* Held on a construction of ss 164 and 166 of the Agra Tenancy Act 1901 that where a suit for profits having been filed against a lambardar the lambardar dies pending the suit and his legal representative is brought on the record as defendant the representative is so far as the assets of the deceased lambardar in his hands are concerned liable to the same extent as the lambardar that is to say not only for money actually collected by the lambardar but also for money left uncollected owing to his negligence or misconduct *Murad un nissa v Ghulam Sajjad I L R 20 All 73* and *Dip Singh v Ram Charan I L R 29 All 15* distinguished BHARAT SINGH v TEJ SINGH (1917) I L R 40 All 246

——— ss 164 and 194—*Lambardar and co sharer—Suit for profits—Liability of lambardar in respect of rents accruing due before the date of his appointment* In a lambardari mahal the lambardar is from the date of his appointment the agent appointed to act on behalf of the co sharers and he is the only person who under s 194 cl (1) of the Agra Tenancy Act has a right to institute a suit against a defaulting tenant for the recovery of any arrear of rent not statute barred A distinction, however may require to be drawn in many cases between the degree of responsibility attaching to a lambardar in respect of arrears of rent which had accumulated during an *interregnum* prior to his appointment and his responsibility for the realization of the current demand as it fell due after the date of his appointment *Ganga Sahai v Ganga Bakhsh B A 1890 p 3* and *Bharat Indu v Syed Muhammad Mustafa Khan I L R 41 All 316* referred to MOJIZ FATIMA BEGAM v ALI AKBAR I L R 42 All 414

——— ss 164 and 201—*Suit for profit—Plaintiff a recorded co sharer at date of suit—Subsequent order of Revenue Court removing plaintiff's name from khewat* Where at the date of institution of a suit for profits under s 164 of the Agra Tenancy Act 1901 the plaintiff is a recorded co sharer his right to obtain a decree will not be taken away by an order subsequently passed by a Court of Revenue removing his name from the khewat The presumption raised by s 201 of the Tenancy Act is irrebuttable so far as a Revenue Court is concerned *Durga Prasad v Hazari Singh I L R 33 All 799* referred to LACHMAN PRASAD v SHITABO KUNWAR I L R 43 All 177

——— s 166—

See s 164 I L R 40 All 246

——— ss 166 201—*Lessee continuing to be recorded as such after expiry of lease—Suit for profits—Presumption* The lessee of a mortgage of zamindari property was recorded as entitled to the profits of the share and remained so recorded even after the mortgage had been redeemed *Held* in a suit for profits that the lessee was entitled to recover so long as he was recorded *Durga Prasad v Hazari Singh I L R 33 All 799* followed MUHAMMAD AHMAD SAID KHAN v MUHAMMAD MASIH ULLAH KHAN (1912) I L R 34 All 250

——— s 167—

See s 4 I L R 39 All 605

AGRA TENANCY ACT (II OF 1901)—*contd*

——— s 167—*contd*

See S 58 I L R 41 All 28

See S 95 I L R 33 All 785

See S 199 I L R 41 All 59

See CIVIL AND REVENUE COURTS I L R 40 All 646

See JURISDICTION I L R 34 All 358

1 ——— *Civil and Revenue Courts—Jurisdiction—Question exclusively within the jurisdiction of a Court of Revenue decided by that Court—Suit in a Civil Court for the purpose of nullifying the Revenue Court's order barred* Where a matter exclusively within the jurisdiction of a Court of Revenue has been tried and decided by that Court as between the parties no subsequent suit will lie in a Civil Court having for its sole object the annulment of the decree passed by the Court of Revenue *Kishore Singh v Bahadur Singh I L R 41 All 97* followed. *Kanhai Ram v Durga Prasad I L R 37 All 223* distinguished BALJIT v MAHIPAT (1918) I L R 41 All 203

2 ——— *Civil and Revenue Courts—Jurisdiction—Question exclusively within the jurisdiction of a Court of Revenue decided by that Court—Suit in a Civil Court for the purpose of nullifying the Revenue Court's order barred* Where a Revenue Court has exclusive jurisdiction to try a certain question and tries that question as between the parties the finding of the Revenue Court is binding upon them and cannot be questioned in a Civil Court regard being had to s 167 of the Agra Tenancy Act 1901 *Shiva Prakash v Karna I L R 35 All 464 Ram Devi Kuari v Bindeshri Upadhya 8 A L J 940 Ram Singh v Girraj Singh I L R 37 All 41* and *Maharaja of Vizianagram v Chhango Kurmi 7 A L J 555* referred to *Jagannath v Ajudhia Singh I L R 35 All 14* distinguished *Kanhai Ram v Durga Prasad I L R 37 All 223* not followed KISHORE SINGH v BAHADUR SINGH (1918) I L R 41 All 97

3 ——— *Jurisdiction—Civil and Revenue Courts— Matter in respect of which a suit might have been brought in the Revenue Courts* The owners of certain zamindari property first mortgaged the property and then executed a perpetual lease of some land appertaining thereto The mortgagees brought the zamindari to sale and it was purchased by a stranger The auction purchaser then sued the lessees in the Civil Court for recovery of possession of the land held by them The lessees were directed to institute a suit in the Revenue Court to determine the question whether they were or were not tenants of the plaintiff In this suit the auction purchaser admitted the existence of a tenancy but pleaded that the precise nature of the tenancy and in particular the validity of the perpetual lease was not a matter for determination *in that suit* A decree was passed by the Revenue Court to the effect that the lessees were tenants of the plaintiff auction purchaser Subsequently the plaintiff amended his plaint by asking for a simple declaration that the perpetual lease was not binding on him *Held* that the suit so framed was barred by s 167 of the Agra Tenancy Act 1901 The plaintiff might have

AGRA TENANCY ACT (II OF 1901)—*contd*

——— s. 167—*contd*

instituted a suit for ejectment in the Revenue Court in the course of which the validity of the perpetual lease would have to be determined *Ram Singh v Girraj Singh I L R 3 All 41* followed SHER KHAN v DEBI PRASAD (1915)

I L R 37 All 254

4 ——— *Suit in Revenue Court for arrears of rent as against sub tenants—Suit decreed—Subsequent suit by defendants in Civil Court for a declaration that they were occupancy tenants barred—Res judicata* In 1898 in a suit for ejectment a Revenue Court decided as against I and J that one H was the tenant of a certain occupancy holding In 1915 the heirs of I and J sued three nephews of H for arrears of rent of part of the same occupancy holding on the ground that they were the plaintiff's sub tenants and succeeded in their suit Two of the defendants to the suit of 1915 then brought a suit in the Civil Court (making the third defendant a *pro forma* defendant thereto) and asked for a declaration that they were the occupancy tenants of the land *Held* that the suit was barred by the previous decision of the Revenue Court in the suit of 1915 *Kishore Singh v Bahadur Singh I L R 41 All 9* followed MULLO v RAM LAL

I L R 43 All 191

5 ——— *Jurisdiction—Civil and Revenue Courts—Suit by assignee of right to receive rent from fixed rate tenant for declaration of plaintiff's title and for an injunction against zamindar and tenant* The transferee of an assignee of the zamindar of the right to realize rent from a tenant at fixed rates of certain plots of land in a village filed a suit in a Civil Court asking for (i) a declaration of the plaintiff's right to receive the said rent in virtue of a certain document styled a perpetual lease and (ii) a perpetual injunction against the zamindar and the fixed rate tenant whose rent was assigned *Held* that the Civil Court had jurisdiction to entertain the suit SIDDIQA BIBI v RAM AUTAR PANDE (1917)

I L R 39 All 675

6 ——— *Revision—Powers of High Court—Suit for rent in the court of an Assistant Collector—Second appeal heard by District Judge* The High Court has no power to entertain an application for revision against an order passed in an appeal by a District Judge against the decision of an Assistant Collector in a case exclusively triable by a Court of Revenue *Muhammad Ellahi Jam Ali v Lalji Singh I L R 41 All 240* followed *Parbhu Narain Singh v Harbans Lal 14 A L J 281* referred to GAJ KUMAR CHANDAR v SALAMAT ALI

I L R 42 All 83

——— ss 167, 199—

See LANDLORD AND TENANT

I L R 41 All 226

——— s 167 Sch IV Group C No 30—*Civil and Revenue Courts—Jurisdiction—Suit by reversionary heir on death of Hindu to recover a holding* The widow and son's widow of a separated Hindu being in possession as such of a fixed rate holding which had belonged to their late husband and father in law sold the same to a *mahajan* who in turn sold it to the zamindar *Held* on suit brought by the reversionary heir of the late tenant some three years after the last widow's death for recovery of possession of the holding (i) that the suit was of the nature contemplated by section 167 and Schedule IV Group C No 30 of the Agra Tenancy Act 1901 and would not lie in a Civil Court and (ii) that the suit was therefore barred by limitation *Ram Lal v Chunni Lal 3 All L J 69* referred to BADRI KASAUNDHAN v SARJU MISR (1913)

I L R 36 All 558

——— ss 175 177 193—*Order passed by a Revenue Court staying or refusing to stay a suit—Appeal* *Held* that no appeal will lie to the High Court from the order of a Court of Revenue staying or refusing to stay a suit pending before it *Quare* Whether any appeal lies at all KIRPA DEVI v RAM CHANDRA SARUP (1917)

I L R 40 All 219

——— ss 176 177—*Civil Procedure Code 1882 ss 2 and 10—Dismissal of suit for default—Order—Decree—Appeal* An order of a Rent Court dismissing a suit for default of appearance by the plaintiff does not amount to a decree and consequently such order when passed by an Assistant Collector of the first class is not appealable *Zohra v Mangu Lal I L R 18 All 765* followed KARANPAL SINGH v BHIKHA MAL (1910)

I L R 32 All 373

——— s 177—

See s 164	I L R 41 All 318
See s 175	I L R 40 All 219
See s 176	I L R 32 All 373
See s 58	I L R 38 All 465
See 95	I L R 40 All 177

1 ——— *Appeal—Question of proprietary title—Jus tertii pleaded by defendant—Third person added as a defendant—Question decided against the latter* In a suit for assessment of revenue on land in the possession of the defendant the defendant pleaded that the land belonged not to the plaintiff but to a third person The third person was brought upon the record as a defendant and claimed the land as his and on the question of ownership being decided against him appealed *Held* that the question raised in the suit was a question of proprietary title which arose directly and substantially in the suit and that an appeal lay to the District Judge MAHARAJA OF BENARES v BALDEO PRASAD (1910)

I L R 33 All 260

2 ——— *Question of proprietary title—Jurisdiction—Civil and Revenue Courts—Pleadings—Plea of jurisdiction entertainable though not raised in the Court below* *Held* that the question whether a tenant defendant in a suit for ejectment before a Court of Revenue is a tenant of one kind or another is not a question of proprietary title within the meaning of s 177 of the Agra Tenancy Act 1901 *Held* also that a plea of want of jurisdiction may be raised in the High Court although it was not raised in the Court below provided that it can be decided on the record as it stands and involves no inquiry into any question of fact *Niranjan v Gajadhar I L R 10 All 153* followed DALLATIA v HARGOBIND

I L R 43 All 18

3 ——— *Jurisdiction—Civil and Revenue Courts—Question of jurisdiction decided*

AGRA TENANCY ACT (II OF 1901)—*contd*

——— s 177—*contd*

—*Appeal—Estoppel* The plaintiff came into court alleging that on a partition between the defendant and himself certain plots of land had been allotted to him but that the defendant had taken possession of them He claimed that under s 34 of the Agra Tenancy Act he was entitled to treat the defendant as a tenant at will and he asked for a decree for his ejectment The defendant pleaded that he was the occupancy tenant of the plots in suit but he had never put forward the plea in the partition proceedings He also pleaded that having regard to the plaintiff s own allegations, the suit was not cognizable by the Revenue Court and on that ground the suit should be dismissed The Court of Revenue held that the suit was properly triable by it but dismissed it upon the ground that the defendant was an occupancy tenant The plaintiff appealed to the Commissioner who returned the memorandum of appeal to the plaintiff holding that the appeal lay to the District Judge The District Judge entertained the appeal and gave a decree in favour of plaintiff *Held* (1) that a question of jurisdiction had been decided within the meaning of s 177 (*f*) of the Agra Tenancy Act 1901 and the District Judge therefore had jurisdiction to hear the appeal and (2) that the defendant not having raised the question of his occupancy rights in the partition proceedings could not afterwards be permitted to raise it as a defence to the plaintiff s suit for ejectment *Deo Narain Singh* v *Sitla Bakhsh Singh I L R 40 All 177 Damodar Das* v *Jhaoo Singh I A L J 319* and *Umrai Singh* v *Fuaz Singh I L R 41 All 270* referred to GOKARAN SINGH v GANGA SINGH **I L R 42 All 91**

4 ———*Suit for ejectment in Revenue Court—Defendant pleading possession as proprietor—Question of proprietary title—Appeal* The plaintiff sued in a Revenue Court to eject the defendant on the allegation that he (the plaintiff) was the occupancy tenant of the plot in question and the defendant was his sub tenant The defendant pleaded that he was in possession not as a sub tenant of the plaintiff but as a proprietor and that the plot was his *khud kasht* *Held* that on the pleadings a question of proprietary title was in issue in the case within the meaning of section 177 (*e*) of the Agra Tenancy Act 1901 and that an appeal lay to the District Judge and not the Commissioner *Dal Chand* v *Slm la* 4 *All L J 1*[illegible]*6* referred to *Udit Tiwari* v *Bilari Pande I L R 35 All 521* overruled BINDESHRI PANDE v GOKUL (1914) **I L R 36 All 183**

——— ss 182 183—*Suit for rent—Second appeal to District Judge—Remand—Appeal—Civil Procedure Code (1908) Order XLI rule 23* *Held* that no appeal lies from an order of remand under Order XLI rule 23 of the Code of Civil Procedure made by a District Judge in an appeal in a suit for rent under s 180 clause (2) of the Agra Tenancy Act 1901 GULZARI LAL v LATIF HUSAIN (1916) **I L R 38 All 181**

——— 183—

See s 182 **I L R 38 All 181**

——— s 193—*Order of remand—Appeal—Preliminary or final decree* A suit was brought in a Court of Revenue for a declaration that the plaintiff was the proprietor of certain *muafi* land The Court of first instance dismissed the suit The lower Appellate Court set aside that decree and allowed the appeal to the extent that it held the plaintiff entitled to be declared a rent free grantee of so much of the land as was entered in his name It then added that the suit be remanded to the lower Court for determination of the revenue payable by the plaintiff appellant *Held* that the order being one of remand no second appeal lay to the High Court and as there was provision in the Tenancy Act about preliminary or final decree the order could not be appealed against as a preliminary decree ANANDGIR v SRI NIWAS (1918) **I L R 40 All 652**

——— s 194—*Lambardar—Suit by lambardar against co sharers for excess of profits due to other co sharers and himself—Lambardar not agent of co sharers* *Held* that a lambardar is not the agent of the co sharers generally so as to be entitled to sue on their behalf to recover profits due to some of them from other co sharers holding *sir* and *khud kasht* lands in excess of their proper shares BISHAMBHAR NATH v BHULLO (1911) **I L R 34 All 98**

——— *Lambardar—Right of lambardar to eject tenants—Suit in ejectment—Other co sharers not necessary parties* *Held* that when a lambardar in a lambardari village sues to eject a tenant he is not bound to join the other co sharers as parties *Semble* That section 194 of the Tenancy Act was not intended to apply to the case of a lambardari village *Bishambhar Nath* v *Bhullo I L R 34 All 98* distinguished GULZARI MAL v JAI RAM (1914) **I L R 36 All 441**

——— s 197—

See BENGAL N W P AND ASSAM CIVIL COURTS ACT (XII OF 1887) s 2- (3) **I L R 37 All 232**

See JURISDICTION **I L R 34 All 358**

——— s 198—

See s 102 **I L R 33 All 61**

See JURISDICTION OF CIVIL COURT **I L R 43 All 325**

——— *Arrears paid subsequent to suit to one of two co lessees* A mahal was leased to two persons M and J After the death of M J sued one of the tenants for arrears of rent The tenant pleaded that he had always paid his rent to M and after M s death to his widow After filing his defence in the suit the tenant proceeded to pay to M s widow the arrears which were then claimed *Held* that s 198 of the Agra Tenancy Act 1901 did not apply to the case *Sheodial Singh* v *Badri Narain 7 A L J 1198* referred to JEONI v KALLU **I L R 43 All 448**

——— ss 198 and 200—

See PROVINCIAL INSOLVENCY ACT 1907 ss 16 AND 56 **I L R 43 All 510**

——— s 199—

See s 142 **I L R 41 All 369**

See LANDLORD AND TENANT **I L R 41 All 226**

AGRA TENANCY ACT (II OF 1901)—*contd*

——— s 199—*contd*

1 ——— [illegible] *Land Revenue Court—Jurisdiction—Appeal—Question of proprietary right* The plaintiff sued in the Revenue Court to eject the defendant alleging that the land in suit was his cultivatory holding and that the defendant was his [illegible] tenant The defendant pleaded that he was a co sharer in the village and that the land in suit was his [illegible] *Held* that no question of proprietary title was raised by the pleadings and that no appeal therefore lay to the District Judge from the order of the Assistant Collector who had decided the case in the first instance *Dal Chand v* [illegible] *All L J* [illegible] dissented from UDIT TIWARI *v* [illegible] PANDE (1913) I. L. R. 35 All. 521

2. ——— *Suit for ejectment —Plea that defendant was holding under an unexpired lease—Question of proprietary title* In a suit for ejectment in a Court of Revenue the defendant pleaded that he was entitled to remain in possession under a certain zar i peshgi lease the term of which had not expired The Court of Revenue treated the question thus raised as falling under s 199 of the Agra Tenancy Act 1901 and directed the defendant to file a suit in the Civil Court within three months to vindicate his right *Held* that s 199 was not applicable and the defendant was not bound to file his suit in the Civil Court within three months from the date of the order of the Court of Revenue SURAJ MAL *v* HIRA KUNWAR (1914) I. L. R. 37 All. 94

3 ——— *Determination by Revenue Court of question of proprietary title—Subsequent suit in Civil Court—Res judicata Held* that the application of the principle that the decision of a question of title by a revenue court under s 199 of the Agra Tenancy Act 1901 constitutes a *res judicata* in respect of a subsequent suit *in pari materia* brought in a Civil Court is not affected by the fact that the Civil Court suit *may* be beyond the pecuniary limits of the jurisdiction of the Revenue Court SHAHZADE SINGH *v* MUHAMMAD MEHDI ALI KHAN (1909) I L R 32 All 8

——— s 200—
See s 58 I L R 35 All 157

——— s 201—
See s 166 I L R 34 All 250

See TRANSFER OF PROPERTY ACT s 41 I. L. R. 34 All. 22

——— *Evidence—Presumption —Record of plaintiff's name as co sharer—Evidence Act* (*I of 1872*) *s 4 Held* by RICHARDS C J KARAMAT HUSAIN TUDBALL CHAMIER AND PIGGOTT J J (KNOX J *dissenting*) that in a suit instituted under the provisions of chapter XI of the Agra Tenancy Act 1901 where the plaintiff is recorded as having proprietary title entitling him to institute the suit the Revenue Court is not competent to go behind the record receive evidence and itself try the question of proprietary title *Bechan Singh* v *Karan Singh I L R* [illegible]0 *All 427* followed *Waris Ali Khan* v *Parsotam Narain I L R 32 All 4*[illegible]7 overruled DURGA PRASAD *v* HAZARI SINGH (1911) I L R 33 All 799
I L R [illegible]2 All 427

——— *Suit for profits—Previous civil suit for declaration of title—Civil Court decision* [illegible] *of the rights of the* [illegible] *in the revenue papers* [illegible] *of suit for profits* In a suit for profits in a Revenue Court respecting an interest in a share amounting in all to [illegible] it appeared that the plaintiff had been during the period for which profits were claimed and was at the date of the institution of the suit recorded as having an interest in the whole [illegible] On the other hand the Civil Court had previously decided that the plaintiff owned a one sixth interest in half the [illegible] was, though it came to no decision in respect of her interest in the remaining half which was *waqf* property During the pendency of the suit for profits the entries in the revenue papers were amended by the revenue authorities and the plaintiff recorded as having an interest in half of the [illegible] only *Held* that the alteration of the revenue records pending the plaintiff's suit for profits could not affect the plaintiff's rights as they stood when the suit was filed prejudicially *Hargu Lal* v *Ved Singh* [illegible] *Indian Cases 503* distinguished *Lachman Prasad* v *Shitalo Kunwar I L R 43 All 17* followed MUBARAK FATIMA *v* MUHAMMAD QULI KHAN I L R 43 All 697

——— s 202—
See s 10 I L R 33 All 507

See CIVIL AND REVENUE COURT I L R 42 All 222

See CIVIL PROCEDURE CODE (1908) s 11[illegible] I L R 39 All 254

——— *Remand—Effect of Revenue Court decision on question of tenancy in a former suit in a subsequent suit in a Civil Court for ejectment as trespasser* Defendants were tenants of one D D took proceedings in the Revenue Courts to eject them as tenants at will The Assistant Collector dismissed the suit but the Commissioner allowed the appeal The Board of Revenue however in second appeal dismissed the suit *D* in the meantime had executed the decree passed by the Commissioner and obtained possession Upon the decree passed by the Board of Revenue in their favour the defendants made an application to be restored to possession but it was rejected as time barred *D's* son brought the present suit to eject the defendants as trespassers alleging that he had been in possession of the land as his *khudkasht* that the defendants had entered into forcible possession and that the effect of the Revenue Court proceedings was to extinguish the tenancy The defendants pleaded that the tenancy subsisted The Court of first instance decided that the tenancy was subsisting but granted to the plaintiff damages for forcible dispossession The lower Appellate Court remanded the case to the first Court with directions to act in accordance with the provisions of s [illegible]02 of the Agra Tenancy Ac[illegible] *Held* that the order was the proper one to make in the circumstances of the case and the question whether by *reason of the events* that had happened since the decision of the Board of Revenue the tenancy was extinguished or not was one which the Revenue Courts were competent to decide *Maru* v *Gauri Sahai* (1904) All Weekly Notes 46 *Sarju Misir* v *Bindeshri Pershad 11 All L J 691* referred to BHAWAN *v* MADAN MOHAN LAL (1916) I. L. R 38 All. 533

AGREEMENT—

See ADMINISTRATOR GENERAL'S ACT (II OF 1874) ss 28 34 AND 35 I L R 38 Mad 500

See ADVERSE POSSESSION I L R 37 Mad 545

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 257A I L R 38 Bom 219

See CONTRACT

See CONTRACT ACT (IX OF 1872)
s 28 I L R 38 Bom 344
s 65 I L R 38 Bom 249

See EVIDENCE ACT 1872 s 92

See HINDU LAW—ADOPTION I L R 39 Bom 528

See HIRE PURCHASE AGREEMENT I L R 44 Calc 72

See LAND ACQUISITION I L R 44 Bom 797

See LIMITATION I L R 38 Mad 101

See REGISTRATION

See REGISTRATION ACT 1908 s 17

See STAMP ACT (II OF 1899) s 62 SCH I ART 5 I L R 40 All 19

———— ante decree—

See EXECUTION PROCEEDINGS I L R 40 Mad 233

———— appointing creditor agent for sale of debtor's goods—

See PROVINCIAL INSOLVENCY ACT (III OF 1907) s 31 I L R 37 All 383

———— breach of—

See ARBITRATION I L R 46 Calc 1041

———— between predecessors in title—

See JURISDICTION OF HIGH COURT I L R 39 Calc 739

———— by executor—

See WILL 14 C W N 967

———— Contemporary Oral agreement—

See EVIDENCE ACT s 92

———— construction of—

See MAHA BRAHMAN I L R 35 All 412

———— fixing compensation—

See LAND ACQUISITION I L R 44 Bom 797

———— for illegal consideration—

See COMPROMISE 1 Pat L J 48

———— for sale of immoveable property—

See CONTRACT I L R 45 Bom 1170

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 54 I L R 41 Bom. 438

———— in writing—admissibility of oral evidence—

See REGISTRATION I L R 1 Lah. 436

———— memorandum of —

See STAMP ACT (II OF 1899) s 2 (*14*) SCH I ART 5 I L R 36 All. 11

AGREEMENT—*contd*

———— suit to enforce—

See MAHOMEDAN LAW OF MARRIAGE I L R 32 All 410

———— to lease—

See SPECIFIC PERFORMANCE 14 C W N 65

———— to supply funds to carry on suit—

See CHAMPERTY 14 C W N 191

———— wrongful termination of —

See DAMAGES I L R 47 Calc 290

1 ———— Interfering with the course of legal proceedings—*Agreement that suit should be decided in accordance with the result of another suit whether a bar to its trial on the merits—Compromise* An agreement by a party that a suit may be decided in a manner different from that prescribed by law is void and does not debar him from subsequently claiming a trial of the suit on its merits *Lukhanbhai* v *Adamji I L R 33 Bom 69 and Moyan v Pathukutti I L R 31 Mad 1* referred to Pending an original suit in the Court of a District Munsif by the maker of a promissory note for a declaration that it was unenforceable the payee instituted a suit on the promissory note for recovery of the amount due in the Small Cause Court The parties agreed that the small cause suit should be decided in accordance with the result of the original suit and the former suit was finally dismissed without a trial, following the decision of the Munsif in the original suit *Held* that the agreement in question did not disentitle the plaintiff from claiming a trial of the small cause suit independently on its merits and the suit must consequently be remanded Subject to certain well known exceptions when the Court is seised of a case it has jurisdiction to decide it in the manner prescribed by law and that the parties have no right to interfere with its authority to do so RAJA OF VENKATAGIRI v CHINTA PEDDY (1914) I L R 37 Mad 408

2 ———— Notice of—*Agreement forming part of consideration for a licence to build on the land of another for payment of haq chaharum in the event of sale of house—Purchaser whether bound by agreement*—One of the conditions upon which the owner of certain land granted permission to a person to build on it was that if any house built on such land was sold the licensee would pay to the owner of the soil one fourth of the purchase money *Held* that the purchaser of a house to which this covenant applied who purchased with notice of the existence of the covenant was bound by it equally with his vendor *Tulk* v *Moxhay 18 L J Ch 83 2 Phill 774 Abadi Begam* v *Asa Ram I L R 2 All 162* and *Churaman* v *Balli I L R 9 All 591* referred to PARBHU NARAIN SINGH v RAMZAN (1919) I L R 41 All 417

3 ———— Sale subject to title being approved—*Agreement for purchase and sale of immoveable property—Condition for return of earnest money on non approval of title by purchaser's solicitor—Non approval must be reasonable and not mala fide—Title approval or rejection condition as to in agreement of sale* Where an agreement for purchase and sale contained a

AGREEMENT—contd

[illegible] that the [illegible] by the [illegible] and [illegible] the [illegible] that the [illegible] in that [illegible] a portion [illegible] at which the property [illegible] of the [illegible] and the [illegible] was unable to [illegible] and [illegible] that it was operative and that his title [illegible] with [illegible] notice was [illegible] to object [illegible] *Held* that it cannot be [illegible] the vendor was [illegible] in [illegible] title [illegible] he cannot be expected to go into any question of evidence as to whether the purchaser was with notice or not and further the vendor [illegible] to show that [illegible] acted in bad faith [illegible] in advising his client to reject the title the intending purchaser was entitled to get back from the vendor the earnest money and his solicitor's costs for investigation of title as was stipulated for in the contract ARTO v PROMOTHO NATH MUKERJEE (1914) 18 C W N 568

AGREEMENT AGAINST PUBLIC POLICY

See CONTRACT ACT 16 [illegible] 23

See LANDLORD AND TENANT
I L R 35 All 19

1 ———— Compounding a Criminal Case—*Contract Act (IX of 1872) s 23—Compromise forbidden by law—An agreement to compound a non compoundable offence void—Criminal breach of trust—Mortgage—Illegal consideration* It is contrary to public policy to compound a non compoundable criminal case and any agreement to that end is wholly void in law *Held* therefore that a mortgage bond executed by a *gomastha* in favour of his master for withdrawal of a prosecution for criminal breach of trust which is not compoundable under the Criminal Procedure Code is void (though a settlement out of Court had been suggested by the Magistrate) and a suit by the master to enforce such a bond is not maintainable *Nubbee B [illegible] v H[illegible]gon 8 W R 412* commented on MAJIDAR RAHMAN v MUKTASHED HOSSEIN (1912) I L R 40 Calc 113

2 ———— *compoundable with leave of Court only if oppose to public policy—Offence not so compoundable alleged but no summons issued—Effect* In a Criminal case the Magistrate after examining the complainant summoned the accused under s 3[illegible] Penal Code although allegations were made in the petition of complaint of an offence under s 147 Penal Code also An agreement was entered into between the parties and with the leave of the Court the case was compromised *Held* that a case under s 3[illegible] Penal Code being compoundable with the leave of the Court and the Magistrate having given permission to compound the case the contract was not opposed to public policy the allegation in the petition of complaint of a non compoundable offence under s 147 Penal Code which was not accepted by the Magistrate when issuing process made no difference MAHAMMAD ISMAIL v SAMAD ALI BHUIYAN (1915) 20 C W N 946

AGREEMENT IN RESTRAINT OF PROFESSION TRADE OR BUSINESS

See CONTRACT ACT (IX OF 1872) s 23
2[illegible] I L R 34 All 587
s 2[illegible] I L R 37 All 212

———— *Contract to play for a term and not to perform anywhere else until return to England if enforceable by injunction—Indian Contract Act (IX of 1872) s — Agreement in restraint of profession—Specific Relief Act (I of 1877) s 57* Where B having contracted with C to play for C and not to play in any other theatre on his own or on some one else's behalf until after the expiration of the period contracted for and until after his return to England performed in another theatre after the expiration of the period for which he was under contract with C but before his return to England it was held that under s [illegible] of the Indian Contract Act the agreement being in restraint of a lawful profession trade or business is void and as such would not be enforced by injunction S 57 of the Specific Relief Act is not applicable to this case COHEN J M D v ALLAN WILKIE (1912)
16 C W N 534

AGREEMENT OF SALE

See AGREEMENT TO SALE

AGREEMENT TO COMPOUND NON COMPOUNDABLE OFFENCE

See AGREEMENT AGAINST PUBLIC POLICY
I L R 40 Calc 113
20 C W N 946

AGREEMENT TO LEASE

See REGISTRATION ACT 1877 ss 3 17 40
I L R 35 Mad 63
s 17 I L R 41 Mad 399

See REGISTRATION OF DOCUMENTS
I L R 46 I A 240

———— *Compromise decree—Registration Act (XVI of 1908) s 2 ( ) 17 sub s (1) (b) (d) sub s (2) (ii) s 49—Lands outside of suit compromised—Civil Procedure Code 1882 s 375—Document not requiring registration—Specific performance* In 1895 the appellant instituted two suits in the Court of the Subordinate Judge of Nadia the one against the Government (7) and the other against W & Co (73) of the same year the object of the suits being to obtain possession of different plots which had reappeared after being diluviated Suit 73 was compromised on the terms amongst others that W & Co were to retain the lands the subject of the suit 73 and recognise the ownership of the appellant and that if the appellant succeeded in obtaining a decree against the Government she would grant a jote settlement of the lands in suit 72 to W & Co on the same conditions as those agreed to with regard to the lands in his possession This agreement was reduced to writing a petition of compromise based upon it was filed by the appellant in suit 73 and on 20th September 1897 judgment was given in terms of the compromise and a decree was drawn up in pursuance of the judgment on the same date This decree recited the claims in the suit and the petition for compromise and granted a decree in the terms of the compromise which were then set out in full The appellant succeeded in her suit against the Government but refused to grant

AGREEMENT TO LEASE—*contd*

to W & Co a jote settlement of the land the subject of suit 72 In a suit by the respondents for specific performance of the agreement —*Held* that the compromise was not an agreement to lease within the meaning of s 17 of the Registration Act (XVI of 1908) and was therefore admissible in evidence under s 49 of that Act though not registered The phrase agreement to lease in that section relates to some document that creates a present and immediate interest in the land and not a document like that in the present case from which it was impossible to say whether there would be a lease or not *Panchanan Bose* v *Chandi Charan Misra I L R 37 Calc 808* approved *Held* also that if the agreement was regarded as being a decree it is exempted from registration by s 17 sub s (2) (vi) and on the true construction of s 375 of the Civil Procedure Code 1882 is none the less a decree under s 17 sub s (2) (vi) because though the whole of the agreement or compromise is recorded in it the operation of the decree is limited only to so much of the subject matter of the suit as is dealt with by the agreement As a decree it may be incapable of being executed outside the land of the suit compromised but can still be received in evidence of its contents though unregistered *Pranal Anni* v *Lakshmi Anni I L R 22 Mad 508 L R 26 I A 101* followed HEMANTA KUMARI DEBI *v* MIDNAPUR ZAMINDARI CO

I L R 47 Calc 485

AGREEMENT TO RECONVEY

See SALE DEED **I L R 44 Bom 961**

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 54

AGREEMENT TO REFER

See ARBITRATION

I L R 47 Calc 752 & 951

AGREEMENT TO SELL.

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 54

——————— *Agreement by defendants 1 and 2 to sell property to plaintiff—Subsequent sale by the same defendants to defendants 3 and 4—Suit by the plaintiff for an order to execute a registered sale deed and for possession—Burden of proof* Defendants 1 and 2 having agreed to sell their property to the plaintiff they subsequently sold the same property to defendants 3 and 4 In a suit brought by the plaintiff for an order to execute a deed of sale and also for recovery of possession of the property *Held* confirming the decree awarding the claim that defendants 3 and 4 having contracted to purchase the property from the same defendants who had contracted to sell it previously to the plaintiff defendants 3 and 4 were bound to show three things, namely that (i) they were purchasers for value and (ii) *bond fid* and (iii) without notice The plaintiff under his contract having a prior equity was entitled to succeed. One who owns property subject to a charge can in general convey no title higher or more free than his own and it lies always on a succeeding owner to make out a case to defeat such a prior charge HIMATLAL MOTILAL *v* VASUDEV GANESH (1912)

I. L. R 36 Bom. 446

AGREEMENT TO SELL—*contd*

——————— *The purpose of earnest money* The defendant agreed to sell to the plaintiff an immoveable property for R4 400 of which R700 was paid by the plaintiff as earnest money It was further agreed that in case the plaintiff failed to pay the balance of the consideration money within the time fixed he would forfeit the earnest money The plaintiffs failed to pay the balance and brought a suit for the refund of R700 *Held* that the primary purpose of the deposit being a guarantee for the performance of the contract the plaintiff was not entitled to recover the money *Soper* v *Arnold, 14 A C 429 at p 435 (1889)* and *Nabab Khaja Habibulla* v *Arman Dewan 30 C L J 113 (1919)* referred to ATUL CHANDRA KUNDU *v* SARAT CHANDRA LAHA **24 C W N 967**

AGREEMENT TO SEPARATE

See CONTRACT ACT (IX OF 1872) s 25

I L R 37 Bom 280

AGREEMENT TO TRANSFER

——————— *Transferee taking possession before execution and registration of document* Where in pursuance of an agreement to transfer property the intended transferee has taken possession though the requisite legal documents had not been executed and registered the position is the same as if the documents had been executed provided specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined SHYAM KISHORE DEY *v* UMESH CHANDRA BHATTACHARYA **24 C W N 463**

AGRICULTURAL INCOME

See INCOME TAX **I L R 48 Calc 161**

AGRICULTURAL LANDS

See BOMBAY LAND REVENUE CODE (BOM ACT V OF 1879) s 48

I L R 42 Bom 126

See EXECUTION OF DECREE

I L R 1 Lah 192

See UNDER RAIYATI HOLDING

I L R 42 Calc 751

See WATERFLOW **I L R 38 Mad 149**

AGRICULTURAL HOLDING

——— **Hut built by tenant and converted—**

See LANDLORD AND TENANT

I. L R 44 Bom 609

——— **lease on Annual tenancy (compensation on ejectment of Tenant after building)—**

See LANDLORD AND TENANT

I L R 44 Bom 950

AGRICULTURAL TRIBE.

See BUNDELKHAND ALIENATION OF LAND ACT (II OF 1903)

s 3	**I L. R 37 All 662**
s 9	**I L R 36 All. 376**
s 16	**I. L. R 42 All 142**

AGRICULTURIST

See Civil Procedure Code 1908
2 and 97 I L R 36 Bom 536
I L R 39 Bom 422
60 (1) (c) I L R 34 All 25
I L P 37 Bom 415
I L R 41 Bom 475

See Dekkhan Agriculturists Relief Act 1879 ss 2 and 20
I L P 34 Bom 161
I L R 36 Bom 36 151 199 496 and 543
I L R 37 Bom 97 398
I L R 38 Bom 18
s 2 I L R 40 Bom 189

———— Definition of—

See Dekkhan Agriculturists Relief Act (XVII of 1879) ss 2 10A
I L P 44 Bom 217

———— house of—

See Provincial Insolvency Act (III of 1907) ss 16 36 and 43
I L R 39 All 120

———— Mortgagor—

See Dekkhan Agriculturists Relief Act (XVII of 1879) 47 and 48
I L R 36 Bom 624

———— Wife of—

See Dekkhan Agriculturists Relief Act (XVII of 1879)
I L R 35 Bom 204

———— custom of—In Punjab

See Hindu Law—Alienation
I L R 40 Calc 288

AHIRS

See Hindu Law—Adoption
I L R 35 All 263

AHMADIS

See Mahomedans 2 Pat L J 108

AHMEDABAD TALUQDARS ACT (BOM VI OF 1862)

See Kasbatis I L R 39 Bom 625

AJMER REGULATIONS

See Regulations

AKBARI ACTS

See under Local Acts

ALIBI

See Criminal Procedure Code s 307
25 C W N 682

ALIEN ENEMY

See Bill of Exchange
I L R 41 Bom 566

See Trading with the Enemy
I L R 42 Calc 1094

———— British subject living in country of—

See Civil Procedure Code 1908
s 83 I L R 1 Lah 276

ALIEN ENEMY—*contd*

———— contract with—(Interest claimable by)—

See Contract with an Alien Enemy
I L R 41 Bom 390

See Debtor and Creditor
I L R 44 Bom 1

———— Right to Sue in a British Court—

See Civil Procedure Code 1908 s 83
I L P 39 All 377

———— Suit against—*If maintainable during the continuance of war—Internment its object* It does not matter whether the cause of action arose before or after the war an alien enemy can be sued in our Courts and has every right to present his case before the Courts in accordance with the laws of procedure *Halsey* v *Lowenfeld* *[1916] I K B 140* followed The fact that the defendant has been interned does not make any difference as the object of internment is to prevent him from doing mischief and not to cut down his liabilities Abdul Quader v Fritz Kapp (1916) I L R 43 Calc 1141

———— Suit by—on promissory notes—*Order of the Government of India restricting right to sue—Subsequent removal of the restriction—Period during which right to sue suspended whether to be reckoned in computing limitation—Disability and inability to sue—Limitation Act (IX of 1908) ss 6 7 9 and 15* On the outbreak of war between England and Germany on the 4th August 1914 the plaintiff Bank which was an alien enemy concern carrying on business in Calcutta had its right to bring suits suspended by an order of the Government of India By a subsequent order of the Government this restriction was removed on the 1st November 1915 and sanction was given to the said Bank to institute suits in Civil Courts On the 9th May 1918 the said Bank brought a suit on four promissory notes payable on demand and executed on the 4th 11th 30th and 30th June 1914 respectively *Held* that this case was covered by s 9 of the Limitation Act and that the period between the 4th August 1914 and the 1st November 1915 could not be excluded from the time prescribed by the Act of Limitation *Per* Woodroffe J Section 15 of the Limitation Act does not apply Deutsch Asiatische Bank v Hira Lall Bardhan & Sons (1918)
I L R 46 Calc 526

ALIENATED VILLAGE

———— Right of Inamdar to enhance assessment at the end of period of settlement—

See Bombay Land Revenue Code (Bom Act V of 1879) s 217
I L R 44 Bom 110

ALIENATION

See Alienation by Widow

See Bhagdari Act 1862 s 3
I L R 38 Bom 679

See Bombay Land Revenue Code s 68
I L R 45 Bom 820

See Civil Procedure Code 1882 s 305A
I L R 33 All 233
I L R 37 All 541

———— For necessity but with Consent by the body of reversioners—*Transaction for consideration—Gift—Partial relinquishment by widow—Hindu Law* The general principle which prohibits a Hindu widow s alienation of immoveable property otherwise than for legal necessity is

ALIENATION—*contd*

relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained The reason for the relaxation is referred to the principle that the consent of the person who would be interested in disputing the transfer affords good evidence that the transfer was in fact made for justifying cause that is for legal necessity *B... Manohar ... Bahadur Singh I L R ... All ...* and ... followed The operation of the principle is ordinarily limited to transfers for consideration and cannot be extended to voluntary transfers by way of gift where there is no room for the theory of legal necessity It should not be extended to cases where the widow has made a partial relinquishment of the estate ... BAPAJI (1909) I L R 34 Bom 173

——— Restrictions on—*Gift burdened with an obligation—Alienation by donee* ... it is doubtful whether a deed embodies a complete dedication of property to a religious trust or merely creates a gift of that property subject to an obligation to perform certain services the question should be decided by reference to the deed itself In the former case the property would be inalienable and in the latter alienable subject to the obligation notwithstanding restrictions as to selling or mortgaging the said property ... (1901) I L R 25 Bom ...

ALIENEE

See ATTACHMENT I L R 41 Calc ...

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXI R 63

I L R 23 Mad ...

——— from trustee—

See CIVIL PROCEDURE CODE (ACT V OF 1908) SS 92 AND ...

I L R 38 Mad ...

——— not a tenant in common—

See HINDU LAW—JOINT FAMILY

I L R ... Mad ...

ALIMONY

See DIVORCE ACT (IV OF 1869)—SS 3 10 37 AND ...

I L R 43 Bom ...

S 37 I L R ... ...

——— decree for against a ...

See ARMY ACT (44 & 45 ...) SS 140 150 I L R 43 Bom ...

ALIYASANTANA LAW

1 ———

—*Grounds on which Ejman of an Aliyasantana family may be removed* When the Ejman of an Aliyasantana family in the ... as Ejman not only neglects the interests of the family but takes advantage of his position to secure benefits for his children at the expense of the members of the family the Courts will be justified in removing such Ejman ... alienations of family property ... Ejman although not a party to ... will be liable to be removed ... to set aside such alienations for the ... family he sides with the ... to support such alienations ... AKKU (1910)

I L R 34 Mad ...

ALIYASANTANA LAW—*contd*

2 ———

... dant ... ourt ... that ... CUN ... 909) ... 250

... *d in* ... *time* ... n the ... ertain ... There ... rtgage ... obtain ... bed in ... recover ... either ... of the ... rtained ... he judg ... him the ... section ... specified ... however ... leave to ... he zamin ... io amend ... power to ... introducing ... limitation ... *Muhammad* ... *616* dis ... GAYA DIN ... 6 All 370

... *and proce* ... *n previous* ... *l bond fide* ... *isdiction*— ... *Act V of* ... an appli ... it without ... t to any ... raise in ... that it ... estion of ... ve been ... r if this ... ring the ... hat the ... ld have ... ut and ... n The ... acts will ... e chief ... he part ... nt with ... cannot be ... that the ... a suit of one ... aracter O II

ALLAHABAD HIGH COURT RULES—*contd*

——— Ch III r 2—

See CIVIL PROCEDURE CODE 1908 s 122 I L R 40 All 1

O XII r 1 I L R 43 All 660

——— Ch IV, r 5 & 8—

See EXECUTION OF DECREE I L R 36 All 33

——— Ch VII r 8—

See CRIMINAL PROCEDURE CODE s 369 I L R 38 All 134

——— Ch XXI r 1—

See HIGH COURT RULES

ALLEGIANCE

See HABEAS CORPUS I L R 44 Calc 459

ALLEGORICAL POEM

See OBSCENE PUBLICATION I L R 39 Calc 377

ALLUVION

See BENGAL ALLUVION AND DILUVION ACT IX OF 1847 24 C W N 737

See FISHERY I L R 42 Calc 489

——— *Gradual accretion to an already existing lanka—Slow and imperceptible meaning of—Land added in the bed of the river by slow imperceptible and gradual river action to a known extent of land applicability of law of accretion to* The plaintiff respondent sued for a declaration against Government that a certain *lanka* or alluvial island formed in the bed of the Godavari at a place where it was both tidal and navigable belonged to him as an accretion to his adjoining *lanka* It was found by the Court below with which finding the High Court agreed that the suit *lanka* was originally formed in contiguity with the plaintiff s land that it was formed very rapidly and in some years during the annual rise of the river large additions were made which could not but be perceptible as soon as the water subsided that portion of the alluvial land was separated from the rest by a channel a few years before the suit and that it was not possible to say that the accretion was slow or imperceptible *Held* that the suit land was an accretion to the plaintiff s land that in applying the rule of English law as to accretions local physical conditions must be taken into consideration and that in the case of large rivers in India like the Godavari which on occasions leave large and sudden deposits it is not necessary that the accretion should be slow or perceptible *Rex (nom Gifford)* v *Yarborough* 2 *Bligh (N S) 147* and *Attorney General* v *McCarthy 2 Ir R 260* referred to *Srinath Roy* v *Dinabandhu Sen I L R 42 Calc 489* applied *Held* also that the fact that in 1870 when the suit *lanka* was not as yet formed the extent and boundaries of the plaintiff s *lankas* were known as ascertainable did not render the law of accretion inapplicable *Attorney General of Southern Nigeria* v *John Holt & Co (Liverpool) Limited* [1915] *A C 519 612* followed THE SECRETARY OF STATE FOR INDIA v RAJAH OF VIZIANAGARAM (1916) I L R 40 Mad 1083

ALLUVION—*contd*

CONFIRMED ON APPEAL 26 C W N 348

——— *Accretions—The Bengal Alluvion and Diluvion Regulation 1825 (Ben Reg XI of 1825) ss 4 and 5* Where a party can show that *char* land is in fact a reformation *in situ* of land identifiable as his own he is entitled to that land though it may have been for a period submerged It is not sufficient for such a claimant to show that the accretion is *in situ* of a river bed which has been settled with him It is necessary for him to show that the land claimed had previous existence and was reformed S 4 of the Bengal Alluvion and Diluvion Regulation 1825 as a whole was not intended to apply to land which has been previously in existence and the property of individuals S 5 was intended to apply to such land NAND KISHORE JAGATI v NIDHI BIHARA 3 Pat L J 478

ALTERATION

See BOND I L R 44 Calc 154

See DEED I L R 38 Mad 746

See MORTGAGE SUIT 25 C W N 942

See WILL I L R 47 Calc 1043

ALTERNATIVE CHARGE

See AUTREFOIS ACQUIT I L R 45 Calc 727

ALTERNATIVE CLAIMS

See PRE EMPTION I L R 36 All 476

ALWAN

See SHAWLS MEANING OF I L R 39 Calc 1029

AMALNAMA

See LANDLORD AND TENANT 15 C W N 536

AMARAM TENURE

See MADRAS ESTATES LAND ACT (I OF 1908) I L R 37 Mad 1

AMBIGUITY

See HINDU LAW—RELIGIOUS ENDOWMENT I L R 42 Calc 536

AMENDED LETTERS PATENT

See LETTERS PATENT

——— Where an appeal has been presented beyond the time allowed by the law and application to excuse the delay refused same can be appealed from RAMCHANDRA GANGADHAR v MAHADEW MORESHWAR I L R 42 Bom 260

AMENDING ACT

——— retrospective effect of—

See LIMITATION I L R 41 Calc 1125

AMENDMENT OF DECREE

See CIVIL PROCEDURE CODE 1908 ss 151 AND 152 4 Pat L J 205

See DECREE I L R 32 All 295

AMENDMENT OF DECREE—*contd*

See DECREE HOLDER
I L R 38 Mad 677

See LIMITATION 2 Pat L J 206

See LIMITATION ACT (IX OF 1908)

See S 5 I L R 43 All 380

SCH I ARTS 181 182
I L R 42 Bom 309

———— Date from which limitation runs—

See BENGAL TENANCY ACT 1885
ss 10 107 109 5 Pat L J 472

———— successive applications for—

See DECREE AMENDMENT OF
I L R 39 Calc 265

———— *by Court which granted it—after a revision to the High Court has been rejected* The plaintiff petitioner applied to the Judge of the Small Cause Court Lahore for amendment of a decree passed in his favour The Court held that it had no power to grant the application inasmuch as the defendant had presented a petition for revision to the High Court which although rejected *in limine* had the effect of merging its decree in that of the High Court *Held* that a decree of a Small Cause Court is final and *not appealable and although in certain* circumstances it may be set aside or modified by a High Court in virtue of its revisional powers it must remain the decree of the Court which originally passed it when the High Court declines to interfere with it on the revision side and that the Lower Court accordingly was competent to entertain the application for amendment KHUDA BAKHSH v ALLAH DITTA I L R 1 Lah 342

AMENDMENT OF PLAINT

See CIVIL PROCEDURE CODE 1908
s 9 I L R 45 Bom 590

See HINDU LAW (ADOPTION)
5 Pat L J 164

See LIMITATION ACT 1877 ss 22 28
I L R 34 Bom 91

See LIS PENDENS I L R 41 All 534

See PLAINT I L R 48 Calc 110

See PROCEDURE.

See HIGH COURT I L R 44 Bom 903

———— when it would convert suit into one of different character—

See CIVIL PROCEDURE CODE (ACT V OF 1908) Os VI r 17 AND XXI R 103
I L R 44 Bom 515

———— After arguments heard in appeal —After arguments in appeal have been heard the Court will not allow an amendment of the plaint so as to convert a suit of one character into a suit of a substantially different character BAYABAI v HAJI NOOR MAHOMED (1908) I L R 31 Bom. 244

———— By referring to document not included in list of documents relied on At the hearing of a suit brought by the plaintiff for the recovery of a sum due at the foot of an account the defendant raised a plea of limitation The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation The lower Court refused the application On appeal —*Held* that the amendment should have been allowed CUNNAJI BHAWAJI v MAKANJI KHOOSALCHAND (1909)
I L R 34 Bom 250

———— Limitation—*Fresh relief claimed in respect of which a suit would have been time barred* A deed of mortgage purported in the first place to mortgage with possession certain specified plots of *sir* and *khudkasht* land There was however a stipulation in the mortgage deed that if the mortgagees failed to obtain possession under the deed or were disturbed in their possession they would be entitled to recover their money from the mortgagors and this either by sale of the mortgaged plots or by sale of the zamindari share to which these plots appertained or from the persons and the property of the judgment debtors A suit was filed just within the extended period of limitation allowed by section 31 of Act No IX of 1908 for sale of the specified plots After the period of limitation however had expired the plaintiffs applied for leave to amend the plaint and asked for sale of the zamindari share The Court below allowed the amendment *Held* that the Court had no power to *allow amendment of the plaint by introducing* a new cause of action after the period of limitation in respect of such cause had expired *Muhammad Sadiq* v *Abdul Majid I L R 33 All 616* distinguished BALTARAN UPADHYA v CAYA DIN KALWAR (1914) I L R 36 All 370

———— Mortgage Suit—*Practice and procedure—Omission to include claims on previous mortgage and charge—Inadvertence and bona fide and erroneous impression as to jurisdiction—Right of appeal—Civil Procedure Code (Act V of 1908) O II r 2* Where the Court on an application for amendment of plaint granted it without deciding the points urged but subject to any contention which the defendants might raise in answer to the claim as amended *Held* that it was better and more regular that the question of the right to amend the plaint should have been determined before the order was made or if this would have involved a lengthy inquiry covering the same ground as the evidence in the suit that the hearing of the application to amend should have been adjourned to the hearing of the suit and determined on the evidence then taken The Court being desirous of getting at the true facts will allow an amendment subject to the three chief conditions that there is good faith on the part of the applicant possibility of amendment without such prejudice to the other party as cannot be compensated by costs and lastly that the amendment is not such as to turn a suit of one character into a suit of another character O II r 2 of the Civil Procedure Code refers to a case where there has been a suit in which there has been an omission to sue in respect of portion of a claim and a decree has been made in that suit In that case a second suit in respect of the portion omitted is barred In a case where the suit has not been heard but a claim has been omitted by inadvertence an amendment may be allowed *Quære*—Whether there was an appeal or not from an order of amendment in this case UPENDRA NARAIN ROY v JANAKI NATH ROY (1917)
I L R 45 Calc. 395

AMENDMENT OF PLAINT—*contd*

——— Courts will allow amendment of pleadings subject to 3 general conditions :: (1) *Bond fides* on the part of the applicant (2) when the amendment does not cause such prejudice to the other party as cannot be compensated for by costs (3) when it does not convert a suit of one character into a suit of another GYANENDRA NATH CHAKRAVARTI *v* LAPESH NATH LAI 26 C W N 73

AMMUNITION

——— Empty cartridge cases—*Arms Act* (*XI of 1878*) *s 1—Definition* *Held* that empty cartridge cases are ammunition within the meaning of s 4 of the Indian Arms Act 1878 *King Emperor* v *Ibrahim 7 Bom L R 414* followed EMPEROR *v* BALDEO SINGH (1910) I L R 32 All 152

ANALOGOUS APPEALS

See PRACTICE 14 C W N 352

ANALOGOUS DESIGNS

See DESIGN I L R 45 Calc 606

ANCESTRAL PROPERTY

See CIVIL PROCEDURE CODE (1908) O XXI r 66 I L R 38 All 481

s 70 I L R 42 All 275

See CUSTOM I L R 2 Lah 195

See EXECUTION OF DECREE I L R 36 All 33

See HINDU LAW—ALIENATION I L R 39 All 485

I L R 40 Calc 288

See HINDU LAW—MAINTENANCE I L R 37 Mad 396

See JOINT HINDU FAMILY I L R 39 Bom 245

See HINDU LAW—WILL I L R 38 Bom 293

See MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894) ss 5 10 cl (2) I L R 39 Mad 930

——— Abandoned land r acquired—

See CUSTOM I L R 2 Lah 366

——— leased government land in Ferozepore—

See CUSTOM (ANCESTRAL PROPERTY) I L R 2 Lah 195

ANCIENT DOCUMENT

See EVIDENCE ACT (I OF 1872) ss 4 90 I L R 37 Mad 455

ANCIENT LIGHTS

See EASEMENT I L R 39 Calc 59
I L R 42 Calc 46

ANCIENT MONUMENTS PRESERVATION ACT (VII OF 1904)

——— ss 10 21—*Land Acquisition Act* (*I of 1894*) *ss 53 54—Award of Court—Appeal to High Court—Practice* An appeal lies to the High Court under ss 53 and 54 of the Land Acquisition Act (I of 1894) from an award of the Court for acquisition of immoveable property under s 10 of the Ancient Monuments Preservation Act (VII of 1904) Section 21 of the Ancient Monuments Preservation Act clearly applies to the purchase of moveable antiquities or relics and the compensation which may have to be paid for incidental damage caused by the removal or protection of such objects of historical interest or art value In ascertaining the market value of such moveable antiquities and the amount of compensation to be paid to adjacent owners for acts done under the Act such acts being clearly enough indicated and by implication defined in s 20 only the provisions of the Land Acquisition Act enumerated in s 21 are to guide the Court VISHNU NARAYAN *v* THE DISTRICT DEPUTY COLLECTOR KOLABA (1917) I L R 42 Bom 100

ANIMALS

See LICENSE I L R 47 Calc 809

ANNUITY

See CHARGE I L R 37 All 72

See LIMITATION ACT (IX OF 1908) SCH I ART 116 120 131 and 132 I L R 34 All 246

See MORTGAGE I L R 39 All 700

——— in Mysore Province—

See INCOME TAX ACT (II OF 1886) I L R 39 Mad 885

——— *Annuity if a charge on property* Where in an *ekrarnama* between A and B it was agreed that A would receive Rs 150 per month during her lifetime from the share of the estate which she inherited from her son that B would pay the said sum every month and if he did not pay it A would be entitled to recover it by suit from the said share *Held* that the annuity was a charge upon the said share The property could be easily ascertained and that being so it did not matter that no schedule of property was given in the deed The question in all such cases is one of intention In equity no charge can be created unless there is an intent to charge SHYAMPEARY DASYA *v* THE EASTERN MORTGAGE AND AGENCY Co LD (1917) 22 C W N 226

——— *Payable to two persons—Survivor—If payable wholly to the survivor on the death of one—Penalty* Although an annuity to two persons should ordinarily be construed to mean that on the death of one of them the other should get a proportionate amount where there are indications of a contrary intention the gift may be taken as a joint gift *Jogeswar Narain Deo* v *Ram Chandra Dutt L R 23 I A 37 s c I L R 23 Calc 670 (1896) and Mathura Prosad* v *Rukmini Koer 17 C L J 84 (1911)* referred to The testator in his Will provided that his brother was to get Rs 25 a month during his life and on his death his sons were to get maintenance On the death of the testator's brother a compromise was arrived at by which it was arranged that the Plaintiff and his brother the sons of the testator's brother were to get Rs 10 a month but in the event of default of payment for four consecutive months they would be entitled to Rs 15 a month On a suit by the Plaintiff on the death of his brother *Held*—That the Plaintiff was entitled to the entire amount of

ANNUITY—*contd*

maintenance agreed upon in the compromise on the death of his brother and not a proportionate amount That the stipulation to pay a higher amount in ca e of default of punctual payment was a stipulation by way of penalty but the Plaintiff was entitled to reasonable compensation (which was determined in the case to be 12 per cent interest on the arrears) HEMANTA KUMAR BHADURI v SUDHANSU GOBINDA CHOUDHURY
25 C W N 262

ANNULMENT OF SALE

See SALE FOR ARREARS OF REVENUE
I L R 46 Calc 255

ANNULMENT PROCEEDINGS

———— notice of—
See LANDLORD AND TENANT
I L R 45 Calc 756

ANONYMOUS COMMUNICATION

See UNPROFESSIONAL CONDUCT
I L R 43 Calc 685

ANTECEDENT DEBT

See HINDU LAW DEBT
I L R 48 Calc 341
See HINDU LAW—JOINT FAMILY
I L R 36 All 17
I L R 41 All 235
See HINDU LAW—JOINT FAMILY PROPERTY
See CUSTOM (ALIENATION)
I L R 1 Lah 472

ANTICIPATORY ATTACHMENT

See EXECUTION OF DECREE
I L R 44 Calc 1072

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See CONTRACT I L R 48 Calc 427
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I L R 43 Calc 305

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———— construction of—
See HINDU LAW—ADOPTION
I L R 38 Calc 694
I L R 39 Calc 582

ANVADHEYA STRIDHAN

See HINDU LAW—STRIDHAN
I L R 34 Bom 553
See HINDU LAW—SUCCESSION
I L R 34 Bom 385

APOLOGY

See CONTEMPT OF COURT
15 C W N 771

APOSTACY

See MAHOMEDAN LAW—BIGAMY
I L R 39 Calc 409
See PENAL CODE 1860 494
I L R 1 Lah 440

APPEAL.

1 ABATEMENT OF APPEAL
2 CONSOLIDATED APPEAL
3 DISMISSAL OF APPEAL
4 JURISDICTION

APPEAL—*contd*

5 LAND ACQUISITION
6 PRACTICE
7 PRIVATE AWARD
8 REMAND
9 RIGHT OF APPEAL
10 VALUATION OF SUIT
11 MISCELLANEOUS

See APPEAL FROM ORDER
See APPEAL *in forma pauperis*
See APPEAL FORUM OF
See APPEAL IN CRIMINAL CASE
See APPEAL RIGHT OF
See ACQUITTAL I L R 44 Calc 703
See ADMINISTRATION BOND
I L R 39 Calc 555
See AGRA TENANCY ACT (II OF 1901)
s 25 31 57 SCH IV(C) ART 18
I L R 41 All 270
ss 58 167 I L R 41 All 28
ss 58 90 I L R 35 All 157
ss 95 177 (*f*) I L R 40 All 17
I L R 47 All 368
ss 175 177 AND 193
I L R 40 All 219
s 177 I L R 32 All 373
I L R 36 All 183
I L R 42 All 91
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I L R 38 All 465
ss 182 183 I L R 38 All 181
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See ARBITRATION
I L R 47 Calc 848
See ARBITRATION ACT (IX of 1899)
ss 4 AND 20 I L R 43 All 349
10 I L R 35 Bom 136
See ARBITRATION BY COURT
I L R 38 Calc 421
See AMENDED LETTERS PATENT CL 15
I L R 42 Bom 260
See APPEAL TO PRIVY COUNCIL
I L R 40 All 497
See AWARD I L R 38 Mad 256
See BENGAL TENANCY ACT —
s 105 15 C W N 921
153 15 C W N 760
See BENGAL, NORTH WESTERN PROVINCE ETC CIVIL COURTS ACT (XII OF 1887) ss 8 20
I L R 32 All 530
I L R 34 All 383
s 21 2 I L R 37 All 76
See CIVIL COURTS ACT (XII OF 1887)
21 I L R 41 All 384
s 21 15 C W N 713
See CIVIL PROCEDURE CODE (1908)—
2 I L R 39 All 292
s 9 104 118 I L R 35 All 569

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s 408 I L R 33 All 510
I L R 37 All 471
I L R 38 All 395

s 413 I L R 38 All 395

s 4 1 I L R 36 All 496

s 423 I L R 34 All 115

s 439 I L R 39 All 549

See Decree I L R 36 Bom 42

See Decree I L R 44 Calc 954

See Dekkhan Agriculturists Relief Act (XVII of 1879) ss 3 (w) 10 53
I L R 39 Bom 165

See Execution of Decree
3 Pat L J 571

See Hindu Law—Adoption
I L R 40 Mad 846

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I L R 47 Calc 721

See Jurisdiction of Civil Court
I L R 34 Bom 267

See Land Acquisition
I L R 43 Calc 665
I L R 46 Calc 861

See Land Acquisition Act 1894 s 3
I L R 45 Bom 277

See Letters Patent

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See Limitation Act (XV of 1877)—

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s 5 I L R 37 All 267

See Limitation Act (IX of 1908)
5 I L R 43 All 392
I L R 45 Bom 607

Sch I Art 152 I L R 34 All 482
I L R 43 Bom 376

See Mamlatdar s Courts Act (Bom Act II of 1906) 23
I L R 37 Bom 595

See Misjoinder I L R 45 Calc 111

See Mortgage I L R 38 Mad 18

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3 Pat L J 166

See Partition I L R 34 All 49
I L R 32 All 223
I L R 33 All 528
I L R 36 Bom 550
I L R 38 Calc 681

See Pensions Act (XXIII of 1871) s 6
I L R 39 Bom 352

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See Presidency Towns Insolvency Act (III of 1909) 6 8 25 58 39 (?) (a) (b) (c) (d) (f) (i)
I L R 40 Bom 461

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I L R 34 All 152
I L R 41 All 243

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20 22 and 46 I L R 36 All 8
36
15 C W N 253
I L R 38 Mad 15

s 43 and 46 I L R 36 All 578

s 43 (?) 46 I L R 39 All 171

s 46 (4) I L R 34 All 496
I L R 33 All 738

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I L R 34 Bom 171

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I L R 48 Calc 454

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I L R 42 Calc 1

See Receiver 14 C W N 183

See Religious Endowment Act 1863 s 5 I L R 43 All 55

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I L R 41 Calc 746
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I L R 38 Calc 307

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I L R 40 Calc 37
I L R 45 Calc 336

See Security for Costs
I L R 43 Calc 243

See Succession Certificate Act (VII of 1889) ss 19 26
I L R 34 All 148

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s 244 I L R 35 All 448

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I L R 38 All 70

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I L R 35 All 450 & 578

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I L R 43 All 644

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s 253 I. L. R. 32 All. 158

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See CIVIL PROCEDURE CODE 1908 O XXII r 8
I L R 43 All 621

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See HINDU MARRIAGE LAW
I L R 44 Bom 446

———— admission of after time-bar without notice to respondent—

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———— Admission of evidence on—

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6 Pat L J 676

———— against order of extension—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXXIV r 8 PROVISO
I L R 39 Mad 876

———— against the order of a single Judge—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 498
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6 Pat L J 43

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I L R 41 Calc 425

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I L R 39 Mad 593

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———— delay in filing—

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I L R 41 Bom 1[illegible]

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See DECREE I L R 39 Calc 34[illegible]

See CIVIL PROCEDURE CODE 1908 O IX r 8 I L R 35 All 10[illegible]

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I L R 38 All 35[illegible]

———— From consent decree (not allowable)—

See I L R 47 I A 20[illegible]

———— from decree of Assistant Collector on question of title—

See PUNJAB LAND REVENUE ACT 1887 s 117 I L R 1 Lah 33[illegible]

———— from decree of Lower Court in exercise of discretionary power—

See MUHAMMADAN LAW—RESTITUTION OF CONJUGAL RIGHT
I L R 1 Lah 59[illegible]

———— from decree of Lower Court deciding part of claim and remanding re —

See CIVIL PROCEDURE CODE 1908 s 10[illegible]
I L R 2 Lah 2[illegible]

———— from order for appointment of receiver—

See RECEIVER I L R 40 Mad 1[illegible]

———— from preliminary decree—

See EVIDENCE ACT (I OF 1872) s 4 90
I L R 37 Mad 455

———— from preliminary order—

See DECREE I L R 37 Mad 29[illegible]

———— from order declining to arrest or attach property—

See CIVIL PROCEDURE CODE ACT (V OF 1908) O XLIII r 1 (r) AND O XXXIX r 2 CL (3)
I L R 39 Mad 907

———— from order dismissing application to be brought on the record as representative of the deceased plaintiff—

See CIVIL PROCEDURE CODE 1908 O XXII r 5 I L R 1 Lah 493

———— From order granting review—

See CIVIL PROCEDURE CODE 190[illegible] XLIII AND XLVII 1 Pat L J 193

———— from order of abatement by a person not a party to the suit—

See CIVIL PROCEDURE CODE 1908 O XXII r 5 I L R 1 Lah 493

———— from order of Lower Appellate Court that appeal has abated—

See CIVIL PROCEDURE CODE 1908 O I r 8 I L R 1 Lah 582

———— from order of single Judge—

See LETTERS PATENT (MADRAS) s 15
I L R 39 Mad 235

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——— from unanimous verdict—

See JURY TRIAL
I L R 46 Calc 635

——— From order of Liquidating Judge reducing remuneration of an employee of Official Liquidator—

See COMPANIES ACT 18 16
I L R 1 Lah 73

——— from order of Executing Court disallowing application for arr t of judgment d btors—

See CIVIL PROCEDURE CODE 1908 47 104
I L R 1 Lah 77

——— from order refusing application by a c edi or to take action against an insolvent—

See PROVINCIAL INSOLVENCY ACT 190 s 43 46
I L R 1 Lah 213

——— from o der returning plaint for amendment—

See CIVIL PROCEDURE CODE 1908 105
I L R 1 Lah 54

——— from order of single Judge of Chief Court sanctioning prosecution of appellant—

See CRIMINAL PROCEDURE CODE 1898 s. 195
I L R 1 Lah 259

——— from O der—Second Appeal—Practice—

See CIVIL PROCEDURE CODE (ACT V OF 1908) ss 47 AND 104 ( )
I L R 44 Bom 472

——— in criminal case—

See PRIVY COUNCIL
I L R 25 Mad 501
I L R 42 Calc 739

——— Joint appeal from 2 separate cases

See COMPANIES (IN LIQUIDATION)
I L R 1 Lah 368

——— No appeal lies against an order refusing injunction to re train pro ecution of suit in a foreign Court—

See LETTERS PATENT CL 1
I L R 44 Bom 472

——— Parties—Practice

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXI
I L R 44 Bom 560

——— presentation of—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 4 1 233 3
I L R 39 Mad 527

——— prosecution of—

See LIMITATION I L R 45 Cal 94

——— Co defendants—whether appellate Court can decree claim against a co defendant on the appeal of the other defendant—

See CIVIL PROCEDURE CODE 1908 (1) O XLI RR 22 33 I L R 1 Lah 396

——— Order for stay of— whether appealable—

See CIVIL PROCEDURE CODE 1 0 47
I L R 45 Bom 241

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——— Order granting lease to Sue a Receiver—

See CIVIL PROCEDURE CODE O XLIII r 1
I L R 45 Bom 99

——— out of time—

See COURT FEES 3 P L J 484

See LIMITATION
I L R 44 I A 218

See PROVINCIAL INSOLVENCY ACT (III OF 1907) s 46 CL (3)
I L R 39 Mad 593

——— our valuation of—

See REFUND OF COURT FEE
I L R 40 Calc 265

——— P c ive —L se o Sue for neg li gence—

See CIVIL PROCEDURE CODE 1908 O XLII R I I L R 45 Bom 99

——— Re rence to Historical work (irregular)—

See CUSTOMARY LAW
1 Pa L J 225

——— re hearing of—

See CIVIL PROCEDURE CODE (1908) O XLI R 1
I L R 39 All 388

——— reversal of—

See ATTACHMENT BEFORE JUDGMENT
I L R 45 Calc 780

——— revision of—

See APPEAL TO PRIVY COUNCIL
I L R 38 Mad 406

——— right of—

See ARBITRATION
I L R 39 Calc 822

See AMENDMENT OF PLAINT
I L R 45 Calc 305

See CIVIL PROCEDURE CODE (ACT V 1908) s 47 3 104
I L R 39 Mad 570

See INSOLVENCY I L R 47 Calc 721

See MADRAS CITY MUNICIPALITY ACT 1 1 1 1 etc
I L R 34 Mad. 1 0

See MUNICIPAL ELECTION
I L R 39 Calc 754

See PROVINCIAL INSOLVENCY ACT 1 43 AND 46 I L R 40 Mad. 630

See SANCTION FOR PROSECUTION
I L R 40 Calc 239

——— Second appeal—

See SECOND APPEAL

See OF PROOF
I L R 43 Mad 567

——— service of notice of on District Magistrate—

See CRIMINAL PROCEDURE CODE (ACT V OF 1) 4 4 4 3
I L R 39 Mad. 508

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——— subsequent filing of—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XLVII r 1
I L R 38 Bom 416

——— summary dismissal of—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XLI r 11
I L R 37 Bom 610

See PENAL CODE s 170 3 Pat L J 389

——— Time for—

See LIMITATION ACT 1908 s 12
1 Pat L J 573

——— transfer of—

See BENGAL N W P AND ASSAM CIVIL COURTS ACT (XII OF 1887) s 22 ( )
I L R 37 All 232

——— valuation of—

See VALUATION OF APPEAL

See CIVIL PROCEDURE CODE 1908 s 107
I L R 42 All 48

——— wrongly laid b fore Collector—

See JURISDICTION OF HIGH COURT
I L R 38 Calc 832

1 ABATEMENT OF APPEAL

——— Limitation Act IX of 1908 s 3 Art 177—*Period of limitation provided in Art 177 applicable to applications made after the day when the Act came into force—Effect of abatement of appeal against one of several joint trustees* Applications to bring in the legal representatives of a deceased respondent made after the coming into force of Act IX of 1908 must under s 3 and Art 177 of the Act be made within six months of the death of such respondent If not so made the appeal must abate against such respondent Where the deceased respondent in respect of whom the appeal abates is a joint trustee with other respondents the appeal cannot proceed against such other respondents ARAYIL KALI AMMA *v* SANKARAN NAMBUDRIPAD (1910)
I L R 34 Mad 292

——— Appeal decree in —*Plaintiff not appealing as regards part of suit dismissed—Position of as respondent* In a suit on a Promissory note *B* prayed for relief against *A* and *G* and obtained a decree against *G* alone *B* preferred no appeal as regards his claim against *A* On appeal by *G B* s suit was dismissed *Held* that the Judge in the appeal by *G* was right in not passing a decree against *A* *B* not having asked for it at all in any manner ASUNDI BASAVVA *v* BAREDDI GOVINDAPPA (1910)
I L R 34 Mad 249

——— Death of one of the Respondents does not abate an appeal VELAYAN CHETTY *v* MAHALINGA AIYER
I L R 39 Mad 386

2 CONSOLIDATED APPEAL

——— *Appeal—Cases governed by one judgment but not consolidated—One appeal if lies* Where in several execution cases one judgment was passed but a separate order was recorded for each case and there was no order for consolidation of the cases *Held* that there should be as many appeals as there were original cases and not one consolidated appeal against all the orders LAKHAL CHANDRA TEWARI *v* MANMOTHO NATH MITTER (1910)
15 C W N 994

——— *Consolidation of appeals—Plaint amendment of when allowable—Practice* The Code of Civil Procedure contains no provisions for consolidating proceedings in India Whether the Court has jurisdiction to consolidate proceedings or not it would only do so where the consolidation is asked for before the trial of the suits begins or where the evidence given in the two cases is common in both of them No amendment of plaint can be allowed where the proposed amendment would take away from the defendants if allowed a right that they would have if the plaintiffs had proceeded against them by way of original suit JANARDAN KISHORE LAL *v* SHIB PERSHAD RAM (1916)
I L R 43 Calc 95

3 DISMISSAL OF APPEAL

——— *Civil Procedure Code (Act V of 1908) O XLI r 18—Failure of appellant to file notice of appeal dismissal of appeal if proper* Where a person preferred an appeal and at the same time deposited the fees for service of the notice of appeal on the respondent but did not file the notice to be served as required by the Circular Order of the High Court *Held* that the appeal could not be properly dismissed under O XLI r 18 of the Civil Procedure Code GOL MAHOMED *v* ABDUL JABBAR (191)
16 C W N 498

——— *Dismissal for default—Order of Special Judge—Bengal Tenancy Act (VIII of 1885) ss 106 109A sub s (2)—Civil Procedure Code (Act V of 1908) O XLI rr 17 19 O XLIII r 1 cl (t)* An appeal lies from an order refusing to rehear an appeal dismissed for default even though such appeal has been preferred under s 109 A sub s (2) in a suit under s 106 of the Bengal Tenancy Act *Mothur Chandra Majumdar v Tara Sunkur Ghose 7 C W N 410* distinguished MANMATHA NATH DEY *v* GADADHAR MAITRA (1917) I L R 45 Calc 638

4 JURISDICTION

——— *Jurisdiction—Sambalpur—Appeal against decree or order passed by Deputy Commissioner acting as a Civil Court—Central Provinces Land Revenue Act (XVIII of 1881) as amended by Beng Act IV of 1906 ss 136 H (1) and 22 cl (b)—Bengal North Western and Assam Civil Courts Act (XII of 188)—Second Appeal if it lies to High Court when original appeal decided by the wrong Court* Section 136 H (1) introduced into the Central Provinces Land Revenue Act of 1881 by Act XVI of 1889 qualifies s 22 cl (b) of the original Act with the result that under it read with s 3 of the Sambalpur Civil Courts Act 1906 (Beng Act IV of 1906) an appeal against a decree or order passed by the Deputy Commissioner acting as Civil Court lies to the District Judge Where in such a case an appeal was wrongfully preferred before the Commissioner no second appeal from the Commissioner s decision lies to the High Court RAGHUNATH SINGH *v* ABDHUT SINGH (1911) I L R 38 Calc 391

APPEAL—*contd*

4 JURISDICTION—*contd*

——————— *Jurisdiction—Valuation—Suit for specific performance of contract to sell—Additional relief claimed by way of cancellation of sale deed subsequently executed* Where a suit was primarily a suit for specific performance of a contract to sell certain property to the plaintiff but also asked for the cancellation of a subsequent sale deed of the property in favour of certain defendants it was *held* that the latter relief was merely incidental to the former and its valuation would not affect the jurisdiction of the Appellate Court *Pirthi Singh* v *Maru Singh* 8 *All L J* 266 distinguished NITYA NAND v BISHAN LAL (1911) **I L R 33 All 634**

——————— *Appeal jurisdiction not questioned in—Jurisdiction—Court—Consent of the parties as to jurisdiction—Suit of value beyond the jurisdiction of the Court—Trial of suit—Jurisdiction cannot be questioned in appeal—Evidence Act (I of 1872)* s 58 The plaintiffs filed a suit for partition in the Court of the Subordinate Judge First Class valuing their claim at an amount which made the suit triable by that Court alone The Judge however made over the trial of the suit to the Joint Subordinate Judge In the latter Court neither party raised any objection on the ground of jurisdiction nor was any issue raised relating to it The trial proceeded on merits and a decree was passed in favour of plaintiffs The defendant appealed to the lower Appellate Court where he for the first time raised the question of jurisdiction on the strength of the market value stated in the plaint The objection was overruled On appeal —*Held* that the market value stated in the plaint *primâ facie* determined the jurisdiction *Held* further that as neither party raised any question as to want of jurisdiction in the first Court and as they by their conduct and silence treated the market value to be of the amount sufficient to give jurisdiction to the Court they dispensed with proof on the question by their tacit admissions and thus the principle of law laid down in s 58 of the Indian Evidence Act came into operation and prevented the result of the statement of the market value in the plaint As a rule parties cannot by consent give jurisdiction where none exists This rule applies only where the law confers no jurisdiction It does not prevent parties from waiving an inquiry by the Court as to facts necessary for the determination of the question as to jurisdiction where that question depends on facts to be ascertained JOSE ANTONIO v FRANCISCO ANTONIO (1910) **I L R 35 Bom 24**

——————— Additional Evidence—*Civil Procedure Code (Act V of 1908) O XLI r 27 O XLVII r 1—Jurisdiction of Appellate Court to admit additional evidence—Application to admit additional evidence before the hearing of the appeal if it can be entertained* Where in an appeal an application was made before the hearing of the appeal for the admission of additional evidence *Held* that such an application was not warranted by the terms of O XLI r 27 and the Appellate Court had no jurisdiction to entertain it O XLI r 27 does not authorise an Appellate Court to admit fresh evidence documentary or oral and whether or not it was in existence at the time of the judgment of the lower Court or at the time the appeal was preferred unless the Appellate Court after examining the evidence on the record comes to the conclusion that it requires the additional evidence in order to enable it to pronounce judgment namely that there is a defect on the evidence on the record An application to admit fresh evidence discovered out of Court by the parties comes under O XLVII r 1 and not under O XLI r 27 *Kessowji Issur* v *Great Indian Peninsula Railway Co* *I L R 31 Bom 381 L J 34 I A 115* referred to GARDEN REACH SPINNING AND MANUFACTURING CO v SECRETARY OF STATE FOR INDIA (1914) **I L R 42 Calc 675**

——————— *Revision power of—Civil Procedure Code (Act V of 1908) s 115—Appeal from order of single Judge sitting on Original Side made in exercise of revisional jurisdiction—Appellate jurisdiction of High Court—Letters Patent of 1865 cls 15 16 39—Judgment —High Courts Act (24 and 25 Vic c 104) s 13—Presidency Small Cause Courts Act (XV of 1882) ss 6 41* An order made by a single Judge sitting on the Original Side under s 115 of the Code of Civil Procedure interfering with a judgment of the Presidency Small Cause Court is a judgment within the meaning of s 15 of the Letters Patent and is appealable *Chappan* v *Moidin Kutti I L R 22 Mad 68* followed *Hiralal* v *Bai Asi I L R 22 Bom 891* distinguished *Girdharee Singh* v *Hurdoy Narain Sahoo 21 W R 60* *Secretary of State for India* v *British India Steam Navigation Co 13 C L J 90* *Venkatta Peddi* v *Taylor I L R 17 Mad 100* referred to An application under s 41 of the Presidency Small Cause Courts Act for the recovery of possession of certain immoveable property was refused by the Presidency Small Cause Court on the ground that the relationship of landlord and tenant had not been established *Held* that assuming that the judgment was erroneous the High Court was not justified in interfering under s 115 of the Civil Procedure Code *Amir Hassan Khan* v *Sheo Baksh Singh I L R 11 Calc 6* followed *Brij Mohan Thakur* v *Rai Uma Nath Choudhry I L R 20 Calc 8* and *Maharajah of Burdwan* v [illegible] *I L R* [illegible] distinguished *Per* WOODROFFE J —The term Jurisdiction in s 115 of the Code of Civil Procedure is used in the ordinary sense to mean a jurisdiction local pecuniary personal or with reference to the subject matter of the suit [illegible] v [illegible] RAM CHANDRA HARIBUX (1913) **I L R 41 Calc 323**

——————— *Jurisdiction—Written statement order refusing leave to file—Judgment—Letters Patent 1865 cl 15—Rules and Orders of High Court Chap XIV r 3* No appeal lies from an order made by a Judge sitting on the Original Side refusing an application by a defendant for leave to file his written statement Such an order is not a judgment within the meaning of cl 15 of the Letters Patent of 1865 *The Justices of the Peace for Calcutta* v *The Oriental Gas Company* 8 *B L R 433* referred to *Mathura Sundari Dassi* v *Haran Chandra Saha I L R 43 Calc 857* distinguished MURALIDHAR CHATTERJEE v M P DALIJA (1917) **I L R 45 Calc 818**

APPEAL—*contd*

4 JURISDICTION—*contd*

——— From the conviction of Assistant Sessions Judge—*Assistant Sessions Judge promoted to position of Sessions Judge before the appeal is filed* An appeal from a conviction and sentence of an Assistant Sessions Judge where the sentence is less than four years rigorous imprisonment lies to the Sessions Judge and the mere fact that before the appeal is filed the Assistant Sessions Judge is promoted to the position of Officiating Sessions Judge does not give the High Court jurisdiction In such a case the appeal should be filed in the Session Court and the Officiating Judge should either send it to the High Court for disposal or postpone the hearing of it until the return of the Sessions Judge GARIB LALL v THE CROWN 3 Pat L J 192

5 LAND ACQUISITION

——— *Award —Refusal to restore claim case if an award—Land Acquisition Act (I of 1894) s 54* An order of the Special Land Acquisition Judge refusing to restore a claim case by setting aside a decree passed *ex parte* for default of the claimant is not an award and does not come under s 54 of the Land Acquisition Act An appeal does not therefore lie against such an order HASEN MOLLA v TASHRUDDIN (1911) I L R 39 Calc 393

——— *Land—Compulsory acquisition—Compensation—Award by Assistant Judge—Appeal to the District Judge—Second Appeal—Practice and procedure—Land Acquisition Act (I of 1894) ss 53 54—Civil Procedure Code (Act V of 1908) ss 96 100* Where an award is made by the Assistant Judge under the provisions of the Land Acquisition Act 1894 and there has been an appeal to the District Judge no second appeal can lie from the appellate decision NATHUBHAI NARANDAS v MANORDAS LALDAS (1911) I L R 36 Bom 360

6 PRACTICE

——— *Second appeal—Finding on facts of lower Appellate Courts should be clear* It is the duty of lower Courts on appeal to come to clear findings on facts as they are final and the High Court cannot go behind them HARIPADO MUKHERJI v RADHA BALLAB PAL (1919) 23 C W N 1048

——— *Civil Procedure Code (Act V of 1908)—Appeal by one of several defendants—Power of Appellate Court to modify decree in favour of non appealing defendant—Parties* One only of three defendants appealed to the lower Appellate Court which modified the decree of the Court of first instance in so far as the other defendants also were concerned *Held* that the lower Appellate Court was wrong in modifying the decree appealed against in favour of the absent defendants without making them parties to the appeal JOGESH CHANDRA BANERJI v SARADA KUMAR CHAKRAVARTI (1918) 23 C W N 223

——— from order confirming an auction sale—*of a house an insolvent—Omission to implead auction purchasers as respondents—Effect of such omission* *Held* following *Mela Ram* v *Narain Das 183 P R 1882* that an appeal against an order confirming an auction sale to which the auction purchasers were not made parties till long after the appeal was time barred as against them should be dismissed KHAIRA v SALEM RAJ I L R 1 Lah 21

——— The Appellant has a right of reply to the Crown on the hearing of an appeal and the Court is bound to find specifically whether witnesses said to be accomplices are so or not and to weigh their evidence accordingly AMANAT SARDAR v NAGENDRA BISWAS I L R 38 Calc 307

——— *Disposal of effect on primary judgment* The effect of the disposal of an appeal from the decree of the primary Court is that if it is reversed it is absolutely dead and gone and if affirmed it is merged in the decree of the superior Court which takes its place for all intents and purposes The fact that an appeal has been dismissed under s 551 of the Code of 1882 or under O XLI r 11 of the Code of 1908 makes no difference in principle for the dismissal operates as a decree and supersedes the decree of the lower Court precisely in the same way as a decree of dismissal made after service of notice to the respondent CHANDRA KANTA BHATTACHARYA v LAKSHMAN CHANDRA CHAKRAVARTI (1916) 21 C W N 430

——— *Heard ex parte—Duty of counsel* Where an appeal is heard *ex parte* it is the duty of counsel to bring to the notice of the Judicial Committee adverse as well as favourable authorities DEONANDAN PROSAD v JANAKI SING (1916) 21 C W N 473

——— *Admission of appeal only on a limited ground—Legality of such procedure—Right of appellant to be heard on all the grounds taken in the petition of appeal—Criminal Procedure Code (Act V of 1898) ss 421 422 423—Examination of a child as a witness without affirmation—Intentional omission to affirm effect of—Competency of a child witness—Mode of testing its capacity—Necessity or advisability of preliminary inquiry—Oaths Act (X of 1873) ss 5 6 and 13—Evidence Act (I of 1872) s 118* When an appeal has been admitted the appellant is entitled to be heard on the whole case and cannot be restricted to any selected ground from those specified in his petition A restrictive order of admission of an appeal is not contemplated by s 422 of the Criminal Procedure Code and is *ultra vires* *Lakhi Narain Serouji* v *Sri Ram Chandra 15 C W N 921* referred to A child witness though under seven years of age must be examined on oath or affirmation under ss 5 and 6 of the Oaths Act (X of 1873) and the Court has no power to refrain from dispensing with the same *King* v *Brasier 1 Leach 237* referred to *Per* MOOKERJEE J—*Quære* Whether an intentional omission to comply with the provisions of ss 5 and 6 of the Oath Act is a defect cured by s 13 thereof *Queen* v *Sewa Bhagta 14 B L R 294 23 W R Cr 12 Queen* v *Mussamat Itwarya 14 B L R 4 22 W R Cr 14 Queen* v *Annundo Chuckerbutty 14 B L R 295n 22 W R Cr 1 Nundo Lal Bose* v *Nistarini Dassi I L R 27 Calc 428 Queen Empress* v *Maru I L R 10 All 207 Queen Empress* v *Lall Sahai I L R 11 All 183 Queen Empress Shava I L R 16 Bom 359* and *Queen Empress* v *Viraperumal I L R 16 Mad 105* referred to The question of the capacity of a witness to testify is one for the Judge to decide

APPEAL—contd

6 PRACTICE—contd

and not for the jury but when he has decided in favour of competency it is for the latter to determine the weight of the evidence *Queen v Hossein* *8 W R Cr 60* followed *Per* BEACHCROFT *J*—The question whether a witness understands the nature and obligation of an oath or affirmation is foreign to the question of competency under s 118 of the Evidence Act Intellectual capacity is the only test *Per* COXHAM Under s, 118 of the Evidence Act the Court is not bound before taking the deposition of a child witness, to a certain by preliminary examination whether the child has capacity to understand the questions put to it and to give rational answers to them but the competency of such witness may be tested during the course of its examination *Sheikh Fakir v Emperor 11 C W N 51* dissented from *Queen v Whitehead L R 1 C C R 33* referred to *Wheeler v United State 159 U S 523* approved Where the Judge intentionally omitted to affirm certain children aged 4 and 6 years respectively examined as witnesses and had not considered whether they were by reason of tender year prevented from understanding the questions put to them and from giving rational answers within the meaning of s 118 of the Evidence Act the conviction of accused was set aside and a retrial ordered NAFAR SHEIKH v EMPEROR (1915)

I L R 41 Calc 406

———————— In an appeal from a conviction it is for the appellate Court to satisfied that the prosecution is true beyond all reasonable doubt KA CHAN MALLIK v EMPEROR

I L R 42 Calc 374

———————— *Practice—Filing of certified copy of decree appealed from after the prescribed period of limitation without leave of the Court effect of—Inherent power of High Court—Ex parte order in application for review of order of dismissal passed at preliminary hearing setting aside of at final hearing of appeal Civil Procedure Code (Act V of 1908) s 151 O XLI rr 1 11 O XLVII rr 1 7—Limitation Act (IX of 1908) s 5* Where a certified copy of the decree appealed from was filed in the High Court after the prescribed period of limitation without leave of the Court in an analogous appeal and when the main appeal had already been dismissed at the preliminary hearing under O XLI r 11 of the Code of Civil Procedure but was restored on review without notice to the respondent after the aforesaid analogous appeal had been admitted by another Divisional Bench at the final hearing of both these appeal on objection being taken by the respondent *Held* that the respondent was entitled to invoke the inherent powers of that Court *Tikai Byjnt Singh v Chris en 1 C W N 86?* followed *Held* also that non compliance with r 4 of O XLVII of the Code rendered the granting of an (*ex parte*) application for review (by the appellant) a nullity as it was prejudicial to the respondent and previous notice was necessary *Held* further that under r 1 O XLI of the Code filing of the decree of the Appellate Court was imperative and an appeal could not be said to have been preferred until that decree was filed. ABDUL HAKIM CHOWDHURY v HEM CHANDRA DAS (1914) **I. L. R 42 Calc. 433**

APPEAL—contd

6 PRACTICE—contd

———————— Principles regarding appeal Court in dealing with findings of fact in Lower Court discussed I ALJE MAHOMED v GUZDAR (1905) **I L R 43 Calc 833**

———————— An accused sentenced to concurrent terms of imprisonment not one of which is individually appealable has no right of appeal The mere admission of an appeal does not preclude the Court from subsequently determining the question whether or not an appeal lies AZIZ SHEIKH v EMPEROR (1913)

I L R 40 Calc 631

———————— Where a memo of appeal is rejected before appeal is admitted on account of insufficiency of stamp an order purporting to restore the appeal cannot be made under O XLI r 19 The expression opposite party in O XLVII r 4 is not limited to cases in which such party has actually appeared SURAJPAL PANDEY v UTIM PANDEY **6 Pat L J 625**

7 PRIVATE AWARD

———————— *Civil Procedure Code (Act XIV of 188) s 525—Order rejecting application to file award made out of Court—Rules of Evidence* An appeal lies against an order refusing to grant an application to file an award made between the parties without intervention of the Court *Sheo Sahi Mahton v Kirtarth Bhagat 7 C L J 486* followed *Bisait Lal v Kunji Lal I L R 28 All 21* not followed Proceedings contemplated by s 525 of the Code of Civil Procedure are proceedings of a private nature to which the rules of evidence cannot be strictly applied RAMDHARI SAHU v RAM CHARITTER SAHU (1910) **I L R 38 Calc 143**

8 REMAND

———————— *Appeal from order dismissing suit under s 10 Civil Procedure Code (Act XIV of 188)—Suit in which two distinct claims were made—Claim to recover money paid to release attachment disallowed—Claim for damages for wrongful attachment withdrawn—Non appearance of plaintiff—Improper procedure in dismissing suit for default—Remand* The plaintiff (appellant) made two claims one for money paid into Court to release from attachment property which he alleged he had purchased but which had been attached as belonging to the Delhi Cotton Mills Company against which the defendant (respondent) held a decree and the other for damages for the wrongful attachment As to the former claim the District Judge ruled that the payment was entirely voluntary and for plaintiff's own interest and that his remedy is under ss 69 and 70 of the Contract Act against the Delhi Cotton Mills and I dismiss the case for recovery with costs The case will proceed on the question of damages for illegal attachment Evidence was proceeded with on the claim for damages and after unsuccessfully petitioning that a decree might be drawn up in respect of the dismissal of his claim to the money paid into Court and for leave to withdraw his claim for damages under s 373 of the Civil Procedure Code (Act XIV of 18) with liberty to bring a fresh suit the plaintiff unconditionally withdrew from the claim for damages but not from the claim to the recovery of the money

APPEAL—contd

8 REMAND—contd

Subsequently the defendant proceeded to give evidence upon the issues raised in the ca e and eventually the plaintiff not appearing the District Judge dismissed the whole ca e for default under s 102 of the Code On appeal to the Chief Court the majority of a Full Bench of that Court decided that no appeal lay from an order di mi sing a suit under s 102 and the appeal was consequently di mi ed *Held* by the Judicial Committee that after the decision of the Di trict Judge ad verse to the plaintiff on the claim to recover the money paid which left no question as to that claim open in the Court of first instance and the abandonment by the plaintiff of the claim to damages there remained nothing in substance to be tried and that the case was one not proper to be dealt with under s 102 Without deciding (as being therefore unnecessary) the question whether an appeal would lie against a dismis al regularly made under that section their Lordships remanded the case to the Chief Court to decide the appeal on its merits KANHYA LAL v THE NATIONAL BANK OF INDIA (1910) **I L R 37 Calc 426**

——— *Civil Procedure Code (Act V of 1908) s 105 cl (2) O XLI rr 23 25—Remand order—Appeal if lies after suit is finally disposed of on appeal* Where a suit has been remanded on appeal an appeal from the order after the suit has been taken up by the first Court on remand and finally disposed of is incompetent *Madhu Sudan Sen* v *Kamini Kanta Sen I L R 32 Calc 10°3 s c 9 C W N 895 Baikantha Nath Dey* v *Nawab Salimullah 12 C W N 590 Mackenzie* v *Narsingh Sahai I L R 36 Calc °62* followed *Uman Konwari* v *Janbandhan I L R 30 All 479* not followed *Palani Chetty* v *Rangiados Naidu I L R 32 Mad 83* distin gui hed S 10₅ cl (2) of the new Civil Procedure Code has no bearing on this question but applies to the converse case JANAKI NATH PAY CHOW DHURY v PROMOTHA NATH ROY CHOWDHURY (1911) **15 C W N 830**

——— *Civil Procedure Code (Act V of 1908) ss 115 104 sub s ° 1o1 O XLI r 90 O XLIII r 1 cl (j)—Sale in execution application to set aside on ground of fraud before new Code came into force—Order pa ed since if open to second appeal—General Clau es Act (X of 1897) s 6 cl (c)—Retrospective operation of repeal ing statute—Revision—Erroneous decision on ques tion of limitation—Limitation Act (IX of 1908) ss 7 9* An application to set aside an execution sale which took place on the 17th September 1900 on the ground of fraud and material irre gularity in publishing and conducting it was made on the 23rd July 1907 and allowed on the 6th July 1908 but the order was set aside on appeal and the case remanded on the 6th November 1908 On the 12th June 1909 the application was again di mi sed but on appeal the order was set aside and the ca e once more remanded on 29th January 1910 *Held* that a second appeal again t the order of remand did not lie under the new Code (Act V of 1908) O XXI r 90 and s 104 sub s (?) read with O 43 r 1 cl (j) which applied to the case The right of second appeal which the judgment debtor would have (by reason of repealed p ovision of the old Code relating to appeals continuing to govern pending cases) had s 6 cl (c) of the General Clau es Act of 1897 alone applied must be held to have been taken away by the expre s terms of s 1o1 of the new Code The words present right of appeal means only a right exi ting on the 1st of January 1909 to appeal against a particular order pa sed under the former Code and subsisting on that date *The Colonial Sugar Refining Company Limited* v *Irving [190₅] A C 369 Hornsey Local Board* v *Monarch Investment Building Society ?1 Q B D 1* referred to Where the lower Appellate Court had held that the application was not time barred as the applicant was a minor overlooking the fact that when the sale took place the father of the applicant was alive so that limitation had already begun running against him *Held* that the fact that the lower Appellate Court overlooked the applicability of s 9 of the Limitation Act to the case was not sufficient to justify interference in revi ion by the High Court BENOD BEHARI BHADRA v RAM SARUP CHAMAR (1912) **16 C W N 1015**

9 RIGHT OF APPEAL

——— *Leave to bid refusal of to decree holder—Appeal* No appeal lies against an order forbidding a decree holder to bid at a sale held in execution of a decree the matter being one of the administration *Jadunath Mandal* v *Brojo Mohan Ghose* referred to KO THA HEUVIN v MA HOIN 1 **15 C W N 862**

——— *Civil Procedure Code (Act XIV of 1882) ss 622 6°3 6°4 6°6—Review — Sufficient reason —Admission by defendant after suit dismissed that case true—Review upon evidence of admission—Appeal—Revision—Mate rial irregularity* Where an order dismi sing a suit was reviewed on the ground of a sub equent admission by the defendant that the plaintiff's case was true and the suit was decreed *Held* that no appeal lay from the order admitting the review as it was not in contravention of s 624 or 6°6 Civil Procedure Code *Munniram Chowdhry* v *Bishen Perkash Narain I L R 24 Calc 878 The Bombay and Persia Steam Navigation Co* v *S S Zuari I L R 12 Bom 171* followed But in admitting the review on that ground the Court acted with material irregularity in the exercise on its jurisdiction within the meaning of s 622 Civil Procedure Code A ground for review must be something which existed at the date of the decree and not a subsequent event *Kotagiri Venkata Subbamma Rao* v *Vellanki Venkatarama Rao I L R 24 Mad 1* followed GOLAM ALI JAMADAR v ABDUL KARIM SIRKAR (1909) **14 C W N 244**

——— *Civil Procedure Code (Act V of 1908) ss 2 47 O XXI r 66—Inter locutory order in execution when appealable as decree—Order determining value of property to be sold in execution* Every order passed in execution proceedings is not appealable The order to be appealable as a decree must conclusively deter mine the rights of the parties *Behary Lal Pundit* v *Kedar Nath Mullick I L R 18 Calc 469* applied No appeal lies against an order by which the value of property directed to be sold under a decree has been a e sed at a certain figure accord ing to the statement of the decree holder *Siva gami Achi* v *Subrahmania Ayyar I L R 27*

APPEAL—*contd*

9 RIGHT OF APPEAL—*contd*

Mad 259 approved *Sivasami Naiclar* v *Ratnasami Naiclar I L R 23 Mad 568 Ganga Prasad* v *Raj Coomar Singh I L R 30 Calc 617 Kashi Pershad Singh* v *Jamuna Pershad Sahu I L R 31 Calc 92? Saurendra Mohan Tagore* v *Hurrul Chand 12 C W N 542* referred to DEOKI NANDAN SINGH *v* BANSI SINGH (1911)
16 C W N 124

——— *Appeal—Order in execution of decree—Order refusing decree holder permission to bid at sale in execution of decree—Civil Procedure Code (Act XIV of 1882) ss 2 244 cl (c) 294 cl (16) 540 588 and 617—Act VII of 1888 s 75—Revision where no appeal lies* No appeal lies from an order refusing an application by a decree holder for permission to bid at a sale in execution of a decree *Jodoonath Mundul* v *Brojo Mohan Ghose I L R 13 Calc 174* approved. KO THA HNYIN *v* MA HNIN I (1911)
I L R 38 Calc 717
15 C W N 682

——— *Civil Procedure Code (Act V of 1908) ss 2 47 O 21 r 66—Sale proclamation valuation for purposes of—Order determining value if applicable* An order by an executing Court under O XXI r 66 of the Civil Procedure Code determining the valuation of immoveable properties attached and sought to be sold in execution of a decree is not appealable as a decree *Deoki Nandan Singh* v *Bansi Singh 16 C W N 124* followed PANCH DUAR THAKUR *v* MANI PAUT (1912)
16 C W N 970

——— *High Court—Bombay District Municipal Act (Bom Act III of 1901) s 160—Municipality—Compulsory acquisition of land—Compensation—Arbitration—Decision of District Court—Construction of statutes* No appeal lies from the decision of a District Court under cl (3) of s 160 of the Bombay District Municipal Act (Bom Act III of 1901) Where a statute creates a right not existing at common law and prescribes a particular remedy for its enforcement then that remedy alone must be followed *Wolverhampton New Waterworks Co* v *Hawkesford 6 C B N s 336* followed CHUNILAL VIRCHAND *v* AHMEDABAD MUNICIPALITY (1911)
I L R 36 Bom. 47

——— *Question in execution—Civil Procedure Code (Act V of 1908) s 47* Held that the question involved in the appeal was a question in execution between the parties to decrees Therefore it fell under the provisions of s 47 of the Civil Procedure Code (Act V of 1908) and the order passed by the lower Court was appealable SORABJI COOVERJI *v* KALA RAGHUNATH (1911)
I L R 36 Bom 156

——— *Succession Certificate Act (VII of 1889) ss 9 5 6—Civil Procedure Code (Act V of 1908) s 96—Succession Certificate—Condition of security* An order granting a succession certificate accompanied by a condition that security should be given is appealable An order directing that a certificate should not be granted unless security is furnished is not appealable *Bai Devkore* v *Lalchand Jivanda I L R 19 Bom 790* explained BAI NANDKORE *v* SHA ...

APPEAL—*contd*

9 RIGHT OF APPEAL—*contd*

——— *Concurrent imprisonment not individually appealable—Aggregate of sentences—Right of appeal—Criminal Procedure Code (Act V of 1898) ss 35 (3)* ... An accused sentenced to concurrent ... imprisonment not one of which is ... appealable has no right of appeal ... sentences cannot for the purposes of ... taken collectively *Suknandan Singh* ... *Emperor 17 C L J 392* approved ... *Khalel* v *King Emperor 17 C W* ... followed AZIZ SHEIKH *v* EMPEROR (1...
I L R 40 ...

——— *Small Cause ... tried as an ordinary suit—Jurisdiction ...* Judicial officer invested with Small C... jurisdiction tries a suit which he might ... under the summary procedure in th... manner the character of the suit is n... altered and his decree is not appealal... *Jarbhai* v *Somabhai I L R 25 Bom 41* ... INDRA CHANDRA MUKHERJEE *v* SRISH... BANERJEE (1913) **I L R 40** ...

——— *Attachment ... execution—Security—Order accepting sec... ther appealable— Decree —Civil Proc... (Act V of 1908) ss 2 (2) and 47* An ... security to stay execution is not an o... mining any rights of the parties It ... an order under s 47 nor is it a decree ... the meaning of s 2 (2) of the Code of C... dure 1908 It is therefore not ... *Deoki Nandan Singh* v *Bansi Singh 1... 35* and *Srinibash Prasad Singh* v *Kes... Singh I L R 38 Calc 754 14 C* ... referred to SARASWATI BARMANIA *v* ... BARMAN (1913) **I L R 41** ...

——— *Mortgage ... representatives of Judgment debtor—Transf... perty Act (IV of 1882) ss 57 56 81—C... dure Code (Act V of 1908) ss 2 47 ... XXXIV r 5—Foreclosure—Sale—Fr... property* Where the petitioners ... mortgagees (who had foreclosed a prope... it now transpired was included in an ea... gage of several other properties to th... decree holders prior mortgagees) applied ... 47 of the Code of Civil Procedure for the ... of the property from the present sale p... and got this order and the judgm... (mortgagor) appealed therefrom *Held* ... petitioners were the representatives of ... ment debtor within the meaning of s ... Code of Civil Procedure and that this o... not be regarded merely as an order un... of Order XXXIV of the Code of Civil ... but amounted to a decree within the m... s 2 of the Code and was therefore a... *Held* further that the Courts have ... appropriate circumstances to make ... under ss 56 and 81 of the Transfer of ... Act *Ishan Chandra Sirdar* v *Len... S Lar I L R 4 Calc 6* relied on. ... *Appayya* v *Manjala Pan...* ... *Mad 419* distinguished TARA PRASAN... *v* NIZAMAT KHAN (1913) **I L R. 41** ...

——— *When decree* ...

APPEAL—contd

9 RIGHT OF APPEAL—contd

some way or other adversely affect the appellant The fact that in the judgment there is an adverse finding on a point not directly or substantially in issue between the parties will not give a party a right to contest such a finding where the decree is entirely in his favour and does not necessarily imply that finding The finding would not act as *res judicata* as regards such point *Quære* Whether an appeal would lie even if the matter were *res judicata*? SECRETARY OF STATE v SAMINATHA KOWNDEN (1914)

I L R 37 Mad 25

——— *Letters Patent 1865 s 15— Judgment"—Order by single Judge on Original Side directing defendant to give security —Civil Procedure Code (Act V of 1908) O XXXVII r 2* An order made by a single Judge sitting on the Original Side under O XXXVII r 2 of the Code of Civil Procedure directing a defendant to give security as a term on which leave to defend should be given is not a Judgment within the meaning of s 15 of the Letters Patent and is not appealable *Justices of the Peace for Calcutta v Oriental Gas Company 8 B L R 433* followed *Sonbai v Ahmedbhai Habibhai 9 Bom H C 398* referred to SUKHLAL CHUNDERMULL v EASTERN BANK LD (1915)

I L R 42 Calc 735

——— *Order of Judge sitting on Original Side rejecting an application for an order to set aside dismissal of suit whether appealable—Jurisdiction—Letters Patent 1865 s 15 44— Judgment —Civil Procedure Code (Act V of 1908) ss 104 117 O IX rr 8 9 O XLIII r 1 (c) O XLIX r 3—Costs* An appeal lies to the High Court in its Appellate Jurisdiction from an order made under Order IX rule 9 of the Civil Procedure Code by a single Judge sitting on the Original Side of the High Court rejecting an application for an order to set aside the dismissal of a suit *Hurrish Chunder Choudhry v Kali Sunderi Debi I L R 9 Calc 482 Gobinda Lal Das v Shib Das Chatterjee I L R 33 Calc 1323 Mensab Ali v Nihal Chand I L R 15 All 359 Brij Coomaree v Ramrick Das 5 C W N 781 Toolsee Money Dassee v Sudevi Dassee I L R 26 Calc 361 The Justices of the Peace for Calcutta v The Oriental Gas Co 8 B L R 433 Sonabai v Ahmedbhai Habibhai 9 Bom H C 398 Hadjee Ismail Hadjee Hubbeeb v Hadjee Mahomed Hadjee Joosub 13 B L R 91* referred to *Gobinda Lal v Shib Das I L R 33 Calc 1323* dissented from by MOOKERJEE J The order of dismissal set aside and the suit restored by the Court of Appeal subject to an order for costs *Southampton Isle of Wight Portsmouth Improved Steamboat Co v Rawlins 34 L J Ch 287 Michell v Wilson 25 W R 380 Birch v Williams 24 W R 700 Hall v Lewis 2 Keen 318 Muruga Chetty v Ponasami 22 Mad L J 284 The Oriental Finance Corporation v The Mercantile Credit and Finance Corporation 2 Bom H C 282* and *Burgoyne v Taylor L R 9 Ch D 1* referred to by MOOKERJEE J MATHURA SUNDARI DASI v HARAN CHANDRA SAHA (1915)

I L R 43 Calc 857

——— *The Right of appeal given by s 87 of the Civil Procedure Code 1908 is not taken away by the mere fact that the Judge* has passed the final decree BHAGABAN CHANDRA DAS v ISHAN CHANDRA DAS

22 C W N 831

——— *Sanction for prosecution refused by the Presidency Small Cause Court—High Court revisional jurisdiction of—Appeal from order of single Judge sitting on Original Side made in exercise of such jurisdiction—Nature of trial— Judgment —Civil Procedure Code (Act V of 1908) s 115—Criminal Procedure Code (Act V of 1898) s 195 (6)—Letters Patent (1865) cl 15* Sanction to prosecute the plaintiff in a civil suit in the Presidency Small Cause Court for making a false claim and for making a false statement in an application for leave to institute a suit was refused by a Judge of that Court The defendant thereupon applied to the Original Side of the High Court for a reversal of the order and obtained an order of remand to the Small Cause Court Judge The plaintiff having appealed against this order of remand *Held* that the order appealed against was a judgment within the meaning of cl 15 of the Letters Patent and that there was a right of appeal *The Justices of the Peace for Calcutta v The Oriental Gas Company 8 B L R 433* referred to *Held* also that in every case where the Court is called upon to decide whether the decision under appeal is or is not a judgment within the meaning of cl 15 of the Letters Patent regard must be had to the nature and the contents of the order *Ebrahim v Fukhrunnissa Begum I L R 4 Calc 531 Hadjee Ismail Hadjee Hubbeeb v Hadjee Mahomed Hadjee Joosub 13 B L R 91 Rama Aiyar v Venkatachella Padayachi I L R 30 Mad 311* and *Mathura Sundari Dasi v Haran Chandra Saha I L R 43 Calc 857* referred to BUDHU LAL v CHATTU GOPE (1916)

I L R 44 Calc 804

——— *Arbitration—Award filed in Court—Application to set aside award—Arbitration Act (IX of 1899) s 11 (2)—Civil Procedure Code (Act V of 1908) s 104 (f)—Letters Patent 1865 cl 15* No appeal lies under s 104 (f) of the Civil Procedure Code from an order refusing to set aside an award made and filed under the provisions of the Arbitration Act S 104 (f) of the Civil Procedure Code does not apply to proceedings under cl (2) of s 11 of the Arbitration Act The Court however has jurisdiction to hear the appeal under cl 15 of the Letters Patent CAMPBELL AND Co v JEASHRAJ GIRIDHARI LALL (1917)

I L R 45 Calc 502

——— *Letters Patent clause (15)—Judgment—Order as to costs only passed by a Judge of the High Court on its Original Side whether a judgment—Judgment interpretation of* An order as to costs passed by a Judge of the High Court in the exercise of its original jurisdiction is not the less a judgment within the meaning of clause (15) of the Letters Patent because it relates to costs only *Tuljaram Row v Alagappa Chettiar I L R 35 Mad 1* followed KULASEKARA NAICKER v JAGADAMBAL AMMAL (1919)

I L R 42 Mad 352

——— *No appeal lies against an order passed by an Appellate Court remanding a case otherwise than under O XLI r 23 C P C* MOHENDRA NATH CHAKRAVARTI v RAM TARAN BONDOPADHYAY (1919)

23 C W N 1049

APPEAL—*contd*

9 RIGHT OF APPEAL—*contd*

———— *Against order of restoration of suit if lies when defendant has taken some advantage under the order—Costs and allocatur—Protest absence of* Where a suit which was dismissed for non prosecution was restored on an application on behalf of the plaintiffs and the Court made certain orders in respect of the payment of defendants costs incidental to the application and the defendants got their costs taxed and obtained an allocatur *Held* that they having taken this advantage under the order were precluded from appealing against it BANKU CHANDRA BOSE v MARIUM BEGUM (1916)
21 C W N 232

———— An appeal raising a question of costs only where no question of principle is involved is incompetent UMESH CHANDRA DUTT v BIBHUTI BHUSAN PAL CHOWDHURY (1919) **I L R 47 Calc 67**

———— *Transfer—Order for transfer of a suit— Judgment —Letters Patent (1865) cls 13 and 15* An order for transfer of a suit to the High Court under clause 13 of the Letters Patent is not appealable *Ismail Soleman Bhamji v Mahomed Khan I L R 18 Calc 296 The Justices of the Peace for Calcutta v The Oriental Gas Company 8 B L R 433* referred to *Hadjee Ismail Hadjee Hubbeeb v Hadjee Mahomed Hadjee Joosub 13 B L R 91* distinguished KHATIZAN v SONAIRAM DAULATRAM
I L R 47 Calc 1104

In a suit alleging an account stated and claiming alternatively to recover such an amount as should be found due it appeared that all the items claimed were statute barred The trial Judge found that there was no account stated but the defendants being willing to pay what was due apart from the statutory defence he took an account and made a decree for a particular sum Upon appeal the High Court agreed with the finding that there was no account stated but increased the amount of the decree —Held that the High Court not having differed from the finding above mentioned had no power to alter the decree since it was a consent decree RAJAH OF KILLIKOTA v CHAITANYA SAHU **L R 47 I A 200**

10 VALUATION OF SUIT

———— *Court fees Act (VII of 1870) s 12—Decision of trying Court as to valuation of suit if open to question in appeal against decree dismissing suit for non payment of additional Court fee on day fixed—Civil Procedure Code (Act XIV of 1882) s 9—Valuation by plaintiff if determines forum of appeal* Where the Court in which a suit was instituted held that it had been undervalued and directed the plaintiff to pay additional Court fees by a certain date but the plaintiff having failed to do so the suit was dismissed *Held* that an appeal lay against the decree dismissing the suit and in that appeal the decision of the first Court regarding the valuation of the suit could be questioned s 12 of the Court fees Act notwithstanding *Omrao Mirza v Mary Jones I C L R 148 H C St d v Mati Mahto I L R 18 Calc 331* relied on *Held* further that the

APPEAL—*contd*

10 VALUATION OF SUIT—*contd*

appeal lay to the Court of the Judicial Commissioner although the Subordinate Judge valued the suit at over Rs 5 000 inasmuch as the plaintiff throughout contended that the value was below Rs 5 000 as stated in the plaint PROKASH CHANDRA SARKAR v BISHAMBHAR NATH SAHI (1909) **14 C W N 343**

———— Where the appellant in an appeal against a mortgage decree does not dispute the amount decreed but raises the question of the liability of certain properties the value of the appeal for the purpose of Court Fees is the value of such properties The Court Fees Act Sch II Art 17 having no application JUGAL PERSHAD SINGH v PARBHU NARAIN JHA
I L R 37 Calc 914

11 MISCELLANEOUS

———— *Suit to wind up partnership and for accounts—Preliminary decree referring suit to Assistant Referee—Question of disputed membership of firm—Report of Referee confirmed by final decree of Trial Judge—Omission to appeal from preliminary decree—Appeal from final decree raising question whether inquiry was rightly referred to Referee—Civil Procedure Code (Act V of 1908) s 97—Interest liability for of partner of firm after dissolution using assets of firm for business for his own benefit* In a suit to wind up a partnership and to have accounts taken the membership of the firm was in dispute certain persons being by the plaintiff alleged to be partners and by the defendants to have been only employees remunerated by a share of the profits An adjudication was made by the Trial Judge which declared that the partnership was dissolved as from 1st July 1907 and then ordered and decreed that it is referred to the Assistant Referee of this Court to take the following account and make the following enquiries that is to say (*a*) to enquire who were the partners entitled to share in the assets and goodwill of the partnership business (*b*) to take an account of the dealings of the parties with the assets of the partnership business From that adjudication though it was appealable the appellants did not appeal The Referee made the enquiries directed and took the account His report as to enquiry (*a*) was adverse to the appellants was excepted to by them and was confirmed by the Trial Judge in his final decree On an appeal by the appellants raising the question whether inquiry (*a*) was rightly included in the first adjudication or whether it was not one which should have been made by the Court itself *Held* (affirming the decision of the Courts below) that the first adjudication of the Trial Judge which included inquiry (*a*) was a preliminary decree under s 97 of the Civil Procedure Code 1908 and that the appellants not having preferred an appeal from it could not question it on appeal from the final decree Where on the dissolution of a partnership one of the partners retains assets of the firm in his hands without any settlement of account and applies them in continuing the business for his own benefit he may be ordered to account for such assets with interest thereon, apart from fraud or misconduct in the nature of fraud AHMED MUSAJI SALEJI v HASHIM EBRAHIM SALEJI (191) **I L R 42 Calc 914**

APPEAL—*contd*

II MISCELLANEOUS—*contd*

———— Where a suit has been remanded on appeal from the order after the suit has been taken up by the first court on remand and finally disposed of is incompetent JANAKI NATH RAY *v* PROMOTHA NATH RAY

15 C W N 830

———— *Against preliminary decree after final decree if can be entertained—Appeal against preliminary decree after final decree—Memorandum of appeal leave to amend—Indian Contract Act (IX of 1872) s 74—Interest payable at a reduced rate if punctually paid if penal* Where an appeal has been preferred against the preliminary decree only after the final decree has been passed the appeal Court is incompetent to entertain the appeal *Mackenzie* v *Nursing Sahai I L R 36 Calc 762 (1909)* approved *Khiroda moyee Dasi* v *Adhar Chandra Ghose 18 C L J 321 (1912)* distinguished The Court however may in a proper case allow the Appellant to amend the memorandum of appeal at the hearing so as to turn the appeal against the preliminary decree into one against both the preliminary and the final decrees An agreement to pay interest at a reduced rate in lieu of the reserved interest at a higher scale as an inducement for punctual payment is not a penal clause *Kirti Chunder Chatterjee* v *Atkinson 10 C W N 640 (1906) Kutubuddin* v *Basiruddin I L R 32 All 488 (1910)* and *Mati Lal* v *Eastern Mortgage and Agency Co 25 C W N 265 (1920)* followed KULADA PRASAD CHAUDHURY *v* RAMANAND PATNAIK

25 C W N 776

———— *Question of Fact—Weight to be given to the opinion of Trial Judge—Duty of Court of Appeal—Practice—Broker s Commission* Decision of a Judge sitting on the Original Side decreeing a claim for commission reversed on appeal on questions of fact [SANDERSON C J dissenting] Principles guiding the Court of Appeal in dealing with the findings of fact arrived at by a Judge of the Court of first instance discussed LALJE MAHOMED *v* GUZDAR (1915)

I L R 43 Calc 833

———— *Review—Civil Procedure Code (Act V of 1908) O XLI r 11 O XLVII r 4—Notice of review to respondents if necessary— Opposite Party —Grounds of appeal if restricted on review—Bengal Tenancy Act (VIII of 1885) ss 85 159 161—Sale in execution of a decree under Chap XIV of that Act—Purchase by a stranger—Meaning of encumbrances in s 161 of the Bengal Tenancy Act* Where an appeal was summarily dismissed by a Divisional Bench of this Court and such order was ultimately set aside on review by the said Bench on an *ex parte* application without notice to the respondents *Held* that the last order was valid even in the absence of such notice *Joy Kumar Dutt Jha* v *Eshree Nand Dutt Jha 16 W R 475 Haladhar Jha* v *Syed Shah Mahomed 25 Ind Cas 880* followed *Abdul Hakim Chowdhury* v *Hem Chandra Das I L R 42 Calc 433* dissented from The expression opposite party in O XLVII r 4 of the Civil Procedure Code means the party interested to support the order sought to be vacated or modified upon the application for review After an appeal is allowed under O XLI r 12 after review the appellants are not restricted to the single ground for appeal which was the basis for review but the whole appeal is before the Court when the case is taken up for final disposal *Lukhi Narain* v *Sri Ram Chandra 15 C W N 921* followed. The rights of a stranger who purchases at a sale in execution of a decree under Chapter XIV of the Bengal Tenancy Act are regulated by s 159 and not by s 85 of that Act The word encumbrances in s 161 of that Act includes the interests of an under raiyat JANAKI NATH HORE *v* PRABHASINI DASSEE (1915)

I L R 43 Calc 178

———— *Death of one of the respondents—Decree passed in ignorance of appellant not entitled to rehearing* The death of one of the defendants or respondents does not abate a suit or appeal *Dale* v *Davie [1890] 2 Q B 260* referred to An unsuccessful litigant has no right therefore to argue his case more than once merely on the ground that one of the other parties to the proceeding was dead at the time of the hearing *Dictum in Goda Coopooramier* v *Soondarammal I L R 36 Mad 167* approved YELLAYAN CHETTY *v* MAHALINGA AIYAR (1914)

I L R 39 Mad 386

———— *Against preliminary decree whether competent when appeal is filed after the passing of the final decree but before it is signed—Civil Procedure Code (Act V of 1908) s 97* Where in a suit for declaration of title and for partition instituted on the 5th July 1913 the preliminary decree was made on the 14th August 1916 and the final decree was passed on the 11th November 1916 but was not drawn up or signed till the 18th November 1916 and in the meantime on the 16th November the present appeal was preferred against the preliminary decree and the respondents raised a preliminary objection that the decree having been passed at the date of the filing of the present appeal the present appeal was incompetent *Held* that at the date when the appeal was preferred the only decree the defendant could appeal against was the preliminary decree as clearly he was not able to appeal against the final decree of which he could not obtain a copy The right of appeal given by s 97 Civil Procedure Code is not taken away by the mere fact that the Judge has passed the final decree PHAGABAN CHANDRA KAIBARTTA DAS *v* ISHAN CHANDRA KAIBARTA DAS (1918) **22 C W N 831**

———— *Change of case in* In this case it was *held* that the lower Appellate Court had erred in accepting and acting upon a case made in that Court but not in the trial Court BIRENDRA KISHORE MANIKYA *v* DOULAT KHAN (1917) **22 C W N 856**

———— admission of subject to being in time—practice—Limitation Act (V of 1908) s 5—An admission of a time passed appeal subject to any objection that may be taken subsequently is irregular The High Court will not ordinarily interfere with the direction exercised by a lower appellate Court in extending time under s 5 of the Limitation Act 1908 but if that court has not in fact exercised any discretion it is open to the opposite party to raise the question in the High Court MUHAMMAD ABDUL KASIM *v* CHATURBHUJ SAHAY **6 Pat L J 444**

APPEAL—contd

II MISCELLANEOUS—contd

——————— *Additional District Magistrate—Whether appeal lies to District Magistrate from an order for security to be of good behaviour passed by the Additional District Magistrate—Criminal Procedure Code (Act V of 1898) ss 10 (2) 406* An appeal lies under s 406 of the Criminal Procedure Code from the order of the Additional District Magistrate to the District Magistrate The Sessions Judge has no appellate authority thereunder MAHENDRA BHUMIJ v EMPEROR (1921) I L R 48 Calc 874

——————— *Preliminary decree—Final decree—Appeal against the preliminary decree after the passing of the final decree—Maintainability—Contract Act (IX of 1872) s 74—Penalty—Stipulation to take interest at reduced rate if payment punctually made whether penalty* Where after the passing of the final decree a party appealed from the preliminary decree but did not also appeal from the final decree *Held* that the appeal from the preliminary decree was incompetent *Ihiroda moyee Dasi* v *Adhar Chandra Ghose 18 C L J 321* distinguished The covenant to accept interest at a reduced rate if it is paid punctually does not make the original rate of interest a penalty within the meaning of s 74 of the Indian Contract Act KULADA PROSAD CHOWDHURY v PAMANANDA PATTANAIK (1921) I L R 48 Calc 1033

APPEAL COMMITTEE

See MUNICIPAL ASSESSMENT I L R 39 Calc 141

APPEAL (CRIMINAL CASES)

See PRIVY COUNCIL PRACTICE OF I L R 41 Calc 1023 I L R 44 Calc 876

——————— *Limitation—Appeal erroneously filed in wrong Court—Extension of time—Sufficient cause—Indian Limitation Act (IX of 1908) s 5* On the 12th January 1920 the petitioner was sentenced by the Additional District Magistrate to two sentences of 4 years and 9 months rigorous imprisonment respectively The sentences to run concurrently On the 2nd February 1920 his counsel erroneously presented an appeal to the High Court which was returned on the 21st February for presentation to the proper Court and was filed in the Sessions Court on the same day The Sessions Judge dismissed it as time barred relying on *Sant Singh* v *Qaim* (*118 P R 1905*) The petitioner filed a revision to the High Court *Held* that the case of *Sant Singh* v *Qaim* (*118 P R 1905*) is distinguishable from the present case on the facts and especially inasmuch as that was a Civil Appeal This appeal being a criminal one there is no successful litigant who has secured any valuable right The Crown cannot be said to gain anything by the appeal being dismissed as time barred as all that the Government is or should be anxious for is that justice should be done *Krisondas* v *Bai Cungabai I L R 30 Bom 59* referred to in *Sant Singh* v *Qaim* (*118 P R 1905*) distinguished *Held* also that the appellant who is in jail should not be deprived of the advantage of having his appeal heard merely because his counsel had been somewhat careless in filing the appeal in a wrong Court and the period of appeal should accordingly be extended SURTA SINGH v CROWN I L R 1 Lah 508

——————— *Criminal case—Practice—Duty of Appellate Court in dealing with the evidence on appeal—Proper standpoint—Conviction not to be upheld unless guilt beyond reasonable doubt affirmatively established—Criminal Procedure Code (Act V of 1898) 423* In an appeal from a conviction it is for the Appellate Court as it is for the first Court to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the appellant has been established beyond all reasonable doubt To hold that unless reasonable ground is given to the Appellate Court for differing from the lower Court the Appellate Court must accept its findings of fact is to approach the case from a wrong standpoint KANCHAN MALLIK v EMPEROR (1914) I L R 42 Calc 374

APPEAL—FORUM OF

See MADRAS CIVIL COURTS ACT 1873 s 77 I L R 38 Mad 531

——————— *Suit for accounts in a Munsif s Court—Munsif passing a decree for more than Rs 5 000—Appeal lying to District Court and not to the High Court under s 13 of the Madras Civil Courts Act (III of 1873)* Where a District Munsif passed a decree for more than Rs 5 000 in a suit for accounts wherein the plaintiff valued the subject matter of the suit at an amount within the pecuniary jurisdiction of the Munsif *Held* that under s 13 of the Madras Civil Court Act (III of 1873) the appeal from the Munsif s decree lay to the District Court and not to the High Court *Ayyalu Naidu* v *Ramaswami Raja* Civil Miscellaneous Appeal No 131 of 1915 and *Chathanath Malhavi* v *Chathanath Kunhunni Menon 4 Mad L J 43* overruled *Ijjatulli Bhujan* v *Chandra Mohan Banerjee I L R 34 Calc 954 958* dissented from *Muthammal* v *Chinnana Gounden I L R 4 Mad 220* referred to KANNAYYA CHETTI v VENKATANARAYYA (1916) I L R 40 Mad 1

APPEAL FROM ACQUITTAL

See STATUTE 4 & 5 VICT C 104 ss 1 AND 2 I L R 36 All 168

APPEAL FROM ORDER

See JURISDICTION I L R 45 Calc 926

APPEAL IN FORMA PAUPERIS

See CIVIL PROCEDURE CODE (1908) O XLIV R 1 I L R 40 All 381

See PROCEDURE I L R 48 Calc 481

See SECURITY FOR COST I L R 42 Bom. 5

——————— *Application to file in time—Dismissal of the application—effect of on appeal—Court fee and payment thereof in time effect of on appeal—Practice—Improper judgment—deprecated* An application for leave to appeal in forma pauperis accompanying an unstamped memorandum of appeal, filed in time was rejected by a D[illegible]

APPEAL—*contd*

11 MISCELLANEOUS—*contd*

——————— Where a suit has been remanded on appeal from the order after the suit has been taken up by the first court on remand and finally disposed of is incompetent JANAKI NATH RAY *v* PROMOTHA NATH RAY

15 C W N 830

——————— *Against preliminary decree after final decree if can be entertained—Appeal against preliminary decree after final decree—Memorandum of appeal leave to amend—Indian Contract Act (IX of 1872) s 74—Interest payable at a reduced rate if punctually paid if penal* Where an appeal has been preferred against the preliminary decree only after the final decree has been passed the appeal Court is incompetent to entertain the appeal *Mackenzie v Nursing Sahai I L R 36 Calc 762 (1909)* approved *Khiroda moyee Dasi v Adhar Chandra Ghose 18 C L J 321 (1912)* distinguished The Court however may in a proper case allow the Appellant to amend the memorandum of appeal at the hearing so as to turn the appeal against the preliminary decree into one against both the preliminary and the final decrees An agreement to pay interest at a reduced rate in lieu of the reserved interest at a higher scale as an inducement for punctual payment is not a penal clause *Kirti Chunder Chatterjee v Atkinson 10 C W N 640 (1906) Kutubuddin v Basiruddin I L R 32 All 188 (1910)* and *Mati Lal v Eastern Mortgage and Agency Co 25 C W N 265 (1920)* followed KULADA PRASAD CHAUDHURY *v* RAMANAND PATNAIK

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I L R 39 Mad 336

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——————— admission of subject to being in time—practice—Limitation Act (V of 1908) s 5—An admission of a time passed appeal subject to any objection that may be taken subsequently is irregular The High Court will not ordinarily interfere with the direction exercised by a lower appellate Court in extending time under s 5 of the Limitation Act 1908 but if that court has not in fact exercised any discretion it is open to the opposite party to raise the question in the High Court MUHAMMAD ABDUL KASIM *v* CHATURBHUJ SAHAY **6 Pat L J 444**

APPEAL—concld

II MISCELLANEOUS—concld

——— *Additional District Magistrate—Whether appeal lies to District Magistrate from an order for security to be of good behaviour passed by the Additional District Magistrate—Criminal Procedure Code (Act V of 1898) ss 10 (2) 406* An appeal lies under s 406 of the Criminal Procedure Code from the order of the Additional District Magistrate to the District Magistrate The Sessions Judge has no appellate authority thereunder MAHENDRA BHUMIJ v EMPEROR (1921) I L R 48 Calc 874

——— *Preliminary decree—Final decree—Appeal against the preliminary decree after the passing of the final decree—Maintainability—Contract Act (IX of 1872) s 74—Penalty—Stipulation to take interest at reduced rate if payment punctually made whether penalty* Where after the passing of the final decree a party appealed from the preliminary decree but did not also appeal from the final decree *Held* that the appeal from the preliminary decree was incompetent *Khiroda moyee Dasi v Adhar Chandra Ghose 18 C L J 201* distinguished The covenant to accept interest at a reduced rate if it is paid punctually does not make the original rate of interest a penalty within the meaning of s 74 of the Indian Contract Act KULADA PROSAD CHOWDHURY v RAMANANDA PATTANAIK (1921) I L R 48 Calc 1033

APPEAL COMMITTEE

See MUNICIPAL ASSESSMENT
I L R 39 Calc 141

APPEAL (CRIMINAL CASES)

See PRIVY COUNCIL PRACTICE OF
I L R 41 Calc 1023
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——— *Criminal case—Practice—Duty of Appellate Court in dealing with the evidence on appeal—Proper standpoint—Conviction not to be upheld unless guilt beyond reasonable doubt affirmatively established—Criminal Procedure Code (Act V of 1898) s 423* In an appeal from a conviction it is for the Appellate Court as it is for the first Court to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the appellant has been established beyond all reasonable doubt To hold that unless reasonable ground is given to the Appellate Court for differing from the lower Court the Appellate Court must accept its findings of fact is to approach the case from a wrong standpoint KANCHAN MALLIK v EMPEROR (1914) I L R 42 Calc 374

APPEAL—FORUM OF

See MADRAS CIVIL COURT ACT 1873 s 7
I L R 38 Mad 531

——— *Suit for accounts in a Munsif's Court—Munsif passing a decree for more than Rs 5000—Appeal lying to District Court and not to the High Court under s 13 of the Madras Civil Courts Act (III of 1873)* Where a District Munsif passed a decree for more than Rs 5 000 in a suit for accounts wherein the plaintiff valued the subject matter of the suit at an amount within the pecuniary jurisdiction of the Munsif *Held* that under s 13 of the Madras Civil Courts Act (III of 1873) the appeal from the Munsif's decree lay to the District Court and not to the High Court *Ayyalu Naidu v Ramaswami P ja* Civil Miscellaneous Appeal No 131 of 1915 and *Chathanath Mallaui v Chathanath Kunhunni Menon 4 Mad L J 43* overruled *Injtulli Bhujan v Chandra Mohan Banerjee I L R 34 Calc 954 958* dissented from *Muttamiral v Chinnara Gounden I L R 4 Mad 20* referred to KANNAYYA CHETTI v VENKATANARASAYYA (1916) I L R 40 Mad 1

APPEAL FROM ACQUITTAL

See STATUTE 24 & 25 VICT C 104 ss 1 AND 2 I L R 36 All 168

APPEAL FROM ORDER

See JURISDICTION
I L R 45 Calc 926

APPEAL IN FORMA PAUPERIS

See CIVIL PROCEDURE CODE (1908) O XLIV R 1 I L R 40 All 381

See PLEADER I L R 48 Calc 481

See SECURITY FOR COST
I L R 42 Bom 5

——— *Application in forma pauperis in time—Dismissal of the application—Effect of—Appeal—Grant of time to pay court fee and filing thereof in time—Effect of on appeal—Practice of pronouncing judgment on Advocate's appearance* An application for leave to appeal *in forma pauperis* accompanied an unstamped memorandum of appeal, filed in time was rejected by a Di tri

APPEAL IN FORMA PAUPERIS—*con d*

Court some months afterwards during the Christmas holidays On the reopening day the appellant applied for and obtained from the Court three weeks time to pay the court fee on the memorandum of appeal The court fee was paid within the time allowed *Held* (i) that the appeal was in time and must be deemed to have been filed as on the original date of presentation (ii) that the dismissal of an application to appeal *in forma pauperis* does not necessarily lead to a dismissal of the memorandum of appeal and (iii) that an Appellate Court has under s 149 Civil Procedure Code power to grant time to pay the requisite court fee *Bai Ful* v *Desai Manor bhai I L R 22 Bom 880* followed NALLAVADIYA AMMAL *v* SUBRAMANIA PILLAI (1916)

I L R 40 Mad 687

APPEAL TO HIGH COURT

See ANCIENT MONUMENT PRESERVATION ACT (VII OF 1904) ss 10 21

I L R 42 Bom 100

See SPECIAL APPEAL

I L R 38 Bom 340

APPEAL TO PRIVY COUNCIL

See APPEAL—

See CIVIL PROCEDURE CODE (1908)—

s 47 AND 109 **3 Pat L J 339**

s 110

s 115 **15 C W N 848**

See LAND ACQUISITION ACT (I OF 1894) s 4 **I L R 37 Bom 506**

See LEAVE TO APPEAL TO PRIVY COUNCIL **I L R 38 Bom 421**

See LEGAL PRACTITIONERS' ACT 1879 s 13 **4 Pat L J 493**

See LIMITATION ACT (IX OF 1908) s 12 SCH I ART 179

I L R 38 All 82

See PRIVY COUNCIL APPEALS

See PROCEDURE

——— mode of valuation for—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 110 **I L R 39 Mad 843**

——— whether lies from consent decree—

See CIVIL PROCEDURE CODE 1908 ss 109 AND 110 **5 Pat L J 383**

——— **Consolidation** of—High Court has inherent powers to allow consolidation of cases for reasons other than those mentioned in Civil Procedure Code 1908 O XLV r 4 CHAUDHRY HARI PRASAD RAI *v* BRIJ KISHOR DAS

3 Pat L J 448

——— **Land Acquisition Act**—(*I of 1894*)—*Award of the Court—Appeal therefrom incompetent* The Collector having made his award under the Land Acquisition Act 1894 as to the value of the land which had been taken for public purposes two Judges of the Chief Court affirmed it sitting as the Court which under the Act means a principal Civil Court of Original jurisdiction and also as the High Court to which an appeal is given from the award of the Court *Held* that an appeal from the High Court was incompetent It was not expressly given by the Act and could not be implied RANGOON BOTATOUNG COMPANY LD *v* THE COLLECTOR OF RANGOON (1912)

L R 39 I A 197
I L R 40 Calc 21

——— **Limitation**—*Period between the signing of the judgment and the decree how far allowed to be calculated in saving limitation in filing Privy Council Appeal—Limitation Act (IX of 1908) ss 5 12 Sch I Art 179* Where the appellant to His Majesty in Council has failed to apply for a copy of the judgment and decree within the period allowed for filing the appeal he cannot be allowed to say that he was prevented from filing the application in time by reason of the decree not being signed and he is not entitled to ask the Court under s 12 of the Limitation Act to deduct the period between the signing of the judgment and the signing of the decree in computing the period of limitation for appeal to His Majesty in Council. *Bechi* v *Ahsan ullah Khan I L R 12 All 461* relied on *Leni Madhab Mitter* v *Matangini Dassi I L R 13 Calc 104* distinguished HARISH CHANDRA TEWARY *v* CHANDPUR COMPANY LD (1912)

I L R 39 Calc 766

——— **Provincial Insolvency Act**—*Right of appeal to Privy Council on what it rest—Letters Patent of 1865 cl 39—Civil Procedure Code (Act V of 1908) ss 109 110 and O XLV r 3—Provincial Insolvency Act (III of 1907) ss 46 47* The right of appeal from the High Court to the Privy Council rests on cl 39 of the Letters Patent of 1865 read with ss 109 and 110 and O XLV r 3 of the Civil Procedure Code The Provincial Insolvency Act does not interfere with any right of appeal to the Privy Council that may otherwise exist *Bombay Burmah Trading Corporation Ltd* v *Dorabji Cursetji Shroff I L R 27 Bom 415* referred to Where an application for insolvency was dismissed under s 15 of the Provincial Insolvency Act and an appeal was also dismissed in the High Court under O XLI r 11 *Held* that an appeal to the Privy Council was competent if the matter was appealable in other ways CHATRAPAT SINGH DUGAR *v* KHARAG SINGH LACHMIRAM (1913)

I L R 40 Calc 685

——— **Sales**—*Orders under ss 311 312 of the Civil Procedure Code 1882 confirming or setting aside sales—Civil Procedure Code 1882 ss 588 (16) 594 595 596—Orders declared final by s 588—Setting aside sale in execution of decree—Non representation of minor—Irregularities in proclamation of sale—Civil Procedure Code 1882 s 287—Under estimation of value of property—Rights of mother of minor as his natural guardian* An appeal lies to His Majesty in Council from an order under s 311 and 312 setting aside or confirming a sale notwithstanding the provisions as to such orders being final contained in s 588 (16) of the Code The definition of decree in s 2 of the Code is not applicable to Chapter XLV (relating to appeals to His Majesty in Council) For the purpose of that Chapter a definition of decree has been therein adopted which is special, and differs from the meaning it bears elsewhere in the Code The word decree in that Chapter must be read as being equivalent to decree judgment or order So read final orders may be appealed

APPEAL TO PRIVY COUNCIL—contd

against to His Majesty in Council under s 595 and that provision cannot be restricted by the provisions of s. 588 (16) that such orders passed in appeal shall be final In this case which was an appeal from an order of the High Court confirming a sale in execution of decree and reversing an order of a Deputy Commissioner which set the sale aside it appeared that the judgment debtor had died pending the proceedings for attachment and sale leaving a widow and a minor son and that the whole of the proceedings subsequent to his death were without notice to any one representing the minor that the sale proclamation had not been properly made and did not contain the particulars *required by s* 287 *of the Code of* Civil Procedure 1882 especially those as to the value of the property which was grossly under estimated that the property was sold for a very inadequate price and that there was abundant evidence that the appellant had suffered substantial injury therefrom *Held* (reversing the decision of the High Court) that there had been no proper representation of the minor and that the above matters constituted material irregularities in publishing and conducting the sale within the meaning of s 311 of the Code which justified the setting aside of the sale There were concurrent decisions of the Courts in India that the Court of Wards never took charge of the property of the minor and their Lordships came to the same conclusion *Held* that inasmuch as the interests of the minor with regard to the property were not in fact represented by the Court of Wards it was open to his mother as his natural guardian to appear (as she had done) and represent him in the proceedings and his appeal was not rendered incompetent thereby KRISHNA PERSHAD SINGH *v* MOTI CHAND (1913) **I L R 40 Calc 635**

——— **Penal Code** —(*Act XLV of 1860*) *ss 302 109—Conviction when to be set aside on appeal—Violation of principles of natural justice or grave injustice done or disregard of legal process—Suspicion of guilt—Inadmissible and hearsay evidence admitted and used to grave prejudice of accused—Absence of reliable evidence* When their Lordships are of opinion that by some disregard of the form of legal process or by some violation of the principles of natural justice or otherwise some substantial and grave injustice has been done then whatever doubts they may have of the appellant's innocence or whatever suspicion they may entertain of his guilt or however great may be their reluctance to interfere with or overrule the decisions of the Indian Courts in criminal matters their Lordships think they are bound to advise His Majesty that the conviction should not be allowed to stand *In re Dil* I A C 459 referred to and followed Their Lordships have come to the conclusion that injustice of the kind mentioned above has been done in this case by the admission of a vast body of wholly inadmissible hearsay and other evidence and the evidence so admitted has been used to the grave prejudice of the accused and that at the end of the hearing before the Sessions Judge there did not exist any reliable evidence upon which a capital conviction could be safely or justly based VAITHI NATHA PILLAI *v* THE KING EMPEROR (1913) **I L R 36 Mad. 501**

——— **Review**—*Civil Procedure Code (Act V of 1908) O XLVII—Letters Patent 1865 cls 10 39—Sanction for prosecution—Criminal Procedure Code (Act V of 1898) s 195* An order sanctioning a prosecution made in the course of a disciplinary proceeding against an attorney under cl 10 of the Letters Patent of 1865 is not governed by cl 39 and therefore against such an order no leave to appeal to the Privy Council can be given Clause 39 of the Letters Patent empowers the High Court to declare the fitness of an appeal to the Privy Council in any matter not being of criminal jurisdiction if it is a final judgment decree or order of the Court made on appeal or in the exercise of original jurisdiction A proceeding under cl 10 *is a disciplinary power which does not fall under* any of the jurisdictions specified in the Letters Patent and thus is not governed by cl 39 IN THE MATTER OF AN ATTORNEY (1914) **I L R 41 Calc 734**

——— **Death of plaintiff**—*Appellant—Suit to set aside adoption by widow as invalid and as affecting reversionary interest of plaintiff—Right of continuing it rests on others to be joined as plaintiffs in presumptive reversion—Suit—Civil Procedure Code (Act V of 1908) O I r 1—Suit to set aside alienation by widow—Pending of appeal—Substitution of parties on record—Survival of right to sue* The appellant brought a suit against the respondents to set aside the adoption of the second respondent by the first respondent as being illegal and invalid under the Hindu Law and for a declaration that it did not affect his interest in the ancestral estate of one F of whom he claimed to be the nearest reversionary heir The suit was dismissed by both Courts in India and the appellant filed an appeal to His Majesty in Council pending which he died In an application by his grandson as the sole surviving member of his grandfather's family and also on his death the next reversionary heir to the estate of F for an order that his name be substituted on the record for that of the appellant and that the appeal be revived *Held* that the petitioner was entitled to the order asked for under O I r 1 of the Civil Procedure Code (Act V of 1908) which declares the persons who may be joined in one suit as plaintiffs A suit to set aside an adoption is brought by the presumptive reversioner in a representative capacity and on behalf of all the reversioners The act complained of is to their common detriment, just as the relief sought for is for their common benefit Under the above rule the contingent reversioner may be joined as plaintiff in the presumptive reversioner's suit and if so it follows that on his death the next presumable reversioner is entitled to continue the suit begun by him The two kinds of suits which the Indian law permits to be brought in the lifetime of a female owner by reversioners for a declaration that an adoption made by her is invalid or an alienation effected by her is not binding against the inheritance [see articles 118 and 125 of schedule I of the Limitation Act (IX of 1908)] although they differ in character will be found to be the same in both instances as regards the position of the plaintiffs so far as the point for decision is concerned and the test of *res judicata* is irrelevant to the inquiry whether the contingent reversioner is entitled to continue the suit commenced by the presumptive reversioner It is the common injury to the reversioners which entitles them to sue and the question

APPEAL TO PRIVY COUNCIL—*contd*

is whether the right to sue urvives apart from any consideration wl ether or not the next pre sumable heir is the legal repre entative of the decea ed pre umptive reversion r VENKATA NARAYANA PILLAI *v* SUBBAMMAL (1915)

I L R 38 Mad 406

——— **Civil Procedure Code (Act V of 1908) s 109**—*Orders remanding not final ord rs o as to le appealable to Privy Council—Civil Pro c dure Code (Act V of 1908) s 109* Order of the High Court reversing on appeal two deci ions of the lower Court and remanding the ca es for trial either on the ground that the lower Court was wrong in di mi ing the suit for insufficiency of the pleading and the other on the ground that the lower Court was wrong in di mi ing the suit on tl e plea of bar contained in s 43 of tl e old Civil Procedure Code are purely preliminary or interlocutory orders which do not decide the re pective rigl ts of the parties and are not *final* orders within the meaning of s 109 Civil Pro cedure Code o as to be capable of being appealed against to the Privy Council *Tirunarayana* v *Gopalasami I L P 13 Mad 349* followed *Saiyid Mu har Hossein* v *Bodha Bibi I L R 17 All 112* applied *Forbes* v *Ameeroon sa Begum 10 Moo I A 340 359* referred to S 109 Civil Procedure Code, does not apply to appeals to His Majesty in Council VENKATARANGA ROW *v* NARASIMHA RAO (1913)

I L R 38 Mad 509

——— **Letters Patent Madras**—*cls 10 and 39—Disciplinary proceedings under clause 10—Right to give leave to appeal to Privy Council* Disciplinary proceedings under clau e 10 of the Letters Patent are not appealable under clause 39 and the High Court has no power to give leave to appeal to the Privy Council from an order pas ed in the exerci e of such juri diction *In re an Attorney I L P 41 Calc ?4* followed *G S D* v *Government Pleader I L P 32 Bom 106* and *Tetley* v *Jai Shankar I L R 1 All 726* referred to *In re S B Sarbadhikary 34 I A 41* explained RAMCHANDRA AYYAR *v* THE PRESIDENT OF THE VAKILS ASSOCIATION HIGH COURT MADRAS (1914)

I L R 39 Mad 128

——— **Appealable value**—*Contract—Breach alleged by both parties—Plaintiff's plea that counter claim not admissible overruled—Point not raised in plaintiff's appeal again t decree in defendant s favour if may be taken by plaintiff in the Privy Council on defendant s appeal again t decree in plaintiff's favour in Appeal Court* Where plaintiff and defendant each alleged breach of contract by the other party making claims and counter claims on that basis and the plaintiff s contention that the defendant s counter claim was not admissible under the Code of Civil Procedure being overruled decree was pas ed in defend ant s favour but the plaintiff did not reopen the que tion in the Appeal Court which rever ed the first Court s decree and made a partial decree in favour of the plaintiff *Held* on defendant s appeal to the Privy Council that the question of the admi ibility of tl e counter claim must be taken to have l een decided between the parties in accordance with the contention of the defendant and the plaintiff could not be permitted to rai e it for showing that defendant s claim on appeal could not come up to Rs 10 000 in value LESLIE & Co *v* N GIRIAH CHETTIAR (1917)

22 C W N 28

——— **Time for valuing of property**—*Whether at date of institution of suit or final decree—Whether plaintiff debarred from proving real value of property—Civil Procedure Code (Act V of 1908) s 110* The point of time to be con idered (as to the value of the property) under the second para graph of s 110 of the Code of Civil Procedure is the date of the judgment or final order under appeal to the Privy Council *Allan* v *Pratt L P 13 A C 780 Macfarlane* v *Leclaire 15 Moo I C 181 Mohideen* v *Pitchey [1894] A C 19? Dalgleish* v *Damodar Narain I L P ?3 Calc 19? Bank of New South Wales* v *Owston L I 4 I C 270 Gooroopersad* v *Juggut Chunder 8 Moo I A 166 Moti Chand* v *Ganga Persad I L I 24 All 174 L R 29 I A 40* and *Nand Kishore Singh* v *Ram Golam Sahu I L P 39 Calc 1037* referred to The que tion whether a tenancy is to be regarded as one at will or one of a permanent nature is a matter in which a sub stantial que tion of law is involved *Maharam* v *Telamuddin 15 C I J ?0* and *Raja Mukund Deb* v *Copi Nath Sahu 21 C L J 45* referred to Where the plaintiff brought his suit in the Mun iff s Court and paid court fees on the annual rental of Rs 44 he is not debarred from subsequently raising the point that the property in dispute was in fact of the value of Rs 11 400 SURENDRA NATH ROY *v* DWARKA NATH CHAKRAVARTI (1916)

I L R 44 Calc 119

——— **Privy Council leave to appeal**—*Civil Procedure Code (Act V of 1908) ss 109 (c) 110—Decree for declaration in first Court—Decree on appeal affirming same and awarding damages in addition—Decree if of affirmance—Cro s suit by applicant in respect of same matter dismissed in both Courts and no sub tantial question of law in volved—Certificate that case otherwise fit for appeal made to avoid inconsistent decree* A having erected a dam across a river sued B for a declaration of his right to put the dam across the river and for damages against the defendant for interfering therewith B on the other hand sued A for a declaration that as riparian owner he was entitled to the use of the water of the river unimpeded by the erection of the dam and for damages in consequence of such erection A s suit was di mi sed by both the lower Courts but B s suit was decreed in the first Court so far only as regards the declaration but the Appellate Court modified it by granting a further decree for damages for Rs 5 000 A applied for leave to appeal to the Privy Council in both suits The value of A s claim in the Court of first instance as also upon appeal to the Privy Council was over Rs 10 000 and the latter covered not merely the amount decreed to B as damages but the declaration also *Held* that the appellate decree in B's suit was one modifying and not affirming the decree of the Original Court and A was en titled to leave as of right That though the decree in A s suit was one of affirmance and no substantial question of law was involved in it as the two suit were dispo ed of by the same judg ment and involved to a material extent the same question in order to avoid incongruous decrees being made in the two suits leave to appeal should be given in A s suit also under s 109 (c)

APPEAL TO PRIVY COUNCIL—*contd*

of the Civil Procedure Code LAGANDEO PROSAD SINGH v D J REID (1918) 23 C W N 582

———— **In formâ pauperis appeal whether maintainable**—The High Court cannot entertain applications for leave to appeal to the Privy Council *in forma pauperis* *Jagadanand Asram* v *Rajendra Loj 17 C L J 391* and *Ramlochan Lal* v *Manna Kumri 3 P L J 169* followed AMBA v SRINIVASA KAMATHI (1918)

I L R 42 Mad 32

———— **Final order" meaning of**—*Order finally disposing of rights of parties—Contract with arbitration clause—Arbitration Act (IX of 1899) 19—Civil Procedure Code 1908 s 109 110—Grant of certificate that value of matter in dispute exceeded Rs 10 000* The decision of the Court of Appeal in England as to what is a final order is that an order is final if it finally disposes of the rights of the parties *Salaman* v *Warner [1891] 1 Q B 734* and *Bozson* v *Altrincham Urban District Council [1903] 1 K B 547* referred to In a suit for damages for an alleged breach of contract for the sale of cotton the contract contained an arbitration clause and the defendant applied under section 19 of the Indian Arbitration Act (IX of 1899) for a stay of proceedings with a view to the issues being referred to arbitration under that section The Trial Judge granted a stay but on appeal the Court of the Judicial Commissioner of Sind reversed that order and refused to stay the proceedings On an application to the Judicial Commissioner for a certificate under section 109 of the Civil Procedure Code 1908 with a view to appeal to the Privy Council the Court of the Judicial Commissioner being of opinion that the order refusing a stay was a final order granted a certificate under section 110 that the value of the matter in dispute exceeded Rs 10 000 and the appeal came to His Majesty in Council On a preliminary objection by the respondent that the order refusing a stay was in fact not final and that the appeal did not lie *Held* that the order under appeal did not finally dispose of the rights of the parties but left them to be determined by the Court in the ordinary way It was therefore not a final order within s 109 of the Civil Procedure Code 1908 which relates to appeals to the Privy Council and appeal was therefore dismissed RAMCHAND MANJIMAL v GOVERDHANDAS VISHANDAS RATANCHAND (1920)

I L R 47 Calc 918

———— **Compromise of suit against minors and others**—An order of the High Court after contest by both parties deciding whether an order of the lower Court recording a compromise was valid or not is not an order by consent and therefore in a proper case an appeal for such an order lies to the Privy Council BIJAY KRISHNA DAS v RAM CHULAM SAHU 6 Pat L J 171

APPEAL UNDER LETTERS PATENT

See INSOLVENCY IN PRESIDENCY TOWNS
I L R 34 Mad 121

———— *Appeal filed beyond time—Application for excuse of delay—Delay not excused by a single Judge—Appeal from the order—Order amounts to judgment under cl 15* Where an appeal has been presented beyond the time allowed by law and application to excuse the delay refused by a single Judge of the High Court the order of refusal amounts to a judgment within the meaning of cl 15 of the Amended Letters Patent and can be appealed from under that clause RAMCHANDRA GANGADHAR v MAHADEV MORESHWAR (1917) I L R 42 Bom 260

APPEARANCE

See DISMISSAL FOR DEFAULT
3 Pat L J 355 & 451
5 Pat L J 17

See EX PARTE DECREE
I L R 41 Calc 951

See FOREIGN DECREE EXECUTION OF
I L R 39 Mad 24

———— **bond for**—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) ss 90 501 AND 507
I L R 38 Mad 1038

APPELLATE COURT

See BOMBAY LAND REVENUE ACT 1879 s 135 I L R 45 Bom 1339

See CIVIL PROCEDURE CODE 1882 s 568 I L R 36 Mad 4[illegible]

See CIVIL PROCEDURE CODE 1908—

O XXIII r 1 I L R 37 All 326

O XLI r 27 I L R 38 Bom 665
I L R 38 Mad 414

See COMPENSATION
I L R 39 Calc 157

See PRACTICE I L R 40 Calc 371

* *See* REMAND I L R 41 Calc 168

See CRIMINAL PROCEDURE CODE [illegible]
I L R 39 Calc 1050

———— **change of**—

See JURISDICTION
I L R 38 Calc 639

———— **Direction by to add parties**—

See REMAND I L R 37 Calc 171

———— **duty of**—

See PRACTICE I L R 40 Calc 376

———— **Judgment of**

See JUDGMENT I L R 2 Lah 3 5

———— **jurisdiction of**—

See ADDITIONAL EVIDENCE
I L R 42 Calc 675

See CIVIL PROCEDURE CODE 1908 O XLI r 30 I L R 43 All 65

See CRIMINAL PROCEDURE CODE ss 9 106 I L R 37 Mad 153

———— **leave to withdraw suit by**—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 107 (1) AND O XXIII r 1
I L R 40 Mad 259
I L R 44 Bom 593

See JURISDICTION
I L R 44 Calc 30[illegible]

APPELLATE COURT—*contd*

——— power of—

See Civil Procedure Code (1908) O XLI r 22 & 33 I L R 1 Lah 396 s 107 I L R 42 All 48

See Costs I L R 42 Calc 451

See Criminal Procedure Code s 195 cl (6) I L R 37 All 439

See Dacoity I L R 41 Calc 35

See Hindu Law—Legal Necessity I L R 38 Calc 721

See Remand I L R 44 Calc 929

——— power of to alter finding —

See Rioting I L R 39 Calc 896

——— *Power to alter conviction under s 147, Penal Code to one under s 323 when the common object charged was other than to cause hurt—Issue of rule and order for bail by the High Court—Duty of the Magistrate on receiving intimation of the same by telegram from Counsel—Delay in transmitting the bail orders—Criminal Procedure Code (Act V of 1898) s 423* The Appellate Court cannot alter a conviction of rioting under s 147 of the Penal Code with the common object to ejecting the complainants from their homestead lands to one under s 323 thereof When a rule is issued by the High Court and the proceedings stayed and *à fortiori* when an order for bail is made the Magistrate on receiving reliable information thereof such as a telegram from the counsel in the case is bound to act on it immediately though he has not received the High Court's orders at the time *Ratnessari Pershad v Empress 2 C W N 495* followed All bail orders must be issued from the office of the High Court on the same day they are passed irrespective of the written order on the record Lal Mohan Mandal v Kali Kishore Bhuimali (1910) I L R 38 Calc 293

——— *Discretion of Appellate Court in the consideration of evidence—Interference with findings of fact of Judge who sees and hears the witnesses rule as to—Pronouncement of Trial Judge as to credibility of witnesses not to be set aside on a mere calculation of probabilities by Court of Appeal—Relevancy of cross examination to credit—Trial Judge's opinion on evidence upheld* Whilst it is doubtless true that on appeal the whole case including the facts is within the jurisdiction of the Appellate Court it is generally speaking undesirable to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has the opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attaches to one or other of conflicting witnesses Nor should the pronouncement of the Trial Judge with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal Bombay Cotton Manufacturing Company v Motilal Shivlal (1915) I L R 39 Bom 386

——— *When should reverse trial Judge's estimate of evidence* Per Richardson J —A Court of Appeal should in general be slow to differ from the trial Court on a question of fact depending on the credibility and veracity of witnesses But there are cases where the trial Judge has approached the evidence from a wrong standpoint or has applied to that evidence wrong standards of probability or improbability If a trial Judge says that a servant speaking for his master ought never to be believed the appeal Court is not obliged to accept his estimate of the servant's evidence In such a case the question is not merely a question of the credibility of the particular witness the witness has not been given a fair chance There are verdicts or findings which are contrary to the weight of evidence Hem Chandra Roy v Bepin Behary Saha Sardar 24 C W N 800

——— *Powers of—Remand for findings—Entire appeal whether open for consideration at final hearing—Inconsistent material facts in the pleadings—Relief in the alternative whether may be claimed—Alternative cases how to be pleaded* P at a time when he was heavily indebted gave some of his immoveable properties to his wife by a deed of gift and then was adjudged an insolvent Subsequently when assets were needed to bring about a composition with the creditors the wife executed a deed of gift covering most of the said properties in favour of the husband who thereafter died In a suit by the wife for the cancellation of the second deed of gift alleging it to have been executed under undue influence the Subordinate Judge gave a decree to the Plaintiff On appeal the High Court remanded the case to the lower Court for finding as to whether the first deed was a genuine transaction The Subordinate Judge found it to be a *benami* transaction *Held* that the entire appeal was open for consideration by the High Court at the final disposal of the appeal *Held* on the evidence that the first transaction was fictitious and the second genuine Official Assignee of Bengal v Bidya Sundari Dasi 24 C W N 145

——— Power of to alter decree in favour of non appealing party Debendro Narayan Sinha v Narendro Narayan Sinha 24 C W N 110

——— When will upset Trial Courts decision in collision case—*General principle that decision must be consistent with case made by parties—Cases where Courts of Appeal should not upset Trial Court's decision unless convinced that it is wrong* It is absolutely necessary that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made The fundamental principle that the plaintiff cannot be permitted to follow a line of attack which the defendant had no opportunity to meet is of special importance in collision cases where the accident happens very often in an entirely unexpected manner and in an extremely short space of time *Held* on a consideration of the circumstances that this was the class of cases where a Court of Appeal should in order to upset the decision of the Trial Court not merely entertain doubts whether the decision below was right but be convinced that it was wrong The parties to the cause are entitled as well on questions of fact as on questions of law to demand the decision of the Court of Appeal and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind in deciding a point on which there is a conflict of

APPELLATE COURT—*concld*

cral te timony that it has neither een nor heard the witne es and could not equ tly make due allowance in this respect W T Rees v John Young 25 C W N 519

APPELLATE DECREE

See Madras Estates Land Act (I of 1908) s 19 I L R 38 Mad 655

APPELLATE FORMS

See Jurisdiction I L R 37 Mad 477

APPELLATE SIDE RULES

See Criminal Procedure Code (Act V of 1898) ss 233 421 537 I L R 39 Mad 527

APPLICATION

See Sanction for Prosecution I L R 41 Calc 14

See Suit I L R 40 Calc 428

——— for leave to appeal—

See Leave to Appeal to Privy Council I L R 42 Calc 35

——— for leave to sue—

See Pauper Suit I L R 46 Calc 651

——— to readmit appeal—

See Civil Procedure Code 1908 s 151 I L R 45 Bom 648

——— to set aside Court sale—

See Civil Procedure Code s 115 I L R 44 Mad 554

——— for which no express provision in the Code—

See Civil Procedure Code 1908 ss 141 151 and O IX r 9 I L R 1 Lah 339

——— to a wrong court—

See Insolvency Proceedings in I L R 39 Mad 74

——— verification of—

See False Evidence I L R 38 Calc 368

APPOINTMENT

See Stamp Act 1899 s 2 Sch I Art 7 I L R 35 Bom 444

——— power of—

See Hindu Law—Will I L R 42 Calc 561

See Lessor and Lessee I L R 38 Mad 86

APPORTIONMENT

See Offerings to Deity I L R 38 Calc 387

See Land Acquisition—Compensation I L R 40 Calc 64

See Lessor and Lessee I L R 38 Mad 83

See Land Acquisition Act (I of 1894) ss 3 (*b*) 11 and 31 (*1*) ( ) I L R 37 Bom 76

APPORTIONMENT—*contd*

——— between zamindar and occupancy ryot—

See Land Acquisition Act I L R 36 Mad 395

APPORTIONMENT OF COSTS

See Punitive Police I L R 40 Calc 452

APPORTIONMENT OF RENT

See Rent suit for I L R 43 Calc 554

APPRAISEMENT

See Bengal Tenancy Act 1885 ss 69 and 70 5 Pat L J 76

See Sanction for Prosecution I L R 45 Calc 336

——— *application for appraisement of produce rent—Order prohibiting removal of paddy till appraisement—Disobedience of order—Applicability of s 188 of the Penal Code and of Order XXXIX r 2 of the Civil Procedure Code—Power to direct prosecution under s 188 for such disobedience—Bengal Tenancy Act (VIII of 1885) s 69—Penal Code (Act XLV of 1860) 188—Civil Procedure Code (Act V of 1908) s 141 and O XXXIX r 2—Criminal Procedure Code Act (V of 1898) ss 195 476* The primary purpose of orders under s 69 of the Bengal Tenancy Act (VIII of 1885) is to prevent breaches of the peace and the disobedience of a prohibitory orde under cl (*3*) falls within the provisions of s 188 of the Penal Code The Subdivisional Magistrate is competent as Collector to act in such cases under s 195 or s 476 of the Criminal Procedure Code and direct a prosecution for such disobedience Lakshan Bor v Nara Narain Hazrah 1921) I L R 48 Calc 1086

APPRENTICE

——— unpaid if public servant—

See Penal Code s 21 15 C W N 319

APPROPRIATION

See Contract Act (IX of 1872) ss 59—61 I L R 37 All 649

See Vendor and Sub Vendor I L R 38 Calc 127

——— of payment—

See Contract Act s 59 60 15 C W N 443

ss 60 and 61 1 Pat L J 474

See Contract I L R 46 Calc 831

See Sale for Arrears of Revenue I L R 38 Calc 537

See Re sale I L R 39 Calc 568

——— to principal or interest—

See Payment by Debtor I L R 48 Calc 839

——— When a debt is due which carries intere t and money is received without a definite appropriation on either the money is first appropriated to the pa interest Meka V ... F Raja Partha arathy

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See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 337 CL (3)
I L R 37 Bom 146
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———— whether Sessions Judge can order commitment of—to Sessions for trial—

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ARBITRATION

See APPEAL I L R 45 Calc 502

See ARBITRATION ACT 1899—
See CIVIL PROCEDURE CODE 1882 ss 13 525 AND 526
I L R 32 All 484

See CIVIL PROCEDURE CODE (1908)—
s 9 SCH II
I L R 37 Bom 442
ss 89 AND 154 SCH II
I L R 43 All 108
ss 99 107 I L R 33 All 645
s 104 I L R 38 All 380
I L R 42 All 185
s 105 I L R 37 All 456
ss 115 151 I L R 38 Bom 638
ss 115 SCH II PARA 16
I L R 45 Bom 832
O XVII R 2 AND SCH II
I L R 45 Bom 1181
O XXI R 3 O XXIV R 4
5 Pat L J 672
O XXXII r 7 Sch II (20) Cl (20)
O XXXIII R 3 SCH II
I L R 38 Bom 687

See COMPANIES ACT (VI OF 1882) ss 67 96 AND 123 I L R 37 All 273

See CRIMINAL PROCEDURE CODE s 145
3 Pat L J 248
25 C W N 719

See DEKKHAN AGRICULTURISTS RELIEF ACT s 15B I L R 35 Bom 310

See BOMBAY DISTRICT MUNICIPAL ACT (BOMBAY) s 160
I L R 36 Bom 47

ARBITRATION—*contd*

See JURISDICTION OF CIVIL COURT
I L R 34 Bom 13

See MAHOMEDAN LAW—HUSBAND AND WIFE I L R 33 All. 683

See PARTNERSHIP 14 C W N 1106
18 C W N 1025

See SPECIFIC RELIEF ACT (I OF 1877) s 21 I L R 33 All 315

See STAMP DUTY I L R 39 Calc 669

See UNITED PROVINCES LAND REVENUE ACT (III OF 1901) ss 203 TO 207
I L R 39 All 711

———— Award—not signed by all arbitrators at the same time and place —

See CIVIL PROCEDURE CODE 1908 SCH II PARAS 15 AND 16 1 P L J 306

———— Decree in accordance with award—no appeal—

See CIVIL PROCEDURE CODE 1908 SCH II PARA 16 1 Pat L J 306

———— misconduct in—

See CIVIL PROCEDURE CODE (1908) SCH II CL 11 I L R 38 Bom 60

I REFERENCE TO ARBITRATION

1 ———— *Letters Patent 1865 cl 15—Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority — Judgment —Appeal—Construction of submission to arbitration—Insurance against fire—Liability of Company for further loss* An order of a Judge dismissing a petition to revoke a submission to arbitration on the ground that the arbitrators are going beyond the scope of the reference is a judgment within the meaning of clause 15 of the Letters Patent and as such is appealable Such an order compels a party to submit to the jurisdiction of arbitrators though he complains that no *such jurisdiction exists* It decides a question of right namely whether or not he is by the terms of reference to arbitration deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law It goes to jurisdiction and is not passed as an exercise of discretion The loss or damage by fire which is insured against in a policy of insurance cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it if they have taken possession A loss so caused is not an inevitable or direct consequence of the mischief by fire It is only where mischief arises from fire (in fire insurance cases) and from perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results that underwriters become responsible for the further mischief so incurred *Montoya v London Assurance Company 6 Ex 451 458* referred to The fact that a petition by nineteen different Companies was not signed by all the nineteen Companies and that the appeal from the order of the Judge dismissing the petition was by but one of the nineteen Companies and the other Companies were not parties to it would have required serious consideration if the Court had to revoke the submission to arbitration but when the order which the Court passes is only an intimation to

ARBITRATION—contd

1 REFERENCE TO ARBITRATION—contd

the arbitrators of its opinion on the question of their jurisdiction it is immaterial whether all or some of the Companies are formally parties to the proceedings in appeal As to the objection that even so far as the petition is by one Company it is signed by one of its officers without any authorisation as required by law the defect is a mere irregularity which can be cured if necessary by the Company putting in a power of attorney showing the authority given to a signatory ATLAS ASSURANCE COMPANY LIMITED v AHMED BHOY HABIBHOY (1908) I L R 34 Bom 1

2 ———————— *Arbitration Act (IX of 1899) s 19—Contract by bought and sold notes — Arbitration clause—Contract Act (IX of 1872) ss 62 63* Where an application under an arbitration clause in a contract was made to stay proceedings and refer matter in dispute to arbitration and it was contended by the opposite party that for the original contract a new agreement had been substituted inasmuch as both parties had agreed to an extension of time *Held* that a mere extension of time did not operate so as to rescind the original contract but where a new term for the inspection of the goods before delivery had also been introduced the original contract was replaced by the new agreement to which the arbitration clause in the original contract could not apply and the application must therefore be refused. In this case the acceptance of part delivery out of time also indicated a new agreement between the parties LACHMINARAIN BHAREODAN v HOARE MILLER & Co (1913) I L R 41 Calc 35

3 ———————— *Jurisdiction— Power of Court to supersede an arbitration proceeding under its orders before submission of award— Revision—Civil Procedure Code (1908) s 115 Sch II para 15 Sembl* That the intention of the second schedule to the Code of Civil Procedure is that when once a reference to arbitartion has been made under the orders of the Court that reference should only be superseded for one of the reasons given in the schedule itself and that allegations of corruption against the arbitrator should be dealt with under para 15 after the award has been received Even if a Civil Court possesses inherent jurisdiction to supersede an arbitration proceeding under its orders such jurisdiction should be cautiously and sparingly exercised and an application invoking such jurisdiction should at least suggest grounds for supposing that the applicant will suffer some irreparable injury if prompt action is not taken. The High Court can interfere in revision when the inherent jurisdiction of a Court is exercised wrongly and with material irregularity *Atlas Assurance Company v Ahmedbhoy Habibhoy I L R 34 Bom 1* not followed CHATARBHUJ v RAGHUBAR DAYAL (1914) I L R 36 All 354

4 ———————— *Bengal Chamber of Commerce arbitration by— Arbitration Act (IX of 1899) s 14—Arbitration clause in a contract— Reference to an association—Rules of an Association for the conduct of arbitration proceedings referred to if whether imported into the contract and binding on the parties thereto* Where a contract contains an arbitration clause by which it is agreed that any dispute arising out of the contract shall be referred to the arbitration of the Bengal Chamber of Commerce the rules of the Association are imported into the contract and are binding on the parties *Per* JENKINS C J The decision in *Ganges Manufacturing Company Ld v Indra Chand I L R 33 Calc 1169* was binding on the learned Judge (of the Court of first instance) and should have been followed by him CHAITRAM RAMBILAS v BRIDHICHAND KESRICHAND (1915) I L R 42 Calc 1140

5 ———————— *Arbitrator refusing to act—Compromise of suit and decree in terms of compromise—Compromise stating matters in dispute and nominating arbitrators to decide them—Power of Court on arbitrator refusing to act—Civil Procedure Code 1882 ss 365 506 508 510—Court determining matter referred to arbitration* S 510 of the Code of Civil Procedure (Act XIV of 1882) which provides that if an arbitrator refuses to act the Court may in its discretion appoint a new arbitrator or make an order superseding the arbitration and in such case shall proceed with the suit is applicable even if the person appointed arbitrator has not accepted office before refusing to act When he has been nominated by the parties his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue and any other construction would defeat the provisions of the Act *Pugardin Rawutan v Moidinsa Rawutan I L R 6 Mad 414* and *Bepin Behari Choudhry v Annoda Prosad Mullick I L R 18 Calc 324* disapproved of In the present case the parties had compromised the suit and had stated in the instrument of compromise the matters in dispute and had each nominated therein a person as arbitrator to decide them A decree in terms of the compromise was made by the Court and the matters were referred to the arbitrators named for their decision One of them refused to act and the party whose nominee he was declined to make another nomination The District Judge in the exercise of his discretion under s 510 of the Code thereupon himself determined the matters submitted to the arbitrators thus practically superseding the arbitration His decision was confirmed by the Court of the Judicial Commissioner *Held* (reversing the decision of the Courts in India) that the District Judge should under s 510 have appointed a new arbitrator which he had power to do notwithstanding that the arbitrator refusing to act had not first consented to do so and he was not precluded from making such appointment by the fact that the party whose arbitrator had refused to act declined to assist the Court by suggesting another name The Court could not proceed with the suit which had been put an end to by the compromise the decree on which was final and it had no power except by consent of parties to itself decide the matters referred to arbitration That right having been remitted to one tribunal had been decided by another was a fatal objection to the procedure adopted SADIQ HUSAIN v NAZIR BEGAM (1911) I L R 33 All 743

6 ———————— *Reference by parties to a suit—Application to stay proceedings—Arbitration Act (IX of 1899) s 19* S 19 of the Arbitration Act only applies where there has been a

ARBITRATION—*contd*

1 REFERENCE TO ARBITRATION—*contd*

submission to arbitration before the commencement of legal proceedings *Ramjidas Poddar* v *Howse I L R 35 Calc 199* followed PERURI SURYANARAYAN & Co v GULLAPUDI CHINNA (1909) I L R 34 Bom 372

7 ——— *Reference made out of Court—Refusal of arbitrator to continue the arbitration—Subsequent application to court to file the agreement to refer* During the pendency of a suit the parties thereto agreed to refer the matters in dispute to arbitration and the suit was withdrawn Before the arbitrator had made his award one of the parties to the reference died and the arbitrator believing himself to have no power to make the representatives of the deceased parties to the proceedings refused to act any longer as arbitrator *Held* that in these circumstances ina much as the arbitrator could not be compelled to act if he did not wish to do so the Court could not accept an application to file the agreement of reference AHMAD NUR KHAN v ABDUR RAHMAN KHAN I L R 42 All 191

8 ——— *Civil Procedure Code (Act V of 1908) paras 17 and 18 of the Second Schedule and s 104 sub cl (e)—Agreement to refer to arbitration—Breach of the agreement—Specific Relief Act (I of 1877) s 21—Right of the party aggrieved—Application to stay suit—Appeal against order staying or refusing to stay suit* Where for the determination of the controversy between the parties two competent tribunals are available the Court and the arbitrators and the plaintiff chooses the latter but in fact has recourse to the former it is not open to his opponent to enforce specific performance of the contract or to plead the contract as a conclusive bar to the suit but he may apply to the Court to stay the suit in the exercise of its judicial discretion so as to enable either of the parties to obtain a reference to the arbitrators When the Court is apprised that the suit has been instituted in contravention of an arbitration agreement the Court has a discretion to stay the suit The burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration and not on the defendant to show that no such reason exists it is the *prima facie* duty of the Court to act upon the agreement between the parties *Iyon* v *Johnson 40 Ch D 579 Clegg* v *Clegg 44 Ch D 200 Hoagson* v *Railway Passenger Assurance Co 9 Q B D 188 Willesford* v *Watson L R Ch App 4 3 Sheo Babu* v *Udit Narayan 17 A L J 757* and *Appavu* v *Seeni I L R 41 Mad 115* approved DINABANDHU JANA v D JANA I L R 46 Calc 1041

9 ——— *Application to stay legal proceedings commenced by party to submission—Order refusing to stay— Step in the proceedings—Appeal right of—Judgment—Arbitration Act (IX of 1899) s 19—Letters Patent 1865 cl 15* The decision of the Court that the applicant was not in the circumstances of the case competent to avail himself of the benefit of the section by reason of steps taken by him in the proceedings in the suit determined that the controversy between the parties must be decided by the Court and not by arbitration and was a judgment within the meaning of the Letters Patent and as such was appealable under clause 15 *The Justices of the Peace for Calcutta* v *The Oriental Gas Company Limited 8 B L R 433 Hadjee Ismail Hadjee Hubbeb* v *Hadjee Mahomed Hadjee Joosub 13 B L R 91 Mathura Sundari Dasi* v *Haran Chandra Saha I L R 43 Calc 857* and *Budha Lall* v *Chattu Gope I L R 41 Calc 801* referred to S 19 of the Arbitration Act contemplates the institution of a suit notwithstanding an agreement to refer to arbitration and authorises the defendant in such suit to apply for stay before he has filed his written statement or taken any other step in the suit Such an application for stay does not constitute taking a step in the proceedings within the meaning of s 19 so as to operate as a bar An appeal by the defendant on certain grounds taken in his memorandum of appeal against an order restraining him from proceeding with the arbitration does not constitute the taking of a step in the proceedings within the meaning of section 19 Such grounds in order to constitute a bar must be taken in the suit *Adams* v *Catley 66 L T R 687* and *Ives & Barker* v *Willans [1891] 2 Ch 478* referred to JOYLALL & Co v GOPIRAM BHOTICA (1920) I L R 47 Calc 611

10 ——— *Clause in indent—Suit by seller against buyer on bills of exchange accepted by the latter—Whether buyer can ask for stay of proceedings under Civil Procedure Code Act V of 1908 Sch II r 18—Negotiable Instruments Act XXVI of 1881 ss 32 43* The defendant Firm placed an indent for the purchase of 10 bales of white shirting of certain specified qualities with the plaintiff Firm The plaintiff after shipment of goods drew two bills of exchange against the defendant at 60 days sight These were presented by the National Bank of India Delhi to the defendant who accepted them but subsequently refused to pay them upon maturity The plaintiff accordingly sued the defendant and based his claim upon the accepted but unpaid bills and in the alteranative sued for the price of the goods and certain expenses The indent contained a clause that if any claim or dispute arose in connection with the contract it should be referred to arbitration and the defendant relying on this clause applied for stay of the proceedings under r 18 Sch II of the Code of Civil Procedure The indent also contained a clause to the effect that the bills drawn by the sellers on the buyers must be accepted and paid at maturity notwithstanding any objection the latter may have regarding or on account of any variation whatever in the terms of the indent such objection to be settled by arbitration *Held* that having regard to s 32 of the Negotiable Instruments Act and the terms of the indent the suit on the bills of exchange was competent and defendant could not claim a stay of proceedings under r 18 Sch II of the Code of Civil Procedure *Ganesh Das Ishar Das* v *Durga Dat Jagan Nath (I L R 2 Lah 19)* distinguished RADHA BEHARI DIWAN SINGH v ALEXANDER I L R 2 Lah 335

11 ——— *Motion to stay proceedings—Submission—Jurisdiction of Court—Discretion of primary Court—Interference of Court of appeal—Arbitration Act (IX of 1899) s 19* Before the jurisdiction of the Court to make

ARBITRATION—contd

1 REFERENCE TO ARBITRATION—contd

an order for stay under s 19 of the Indian Arbitration Act can be invoked it must be established beyond all doubt that there is a valid submission Where there is a submission before an order can be made the Court must be satisfied that there is no sufficient reason why the matters should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration This is manifestly a matter largely in the discretion of the Court which no doubt must—be judicially exercised But when the discretion has been exercised by the primary Court a strong case must be made out to justify the interference of a Court of Appeal *Freeman & Sons v Chester Rural District Council [1911] 1 K B 83 Vawdrey v Simpson [1896] 1 Ch 166* and *Barnes v Youngs [1898] 1 Ch 414* referred to KEDARNATH BABULAL v SUMPATRAM DOOGER (1920)
I L R 47 Calc 1020

12. ——— *Subsequent institution of suit—Position of arbitrators—Award—Stay of suit—Arbitration Act (IX of 1899) s 19—Appeal—Discretionary order* One of the parties to an Arbitration to the Bengal Chamber of Commerce under a clause in a contract instituted a suit pending the arbitration on the same contract After the institution of the suit an award was made but was set aside Subsequently the defendant made an application for stay of the suit *Held* that the institution of the suit though it made the arbitrators *functus officio* could not affect the validity of the reference which when made was in exact conformity with the agreement between the parties and that portion of the arbitration proceedings which took place before the institution of the suit was not affected *Held* further that when the suit is stayed it would be competent to the Chamber of Commerce to substitute and appoint new arbitrators and the Court so re constituted will be then able to proceed with the arbitration *Doleman & Sons v Ossett Corporation [1912] 3 K B 257 Dinabandhu Jana v Durga Prasad Jana I L R 46 Calc 1041 Freeman v Chester Rural District Council [1911] 1 K B 783 Vawdrey v Simpson [1896] 1 Ch 166 Barnes v Young [1898] 1 Ch 414 Wallis d v Watson L R 8 Ch App 100 I v Garrett 8 Ch D 96 Lyon v Johnson 40 Ch D 5 Clegg v Clegg 44 Ch D 200 Mitchell v Turnbull 25 W R (Eng) 203 Mason v Haddon 6 C B N S 526 Hodgson v Railway Passengers Assurance Company 9 Q B D 188 Fox v Railway Passengers Assurance Company 54 L J Q B 505 Dunn v Legge 72 L T 6 C Clough v County Live Stock Insurance Association 85 L J K B 1185* referred to JOHIRAM KALA v GHANESHAMDAS KEDARNATH (1920) **I L R 47 Calc 849**

13 ——— *Reference without order of Court—Matters left undecided* Where parties to a reference submit their differences to arbitration they cannot be allowed to revoke without any good cause **4 Pat L J 394**

14 ——— *Arbitration Act (III of 1899) s 11—Reference to arbitration under contract—Contract denied or impeached—Interlocutory injunction restraining arbitration proceedings when may or may not be granted—Injunction if should be granted when proceedings would be nullity although vexatious—The procedure to be followed by party denying contract* When a contract is impeached on equitable grounds the Court may restrain arbitration proceedings commenced under it by issuing an injunction but no such injunction should be granted when the contract is merely denied The proper course to be followed by the party denying the contract indicated The Court would not grant an interlocutory injunction restraining proceedings which are null and futile although the same may be vexatious SARDAR MULL JESSRAJ v AGAR CHAND MEHTA & Co (1919) **23 C W N 811**

15 ——— *Civil Procedure Code (Act V of 1908) s 11—Arbitration—Arbitrator not resigning or declining to act but arbitration not proceeding owing to practical difficulties—Court's jurisdiction to withdraw arbitration* A suit was referred to arbitration but subsequently although the arbitrator did not resign or decline to act practical difficulties arose so as to prevent arbitration proceedings being taken in hand by the arbitrator and the Court cancelled the arbitration and ordered the suit to be proceeded with *Held* that s 18 Sch II C P C was not applicable to the circumstances of the present case That the question whether the arbitration agreement and the proceedings had thereunder constituted a bar to the prosecution of the suit was to be decided in the suit itself on an issue raised for the purpose and the order of the lower Court should be vacated SASHIMUKHI DEBI v PARBATI SHANKAR ROY (1918) **23 C W N 293**

16 ——— *Held* that a reference entitled arbiters to go into a question of forgery ALIBHOY MAHOMED v BAIJNATH KALOORAM **24 C W N 567**

17 ——— It is open to parties to an appeal even after the matter has been referred to the High Court to settle matters by arbitration RAM LAL v DEO RAJ
I L R 44 All 44

2 AWARD

(a) AWARD

1 ——— *Award—Dispute existence of—What is a dispute—Award as to interest* The applicant challenged an award on the ground that it was made without jurisdiction as there was no dispute between the parties he having admitted his liability under the contract though wanted a set off against claims arising out of other transactions *Held* that the existence of a dispute was an essential condition for the arbitrator's jurisdiction but the dispute might be either in the acknowledgment of the debt or as regards the mode and time of satisfying it *Macdonald v Donald Campbell & Co (1916)* unreported referred to *Gobardhan Das Piyara Lal v B Nath Lal & Co (1918)* unreported and *Narendra Nath Basu v Ram Narain Jal (191)* unreported distinguished *Held* also that the arbitrators had jurisdiction to make an award as to interest *Produce Brokers Co Ld v Olympia Oil and Cake Co Ld [1916] A C 314* referred to UTTAM CHAND SALIGRAM v JEWA MAMOOJI (1919) **I L R 46 Calc 534**

ARBITRATION—*contd*

2 AWARD—*contd*

2 ——————— *Award—Time for making award not specified by Court—Application to set aside award—Extension of time for making award—Jurisdiction of Court—Arbitration Act (IX of 1899) ss 12 13—Civil Procedure Code (Act V of 1908) O XLI r 33* The Bengal Chamber of Commerce made an award in an arbitration proceeding in favour of one of the parties to a certain contract On the application of the aggrieved party the award was remitted on the 22nd July 1918 by the High Court to the Bengal Chamber of Commerce for further consideration The Chamber thereupon made a fresh award on the 24th October 1918 again in favour of the same party as at first Both parties obtained separate Rules from the High Court—the one aggrieved by the award to show cause why the said award should not be set aside as having been made in contravention of s 13 (2) of the Indian Arbitration Act the other in whose favour the award was made to show cause why the time for making the award should not be enlarged till the 31st October 1918 *Held* that without deciding whether there was an appeal against the order refusing to extend the time an appeal lay against the order setting aside the award and the Court in considering that appeal must consider the learned Judge s reasons for his decision and if the Court came to the conclusion that the learned Judge s reasons were ill founded and that he was wrong in holding that he had no power to extend the time and so make the award effective this Court would have the power to make an order for extension of time under O XLI r 33 of the Civil Procedure Code *Held* also that this case depended upon the provisions of the Indian Arbitration Act and under s 12 of that Act the Court had power to extend the time though the time for making the award had expired and even though the award had been in fact made *Shib Krishna Daun & Co* v *Satish Chunder Dutt I L R 38 Calc 5*[?] and *Raja Har Narain Singh* v *Chaudhrain Bhagwant Kuar I L R 13 All 300* distinguished *Knowles & Sons Ld* v *Bolton Corporation [1900] 2 Q B 253* approved TEJPAL JAMUNADAS v B NATH MULL & Co (1919) **I L R 46 Calc 1059**

3 ——————— *Award filing of—Time requisite for obtaining copy of a decree—Submission to the Court and Filing in Court—Exclusion of time between submission and filing—Limitation Act (IX of 1908) Sch I Art 158—Civil Procedure Code (Act V of 1908) Sch II s 10—Rules and Orders of the High Court Chapter XVIII r 1* The arbitrator in a certain suit made his award on the 22nd August 1917 and on the 3rd September 1917 the plaintiff through his attorneys applied for a copy of the award On the 10th October 1917 the award was received by the Registrar Owing to the Long Vacation the Court was closed on that date and remained so till the 17th November 1917 On the 22nd November 1917 the defendants filed the award in Court In pursuance of the above mentioned application dated the 3rd September 1917 a copy of the award was supplied to the plaintiff on the 27th November 1917 On the 6th December 1917 the plaintiff applied to the Court for an order to set aside the award and the award was subsequently set aside On appeal *Held* that it was not shown that it was the duty of the respondent to file the award and that he could and should have done so between the 17th and 22nd November *Held* also that r 1 Chapter XVIII (of the Rules and Orders of the High Court) did not appear to be in conformity with the provisions of r 10 Sch II of the Code of Civil Procedure *Held* also that if time commenced to run either on the 10th October or 22nd November it did not appear that the application (of the 6th December) was barred *Per* CUPIAM It seems that the word Court in Art 158 of the Limitation Act means Court and not its Registrar and submission means submission to the Court which again according to Sch II s 10 of the Civil Procedure Code is to be done by filing the award in Court *Nobin Kally Dabee* v *Ambica Churn Bannerjee 5 C W N 813* doubted SOVA CHAND BHUTORIA v HURRY BUX DEORA (1918) **I L R 46 Calc 721**

4 ——————— *Agreement to refer to—Award made ex parte—Notice of arbitrator s intention to proceed ex parte—Non appearance of party—Validity of award—Filing of award—Arbitration Act (IX of 1899) ss 11 (2) and 15 (1)* Sub section (2) of section 11 read with sub section (1) of section 15 shows that the moment an award has been filed in Court by the arbitrator it becomes enforceable as if it were a decree of the Court even before the arbitrator has notified to the parties the fact of its filing under section 11 (2) *Baijnath* v *Ahmed Musaji Saleji I L R 40 Calc 219* referred to There is no statutory rule that if an arbitrator proceeds *ex parte* without giving notice of his intention to proceed in that manner the award made by him must be set aside Where an arbitrator has proceeded *ex parte* without giving notice of his intention to proceed in that manner the true test is has the complainant who takes exception to the validity of the award been in fact prejudiced by the omission of the arbitrator to serve the special notice on him If it is established that notwithstanding such warning he would not have appeared before the arbitrator he has really no grievance and cannot invite the Court to set aside the award on account of the alleged defect in procedure *Claluin* v *Chilcote 9 Doul 550 Waller* v *King 9 Mod 63 Wood* v *Leake 12 Ves 412 In the matter of Hall* v *Anderson 8 Dowl 326* and *Scott* v *Van Sandau 6 Q B 237* referred to UDAICHAND PANNA LALL *v* DEBI BUX JEWANRAM (1921) **I L R 47 Calc 951**

5 ——————— *Agreement to refer to—Reference made before suit—Award given during the pendency of the suit—No application for stay of suit—Validity of award—Jurisdiction of the Court* Where an action has been commenced upon a contract which contains a provision for reference to arbitration even if a reference to arbitration has been made before the commencement of the suit the award is of no effect unless the suit has been stayed pending the arbitration If the Court has refused to stay an action or if the defendant has abstained from asking it to do so the Court has seisin of the dispute and it is by its decision and by its decision alone that the rights of the parties are settled *Doleman & Sons* v *Ossett Corporation [1912] 3 K B 257 Dinabandhu Jana* v *Durgaprasad Jana I L R 46 Calc 1041 29 C L J 399 23 C W N 716* and *Apparu*

ARBITRATION—contd

2 AWARD—*contd*

Routher v Seni Routher I L R 41 Mad 115 referred to RAM PROSAD SURAJMULL v MOHAN LALL LACHMINARAIN (1919)

I L R 47 Calc 752

6 ——————— *Notice—Award against a firm—Arbitration Act (IX of 1899)—Jurisdiction* It is the duty of the arbitrators before they proceed *ex parte* to see that the parties had sufficient notice to enable them to appear and put their case before the arbitrators An award against a firm is not bad The provisions which relate to the execution of a decree against a firm apply in the case of an award which has been filed award being made against the firm *Hardwary Mill v Ahmed Musaji Saleji 13 C W N 63* dissented from LOUIS DREYFUS & Co v PURUSHOTTAM DAS NARAIN DAS (1919)

I L R 47 Calc 29

7 ——————— *Dispute—Award upon an award—Jurisdiction of the arbitrator—Award determining the default and default price—Subsequent award determining the amount due whether valid* Disputes having arisen under contract for the sale of jute (in the terms of the London Jute Association Contract Form No 3 1913) these were referred to arbitration under the arbitration clause contained therein The arbitrator determined the default of the sellers and fixed the default price The sellers refused to pay the amount found due on the basis of the award Thereupon the matter was again referred to arbitration and the second award fixed the amount due from the sellers *Held* the second award was valid CHANDANMULL *v* DONALD CAMPBELL & Co (1916) **23 C W N 707**

8 ——————— *Staying proceedings before arbitrator—Injunction—Wagering contract—Jurisdiction—Equitable grounds* The plaintiff (appellant) and the defendants (respondents) entered into several contracts for the purchase of hessian cloth which were followed by settlement contracts Disputes having arisen under the contracts the defendants referred the same to arbitration under the arbitration clause contained therein. Plaintiff brought the suit for amongst other things a declaration that the contracts were of a gambling and wagering nature and so void under the Contract Act and applied for a stay of the arbitration proceedings *Held* under the circumstances the plaintiff had no equity which would entitle him to ask for an injunction restraining the arbitration proceedings BALJNATH v MANSUKRAI PANNALAL (1918)

I L R 37 Mad 258

9 ——————— *Award—Decree following award—Appeal right of—Civil Procedure Code (Act V of 1908) second Schedule rules 15 and 16—Letters Patent of 1865 cl 15* Where an application to set aside an award on the ground that it was made after the expiration of the period allowed by the Court has been refused and subsequently judgment has been given according to the award no appeal lies from such judgment on the same ground whether under the Letters Patent or under the Code of Civil Procedure SHIB KRISTO DAW & Co v SATISH CHANDRA DUTT (1912) **I L R 39 Calc 822**

10 ——————— *Bengal Chamber of Commerce arbitration by—Award filing of—Arbitration Act (IX of 1899) ss 11 13 14 and 15—Rules under the Indian Arbitration Act 1899—Submission—Bought and sold notes—Stamp duty—Form of order—Costs* Where bought and sold notes relating to a contract for the sale of goods contained an arbitration clause and were stamped with one anna stamp *Held* that on the materials before the Court the practice of stamping such documents with one anna stamp was not invalid and the proceedings in arbitration were effectual Under the provisions of the Indian Arbitration Act an award is to be filed not on the application of the parties but at the instance of the arbitrator and when the award has been filed the result is not that there is a suit in which a decree has been passed but that there is an award which is enforceable as a decree *Tribhuvandas Kalliandas Gajjar v Jivanchand I L R 35 Bom 196* and *In re Bankruptcy Notice [1907] 1 K B 478* referred to Such of the rules of Court framed under the Indian Arbitration Act as are not in accordance with the Act are inoperative and no effect can be given to them BAIJNATH v AHMED MUSAJI SALEJI (1916)

I L R 40 Calc 219

11 ——————— *Award—Party to the suit not made party to the submission to arbitration—Party so omitted not a necessary party to the suit* *Held* that an arbitration and an award made in the course of a suit would not be rendered invalid by the mere fact that a party whose name was in the record but who was not a necessary party to the suit was not made a party to the arbitration proceedings SABTA PRASAD *v* DHARAM KIRTI SARAN (1912) **I L R 35 All 107**

12 ——————— *Legal misconduct of arbitrator—Award set aside—Remission of award—Arbitration Act (IX of 1899) ss 13 and 14* Where an award was set aside on the grounds of the legal (as distinguished from moral) misconduct of the arbitrator and the indefiniteness of the award *Held* that the Court had the power to remit the award to the arbitrator for reconsideration *Re Arbitration between Montgomery Jones & Co and Liebenthal & Co 78 L T 406* and *Anning v Hartley 27 L J Exch 145* followed. *In re Keighley Maxsted & Co and Bryan Durant & Co [1893] 1 Q B 405* referred to CROMPTON & Co LD AND MOHAN LAL *Re Arbitration between* (1915) **I L R 41 Calc 313**

13 ——————— *Award—Misconduct of arbitrator—Application to file award and for a decree in accordance with it—Civil Procedure Code 1908 sch II para 14 15 20—Arbitrator witness—Evidence of arbitrator where charges of dishonesty and partiality are made—Portion of award invalid but separable—Arbitrator's notes* *Held* in this case that an award which had been made in arbitration proceedings without the intervention of the Court and in respect of which an application was made under paragraph 20 of the Civil Procedure Code 1908 that the award should be filed in Court and a decree passed in accordance therewith was not invalidated by anything done by the arbitrator in the arbitration proceedings his acts not amounting to corruption or misconduct within the meaning of paragraph 15 of schedule II of the Code If irregularities can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient

ARBITRATION—*contd*

2 AWARD—*contd*

to vitiate the award without any imputation on the honesty or impartiality of the arbitrator but no such irregularities were established by the appellant on whom the onus of proving them lay An arbitrator selected by the parties comes within the general obligation of being bound to give evidence and where a charge of dishonesty or partiality is made any relevant evidence he can give is without doubt properly admissible It is however necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose namely to scrutinize the decision of the arbitrator on matters within his jurisdiction and in which his decision is final The limitations applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case of *Buccleugh* v *Metropolitan Board of Works L R 5 H L 418* but where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established In this case the charges of dishonesty and partiality were *held* to have entirely failed Where part of an award was found to be invalid as being in excess of the arbitrator s powers and it was separable from the rest the remainder of the award being good was maintained It is generally desirable that an arbitrator should make and retain for sub equent use if necessary notes of the proceedings before him but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties who must be held to have known the general course of procedure and who did not make any protest until after the making of the award with the terms of which she was not satisfied AMIR BEGAM *v* BADR UD DIN HUSAIN (1914) **I L R 36 All 336**

14 ——————— *Private award if compulsorily registrable—Deed of partition and award distinction between* The word award in cl (*b*) of s 17 of the Indian Registration Act is not *restricted to awards filed in Court* and a private award is not compulsorily registrable But a document which purports to be an award may amount to something more than an award if the parties to the reference affix their signatures to the award in token of their acceptance of the decision of the arbitrators the award may there upon become a deed of partition and may as such become compulsorily registrable TEK LAL SINGH *v* SRIPATI CHOWDHURI (1913) **18 C W N 475**

15 ——————— *Award filed out of time—Agreement of parties not to dispute award—Civil Procedure Code (Act V of 1908) s 148 sch II cls 8 15 and O XXIII r 3* Where the Court granted time till the 28th of February 1914 for filing the award and the arbitrators made an award in the Hindi language on that date and also signed the same but instead of filing it on that day had the same rendered into English and filed the same on the 2nd of March following *Held* that the word filing in the Court s orders was a clerical error and since the Hindi award was made within the time fixed by Court it did not matter that the award rendered into English was prepared and filed two days later the requirements of the law had been satisfied and the award was a good one *Quære* Whether *Shib Krishna* v *Satish Chandra I L R 38 Calc 522* had been rightly decided having regard to the change in the law made by the wordings of s 148 and sch II cls 8 and 15 of the Code of Civil Procedure (Act V of 1908) which would seem to give the Court discretion to extend time even after the original time for making the award has expired Whether having regard to the above changes in the law the decision of the Privy Council in *Rajah Har Narain* v *Bhagwant I L R 13 All 300 s c L R 18 I A 55* is of the same binding authority as before *Semble* As in this case while the award was being rendered into English the parties entered into a written agreement not to dispute the award the plaintiff was precluded from questioning the award The agreement might be regarded as amounting to a fresh submission and acceptance of the English award as an award binding on all the parties to the agreement or it might be regarded as a lawful adjustment of the suit which might be enforced as a decree under O XXIII r 3 SRI LAL *v* ARJUN DAS (1914) **18 C W N 1325**

16 ——————— *Award—Private award by arbitrators—Order of Court to file award—Appeal if competent after decree drawn up—Decree if subsists after order set aside—Capacity to refer—Executors if may refer question of construction of will—Arbitrators if may be empowered to alter will—Award so altered if valid—One party to reference if may object to legality—Estoppel—Award affecting persons not parties to reference if enforcible* The right to appeal against an order directing to be filed an award made by arbitrators without the intervention of the Court is not lost as soon as a decree is drawn up in accordance with the judgment pronounced on the basis of the award The order does not merge in the decree It is competent to a Court setting aside an order directing an award to be filed to declare that the decree based on the award has been vacated because the order on which it was based has been cancelled *Kshetra Nath* v *Ushabala 18 C W N 381* Submission to arbitration is a contract and the parties thereto must not only have a general legal capacity to contract but they must also have such power in relation to the subject matter of the submission as will enable them to carry into effect any order which could be legally and properly laid upon them by the award Where a party s capacity to contract is restricted the power of making a submission is in the same manner and to the same extent limited An executor cannot make a reference to arbitration with the avowed purpose that the terms of the will may be modified and arrangements made for the management and distribution of the estate contrary to the directions of the testator Questions of law including questions as to construction of a will may be validly referred to arbitrators But they cannot add to or alter the terms of the will A Court will not enforce an award to the detriment of persons not parties to a reference may take exception to the legality of the award Submission to an arbitrator does not operate as a waiver of an extrinsic objection that the award is illegal because based on an illegal act or subject matter SOUDAMANI GHOSH *v* GOPAL CHANDRA GHOSE (1914) **19 C W N 948**

ARBITRATION—*contd*

— AWARD—*contd*

17 ———————— *Order of reference authorising arbitrator to extend time made by consent of parties—Arbitrator extending time after the period originally fixed by Court had expired—Arbitrator after such time if functus officio—Award submitted within such extended time if must be set aside—Arbitrator s interest in subject matter in suit when insignificant and unknown to him if would invalidate award* Where an order of reference to an arbitrator under Sch II of the Code of Civil Procedure (Act V of 1908) fixed three months time for the submission of the award to Court and also empowered the arbitrator to extend the time for such submission from time to time by endorsement in the office copy of the order *Held* that when the Court had made the order by consent of the parties, there could be no objection to the functions of the Court with regard to the enlargement of time being delegated to the arbitrator if the parties so desired But the arbitrator can only extend the time in such cases before the time originally fixed for making the award had expired If he did not do so he was by reason of effusion of time *functus officio* and had no further jurisdiction in the matter As in this case the arbitrator had extended the time after the three months originally fixed by Court had expired the award must be set aside although it was submitted within the time so extended by the arbitrator *If an arbitrator unknown to one of the parties* has a personal interest in the subject matter of the award it would be improper that he should act as arbitrator If however his interest is insignificant and unknown to himself so that it is impossible that it could have influenced his award in any way the Court would not be disposed to set aside the award. CO OPERATIVE HINDUSTHAN BANK LD *v* BHOLA NATH BOROOAH (1914)
19 C W N 165

18 ———————— *Private award in excess of reference and contrary to law on one point but valid as to rest—Invalid portion separable from valid—Court if may accept valid portion and pass a decree on it—Award not enforcible summarily but operative as contract* Where the matter has been referred to arbitration without the intervention of the Court under para 21 of Sch II of the Civil Procedure Code the Court cannot proceed to file the award when any of the grounds mentioned in paras 14 and 15 of the same Schedule is proved Even when the portion of the award open to exception is separable from the rest the Court cannot proceed to give effect to the portion which is valid in a summary proceeding under para 21 of Sch II of the Civil Procedure Code The mere fact however that the award cannot be filed will not affect the validity of this portion of the award as a contract between the parties A mistake of law on a legal point specifically referred to the arbitrators would not vitiate their award but a decision on a *question of succession not referred to them* and patently contrary to law cannot be accepted by the Court DINABANDHU JANA *v* CHINTAMONI JANA (1914) **19 C W N 476**

19 ———————— *Application of parties to Court for reference of suit to arbitration—Omission of guardian of minor party to sign application—Civil Procedure Code 1908 ss 114 115 121 and O XLVII (1) Sch II ss 1 15 and 16 (1) (2) —Ground for setting aside award—Reversal by Officiating Chief Commissioner on review of order of Chief Commissioner refusing revision—Finality of decree of award* *Held* that Sch II, s 1 of the Civil Procedure Code 1908 which provides that where the parties to a suit have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an order of reference does not require that the writing should necessarily be signed and where the guardian *ad litem* of a minor party was in Court and assented to the application the omission of the guardian to sign it was immaterial *Held* also (allowing the appeal) that in this case there was no defect on the face of the award nor any misconduct of the arbitrators or umpire nor any concealment of facts by any of the parties which would bring the case within those provisions in Sch II which might enable the Court to set it aside and that the officiating Chief Commissioner was therefore not justified in interfering in review with an order made by the Chief Commissioner refusing revision UMED SINGH *v* SETH SOBHAG MAL DHADRA (1915)
I L R 43 Calc 290

20 ———————— *Arbitration and award by Bengal Chamber of Commerce—Jurisdiction—Broker liable as principal—Custom and usage of Calcutta Gunny Market—S 92 Prov (5) Indian Evidence Act (I of 1872)—Evidence of custom or usage incidental to contract—Indian Contract Act (IX of 1872) ss 230 and 236* An award made by the Bengal Chamber of Commerce was sought to be set aside by defendants in Court on the ground that the Chamber acted in excess of jurisdiction in having made the award in favour of the plaintiffs disregarding the fact that the contract in question was made by plaintiffs as brokers although in fact the plaintiffs had no principals and the contract was not therefore enforceable The plaintiffs alleged that there was a custom in the market in respect of gunny hessian and manufactured jute goods by which brokers are held liable upon such contracts and such custom being well known to the Chamber the award was properly made and valid The Court allowed evidence of custom and usage to be given and held that there was such a custom and that the defendants knew of it *Patiram Banerjee v Kankinara Co Ld 19 C W N 6..* distinguished *Held* that ss 230 and 236 of the Indian Contract Act the former of which deals with undisclosed principal and the latter with falsely contracting as agent were not applicable to this case *Held* also that evidence of usage of trade applicable to the contract which the parties making it knew or may be reasonably presumed to have known is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent *Fleet v Murton L R 7 Q B 126* followed. That the usage being known to the Chamber the matter was within their jurisdiction and the award was properly made JOY LAL & Co *v* MONMOTHA NATH MULLICK (1916)
20 C W N 335

21 ———————— *Arbitrator giving evidence before colleagues if improper—Application for reference to arbitration containing provision as to opinion of majority prevailing but reference to arbitration silent on the point—Award of majority if bad, on this ground—*

ARBITRATION—*contd*

2 AWARD—*contd*

Award made in the absence of party who withdrew from the arbitration if bad A suit was referred to the arbitration of three persons two of whom were witnesses in the case one for the plaintiff and one for the defendant The former of these gave evidence before the two other arbitrators at the instance of the plaintiff Thereafter the defendant objected to the arbitration going on and intimated that he would not call any evidence before the arbitrators who concluded the arbitration and gave an award two for the plaintiffs and one for the defendant The application for reference to arbitration contained a provision that the opinion of the majority would prevail but the reference to arbitration did not provide for it *Held* that there was no impropriety on the part of the arbitrator who gave evidence before his colleagues That the application for reference to arbitration having provided that the opinion of the majority would prevail the award was not bad because of the absence of any such provision in the reference to arbitration That the defendant having refused to call any evidence before the arbitrators they were justified in continuing the hearing and giving their award in the absence of the defendant HARIDAS DUTTA v BAIDYANATH GHOSH (1917)

21 C W N 895

22 —————————— *Civil Procedure Code (Act V of 1908) Sch II cls 1 and 15—Award when all parties interested did not agree to order of reference validity of—Partners some not appearing in a suit against members of the firm if interested parties—Court jurisdiction of to set aside award when reference invalid—Award if evidence of a separate agreement between the parties who agreed to the reference* Where in a suit against the members of a partnership an order was made under cl 1 Sch II of the Civil Procedure Code 1908 referring all the matters in difference between the parties to the suit to arbitration with the consent of all the parties with the exception of two of the defendants who did not enter appearance and an award was made thereon —*Held* that the order of reference was invalid not only against the parties who did not agree to the order of reference but also against those who had agreed and the award must be set aside SETH DOOLY CHAND v MAMUJI MUSAJI (1916)

21 C W N 387

23 —————————— *Suit after submission with respect to the subject matter of the reference—Award given during the pendency of the suit validity of—Power of Court to stay trial—Civil Procedure Code (Act V of 1908) Sch II s 18* A private reference to arbitration of a subject of a dispute does not prevent either party from filing a suit in a Court of law in respect of the same matter The arbitrators thereupon become *functus officio* and any award by them is without jurisdiction Where there is a previous agreement to refer a matter to arbitration and a suit is filed in respect of the subject matter of that agreement the Court has a discretion under s 18 of the second schedule to the Civil Procedure Code to stay the re trial of the suit *Doleman & Sons v Ossett Corporation* [191-] 3 K B 257 and *Sheo Babu v Udit Narain* 12 A L J 757 followed *Rama Chandra Pal v Kristo ... Pal 1. C W ... 3 1* explained

Indian legislation on the subject historically reviewed APPAVU v SEENI (1917)

I L R 41 Mad 115

24 —————————— *Arbitration award proceedings provided for in contract—Stay of arbitration pending decision of suit when party filed suit impeaching contract on equitable grounds* In a contract of purchase and sale of goods between plaintiff and defendants there was the usual clause for referring disputes arising out of the contract to arbitration Plaintiff repudiated the contract on the ground that the broker in the transaction did not disclose that he was a partner of the defendants firm Defendants maintained that plaintiff was still bound to take delivery of goods and on plaintiff s refusal referred to dispute to arbitrators mentioned in the contract The plaintiff filed a suit for a declaration that the contract was not binding on him and obtained an order from Court restraining defendants from proceeding with the arbitration *Held* that as this was a case where the plaintiff was impeaching the contract on the ground of fraud the Court below was right in staying the arbitration proceedings until the suit impeaching the contract was decided GAJANAND MASKARA v SHAIKH TALEB JALALUDDIN (1917) 22 C W N 535

25 —————————— *Limitation Act (IX of 1908) Sch I article 178—Publication of award date of—Power of Court to remit matter left undecided* The publication of a draft award is not publication of the award within the meaning of article 178 of Sch 1 to the Limitation Act 1908 Paragraph 21 of the 2nd Schedule to the Code of Civil Procedure 1908 confers no power on the court to remit an award for the determination of matters left undecided by the arbitrators If therefore any of the matters referred to in paragraph 14 are proved the court has no option but to refuse to file the award KUNJ LAL v BANWARI LAL 4 Pat L J 394

26 —————————— *Delay in filing award effect of when parties acquiesce in delay—Code of Civil Procedure (Act V of 1908) s 115 Sch II rr 8 and 15—Revision* R 15 of Sch II of the Code of Civil Procedure 1908 does not render an award made out of time *per se* a nullity but merely voidable within ten days from the time when the award is filed and it is binding upon the parties if no action taken before them Under r 8 of Sch II the Court may extend the time after the award has in fact been made even if made out of time and the parties can also agree to an extension and such agreement can be implied In such a case the parties would be estopped from impeaching the award upon the ground that it was made out of time If a Court *bonâ fide* in the exercise of its jurisdiction decides some matter of fact or law erroneously even though such decision may involve a determination as to the regularity or irregularity of some method of procedure this determination would not necessarily render applicable the provisions of s 115 PATTO KUMARI v UPENDRA NATH GHOSH

4 Pat L J 265

27 —————————— *Award—Non appearance of plaintiff before arbitrator—Default—Arbitrator power of as Civil Court if can deal under O IX r 8 Civil Procedure Code (Act V of 1908)*

ARBITRATION—*contd*

2 AWARD—*contd*

Sch II cls 14 and 16—Application under O IX r 9—Award leaving matters referred to arbitration undetermined—S 115—Jurisdiction of High Court—Permission of award to arbitrator by High Court in revisional jurisdiction—Procedure A suit was referred to arbitration by a Court on the application of the parties The terms of the reference provided that the arbitrator should determine the case after hearing the evidence and if one of the parties failed to appear before him he should have power to decide the case *ex parte* On the date fixed for trial the defendant appeared with his witnesses but the plaintiff did not appear The arbitrator did not take the evidence on behalf of the defendant but made an award by dismissing the suit for default The award was filed in Court. Thereupon plaintiff applied to the Munsif for the setting aside of the award on the ground that he could not appear before the arbitrator for illness but the application was rejected and the Munsif passed judgment according to the award In the course of his order however the Munsiff expressed an opinion that the ground alleged might be a good ground under O IX r 9 Civil Procedure Code Plaintiff thereafter applied to the Munsif under O IX r 9 Civil Procedure Code and then the Munsif set aside the award of the arbitrator and restored the suit to his file The defendant moved the High Court against that order *Held* that the arbitrator had no power to deal with the matter under the provisions of O IX r 8 of the Civil Procedure Code and that he ought to have heard the evidence on behalf of the defendant that the award made by the arbitrator should be held to have left undetermined the matters referred to him for arbitration and that under the provisions of cl 14 of the Second Schedule of the Code of Civil Procedure the Munsif ought to have remitted the award or the matters referred to arbitration for the reconsideration of the arbitrator that the application under O IX r 9 Civil Procedure Code made to the Munsif was incompetent and the Munsif was obviously wrong in setting aside the award of the arbitrator and restoring the suit to his file *Held* further that the proper order to make in this case was that the order of the Munsif being set aside the High Court in the exercise of its revisional jurisdiction under s 115 Civil Procedure Code should remit the award in the matter referred to arbitration for reconsideration by the same arbitrator on the ground that the award had left undetermined the matters referred to arbitration GOPAL CHANDRA DAS v KHETRA MOHAN BHUNJA (1918) **22 C W N 933**

28 ———————— *Private reference—Award—Reference by some of the disputing parties effect of—Civil Procedure Code (Act XIV of 1882) s 506* Upon a suit brought by the plaintiffs for recovery of possession of certain lands the defence raised was that the plaintiffs were bound by an award which was made upon a private reference to arbitration to which some of the plaintiffs and the defendants were parties *Held* that the award was binding as between those plaintiffs and the defendants who were parties to the reference JADUNATH CHOWDHRY v KAILAS CHANDRA BHATTACHARJEE (1909) **I L R 37 Calc 63**

29 ———————— *Award made after the death of one of the parties—Nunc pro tunc whether applicable to the award—Submission to arbitration revocation of by the death of a party* Where a submission to arbitration has been made a rule of Court the death of one of the parties does not work a revocation Where an agreement to refer having been filed in Court the Court appointed an arbitrator who after finishing his enquiries and hearing the arguments of the pleaders of the parties reserved his report and award and then one of the parties died *Held* that under the circumstances of the case the death of the party did not make the award void and the doctrine of *nunc pro tunc* was applicable as in the case of judgment of Court HARA KRISHNA MITRA v RAM GOPAL MITRA (1910) **14 C W N 759**

30 ———————— *Award—Bona fide mistake of law committed by arbitrator—Minor party receiving a smaller share—Award binding upon the minor* The arbitrators to whom a dispute was referred by parties one of whom was a minor took *bona fide* an erroneous view of law and ordered an unequal division of the property in dispute awarding the smaller share to the minor The lower Court set aside the award on the grounds that the arbitrators had taken an erroneous view of the law and that as the minor had received a smaller share under the award it was not to his benefit and therefore not binding upon him *Held* that the award was valid and binding upon the minor The validity of the award must be determined according to the circumstances as they existed at its date and not by what transpired some years after it had been passed by the arbitrators *Rajunder Narain Rae v Bajai Govind Singh 2 Moo I A 181 249 251* followed SARKAPPA BIN LINGAPPA v SHIVAPPA (1910) **I L R 35 Bom 153**

31 ———————— *Setting aside an award—Invalid contract—Award attacked on ground going to the root of the dispute—Whether a suit is maintainable to set aside the award—Indian Arbitration Act (IX of 1899) s 14—Consent of counsel when free and fair—Civil Procedure Code (Act V of 1908) s 9* Where the ground on which an award is attacked goes to the root of the dispute and arises as it were before the constitution of the domestic forum a suit is maintainable for the investigation and determination of the controversy according to the procedure prescribed by law *Quære* Whether a suit lies to set aside an award on a ground covered by s 14 of the Indian Arbitration Act 1899 The plaintiff (Appellant) filed this suit for a declaration that a contract for the sale of piece goods alleged to have been entered into between him and the defendant was invalid as the parties were not *ad idem* on a fundamental point and that an award made by the Bengal Chamber of Commerce in favour of the defendant for breach of the said contract was also void and inoperative The plaintiff also charged the defendants with fraud inasmuch as they claimed damage for refusal to accept goods which they never offered and were indeed not in their possession The plaintiff applied for an interlocutory injunction during the pendency of the suit restraining the defendants from executing the award. RANKIN J *held* that the suit did not lie and declined to entertain the hearing of the application "except

ARBITRATION—*contd*

2 AWARD—*contd*

on the basis that it be treated both as the trial of the action and as a petition under the Indian Arbitration Act Being under the impression that Counsel on both sides consented to this course being adopted he heard the matter on affidavits and dismissed both the motion and the action with costs *Held* that under the circumstances there was no consent by Counsel on both side to the course adopted by PANKIN J *Held* further that under the circumstances even though there was consent on the part of the plaintiff s Counsel it was not free and fair consent but constrained and involuntary acquiescence in a mode of trial which the Court had decided to adopt and so was not binding on the plaintiff *Held also* that the suit was maintainable under s 9 of the Civil Procedure Code 1908 and there was nothing in the Indian Arbitration Act 1899 which barred the suit *Sardarmull* v *Agarchand 23 C W N 811 (1919)* *Turnbull* v *Brown 5 B N C 334 29 R R 275 (1826)* and *Worrall* v *Deane 2 Dowl 261 (1833)* referred to RADHA KISSEN KHETTRY v LUKHMI CHAND JHAWAR

24 C W N 454

32 ——————— *Award made after expiry of time fixed by Court—Application for enlargement of time to file award—Civil Procedure Code (Act XIV of 1882) s 521 (c) (Act V of 1908) s 148 Sch II s 15 (c)* An award was made after the time allowed by the Court had expired On an application for enlarging the timing for making such award *Held* that the Court had no power to grant the application *Raja Har Narain Singh* v *Chaudhrain Bhagwant Kuar I L R 13 All 300* followed *Held* further that where the time for making an award had expired and no award had been made s 148 of the Civil Procedure Code (Act V of 1908) gives the Court power to extend the time for the making of the award notwithstanding that it had expired at the time of the application but that section does not enable the Court to extend the time for the doing of a particular act when in truth and in fact the act had already been done SHIB KRISHNA DAW & CO v SATISH CHUNDER DUTT (1911)

I L R 38 Calc 522

33 ——————— *Agreement to abide by decision of majority whether binding on Parties—whether appeal lies from order recording an award* When the parties have agreed to abide by the decision of the majority of the arbitrators an award cannot be set aside on the ground that it has not been signed by all the arbitrators No appeal lies from an order to record an award made by arbitrators RAM NARAIN RAM v PATI RAM TEWARI

1 Pat L J 90

34 ——————— An award ... time is merely voidable under Sch ... Procedure Code PUTTO ...

... Pat L J 265

... Some parties ... arbitrators ... they and their ... be bound by the ... argument was ... notice of the arbi ... rties had died and

the arbitrators allowed time for filing fresh *achal namahs* and for appointment of a guardian for the minor heir of one of the deceased parties but nothing was done The arbitrators then made their award and on application being made to Court the Court made the order for filing the award *Held* that having regard to the subject matter of the arbitration and the terms of the reference the legal representatives of the deceased persons would be bound by the reference to arbitration made by their predecessors BINAYAKDAS ACHARYA CHOWDHRY v SASI BHUSAN CHOWDHRY

26 C W N 804

36 ——————— *Successive awards —Contract for sale of goods deliverable by instalments —Arbitrators whether functus officio after one award—Dispute with regard to different instalments—Res judicata—Civil Procedure Code (Act V of 1908) s 11 O 11 r 2 whether applicable to arbitration proceeding* There may be as many awards as there are disputes arising out of the contract The submission is not exhausted by reason of the mere fact that one award final and complete in itself has issued from it *Chandanmal* v *Donald Campbell & Co 23 C W N 707n (1916)* referred to By a contract dated 1st December 1917 the plaintiff agreed to sell to the defendant three lacs of yards of hessian delivery to be given and taken in December 1917 each month s delivery to be treated as a distinct and separate contract The contract also provided that any dispute whatever arising on or out of this contract shall be referred to the arbitration of the Bengal Chamber of Commerce One half lac yards of hessian were delivered to and accepted by the defendant the balance was divided into three lots Disputes having arisen with regard to the delivery of these three lots they were referred to the arbitration of the Bengal Chamber of Commerce by the defendant on 28th February 9th April and 21st June respectively all the disputes having arisen previous to 28th February An award was made with respect to the first lot in favour of the defendant The plaintiff filed this suit to stay the arbitration upon the second on grounds that arbitrators were *functus officio* having given one award *Held* they were not BALMUKUND RINA v GOPIRAM BHOTIKA

24 C W N 775

36-A ——————— *Award—Consent of parties—Insolvent defendant—Civil Procedure Code (Act V of 1908) Sch II r 1* In a redemption suit by a mortgagor the insolvent mortgagee was made a party along with the Official Assignee The matter was referred to arbitration by consent of parties other than the insolvent mortgagee who did not appear *Held* that the Court had no jurisdiction to make the order of reference without his consent consequently the award was invalid LADHURAM NATHMULL v NANDALAL KARURI (1919) I L R 47 Calc 555

37 ——————— *Setting aside an award —Forgery—Dispute arising on or out of the contract—Jurisdiction of the arbitrator to decide what was the contract—Difference between the question whether there was a contract or whether the contract was forged or altered* A and B entered into several contracts for the sale and purchase of hessian which were contained in Advice Notes The

ARBITRATION—*contd*

2 AWARD—*contd*

advice Note No 31 contained a writing upon it which stated that it was in settlement of Advice Note No 25 The contracts provided that all disputes whatsoever arising on or out of the *contract should be referred to arbitration* Disputes having arisen they were referred to arbitration and an award was given in favour of *B* *A* applied to set aside the award on the ground that the said writing on the Advice Note No 31 was forged and so the arbitrators had no jurisdiction to decide the question of forgery which went to the very root of the contract *Held* that it was competent for the arbitrators under the terms of the submission to decide whether or not this interpolation was in the contract as originally made *Per* GREAVES *J*—There seems to be a difference between a dispute which raises the question whether *in fact X entered into a contract at all* or a question whether X was induced to enter into a contract by fraud and a question such as the present whether a contract contained a particular term at the time it was made ALIBLOY MOHAMMAD *v* BAIJNATH KALOORAM **24 C W N 567**

38 ——————— *Order to record—Agreement to abide by majority* No appeal lies from an order to record an award made by arbitrators when parties have agreed to abide by the decision of a majority of arbitrators an award cannot be set aside on the ground it has not been *signed by the minority* *I L R 29 Calc 167* followed RAM NARAIN RAM *v* PATI RAM TEWARI **1 Pat L J 90**

39 ——————— *Private arbitrator not making his award within time—Notice issued to show cause why he should not be proceeded against for contempt of court* *Semble* that a court has no authority to compel a private arbitrator to arbitrate against his own will as by issuing a notice to him to submit his award by a certain date or to explain or show cause why he should not be charged with contempt of court *Shibcharan* v *Ratiram* *I L R 7 All 20* referred to BASDEO MAL GOBIND PRASAD *v* KANHAIYA LAL LACHHMI NARAIN **I L R 43 All 101**

40 ——————— *Consent order for extension of time presented before award—Order signed after making of award—Validity of award—Application to set aside—Form of—Indian Limitation Act (IX of 1908) Sch I Art 158—Civil Procedure Code (Act V of 1908) Sch II—Practice* Both parties to a suit which had been referred to arbitration having consented to an order for the extension of time for making the award the order was taken to the proper officer (*sc* the Prothonotary) for signature In the ordinary course of events the latter would have exercised his discretion to sign the order on the same day but owing to pressure of work the order was not signed till some days later the award itself having been made in the interval *Held* that though the Prothonotary had actually exercised his discretion later his decision must in the circumstances be thrown back to the day on which the order was presented for his signature and as the order ought to have been signed as of that day the award was not invalid The form which an application to set aside an award under the Second Schedule of the Civil Procedure Code should take is nowhere prescribed or indicated It is sufficient if some notice is given to the proper office that the party objects to the award and the date on which such notice is given is for the purpose of the Indian *Limitation Act* the date on which the application is made GOPALJI KALLIANJI *v* CHHAGANLAL VITHALJI **I L R 45 Bom 1071**

41 ——————— *Mutation of names—Mutation proceedings referred to arbitration—Award based on finding as to title of one of the parties—Award no bar to suit for possession in a Civil Court* The parties to proceedings for mutation of names in a Court of Revenue referred the matters in dispute between them to arbitration The arbitrators made their award declaring a certain person to be entitled to mutation upon the finding that he was the adopted son of the last holder *Held* that this award was no bar to the other party to the mutation proceedings suing in a Civil Court to recover possession of the property upon the ground that the adoption of the defendant was not established *Girdhari Chaube* v *Ram Baran Misir* *1* *A L J 85* followed DALIP SINGH *v* MAN KUNWAR **I L R 43 All 387**

42 ——————— *Reference to by Court informally while suit pending—Civil Procedure Code (Act V of 1908) s 89 O XXIII r 3—Second Schedule—Indian Arbitration Act (IX of 1899)—Reference to arbitration without intervention of Court while suit pending—Award if enforceable* Where in a pending suit the parties refer the matter to arbitration without the intervention of the Court the award made cannot be enforced either under O XXIII r 3 of the Civil Procedure Code or under the provisions of the Indian Arbitration Act THE DEKARI TEA CO LTD *v* THE INDIA GENERAL STEAM NAVIGATION CO LTD **25 C W N 127**

43 ——————— *Contract to buy goods between London and Madras merchant—Stipulation for arbitration in London—Award made in London—Suit on award—Defence that arbitrator having given no opportunity to Defendant to be heard if may be taken in the suit—English Arbitration Act 1889—Supreme Court Rule O 64 r 14—Irregularity not going to the root and not apparent on the face of award* In a contract to purchase sheep skin of a specified quality by a merchant carrying on business in London from a merchant carrying on business in Madras it was stipulated that any differences not amicably settled was to be submitted to arbitration in London in the usual way and the award of such arbitration was to be binding on both buyer and seller The buyer having sued the seller in the Madras High Court for enforcement of an award made by an arbitrator in London the seller objected that the award was not binding on him as the arbitrator had proceeded to arbitrate without giving him an opportunity to be heard *Held* that as the arbitration clause provided for an arbitration which was to take place in London and in accordance with English law and procedure any objection to the award on the ground of misconduct or irregularity had to be taken by motion to set aside or remit the award under the English Arbitration Act of 1889 within the time limited by O 64 r 14 of the rules of the Supreme Court No such objection having been taken

ARBITRATION—concld

2 AWARD—concld

the award became fully binding on both parties to it as if it had been incorporated in the contract Any defence going to the root of the award e g that the arbitrator had no jurisdiction or that the matter was tainted with fraud—could have been pleaded in the suit but a defence on the ground of irregularity not appearing on the face of the award was excluded by the law by which both parties had agreed to be bound L OPPENHEIM & Co v HAJEE MAHOMED HANEEF SAHIB P C) 26 C W N 642

ARBITRATION ACT (IX OF 1899)

See ARBITRATION I L R 47 Calc 29

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 89 O XXIII R 3 I L R 40 Bom 386

——— *Reference to two arbitrators and an umpire—Subsequent addition, by consent of parties of other arbitrators—Objections raised after the pronouncement of the award to the appointment of additional arbitrators—Estoppel* A reference to arbitration was made under Act No IX of 1899 The reference was to two arbitrators and an umpire Subsequently the parties agreed to appoint two more arbitrators on either side The six arbitrators and the umpire proceeded with the arbitration and pronounced a unanimous award One party then applied for the award to be filed and the other party took objection *inter alia* to the number of the arbitrators *Held* that though either side might have objected in the first instance to the appointment of additional arbitrators it was too late to do so when they had all along acquiesced in the appointment and after the arbitrators had pronounced their award ABDUL SHAKUR v MUHAMMAD YUSUF I L R 43 All 456

——— ss 2 5 8 9 15 and 19—*Arbitration—"Submission" by three persons to refer dispute to three arbitrators—One of the parties filing a suit—Court has jurisdiction to stay the suit—Submission not outside the scope of the Act—Award passed under the submission may be filed under the Act—Court may give indirect assistance by staying a suit though it cannot give direct assistance to enforce the arbitration* Under s 19 of the Indian Arbitration Act the Court has jurisdiction to stay a suit where the parties to the suit have by submission agreed to refer the matter in dispute to three arbitrators each party appointing his own arbitrator A 'submission' providing for a reference to three arbitrators is not outside the scope of the Indian Arbitration Act and an award passed by three arbitrators may be filed and given the status of a decree under s 15 of the Act *Manchester Ship Canal Company* v *S Pearson and Son Ltd* [1900] 2 Q B 606 and *Gopalji Kuverji* v *Morarji Jeram (1919) 43 Bom 809* referred to The words a submission to which this Act applies in s 19 are not limited to submissions which can be enforced under s 8 or s 9 but are intended to provide for the case where a suit is filed in an up country Court in an area to which this Act has not been applied though part of the cause of action has arisen in a Presidency town That Court would have the power to stay the suit if the submission was one to which the Act applied or in other words if the suit could

ARBITRATION ACT (II OF 1899)—

——— ss 2 5 8 9 15 and 19—*contd*

with leave or otherwise have been filed in a Presidency town *Ralli* v *Noor Mahomed (1906) 31 Bom 236* dissented from BAPALDAS KHEMCHAND *In re* I L R 45 Bom 1

——— s 4—*Submissions inferred for several documents—Arbitrator acting outside limits of his jurisdiction* A submission or agreement submit may be collected from several documents even though collected from parole evidence and signature of any document forming part of the agreement to sufficiently bind the person so signing SUKHANAH BANSIDHAR v BABU LAL KEDIA & Co I L R 42 All 525

——— ss 4 20—*Civil Procedure Code (1908) s 104 (1) (f)—Award under Arbitration Act—Order refusing to file—Appeal* The parties to a contract for the sale and purchase of cloth agreed to refer a dispute arising thereout to arbitration under the provisions of the Indian Arbitration Act 1899 A reference was made and an award was pronounced One of the parties then applied to the District Judge for an order to file the award but on objection taken by the other party the District Judge refused to file it *Held* that in the absence of rules framed by the High Court under s 20 of the Indian Arbitration Act the procedure prescribed by the Code of Civil Procedure would apply and an appeal against the order of the District Judge would lie under section 104 (1) (f) of the Code *Campbell and Co* v *Jeshraj Girdhari Lall I L R 42 Calc 502* distinguished The judgment of PIGGOTT J in *Sukhamal Bansidhar* v *Babu Lal Kedia and Co I L R 425 All 25* referred to NAINSUKH DAS NAGAR MAL v GAJANAND SHYAM I L R 43 All 348

——— s 8 (1) (a) (b) (c) (d) and (2) 9—*English Arbitration Act of 1889 (52 and 53 Vic c 49)—General Clauses Act (X of 1897) s 15—Reference and submission to three named arbitrators who acting for some time decline to proceed further—Application to Court to appoint fresh arbitrators—Jurisdiction* In a case of submission to three named arbitrators all of whom after acting have declined to proceed any further the Court has no jurisdiction to appoint fresh arbitrators in their place under the Indian Arbitration Act *Per* SCOTT C J S 8 (1) (b) of the Indian Arbitration Act does not apply to the case of independent appointments of two arbitrators In such a case when a vacancy occurs it would ordinarily be filled by the original appointor as contemplated in s 9 S 8 (1) (b) only applies in terms to a single vacancy to be supplied by the *parties* S 8 nowhere seems to contemplate the case of two original arbitrators appointed jointly by the parties *plus* a third of the same class appointed by the two already jointly appointed or by the parties In short s 8 only applies to certain cases of failure to appoint jointly Where choosers should but do not concur the Court is enabled to assist them by the selection and appointment of an individual falling in one of the following categories—an (i e one) arbitrator an umpire a third arbitrator in the special sense in which that term is used *Per* HAYWARD J It is not in my opinion open to us to extend this special jurisdiction to special contracts not clearly contemplated and expressly mentioned by the Act *In re Smith and Service and Nelson and Sons* 2,

ARBITRATION ACT (IX OF 1899)—*contd*

——— s 8—*contd*

Q B D 545 and *Manchester Ship Canal Company v S Pearson and Sons Limited [1900] 2 Q B 606* referred to GOPALJI KUVERJI v MORARJI JERAM (1919) I L R 43 Bom 809

——— s 9—*Appointment of arbitrators—Notice by one party to the other to appoint his arbitrator—No appointment by the former of his own arbitrator before giving notice—Default by latter to name his arbitrator on notice—Right of former to appoint both arbitrators under the contract—s 9 of the Act whether applicable—Proviso to s 9 whether applicable to set aside appointments under contract—Refusal of arbitrator to grant adjournment—Misconduct—Award whether invalid* The provisions of s 9 (b) of the Indian Arbitration Act 1899 do not apply to a case where by the contract between the parties a different course is provided for the appointment of arbitrators and as to what is to happen if the party to whom notice is given makes default in making the appointment and the proviso to the same section which empowers the Court to set aside the appointment does not apply to an appointment made under the contract Where the arbitrators appointed under the contract and not under s 9 of the Act refused to grant an adjournment so as to enable one of the parties to apply to the Court to set aside their appointment they were not guilty of misconduct and the award was not liable to be set aside SHAW WALLACE & Co v SUBBDER SONS I L R 44 Mad 406

——— s 10—

See INSURANCE I L R 37 Bom 183

——— *Arbitration—Statement of special case for opinion of Court—Appeal from order of Court—Civil Procedure Code (Act V of 1908) s 104 and Sch II r 11* In a suit filed for partition of joint family property the parties agreed to refer the matter to arbitration and a consent order of reference was taken A similar agreement referred to the same arbitrators questions as to the partition of such immoveable property as was outside the jurisdiction of the Court in the suit The arbitrators disagreed on certain points but instead of referring their differences (as the agreements of reference authorised them to do) to an umpire they submitted their own opinion in the form of a special case for the opinion of the Court In doing so they purported to act under the provisions of the Civil Procedure Code (Act V of 1908) Sch II r 11 and of the Indian Arbitration Act (IX of 1899) s 10 (b) The matter was decided by the Chamber Judge and an appeal was preferred against the decision *Held* that no appeal lay Inasmuch as the special case was in no sense an award it did not come within the Civil Procedure Code (Act V of 1908) Sch II r 11 but in so far as it related to the agreement which was not the subject of the Court s order it fell under the Indian Arbitration Act (IX of 1899) s 10 (b) PURSHOTUMDAS RAMGOPAL v RAMGOPAL HIRALAL (1910) I L R 35 Bom 130

——— s 11—

See APPEAL I L R 45 Calc 502

——— ss 11 13 to 15

See ARBITRATION I L R 40 Calc 219

ARBITRATION ACT (IX OF 1899)—*contd*

——— 11 15—

See ARBITRATION I L R 47 Calc 951

——— *Award —Civil Procedure Code (Act V of 1908) Sch I O XXI r 29* An award filed in Court under s 11 of the Indian Arbitration Act (IX of 1899) is nothing more than an award although it is enforceable as if it were a decree Execution of such an award cannot be stayed under O XXI r 29 of the Civil Procedure Code (Act V of 1908) TRIBHUWAND S KALLIANDAS GAJJAR v JIVANCHAND LALLUBHAI & Co (1910) I L R 35 Bom 196

——— ss 12 13—

See ARBITRATION I L R 46 Calc 1059

——— ss 13 14—

See ARBITRATION I L R 41 Calc 313
I L R 42 Calc 1140

——— s 14—

See AWARD I L R 47 Calc 806

——— s 19—

See ARBITRATION I L R 41 Calc 35
I L R 47 Calc 611 752 849 1020

See APPEAL TO PRIVY COUNCIL I L R 47 Calc 91

——— *Arbitration—Effect of order staying suit— Court Held* on a construction of s 19 of the Indian Arbitration Act 1899 that the Court therein mentioned is not necessarily the Court of the District Judge but the court before which the suit or other legal proceeding which it is sought to refer to arbitration is instituted *Held* also that a stay order passed under s 19 is not a mere temporary injunction but a final order which disposes of the suit SITA RAM NATH MAI v SHUSHIL CHANDRA DAS I L R 43 All 553

——— *Subject matter of pending suit referred to arbitration—Order under s 19 staying suit—Arbitration ending in an award—Formal order revoking stay and dismissing suit unnecessary* Ordinarily a stay order passed by a court under s 19 of the Indian Arbitration Act 1899 when the matters in dispute in a suit before it have been referred to arbitration is permanent and when the arbitration is completed there is no necessity for the court to revoke the stay order and pass a formal order dismissing the suit *Sheo Babu v Udit Narain 12 A L J 75* referred to STRAUSS AND COMPANY v RAGHUBAR DAYAL DURGA PRASAD I L R 43 All 2 9

——— *Taking grounds in a memorandum of appeal if a step in the proceedings—S 19—Order refusing stay of proceedings if a judgment within cl 15 of the Letters Patent* The order that the applicant was not competent to avail himself of the benefit of s 19 Arbitration Act by reason of steps taken by him in the proceeding in the suit is a judgment within the meaning of cl 15 Letters Patent and is appealable *Justices of the Peace for Calcutta v Oriental Gas Co 8 B L R 433 (1872)* *Hadjee Ismail Hadjee Hubeeb v Hadjee Mahomed Hadjee Joosub*

ARBITRATION ACT (IX OF 1899)—*concld*

——— s 19—*contd*

13 B L R 91 (1874) *Mathura v Haran I L R 43 Cal 857* s c *20 C W N 594 (1915)* and *Budhu v Chattu I L R 44 Cal 804* s c *21 C W N 289 (1916)* referred to Taking grounds in a memorandum of appeal against an adverse order does not constitute the taking of a step in the proceedings within the meaning of s 19 Arbitration Act *Adams v Callay (1892) 66 L T Rep 657* distinguished JOYLALL & Co v GOPI RAM BHATICA 24 C W N 612

ARBITRATION AWARD

See ARBITRATION

——— *Reference authorising majority award—Award by majority without consulting others if valid* An award made by a majority of arbitrators appointed by the parties without consulting the others is not a valid award even when the reference authorises the arbitrators to make a majority award ABU HAMID ZARIFA ALA v GOLAM SARWAR (1916) 22 C W N 301

ARBITRATION BY COURT

——— *Submission of the questions in dispute to Court for determination—Award—Review—Appeal—Jurisdiction—Civil Procedure Codes (Act XIV of 1882) s 622 (Act V of 1908) s 115* When after the hearing of a suit had commenced before a Munsif both parties agreed to leave the questions in dispute between them to the determination of the Court after the Court had made a local inspection and also agreed not to raise any objection to the same or to prefer an appeal *Held* that the decision of the Munsif was in the nature of an award and that he could not alter the award when once made or review his own decision *Dutto Singh v Dosad Bahadur Singh I L R 9 Calc 575* referred to *Held* further that no appeal lay to the District Judge and the order of the District Judge in entertaining the appeal and making the order of remand was without jurisdiction *Sayad Zain v Kalabhai I L R 23 Bom 752* followed *Held* further that no appeal lay from the decision of the District Judge to this Court but the High Court could interfere *suo motu* under s 622 of the Civil Procedure Code (Act XIV of 1882) corresponding with 115 of the new Code (Act V of 1908) BAIKANTA NATH GOSWAMI v SITA NATH GOSWAMI (1911) I L R 38 Calc 421

ARBITRATION CLAUSE

See CONTRACT I L R 47 Calc 799

——— contract with—

See APPEAL TO PRIVY COUNCIL I L R 47 Calc 918

——— Proceedings on—

See INJUNCTION I L R 47 Calc 733

ARBITRATION IN LONDON

See ARBITRATION (AWARD 43) 26 C W N 842

See CONTRACT I L R 43 Calc 77

ARBITRATOR

See ARBITRATION ACT (IX OF 1899) ss 8 (1) (a) (b) (c) (d) AND (2) 9 I L R 43 Bom 809

See CONTRACT 15 C W N 981

——— distinction between—and valuer—

See I[illegible]EMPTION I L R 42 Bom 668

——— duties of—

See CIVIL PROCEDURE CODE (1908) s 104 (*f*) I L R 38 All 380

——— jurisdiction to award damages to defaulting seller—

See AWARD I L R 44 Bom 780

——— power of—

See CONTRACT ACT (IX OF 1872) ss 1 118 I L R 41 Bom 518

ARCHAKA

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXIII R 3 I L R 38 Mad 850

AREA

See MEASUREMENT I L R 47 Calc 266

——— deficiency in—

See BENGAL TENANCY I L R 48 Calc 473

See KABULIAT I L R 41 Calc 493

ARMS

See ARMS ACT (XI OF 1878) s 4 I L R 32 All 152

——— joint possession of—

See MISJOINDER OF CHARGES I L R 42 Calc 1153

——— purchase of—

See FORGERY I L R 43 Calc 421

——— What are—

See ARMS ACT 1878 s 20 I L R 2 Lah 290

——— *Possession of a gun by the servant of a licensee in order to take to a Magistrate for renewal of the license without intention to use the same—Arms Act (XI of 1878) s 19 (f)* A servant of the holder of a gun license who is merely carrying it to a Magistrate with the expiring license for renewal thereof but without any intention to use the gun is not liable to conviction under s 19 (*f*) of the Arms Act *Queen Empress v Tota Ram I L R 16 All 276* and *Prabhat Chandra Choudhury v Emperor I L R 35 Calc 219* followed CHARU CHANDRA GHOSE v EMPEROR (1913) I L R 41 Calc 11

ARMS ACT (XI OF 1878)

——— s 4—*Definition—Ammunition—Empty cartridge cases* *Held* that Indian empty cartridge cases are ammunition within the meaning of s 4 of the Indian Arms Act 1878 *King Emperor v Ibrahim 7 Bom L R 471* followed EMPEROR v BALDEO SINGH (1909) I L R 32 All. 152

——— ss 4, 5 14 19(*a*) (*f*), 20—

See MISJOINDER OF CHARGES I L R 42 Calc. 1153

ARMS ACT (XI OF 1878)—contd

——— s 19 cl (b)—*Gun found in room equally accessible to several persons if to be considered as in the possession of any one of them* A gun was found in an abandoned room of the house belonging to the accused in which the accused who were members of a joint family and others resided It appeared from the evidence that the room was accessible from outside The accused were convicted under s 19 (b) of the Indian Arms Act *Held* that if the place in which an article is found is one to which several persons have equal right of access it cannot be said to be in the possession of any one of them and the conviction of the accused could not be sustained *Jogjiban Ghose v The King Emperor 13 C W N 861* followed SUDHANYA BAWALI v KING EMPEROR (1916)
21 C W N 839

——— s 19 (c)—

——— *Intention not necessary to constitute offence* An offence under 19 (c) of the Arms Act is committed when a person enters British India with a weapon he is not lawfully entitled to possess in this country It is not necessary that there should be any particular intention in the mind of the offender to complete the offence *Re* MAHOMED ISMAIL POWTHER (1912)
I L R 35 Mad 596

——— *Servant temporary possession of gun by on behalf of master* The petitioner was carrying a gun on behalf of his master with the licence to the Magistrate for the purpose of a renewal of the licence It was admitted that the object of the petitioner was merely to carry the gun to the Magistrate The petitioner was convicted under s 19 (6) of the Act for possessing a gun in contravention of the provisions of the Act *Held* that the conviction of the petitioner cannot be upheld *Queen Empress v Tota Ram I L R 16 All 276 Prabhat Chandra v Emperor I L R 30 Calc 219 12 C W N 2?9* followed CHARU CHANDRA GHOSH v THE KING EMPEROR (1913)
17 C W N 979

——— s 19 (e)—*Arms—Gun—License—Going armed without license—Servant fetching gun for his master—Liability of servant* The accused was sent to an adjacent village by his master who was licensed to bear arms to fetch a gun which he (the master) had left there While so returning with the gun the accused was arrested for going armed in contravention of the provisions of s 13 of the Indian Arms Act (XI of 1878) He was convicted and sentenced under s 19 (e) of the Act *Held* acquitting the accused that the mere temporary possession without a licence of arms for purposes other than their use was not an offence within the meaning of s 19 of the Indian Arms Act (XI of 1878) *Emperor v Harpal Rai 24 All 451* followed EMPEROR v KOYA HANSJI (1912)
I L R 37 Bom 191

——— s 19 (f)—

See ARMS **I L R 41 Calc 11**

——— *Arms—Finding as to factum of possession of unlicensed arms—Minor nearing majority living with his elderly parda nashin mother—Possession attributed to son* A parda nashin lady and her minor son a young man of some 17 years of age lived together in the family house. In their house was a small collection of arms of various kinds which had belonged to the father who as an honorary magistrate was exempt from the operation of the Arms Act There was evidence that the arms were kept clean and that the son at all events took a certain amount of interest in them *Held* that a finding that the son was in possession of these arms and not having a license for them was liable to conviction for an offence under s 19 (f) of the Indian Arms Act 1878 was not open to objection EMPEROR v GHULAM HUSAIN (1918)
I L R 40 All. 420

——— *Accused not in present possession if may be convicted—Person liable to punishment under cl (f) of s 19* Where the petitioner having been in possession of a gun for some time made it over a year and a half ago to another person in whose possession the gun was without a license *Held* that the petitioner could not be convicted of an offence under s 19 cl (f) of the Indian Arms Act The only person who can be punished under cl (f) is the person who has in his possession or under his control any arm in contravention of the provisions of ss 14 and 15 AKHIL NATH DEY v EMPEROR (1910) **15 C W N 440**

——— s 20—Dang *and detachable blade—whether an instrument falls within the expression Arms depends upon the circumstances of the case* Appellant was found carrying a bamboo *dang* 5 feet 4 inches long which had an iron attachment at the thick end and hidden in the folds of his loin cloth was a blade 8 inches long which fitted the end of the *dang* *Held* that taking into consideration the nature of the instrument the fact that the blade could be readily slipped on and off the stick and the fact that it was found detached from the stick and hidden in the appellant s loin cloth shewed that it was possessed by him not for ordinary domestic purposes but for purposes of offence or defence and that it was therefore included in the term Arms used in the Arms Act Whether or not any particular instrument is included in the expression Arms used in the Arms Act depends on the circumstances of the case *Crown v Santa Singh (16 P R (Cr) 1900)* and *Crown v Ralla Singh (32 P R (Cr) 1918)* followed Criminal Revision No 1641 of 1916 *and Criminal Appeal No 673 of 1910 (unpublished cited)* MANGAL SINGH v CROWN
I L R 2 Lah 290

——— s 25—

See TRESPASS **I L R 39 Calc 953**

——— ss 25 and 28—

See CRIMINAL PROCEDURE CODE s 195
I L R 42 Mad 96

ARMY ACT 1881 (44 & 45 VICT., c 58)

——— s 136—

See ATTACHMENT
I L R 43 Bom 716

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 60 CL. (?) (b)
I. L. R 38 Bom 687

——— ss 145 190—*Army (Amendment No 2) Act 5 and 6 Geo V c 58 s 4—First Class Warrant Officer of the British Army—Soldier—Decree for alimony and maintenance—Order by Commander in Chief for payment of alimony and*

ARBITRATION ACT (IX OF 1899)—*concld*

——— s 19—*contd*

13 B L R 91 (1874) *Mathura* v *Haran* *I L R 43 Cal 857* s c *20 C W N 594 (1915)* and *Budhu* v *Chattu* *I L R 44 Cal 804* s c *21 C W N 269 (1916)* referred to Taking grounds in a memorandum of appeal against an adverse order does not constitute the taking of a step in the proceedings within the meaning of s 19 Arbitration Act *Adams* v *Callay* *(1892) 66 L T Rep 637* distinguished JOYLALL & Co v GOPI RAM BHATICA 24 C W N 612

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ARBITRATION CLAUSE

See CONTRACT I L R 47 Calc 799

——— contract with—

See APPEAL TO PRIVY COUNCIL I L R 47 Calc 918

——— Proceedings on—

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ARBITRATION IN LONDON

See ARBITRATION (AWARD 43) 26 C W N 642

See CONTRACT I L R 43 Calc 77

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See ARBITRATION ACT (IX OF 1899) ss 8 (1) (a) (b) (c) (d) AND (2) 9 I L R 43 Bom 809

See CONTRACT 15 C W N 981

——— distinction between—and valuer—

See RESUMPTION I L R 42 Bom 668

——— duties of—

See CIVIL PROCEDURE CODE (1908) s 104 (f) I L R 38 All 380

——— jurisdiction to award damages to defaulting seller—

See AWARD I L R 44 Bom 780

——— power of—

See CONTRACT ACT (IX OF 1872) ss 1 118 I L R 41 Bom 518

ARCHAKA

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXIII R 3 I L R 38 Mad 850

AREA

See MEASUREMENT I L R 47 Calc 266

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See KABULIYAT I L R 41 Calc 493

ARMS

See ARMS ACT (XI OF 1878) s 4 I L R 32 All 152

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ARMS ACT (XI OF 1878)—*contd*

——— s 19 cl (b)—*Gun found in room equally accessible to several persons if to be considered as in the possession of any one of them* A gun was found in an abandoned room of the house belonging to the accused in which the accused who were members of a joint family and others resided It appeared from the evidence that the room was accessible from outside The accused were convicted under s 19 (b) of the Indian Arms Act *Held* that if the place in which an article is found is one to which several persons have equal right of access it cannot be said to be in the possession of any one of them and the conviction of the accused could not be sustained *Jogjiban Ghose* v *The King Emperor 13 C W N 861* followed SUDHANYA BAWALI v KING EMPEROR (1916)
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——— *Intention not necessary to constitute offence* An offence under s 19 (c) of the Arms Act is committed when a person enters British India with a weapon he is not lawfully entitled to possess in this country It is not necessary that there should be any particular intention in the mind of the offender to complete the offence Re MAHOMED ISMAIL POWTHER (1912)
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——— *Servant temporary possession of arm by on behalf of master* The petitioner was carrying a gun on behalf of his master with the license to the Magistrate for the purpose of a renewal of the license It was admitted that the object of the petitioner was merely to carry the gun to the Magistrate The petitioner was convicted under 19 (6) of the Act for possessing a gun in contravention of the provisions of the Act *Held* that the conviction of the petitioner cannot be upheld. *Queen Empress* v *Tota Ram I L R 1? All ?16 Probhat Chandra* v *Emperor I L R ?? Calc ?19 1? C W N 2?2* followed CHARU CHANDRA GHOSH v THE KING EMPEROR (1913)
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——— s 19 (e) — *Arms—Gun — License—Going armed without license—Servant fetching gun for his master—Liability of servant* The accused was sent to an adjacent village by his master who was licensed to bear arms to fetch a gun which he (the master) had left there While so returning with the gun the accused was arrested for going armed in contravention of the provisions of s 13 of the Indian Arms Act (XI of 1878) He was convicted and sentenced under s 19 (e) of the Act *Held* acquitting the accused that the mere temporary possession without a license of arms for purposes other than their use was not an offence within the meaning of s 19 of the Indian Arms Act (XI of 1878) *Emperor* v *Harpal Rai ?4 All 451* followed EMPEROR v KOYA HANSJI (191?)
I L R 37 Bom. 191

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See ARMS **I L R 41 Calc 11**

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an honorary magistrate was exempt from the operation of the Arms Act There was evidence that the arms were kept clean and that the son at all events took a certain amount of interest in them *Held* that a finding that the son was in possession of these arms and not having a license for them was liable to conviction for an offence under s 19 (f) of the Indian Arms Act 1878 was not open to objection EMPEROR v GHULAM HUSAIN (1918) **I L R 40 All 420**

——— *Accused not in present possession if may be convicted—Person liable to punishment under cl (f) of s 19* Where the petitioner having been in possession of a gun for some time made it over a year and a half ago to another person in whose possession the gun was without a license *Held* that the petitioner could not be convicted of an offence under s 19 cl (f) of the Indian Arms Act The only person who can be punished under cl. (f) is the person who has in his possession or under his control any arm in contravention of the provisions of ss 14 and 15 AKHIL NATH DIT v EMPEROR (1910) **15 C W N 440**

——— s 20—Dang *and detachable blade—whether an instrument falls within the expression* Arms *depends upon the circumstances of the case* Appellant was found carrying a bamboo *dang* 5 feet 7 inches long which had an iron attachment at the thick end and hidden in the folds of his loin cloth was a blade 8 inches long which fitted the end of the *dang* *Held* that taking into consideration the nature of the instrument the fact that the blade could be readily slipped on and off the stick and the fact that it was found detached from the stick and hidden in the appellant s loin cloth shewed that it was possessed by him not for ordinary domestic purposes but for purposes of offence or defence and that it was therefore included in the term Arms used in the Arms Act Whether or not any particular instrument is included in the expression Arms used in the Arms Act depends on the circumstances of the case *Crown* v *Santa Singh (16 P R (Cr) 1900)* and *Crown* v *Ralla Singh (32 P R (Cr) 1918)* followed Criminal Revision No 1641 of 1916 and Criminal Appeal No 673 of 1910 (unpublished cited) MANGAL SINGH v CROWN
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——— s 25—

See THE PASS **I L R 39 Calc 953**

——— ss 25 and 28—

See CRIMINAL PROCEDURE CODE s 1?? **I L R 42 Mad 96**

ARMY ACT 1881 (44 & 45 VICT c 58)

——— s 136—

See ATTACHMENT
I L R 43 Bom. 716

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 60 CL. (?) (b)
I. L. R 38 Bom. 66?

——— ss 145 190— *Army (Amendment No 2) Act 5 and 6 Geo V c 58 s 4—First Class Warrant Officer of the British Army—Soldier—Decree for alimony and maintenance—Order by Commander in Chief for payment of alimony and*

ARBITRATION ACT (IX OF 1899)—*concld*

——— s 19—*contd*

13 B L R 91 (1874) Mathura v Haran I L R 43 Cal 857 s c 20 C W N 594 (1915) and *Budhu v Chattu I L R 44 Cal 804 s c 21 C W N 269 (1916)* referred to Taking grounds in a memorandum of appeal against an adverse order does not constitute the taking of a step in the proceedings within the meaning of s 19 Arbitration Act *Adams v Callay (1892) 66 L T Rep 687* distinguished JOYLALL & Co v GOPI RAM BHATICA 24 C W N 612

ARBITRATION AWARD

See ARBITRATION

——— *Reference authorising majority award—Award by majority without consulting others if valid* An award made by a majority of arbitrators appointed by the parties without consulting the others *is not* a valid award even when the reference authorises the arbitrators to make a majority award ABU HAMID ZAHIRA ALA v GOLAM SARWAR (1916) 22 C W N 301

ARBITRATION BY COURT

——— *Submission of the questions in dispute to Court for determination—Award—Review—Appeal—Jurisdiction—Civil Procedure Codes (Act XIV of 1882) s 622 (Act V of 1908) s 115* When after the hearing of a suit had commenced before a Munsif both parties agreed to leave the questions in dispute between them to the determination of the Court after the Court had made a local inspection and also agreed not to raise any objection to the *same* or to prefer an appeal *Held* that the decision of the Munsif was in the nature of an award and that he could not alter the award when once made or review his own decision *Dutto Singh v Dosad Bahadur Singh I L R 9 Calc 575* referred to *Held* further that no appeal lay to the District Judge and the order of the *District* Judge in entertaining the appeal and making the order of remand was without jurisdiction *Sayad Zain v Kalabhai I L R 23 Bom 752* followed *Held* further that no appeal lay from the decision of the District Judge to this Court but the High Court could interfere *suo motu* under s 622 of the Civil Procedure Code (Act XIV of 1882) corresponding with s 115 of the new Code (Act V of 1908) BAIKANTA NATH GOSWAMI v SITA NATH GOSWAMI (1911) I L R 38 Calc 421

ARBITRATION CLAUSE

See CONTRACT I L R 47 Calc 799

——— contract with—

See APPEAL TO PRIVY COUNCIL I L R 47 Calc 918

——— Proceedings on—

See INJUNCTION I L R 47 Calc 733

ARBITRATION IN LONDON

See ARBITRATION (AWARD 43)
26 C W N 642

See CONTRACT I L R 43 Calc 77

ARBITRATOR

See ARBITRATION ACT (IX OF 1899) ss 8 (1) (a) (b) (c) (d) AND (2) 9 I L R 43 Bom 809

See CONTRACT 15 C W N 981

——— distinction between—and valuer—

See PRESUMPTION I L R 42 Bom 668

——— duties of—

See CIVIL PROCEDURE CODE (1908) s 104 (f) I L R 38 All 380

——— jurisdiction to award damages to defaulting seller—

See AWARD I L R 44 Bom 780

——— power of—

See CONTRACT ACT (IX OF 1872) ss 1 118 I L R 41 Bom 518

ARCHAKA

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXIII R 3 I L R 38 Mad 850

AREA

See MEASUREMENT I L R 47 Calc 286

——— deficiency in—

See BENGAL TENANCY I L R 48 Calc 473

See KABULIYAT I L R 41 Calc 493

ARMS

See ARMS ACT (XI OF 1878) s 4 I L R 32 All 152

——— joint possession of—

See MISJOINDER OF CHARGE I L R 42 Calc 1153

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I L R 2 Lah 290

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See TRESPASS **I L R 39 Calc 953**

——— ss 25 and 28—

See CRIMINAL PROCEDURE CODE s 195
I L R 42 Mad 96

ARMY ACT 1881 (44 & 45 VICT c 58)

——— s 136—

See ATTACHMENT
I L R 43 Bom 716

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 60 CL (2) (b)
I. L. R 38 Bom 667

——— ss 145 190—*Army (Amendment No 2) Act 5 and 6 Geo V c 58 s 4—First Class Warrant Officer of the British Army—Soldier—Decree for alimony and maintenance—Order by Commander in Chief for payment of alimony and*

ARMY ACT 1881 (44 & 45 VICT, C 58)—contd

————ss 145 190—*contd*

maintenance—Civil Court cannot attach salary in execution of decree—Civil Procedure Code (Act V of 1908) ss 4 60 (2) (b) O XXI r 48—Repeal of s 60 (2) (b) by the Repealing and Amending Act (X of 1914) In a suit for dissolution of marriage the defendant who was a First Class Warrant Officer of the British Army was ordered to pay permanent alimony to his wife (plaintiff) and maintenance to his children by her Later the Court having fixed the amount of Rs 65 as payable on each account the plaintiff applied to the Court for attachment of the defendant s salary and allowance under the provisions of O XXI r 48 of the Civil Procedure Code 1908 The application was dismissed under s 136 of the Army Act The plaintiff having appealed it was contended for the defendant that in view of an order made by the Commander in Chief directing that a certain sum be deducted from the defendant s salary for payment to the plantiff under s 145 (2) of the Army Act (44 and 45 Vict c 58) on the footing that the defendant was a soldier his pay could not be attached under the provisions of the Civil Procedure Code 1908 *Held* upholding the contention that s 145 of the Army Act prevailed over the provisions of the Civil Procedure Code in spite of the repeal of clause (b) from sub s (2) of s 60 by the Repealing and Amending Act of 1914 *Held* also that the terms of s 4 of the Civil Procedure Code compelled the Court to apply the special rule of procedure provided by s 145 of the Army Act in preference to the general provisions of the Code DUCKWORTH v DUCKWORTH (1918) I L R 43 Bom 368

ARREARS OF RENT

See PATNI SALE I L R 47 Calc 337

See PATNA TALUK
I L R 48 Calc 454

See PUTNI TENURE
I L R 37 Calc 747

See INTEREST *I L R 41 Calc 342*

See CHOTA NAGPUR ENCUMBERED ESTATES ACT APPLICATION OF
I L R 46 Calc 1

———— suit for—

See ILLEGAL CESS
I L R 45 Calc 259

ARREARS OF REVENUE

See COMMISSIONER POWER OF
I L R 40 Calc 552

———————— *Surplus sale proceeds —Recorded proprietors assignee of right to receive—Revenue Sale Law (Act XI of 1859) s 31—Declaratory suit maintainability of—Time running of from denial of such right—Limitation Act (IX of 1908) Sch I Art 120* Under s 31 of Act XI of 1859 an assignee of the recorded proprietors is not their representative so that the Collector is justified in refusing to pay to such assignee *claiming on his own behalf* the money held in deposit on account of the recorded proprietors *Secretary of State for India v Marjum Hosein Khan I L R 11 Calc 359* followed But the assignee is nevertheless entitled to a declaration in the Civil Court as against the recorded proprietors that he is entitled to the estate at the time of the sale and consequent thereto to the surplus sale proceeds the assignee is at liberty to apply to the Collector on the basis of this decree for payment of the surplus sale proceeds In such a suit time should run against the assignee (under Art 120 of the *First Schedule to the Indian Limitation Act*) from the date when the right to obtain relief by way of declaration had been denied in a dispute amongst the parties entitled to the money BIJOY LAL SEAL v NAYAN MUNJARI DASSI (1919)
I L R 47 Calc 331

ARREST

See ARREST BY PRIVATE PERSON

See CIVIL PROCEDURE CODE 1882 s 341 AND 349 I L R 33 All 279

See CIVIL PROCEDURE CODE 1908 ss 47 96 104 (b) 135 (2)
I L R 32 All 3

See CRIMINAL PROCEDURE CODE 188 I L R 35 Bom 225

s 56 AND 110
I L R 35 All 407

s 110 167 I L R 43 All 186

See HABEAS CORPUS
I L R 39 Calc 164
I L R 44 Calc 76

See PENAL CODE (ACT XLV OF 1860) s 225B I L R 38 All 506

See RESCUE FROM LAWFUL CUSTODY
I L R 43 Calc 1161

See WARRANT OF ARREST
3 Pat L J 493

———— by Excise Inspector—

See PIOTING I L R 41 Calc 836

———— By Private Person—

See PENAL CODE s 107
5 Pat L J 129

———— of Indian subject in railway land of Gwalio State—

See JURISDICTION OF CRIMINAL COURTS
I L R 1 Lah 406

———— order declining to—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XLIII R 1 (r) AND O XXXIX R 2 CL (3)
I L R 39 Mad 907

———— powers of—

See CRIMINAL PROCEDURE CODE s 54 (1)
I L R 36 All 6

———— warrant to—

See HABEAS CORPUS
I L R 44 Calc 459

———— without warrant—

See PIOTING I L R 41 Calc 836

ARREST AND SEARCH

See CONSPIRACY I L R 40 Calc 898

ARREST BY PRIVATE PERSON

See ARREST

See CRIMINAL PROCEDURE CODE 107 5 Pat L J 129

See PENAL CODE s 107 5 Pat L J 129

——— *Private person making offender over to a chowkidar to be taken to the thana—Escape of the offender—Legality of the chowkidar's custody—Criminal Procedure Code (Act V of 1898) s 59—Penal Code (Act XLV of 1860) ss 224 225* Where a private person has lawfully arrested an offender under s 59 of the Criminal Procedure Code but made him over to a chowkidar to be taken to the thana the custody of the latter is not lawful within ss 224 and 225 of the Penal Code inasmuch as he is not a police officer within the meaning of the term in s 59 of the Criminal Procedure Code *Kalai v Kalu Chowkidar I L R 27 Calc 366* followed PURNA CHANDRA KUNDU v EMPEROR (1913) I L R 41 Calc 17

ARREST OF SHIP

——— *Trespass—Absence of Notice—Cause of action—Admiralty jurisdiction—Letters Patent 1865 cl 32—Letters Patent 1862 cl 31—Charter of the Supreme Court 1774 cl 26—Admiralty Court Act 1840 (3 and 4 Vict c 65)—Admiralty Court Act 1861 (24 Vict c 10) s 5—Colonial Courts of Admiralty Act 1890 (53 and 54 Vict c 27) ss 2 (3) (a) 35—Interpretation Act 1889 (52 and 53 Vict c 63) s 18 (2)—Maritime necessaries—Action in rem—Wrongful seizure—Limitation Act (IX of 1908) Sch I Arts 29 36 49—Pleadings* On the 4th June 1910 the respondent company instituted a suit *in rem* against the *Clan Mackintosh* in this Court as a Colonial Court of Admiralty for an amount alleged to be due to them for maritime necessaries and obtained a warrant of arrest The ship was arrested on the same day and remained under arrest until her release on the 31st January 1912 the action having been dismissed two days earlier on the ground of absence of jurisdiction The owners of the ship were the appellant company who had their office in Burma On the 14th June 1912 the appellant company instituted the present suit in the ordinary original civil jurisdiction of this Court against the respondent company for the wrongful arrest of the ship The suit as framed was based on malice or its equivalent but at the hearing the appellant company proceeded on the footing of the suit being one for mere trespass *Held* that in the absence of proof of malice or its equivalent a suit for simple trespass will not lie for the arrest of a ship *The Walter D Wallet [1893] P 202* *Xenos v Aldersley* *The Evangelismos 12 Moo P C 352* and *The Strathnaver L R 1 A C 58* referred to The arrestment of the ship was a judicial act of the Court and an ordinary step in an action *in rem* Under the arrest the custody and possession was with the Marshal as an officer of the Court and could not be regarded as a detention by the respondent company The damage if any suffered from the continuance of the officer's custody and possession was due not to the default of the respondent company but to the law's delay *Peruvian Guano Co v Dreyfus [189] A C 166* followed The foundation of the Admiralty jurisdiction of the High Court more especially in respect of maritime necessaries discussed *The Two Ellens L R 4 P C 161* *The Henrich Bjorn L R 11 A C 270* *Murray v Longford 1 Fulton 95* *The Asia 5 Bom H C (O C) 64* *The Portugal 6 B L R 323* *Bardot v The Augusta 10 Bom H C 110* referred to Assuming that the High Court in its Admiralty jurisdiction did not acquire jurisdiction over maritime necessaries by any previous enactment such jurisdiction would now rest on the Colonial Courts of Admiralty Act 1890 which vests in it the powers described in s 5 of the Admiralty Act 1861 To oust the jurisdiction of this Court under s 5 it is not enough that the owners of the ship should be infact domiciled in India or Burma this domicile has to be proved to the satisfaction of the Court *Ex parte Michael L R 7 Q B 658* followed Inasmuch as such proof was not produced before the Court when the order for arrest was made the order for arrest cannot be treated as *coram non judice* or a nullity Assuming that an action would lie in the absence of proof of malice or its equivalent the action would be for wrongful seizure under legal process and would be barred by Art 29 of the Limitation Act It is imperative under O VII r 1 (e) of the Code of Civil Procedure that a plaint should contain the facts constituting the cause of action and *when it arose* MADRAS STEAM NAVIGATION CO LD v SHALIMAR WORKS LD (1914) I L R 42 Calc 85

ARTICLES OF ASSOCIATION

See COMPANIES ACT (VI OF 1882) ss 76 77 I L R 36 All. 416

See MORTGAGE I L R 39 Calc 810

ARTICLE IN NEWSPAPER

See SEDITION I L R 38 Calc 253

ARTIFICIAL CHANNEL

See MADRAS IRRIGATION CESS L R 44 I A 166 and 302

ASCETICS

See HINDU LAW—INHERITANCE I L R 40 Calc 545

——— sudra inheritance by—

See HINDU LAW—ADOPTION I L R 40 Mad 846

ASSAM FOREST REGULATION (VII OF 1891)

——— ss 4 to 17 25—

See RESERVED FOREST I L R 47 Calc 889

——— s 17—*Declaration of reserved forest—Disposal of claim as condition precedent to validity of final order* Where after the issue of the preliminary notification under s 5 of the Assam Forest Regulation the Petitioner filed a claim before the Forest Settlement Officer who held that he was not competent to decide a claim of the nature made in the case and disallowed it and the Petitioner did not appeal against this order and the final notification declaring the forest to be a reserved forest was made *Held* that the Petitioner's claim was not undisposed of within the meaning of s 17 of the Regulation and the final notification was not invalid. KHANDKAR HEDAYATULLA v KING EMPEROR 24 C W N 645

ASSAM LABOUR AND EMIGRATION ACT (VI OF 1901)

——— ss 2 152 162 164—*Illegal recruitment of cooly—Repatriation at the expense of the employer—Jurisdiction of Magistrate* In a case under s 164 of the Assam Labour and Emigration Act for illegal recruitment of coolies the Sub Deputy Magistrate while acquitting the accused made an order that the proprietor of the garden should deposit the expenses of repatriation of the coolies in question *Held* that the Sub Deputy Magistrate not being appointed by the Local Government within the meaning of s 2 of the Act his order was *ultra vires* That the order was also bad on the ground that the Sub Deputy Magistrate *did not call upon the employer to* show cause against the order there being an acquittal of the accused and nothing to show undue influence or coercion KING EMPEROR v RIHE CHAMAR (1914) 18 C W N 1143

——— ss 20 164—

See EMIGRATION I L R 37 Calc 27

——— Emigration within the meaning of the Act must be with the idea that the object to be attained or kept in view by the emigrant is arrival in a labour district and labouring there MANIK RAM AHIR v KING EMPEROR 1 Pat L J 383

——— ss 2 (1) and 164 – *Interpretation clauses construction of* Cl (e) of sub s (1) of s 2 of the Assam Labour and Emigration Act 1901 does not purport to be a definition of the word emigrate and cannot therefore be construed in too literal a sense as if it were a positive enactment The clause is merely descriptive To constitute emigration within the meaning of the Act all that is necessary is (a) that the points of departure and destination should be as required by the Act i e the departure should be from any part of the territories in which the Act for the time being is in force and the destination should be a labour district (b) that the emigrant should be sixteen years of age or upwards and (c) that the emigrant is to labour for hire in a labour district otherwise than as a domestic servant There is nothing in clause (e) to indicate that in order to constitute emigration within the meaning of s 164 there must be a personal intention present to the mind of the person recruited when he is recruited to go to a labour district to work there for hire *Manik Ram Ahir* v *King Emperor* 1 P L J 383 not followed *Fazi Ali* v *Emperor* I L R 37 Calc 27 *referred to* 2 Pat L J 91

——— s 91—

See SECRETARY OF STATE

I L R 37 Mad 55

ASSAM LAND AND REVENUE REGULATION (I OF 1886)

——— ss 3 96, 97, 154—

See PARTITION

I L R 47 Calc 354

——— s 6—*Assam Land and Revenue Regulation (I of 1886) s 6 r 80 (i) of the Government Rules—Settlement of land first applicant if entitled—Jurisdiction of Civil Court* R. 80 cl (i) of the rules framed under Regulation I of 1886 of the Assam Land and Revenue Regulation lays down a principle for the guidance of Settlement Officers and does not confer a right on the first applicant to a settlement It directs that in cases where settlement is not made with the first applicant the reasons therefor should be stated in writing It does not follow from this that if the reasons are not recorded the first applicant is entitled to a settlement *Mathab Nath* v *Myarani Madhi* I L R 17 Calc 819 *Patan Marin* v *Bhabiram Dutt* I L R 24 Calc 239 distinguished Under s 6 (a) of the Regulation no right to settlement arises merely by reason of the fact that the plaintiff was the first applicant ANANDA KISORE SEN v SECRETARY OF STATE FOR INDIA (1910) 14 C W N 993

——— s 12—

——— *R 57 of the Rules framed by the Chief Commissioner under s 12—R settlement of land previously settled by lease—Jurisdiction of Civil Court to examine if Collector had in mind while making settlement the instruction in Rule as to person to whom preference to be given* Under r 57 of the rules framed by the Chief Commissioner under s 12 of the Assam Land and Revenue Regulation the previous settlement holder is to be ordinarily given preference in resettling a land previously settled by a lease In a suit by the previous settlement holder of land for declaration of his right to settlement the Civil Court has jurisdiction to see whether r 57 has been complied with It is not open to the Civil Court to go into the question of correctness or sufficiency of the reasons and once it appears that the revenue authorities took into their consideration the fact that preference should ordinarily be given to the settlement holder they have a discretion in the matter The Civil Court has power to see whether the Collector has found anything for excluding the plaintiff from the settlement and the reasons for such exclusion may appear not only in the Collector's order but in the office report and even in the petition of the parties or in other settlement papers JOY GOBINDO HAJAM v MUSSIT HAZIRA BIBI 24 C W N 149

——— s 28 proviso 2 and 4—

See ASSESSMENT I L R 43 Calc 873

——— ss 63, 67 85—

See SALE FOR ARREARS OF REVENUE I L R 44 Calc 412

——— ss 70 71—

See SALE FOR ARREARS OF REVENUE I L R 43 Calc 779

——— *Suit to recover possession from person registered under the Regulation of lies—Jurisdiction of Civil Court* The plaintiff sued for recovery of possession of land upon declaration of title The plaintiffs purchased the land in suit from the defendants but notwithstanding this rule the defendants got themselves registered under the Assam Land and Revenue Regulation and kept the plaintiffs out of possession *Held* that it was competent to the Civil Court not only to declare the title of the plaintiffs but also to place them in possession of the disputed property by ejectment of the defendants ASKAR MIAN v SABAD ALI BORA (1915) 23 C W N 540

ASSAM LAND AND REVENUE REGULATION (I OF 1886)—*contd*

——— ss 96 97 154 (e)—

See PARTITION I L R 46 Calc 236

——— s 97—*Held* that s 97 confers on every recorded proprietor of permanently settled land the right to claim partition subject to certain qualifications NASIM ALI MIRDHA v RADHA GOBINDA. 26 C W N 381

——— s 154—*if bars suit for declaration of title and possession by Co sharer* S 154 of the Assam Land and Revenue Regulation which provides that no Civil Court shall exercise jurisdiction in the distribution of land or allotment of revenue on partition is no bar to an unrecorded co sharer who was not allowed to intervene in partition proceedings before the Revenue authorities instituting a suit for a declaration of his title to a share of the estate and for confirmation of possession, when the partition proceedings before the Revenue authorities had not yet been completed HABIRAM DAS v HEM NATH SARMA (1915) *19 C W N 1068*

ASSAULT

See CRIMINAL PROCEDURE CODE ss 345 AND 439 I L R 37 All 419

See MISJOINDER OF PARTIES I L R 42 Calc 760

See PENAL CODE (ACT XLV OF 1860) ss 323 AND 332 I L R 37 All 353

See RAILWAY PASSENGER I L R 44 Calc 279

See TORT I L R 43 Bom 103

——— *threat to*—

See PROVINCIAL SMALL CAUSES COURTS ACT SCH. II CL 35 (*l*) I L R 36 Bom 443

ASSEMBLING WITH ARMS

See DACOITY I L R 41 Calc 350

ASSESSED LAND

——— suit for land and trees valuation of—

See COURT FEES ACT (VII OF 1870) s 7 CL (V) (B) AND (C) I L R 40 Mad 824

ASSESSMENT

See BOMBAY LAND REVENUE CODE—
s 3 I L R 35 Bom 462
s 48 I L R 34 Bom 239
s 56 AND 214 I L R 38 Bom 91

See CALCUTTA MUNICIPAL ACT s 151 CL (*b*) 15 C W N 84

See CANTONMENTS ACT (III OF 1880) s 22 I L R 38 Bom 293

See CHAUKIDARI CHAKRAN LANDS I L R 42 Calc 710

See COMPENSATION I L R 44 Calc 87

See INAMDAR I L R 41 Bom 159

——— failure to pay—

See BOMBAY LAND REVENUE CODE (BOMBAY) s 56 I L R 37 Bom 692

ASSESSMENT—*contd*

——— of Kazi Inam lands—

See BOMBAY REVENUE JURISDICTION ACT (BOMBAY) s 4 (*a*) PROV (*l*) I L R 44 Bom 120 and 130

——— method of—

See LAND ACQUISITION—COMPENSATION I L R 40 Calc 64

See MACHINERY I L R 46 Calc 910

See MUNICIPALITY I L R 46 Calc 784

See SUMMARY SETTLEMENT ACT (BOM ACT VII OF 1863) I L R 43 Bom 583

——— penal levy of—

See MADRAS LAND ENCROACHMENT ACT (III OF 1905) ss 5 6 7 14 I L R 39 Mad 727

——— Powers of the Collector to increase or alter assessment—

See INCOME TAX ACT (II OF 1886) ss 14 AND 50 I L R 44 Bom 234

——— principle of—

See MUNICIPAL ASSESSMENT I L R 39 Calc 141

See MUNICIPALITY I L R 41 Calc 168

——— Right of Inamdar to enhance assessment at the end of the period of settlement—

See BOMBAY LAND REVENUE CODE (BOM ACT V OF 1879) s 217 I L R 44 Bom 110

——— *Rateable value—Salt works—Method of assessment—Assessing authority to consider what an hypothetical tenant would pay—Premises to be valued for rateable purposes rebus sic stantibus—Valuation for assessment based upon a method applied to salt pans in a different country at different times—Method of valuation wrong and illegal—Aden Act (II of 1864) s 8* The principles on which property is assessed to the rates are first that in assessing any particular property the assessing authority must consider what a tenant from year to year with a reasonable prospect of the continuation of his lease would give for the premises and in considering this the assessing authority must regard the then occupier as a likely tenant secondly that the premises must be valued for rateable purposes *rebus sic stantibus* i e as they exist at the date of the valuation *The Queen v School Board for London 17 Q B D 738 London County Council v Church Warden etc of Parish of Erith and Assessment Committee of Dartford Union [1893] A C 562 Great Central Railway v Banbury Union [1909] A C 315 Davies v Seisdon Union [1909] A C 78 The Queen v Fletton 3 E & E 450 465* referred to In 1909 the plaintiffs obtained from Government a lease of certain lands at Aden for the purpose of constructing salt works thereon at the annual rental of R- 000 for the land and a royalty of 8 annas per ton of salt exported. They erected a factory for crushing salt on the land and the works first commenced to yield salt in 1911 The defendants were the assessing authority for

ASSESSMENT—*contd*

the Aden Settlement For the year 1909 and 1910 the defendants had under the powers conferred upon them by Government Notifications assessed the plaintiffs in the annual rent of R7 000 payable by them under the lease In the year 1911 the defendants adopted a different basis of assessment They assessed the plaintiffs on the basis of half the produce of works less 10 per cent landlord s deductions *In support of* this method of assessment the defendants relied upon a method of valuation considered to have been in vogue for salt pans in Bombay in the year 18 and upon a decision which they had obtained in their favour from the Resident s Court at Aden in 1909 in respect of other salt works at Aden to which the alleged Bombay method of assessment was applied A question being raised whether the mode of assessment adopted by the defendants in the year 1911 was wrong and illegal *Held* that the mode of assessment was wrong and illegal as the defendants made no attempt to value the particular salt works in question or to say whether the method they applied was such as to result in the assessment that the hypothetical tenant of these premises would pay for them ABDULLABHOY LALJI v THE EXECUTIVE COMMITTEE ADEN SETTLEMENT (1918) I L R 42 Bom 692

———— *Arable land—Exemption from—Bengal Municipal Act (Beng III of 1884) s 6 cl 3 85— Holding —Bengal Municipal (Amendment) Act of 1894 s 36* The word hold ing in the Bengal Municipal Act 1884 is wide enough to cover arable land which is therefore liable to be assessed under the provisions of the Act MAHADEB ADY v CHAIRMAN OF THE HOWRAH MUNICIPALITY (1910) I L R 37 Calc 697

———— *Jurisdiction of Civil Court—Bengal Municipal Act (Beng III of 1884) s 116—Ultra vires* Under s 116 of the Bengal Municipal Act the decision of the Objection Committee in matters regarding the amount of assessment is final, and the Civil Court has no jurisdiction to interfere in such matters It can only interfere when the assessment is *ultra vires* *Manessur Dass v The Collector and Municipal Commissioners of Chapra I L R 1 Calc 409* referred to *Karadip Chandra Pal v Purnananda Saha 3 C W N 73* and *Kameshwar Pershad v The Chairman of the Bhabua Municipality I L R 27 Calc 849* distinguished CHAIRMAN MUNICIPAL BOARD CHAPRA v BASUDEO NARAIN SINGH (1910) I L R 37 Calc 374

———— *Sovereign right—Limitation—Resumption—Right of Government to assess revenue on land alleged to be lakheraj—Divesting of such right effect of—Bengal Regulation (II of 1805) s 2 sub s (2)—Assam Regulation (I of 1886) s 28 provisos 2 and 4—Legislation when retrospective* Though the Government s right to assess land revenue is a sovereign right and hence not subject to the Statute of Limitation under ordinary circumstances there is nothing to prevent the Government *from divesting itself of such right* by making regulations for assessment and collection of revenue which might under certain circumstances give exemption from assessment of land revenue *Boddupalli Jagannadham v The Secretary of State for India I L R 27 Mad 16* distinguished. The effect of proviso 4 to s 28 of the Assam Regulation (I of 1886) which is based on s 2 of the Bengal Regulation (II of 1805) is to exempt land from assessment if the owner can prove 60 years possession of it without payment of any revenue during that period and thus to introduce the rule of 60 years limitation Proviso 2 of that Regulation merely authorises assessment of lands excepted from the Permanent Settlement if they do not fall under any of the saving clauses *A statute is* not retrospective simply because a part of the requisites *for its action is drawn from a time antecedent* to its passing *Queen v St Mary Whitechapel 12 Q B 120* followed ANANDA KUMAR BHATTACHARJEE v SECRETARY OF STATE FOR INDIA (1916) I L R 43 Calc 973

———— *Bengal Municipal Act (Beng III of 1884) ss 85 87 — Circumstances and property within the Municipality meaning of* It is now settled law that the words within the municipality in s 85 of Bengal Municipal Act (Beng III of 1884) govern both circumstances and property and that the word circumstances is in substance the equivalent of means *Deb Narain Dutt v Chairman of the Baruipur Municipality I L R 39 Calc 141* and *I L R 41 Calc 168, Chairman of Giridih Municipality v Srish Chandra Mozumdar I L R 35 Calc 859 12 C W N 709* referred to Income brought to be spent and enjoyed within the municipality in which the rate payer is resident becomes part of the means or circumstances within that municipality and liable to assessment thereunder s 85 of the Bengal Municipal Act (Beng III of 1884) *Kameshwar Pershad v Babua Municipality I L R 27 Calc 849* distinguished CHAIRMAN JAYNAGAR MUNICIPALITY v SAILABALA DUTT (1920) I L R 48 Calc 443

ASSESSMENT OF RENT

See ASSESSMENT

———— by Collector—

See CHAUKIDARI CHAKRAN LAND I L R 37 Calc 598

———— by Settlement Officer—

See BOMBAY LAND REVENUE CODE (BOM) SS 144 AND 160 I L R 43 Bom 6

See RENT I L R 38 Calc 278

See SARANJAM I L R 40 Bom 606

See TRANSFER OF PROPERTY ACT S 53 I L R 34 Bom 387

ASSESSORS

See CRIMINAL PROCEDURE CODE 1898
s 238 I L R 45 Bom 619
ss 268 AND 537 I L R 43 All 125
s 284 I L R 35 All 570
3 Pat L J 141

See DACOITY I L R 41 Calc 350

See PRIVATE DEFENCE 3 Pat L J 653

———— appointment of—

See BENGAL MUNICIPAL ACT (BENG ACT III OF 1884) *I L R 37 Calc 44*

———— opinion of—

See MAGISTRATE I L R 39 Calc 119

———— *Examination of Assessors—Re trial—Criminal Procedure Code (Act V of 1898) ss 309 403 423 439—Assessors not to be questioned until their opinions delivered and recorded—Rioting—Right of private defence—Practice* S 309 of the Code of Criminal Procedure

ASSESSORS—*concld.*

gives the Judge a discretion to sum up the evidence for the benefit of the assessors if he thinks necessary but it gives him no power to question them until they have delivered their opinions orally and he has recorded such opinions When a conviction is set aside and a re trial ordered the whole case is re opened and the accused must be tried again on all the charges originally framed and having regard to the provisions of s 423 of the Code of Criminal Procedure the provisions of s. 403 in that respect cannot apply *Krishna Dhan Mandal* v *Queen Empress I L R 22 Calc* [illegible] and *Queen Empress* v *Jabanulla I L R 23 Calc 9* [illegible] referred to NAZIMUDDIN v EMPEROR (1912) I L R 40 Calc 163

ASSETS

See ADMINISTRATOR GENERAL'S ACT (II OF 1874) ss 28 34 35 I L R 38 Mad. 500

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) ss 276 AND 295 I. L R 37 Bom 138

——— held by Court—

See CIVIL PROCEDURE CODE O XXI R 62 I L R 44 Mad. 100

——— rateable distribution of—

See CIVIL PROCEDURE CODE 1908 s 73 15 C W N 872

ASSIGNEE

——— addition of, as plaintiff—

See LIMITATION ACT (XV OF 1877) s 22 I L R 40 Mad 722

See EXECUTION OF DECREE I L R 47 Calc 515

——— from subscriber to kuri—

See SPECIFIC RELIEF ACT (I OF 1877) s 42 I L R 39 Mad 80

——— of promissory note—

See TRANSFER OF PROPERTY ACT (IV OF 1882) ss 130 AND 131 I L R 38 Mad 207

——— right of to apportionment—

See LESSOR AND LESSEE I L R 38 Mad 80

See SUCCESSION CERTIFICATE ACT (VII OF 1889) s 4 I L R 38 All 474

——— right of, to a charge—

See INAMDAR I L R 40 Mad 93

——— *Decree reversed in appeal—Assignee not a party to the appeal—Money realised by assignee in execution—Application by judgment debtor for restitution—Objection by assignee to application—Suit by judgment debtor against assignee—Fraud and collusion between judgment debtor and original decree holder effect of—Civil Procedure Code (Act XIV of 1882) s 583—Lis pendens* A judgment debtor from whom the assignee of a money decree has realised the decretal amount in execution is entitled to recover it back from him when the decree is afterwards reversed in appeal even if the assignee of the original decree was not brought on the record in the appeal Neither the fact that the assignment was made before the appeal was filed nor the fact that the judgment debtor had knowledge of the assignment before he lodged his appeal makes any difference Where the decree of the Appellate Court was the result of fraud and collusion between the judgment debtor and the original decree holder it is possible that such a plea if made and proved would be a sufficient answer to a suit by the judgment debtor against the assignee of the decree Money obtained under an invalid process of Court must be treated as money had and received to the use of the person from whom it was realised A suit for restitution by the judgment debtor was maintainable where he had sought his remedy for restitution by an application made to the Court which executed the decree and it was on the objection of the defendant (assignee of the decree) that he was driven to institute the suit the defendant cannot now be heard to say that the procedure to which he himself successfully objected was the proper procedure *Settappa Goundan* v *Muthia Goundan I L R 31 Mad 208* and *Doraiswami Ayyar* v *Annaswami Ayyar I L R 23 Mad 306* followed *Tangi Joghi* v *Hall I L R 33 Mad 203* referred to *Lalta Prasad* v *Sadiq Husen I L R 24 All 288* dissented from COVINDAPPA v HANUMANTHAPPA (1912) I L R 38 Mad 30

ASSIGNEE OF DECREE

See LANDLORD AND TENANT I L R 41 Calc 926

ASSIGNEE OF MORTGAGEE

——— suit by—

See MORTGAGE I L R 47 Calc [illegible]

——— Purchaser—

See LIEN I L R 47 Calc 1108

ASSIGNMENT

See ADMINISTRATION BOND I L R [illegible] Calc [illegible]

See CHAMPERTY AND MAINTENANCE I L R [illegible] All [illegible]

See CIVIL PROCEDURE CODE 1908 O XXI R 16 I L R [illegible] Bom [illegible]

See CONTRACT I L R [illegible] Calc [illegible]

See EQUITABLE ASSIGNMENT

See TRADE MARK I L R 40 Calc 814 I L R [illegible] Calc [illegible]

See TRUSTS ACT s [illegible] I L R [illegible] Bom [illegible]

——— founded on tort—

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 6 (e) I L R 38 Mad 133

——— by lessee—

See LESSOR AND LESSEE I L R 38 Mad 80

——— of lease—

See LEASE I L R 42 Bom 103 I L R 43 Bom 734

See LESSOR AND LESSEE I L R 49 Calc 176

——— of debt—

See DEBT I L R [illegible] Calc [illegible]

See SUCCESSION ACT [illegible] I L R [illegible]

ASSIGNMENT—*contd*

See SUCCESSION CERTIFICATE ACT 1889 s 4 I L R 36 All 21
I L R 38 All 474

———— *Deposit of money—Stakeholder—Valid assignment by depositor to his creditor—Neglect of the creditor to recover—Creditor chargeable with the amount* Where money deposited with a stakeholder was validly assigned by the depositor to his creditor in satisfaction of his debt and the creditor being able to recover the amount so assigned neglected to do so he was chargeable with the amount GANPATRAO BALKRISHNA BHIDE v MAHARAJA MADHAVRAO SINDE SARKAR (1910) I L R 35 Bom 1

———— The fact that the person entitled to sue on a mortgage *happens* by assignment to be a Parsee cannot affect the (Hindu) mortgagor s right to claim the advantage of the rule of damdupat if it existed when the mortgage was entered into JEEWANBAI v MANORDAS LACHMANDAS I L R 35 Bom 199

ASSIGNMENT OF DECREE

See CIVIL PROCEDURE CODE 1908 O XXI R 16 5 Pat L J 390

See EXECUTION OF DECREE I L R 34 All 518

See MAINTENANCE I L R 38 Calc 13

See REGISTRATION ACT (XVI OF 1908) ss 17 (b) 49 I L R 36 All 524

———— to defeat creditors—

See DECREE I L R 37 Mad 227

ASSIGNMENT OF EQUITY OF REDEMPTION

See MORTGAGE I L R 45 Calc 702

ASSIGNMENT OF JODI

———— by Government—

See INAMDAR I L R 40 Mad 93

ASSISTANT COLLECTOR

———— jurisdiction of—

See CIVIL PROCEDURE CODE (1908) ss 68 AND 70 SCH III I L R 37 All 334

ASSISTANT JUDGE

See BOMBAY CIVIL COURTS ACT (XIV OF 1869) s 16 I L R 37 All 136

ASSISTANT SESSIONS JUDGE

See CRIMINAL PROCEDURE CODE s 408 (b) I L R 37 All 471

ASURA FORM

See TRUSTS ACT (II OF 1882) s 88 I L R 43 Bom 173

———— of marriage—

See HINDU LAW—MARRIAGE I L R 37 Bom 295

ATTACHED PROPERTY

———— claims to—

See VOLUNTARY PAYMENT I L R 40 Calc 598

ATTACHING CREDITOR

See ATTORNEY I L R 43 Calc 932

———— withdrawal by—

See DEPOSIT IN COURT I L R 43 Calc 289

ATTACHMENT

See AGRA TENANCY ACT (II OF 1901) s 124 I L R 38 All 40

See APPEAL I L R 41 Calc 160

See ARMY ACT (44 & 45 VICT c 58) ss 145 190 I L R 43 Bom 368

See ATTACHMENT BEFORE JUDGMENT

See ATTACHMENT OF DEBT

See BENGAL MUNICIPAL ACT s 321 15 C W N 519

See BENGAL TENANCY ACT s 170 15 C W N 820

See BOMBAY LAND REVENUE CODE (BOM) ss 144 160 I L R 43 Bom 6

See CIVIL PROCEDURE CODE 1882—
ss 268 274 I L R 35 Bom 288
ss 276 295 I L R 37 Bom 138
ss 278 279 280 281 I L R 34 All 365
ss 282 287 I L R 35 Bom 275
ss 287 293 I L R 36 Bom 329
s 325A I L R 36 Bom 510

See CIVIL PROCEDURE CODE (1908)—
s 60 O XXII R 12 I L R 42 All 570
s 60 CL (2) (b) I L R 33 All 529
I L R 37 Bom 26 415 471
I L R 35 All 307
I L R 38 Bom 687
I L R 39 All 308
I L R 40 Mad 302
I L R 41 Bom 475
s 64 I L R 43 All 399
ss 47 73 O XXI RR 54 55 I L R 36 Bom 156
s 115 I L R 45 Bom 260
s 151 I L R 34 Bom 135
O XXI R 16 I L R 36 Bom 58
O XXI R 58 I L R 45 Bom 561
O XXI R 57 I L R 34 All 490
O XXXIV R 14 I L R 35 Bom 248

See CONTRACT ACT (IX OF 1872) s 70 I L R 42 Bom 556

See CONTRIBUTION I L R 32 All 479

See CO OPERATIVE SOCIETY ACT ss 19 20 I L R 42 Calc 377

See CRIMINAL PROCEDURE CODE s 146 15 C W N 163

See DISPUTE CONCERNING LAND I L R 37 Calc 331

See EXECUTION OF DECREE I L R 33 All 482
I L R 48 All 658
I L R 38 Calc 482

ATTACHMENT—*contd*

See EXECUTION OF DECREE—*contd*
I L R 42 All 594
I L R 46 Calc 962

See CHATWALI TENURE
I L R 39 Calc 1010

See INSOLVENCY I L R 40 Calc 78

See JALKAR I L R 39 Calc 469

See LIMITATION I L R 45 Calc 285
I L R 42 Calc 72 289

See LIMITATION ACT (XV OF 1877) Sch II ART 1 0
I L R 36 Mad 283

See MAINTENANCE
I L R 38 Calc 13

See MORTGAGE I L R 38 Bom 10
I L R 46 Calc 245

See OCCUPANCY HOLDING
I L R 44 Calc 720

See PROVINCIAL INSOLVENCY ACT (III OF 1907) ss 18 22 AND 23
I L R 40 All 86 197 582

See BOMBAY REVENUE JURISDICTION ACT (BOM) I L R 37 Bom 542

See SALE FOR ARREARS OF REVENUE
14 C W N 677

——— by creditor—

See INSOLVENCY
I L R 44 Calc 1016

——— cancelling of—

See COURT FEES ACT (VII OF 1870) SCH II ART 17 I L R 39 Mad 602

——— effect of—

See CIVIL PROCEDURE CODE (1908) s 73 O XXXVIII RR 5 8 AND 10 O XXI RR 52 AND 63
I L R 37 All. 575

——— for arrears of revenue—

See CONTRACT ACT (IX OF 1872) ss 69 AND 70 I L R 39 Mad 795

——— of alienated property—

See FRAUDULENT CONVEYANCE
I L R 41 Mad 612

——— of British army officer's pay—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 60 CL (2) (b)
I L R 37 Bom 26

——— of debt—

See CIVIL PROCEDURE CODE 188_ ss 268 278 AND 283
I L R 38 Bom 631

See EXECUTION OF DECREE
I L R 38 Bom 631

See LIMITATION ACT 1908 SCH II ART _9 6_ 1_0 I L R 38 Mad. 972

——— of mortgaged property—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) ss _ _ 2_ _83 _8_
I L R 41 Bom. 64

——— of moveables—

See JURISDICTION
I L R 46 Calc. 520

ATTACHMENT—*contd*

See SANCTION FOR PROSECUTION
I L R 47 Calc 741

——— of property in widow's hands—

See HINDU LAW—WIDOW
I L R 39 Mad 565

——— of property in custody of Court—

See CIVIL PROCEDURE CODE 1908 O XXI R 5 I L R 44 Mad 190

——— prayer for—

See EXECUTION PETITION
I L R 41 Mad 251

——— where maintenance charge on the property—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXI R 60
I L R 44 Bom 860

——— withdrawal of—

See CIVIL PROCEDURE CODE (188_)
I L R 37 All. 542

1 ——— *Civil Procedure Code (Act XIV of 1882) ss 256 488 and 490—Attachment before judgment—Omission to take objection that the attached property was not saleable—The effect of such omission in subsequent execution proceedings* An attachment before judgment does not for all purposes stand on the same footing as an attachment in execution proceedings An omission on the part of the defendant to take exception to the validity of the attachment on the ground that the property sought to be attached is not transferable at the time when the application is made for attachment before judgment does not operate as a bar to the investigation of the objection when an application has been made for execution of the decree made in the suit BASIRAM MALO *v* KATTYAYANI DEBI (1911)
I L R 38 Calc 448

2 ——— *Criminal Procedure Code (Act V of 1898) ss 146 and 148—Refusal to grant time—Duties of the Magistrate—Practice* It is only when the Magistrate decides that none of the parties was in possession or is unable to satisfy himself as to which of them is in possession that he can attach property under s 146 of the Criminal Procedure Code He cannot say that he is unable to satisfy himself if he has never made the slightest effort to do so *Munsur Ali v Mat Ali lah 12 C W N 896* followed *Bejoy Madhab Chowdhury v Chandra Nat Chuckerbutty 14 C W N 80* distinguished SREODILAK PAI *v* BHAGWAT PANDEY (1919)
I L R 46 Calc 105

3 ——— *Warrant—Penal Code (Act XLV of 1860) s 14—Nazir s power of delegation—Bailiff—Civil Procedure Code (Act V of 1908) O XXI r 25* Where a nazir directed a peon to attach property and fixed a time within which the attachment was to take place and the peon executed the warrant of attachment after the expiration of the time so fixed *Held* that the peon deriving his authority from the Court to make the seizure could lawfully make the seizure even after the time fixed by the nazir for the execution had expired The nazir and bailiff are not the same person The officer to whom O XXI r 25 of the Civil Procedure Code refers is not the nazir but the peon *Dharam Chand Lall v*

ATTACHMENT—*contd*

Queen Empress I L R 22 Calc 996 distinguished SUBED ALI *v* EMPEROR (1913)
I L R 40 Calc 849

4 ———————— *If creates lien or title* It is well settled that attachment creates no charge or lien upon the attached property it merely prevents private alienation It does not confer any title on the attaching creditor MONI UDDIN *v* PIRTHICHAND LAL CHOWDHURY (1914)
19 C W N 1159

5 ———————— *Alienation by judgment debtor alleged to be pending the attachment and a fraudulent transfer to a creditor other than decree holder—Transfer of Property Act (IV of 1882) s 53—Judgment debtor preferring one creditor before others—Civil Procedure Code 1882 ss 210 276 295—Contest between private alienee and decree holder—Continuance of attachment* The question in this case was which of two titles to the property in suit was to be preferred that of the appellant under two deeds of sale executed in her favour on 15th July 1907 by the judgment debtor or that of the respondent (decree holder) who purchased the property at an auction sale on 23rd August 1907 in execution proceedings under a decree dated 3rd January 1901 which were instituted by an application for attachment on 16th July 1907 There were two decrees of the High Court at Calcutta Original Side against the judgment debtor of 24th August 1896 and 3rd January 1901 and the respondent was transferee of both decrees which were sent to the District Court at Murshidabad for execution On 13th June 1902 application was made for execution of the decree of 1896 and the proceedings became execution case 8 of 1902 and the execution of the decree of 1901 commenced as above as execution case 16 of 1907 *Held* by the Judicial Committee (reversing the decision of the High Court) that on the evidence and under the circumstances of the case the appellant (plaintiff) had the better title The deeds in her favour were not ante dated as alleged and there was no fraudulent transfer to her within the meaning of s 53 of the Transfer of Property Act (IV of 1882) The preferring of one creditor to another by the judgment debtor did not make the transfer a fraudulent one A debtor [illegible] that is contained in s 53 may pay his debts in any order he pleases and may prefer any creditor he chooses Nor was the private alienation to the appellant void under s 276 of the Civil Procedure Code 1882 as having been made during the continuance of an attachment The respondent s title rested entirely on the attachment in the execution case 16 of 1907 and that alone was the attachment the continuance of which could avoid the appellant s private alienation but on the facts it did not do so The respondent could not invoke the attachment in execution case 8 of 1902 to defeat the alienation to the appellant which was made in different execution proceedings Nor could he with its aid rely on s 295 of the Civil Procedure Code 1882 as entitling him to the benefit of s 276 There were no assets in Court which was essential if s 295 were invoked and the only attachment within the meaning of s 276 was that in execution case 16 of 1907 which he could not employ against the appellant *Sorabji Edulji Warden v Gobind Ramji I L R 16 Bom 91* referred to MINA KUMARI BIBI *v* BIJOY SINGH DUDHURIA (1916) **I L R 44 Calc 662**

6 ———————— *The pay of a British Officer in the Indian Army is liable to attachment—Civil Procedure Code (Act V of 1908) ss 2 (17) 60 (1) (i) and O XXI r 48—Repealing and Amending Act X of 1914—Army Act 1881 (44 and 45 Vict c 58) ss 136 190 (8)—Army (Annual) Act 1895 s 4—Government of India Act 1915, ss 33 65 (1) (d) and (2)—Chamber Summons* A British Officer in the Indian Army is a Public Officer within the meaning of s 2 (17) of the Civil Procedure Code 1908 and as such public officer he is liable to have half his pay or salary attached under s 60 (1) (i) and O XXI r 48 of that Code inasmuch as that attachment is a deduction authorised by a law (i e the Civil Procedure Code) passed by the Governor General of India in Council within the meaning of s 136 of the Army Act 1881 as amended by s 4 of the Army (Annual) Act 1895 The proviso in s 60 (?) (b) of the Code of Civil Procedure 1908 having been repealed by the Repealing and Amending Act X of 1914 must be regarded as unnecessary or dead law *H F B D Hay v Ram Chandar I L R 39 All 308* followed *Calcutta Trades Association v Ryland I L R 21 Calc 102* and *Watson v Lloyd I L R 25 Mad 402* referred to *Duckworth v Duckworth I L R 43 Bom 368* distinguished *Colonel Lecky v Bank of Upper India Limited I L R 33 All 579 Velchand v Bourchier I L R 37 Bom 96* and *King King & Co v Major Davidson I L R 38 Bom 667* regarded as obsolete owing to the repeal of the proviso in s 60 (?) (b) of the Civil Procedure Code 1908 KERING RUPCHAND & Co *v* MURRAY (1918) **I L R 43 Bom 716**

7 ———————— *Attachment raised by order of the lower court—Subsequent order of the High Court restoring the attachment—Retrospective effect of High Court s order* *Held* that an order of the High Court restoring an attachment which has been raised by an order of an inferior court relates back to the date when the attachment was first made and its effect will be to invalidate a sale made when on the face of the record there was no subsisting attachment of the property sold *Ali Ahmad Khan v Bansidhar 6 A L J 434 Azi Bakhsh v Kani Fatima Bibi I L R 34 All 490 Mahomed Warris v Pitambur Sen 21 W R C R 435 Bonomali Rai v Prosunno Narain Chowdhury I L R 23 Calc 829* and *Ram Chandra Marwari v Mudheshwar Singh I L R 33 Calc 1153* referred to GOPAL PRASAD *v* KASHI
I L R 42 All 39

8 ———————— *Sale set aside on the ground of value of property not having been properly stated in sale proclamation—Subsequent application for attachment whether revives previous attachment—Code of Civil Procedure (Act V of 1908) O XXI r 57* Where an execution sale is set aside for any reason other than default on the part of the decree holder the attachment which had been obtained prior to the first sale revives to support a subsequent application for execution and no fresh attachment is necessary MAHABHARAT DUTTA *v* SURJA KANTA DE **3 Pat L J 310**

9 ———————— *Decree—Execution—Claim to property—Burden of proof on the claimant—Adverse possession—Indian Limitation Act (IX of 1908) s 28* A claimant in attachment proceedings must prove that he himself had an interest in the attached property If he fails to do that then he has no further interest in the pro

ATTACHMENT—contd

ceedings. An owner of property does not lose his right to property merely because he happens not to be in pos e sion of it for twelve years Under s 28 of the Indian Limitation Act 1909 his right is only extingui hed at the determination of the period limited by the Act to him for instituting a suit for possession of property that period cannot be determined unless it has commenced to run and the period will not commence to run until the owner is aware that some one else in posse sion is holding adver ely to himself SWAMIRAO SHRINIWAS v BHIMABAI (1920)
I L R 45 Bom 1020

ATTACHMENT AND SALE

——— of moveables—

See LIMITATION ACT (IX OF 1908) SCH I ART 11 I L R 40 Mad 733

ATTACHMENT BEFORE JUDGMENT

See ATTACHMENT I L R 38 Cal 448

See CIVIL PROCEDURE CODE (ACT V OF 1908)—

O XXXVIII R 5

See LIMITATION ACT (IX OF 1908) SCH I ART 13 I L R 41 Mad 23

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 52 I L R 40 Mad 955

——— **Divorce Act (IV of 1869) ss 7 45**—*Civil Procedure Code (Act V of 1908) O XXXVIII rr 5 6—Relief* An order for attachment before judgment will not be made in divorce proceedings Attachment before judgment being a matter of relief and not of procedure is governed by s 7 of the Divorce Act and the principles and rules of the English Divorce Court and not by s 45 of the Divorce Act and the Civil Procedure Code Order XXXVIII rules 5 and 6 have no application in divorce proceedings PHILLIPS v PHILLIPS (1910) I L R 37 Calc 613

——— **Maliciously procuring**—*No right of suit for damages therefor* Procuring an order for attachment before judgment however maliciously does not of itself *afford* a cause of action for damages as damage does not necessarily and naturally flow from an application for attachment before judgment *Semble* Petitions for adjudications in bankruptcy and for winding up of companies stand on a different footing RAMA AYYAR v GOVINDA PILLAI (1915)
I L R 39 Mad 952

——— **Termination of on appeal**—*Private sale—Sale in execution of decree—Jurisdiction—Civil Procedure Code (Act V of 1908) s 115 O XXXVIII rr 9 and 11* The Court should when dismissing a suit at the same time make the order directing attachment before judgment to be withdrawn But even if the order is not made on the dismissal of the suit the attachment before judgment falls to the ground whether an appeal is filed or not *Sasirama Kumari v Meherban Khan 13 C L J 943* and *Ram Chand v Pitam Mal I L R 10 All 506* referred to Where the District Judge has directed property not under attachment to be sold without being first attached the question raised is one which falls within the scope of s 115 of the Civil Procedure Code ABDUL RAHMAN v AMIN SHARIF (1918)
I L R 45 Calc 730

ATTACHMENT BEFORE JUDGMENT—contd

——— **of money payable out of jurisdiction** *by non resident judgment debtor—Illegal—Court realising money by usurpation of jurisdiction and paying it out—Order—Remedy may be maintained as right on the ... —Recovery of money paid illegally by Court of its own motion by execution* It is not competent to a Court in execution of a decree for money to attach at the instance of a decree holder a debt payable to the judgment debtor outside the jurisdiction by a person not resident within the jurisdiction of the Court Where money has been paid to the Court as a result of such attachment the order of the Court directing payment of the money should be cancelled and the parties restored to the position which they occupied before the illegal intervention of the Court Order passed by Court by usurpation of jurisdiction cannot be allowed to stand on a consideration that a similar order would have been made on the merits by a Court of competent jurisdiction It is the policy of the law as a question of public order to keep inferior Courts strictly within their proper sphere of jurisdiction It is imperative that money which has been paid out of Court under an illegal order made without jurisdiction must be brought back into court If the money is not returned to Court by the party who took it out the Court should of its own motion proceed to realise it by attachment and sale of his properties and by attachment of his person if necessary SURENDRA NATH GOSWAMI v BANSI BADAN GOSWAMI (1916) 22 C W N 160

——— **Omission of Court to order withdrawal of when dismissing suit**—*Suit decreed by Appellate Court—Attachment if remains in force—Civil Procedure Code (Act V of 1908) O XXXVIII rr 9 and 11* Where the trial Court made an order for attachment before judgment and after trial dismissed the suit but omitted to make an order in terms of O XXXVIII r 9 withdrawing the attachment and the suit was eventually decreed by the Appellate Court *Held* that the attachment did not subsist and fell with the dismissal of the suit in spite of the Court s failure to make the formal order withdrawing the attachment when dismissing the suit Effect of O XXXVIII r 11 considered AZIZUR RAHMAN v AMIN SHARIF (1918) 22 C W N 927

——— **Moveables**—*Power of the Provincial Small Cause Court—Civil Procedure Code (Act V of 1908) ss 7 (b) 94* For the purpose of interpreting cl (b) of s 7 of the Civil Procedure Code an attachment before judgment is not one of the interlocutory orders there referred to The only orders excluded are those specifically mentioned in s 94 as injunctions or interlocutory orders that is to say orders under cl (c) or cl (e) of s 94 A Provincial Small Cause Court has the power to attach movables before judgment S 7 cl (b) and s 94 of the Civil Procedure Code interpreted KUMUD BEHARY LAL v HARI CHARAN SARDAR (1918)
I L R 46 Calc 717

ATTACHMENT IN EXECUTION OF A MONEY DECREE

——— **s 64**—*Civil Procedure Code Act (V of 1908)—Sale of the same property under a mortgage decree against the same judgment-debtor—Effect of an attachment—Extinguishment of a subsisting creditor s right to redeem—Attachment whether constituting his*

ATTACHMENT IN EXECUTION OF A MONEY-DECREE—contd

pendens—Suit on Mortgage—Attaching creditor whether proper party—Subsequent agreement to sell to another by judgment debtor pending application for re attachment but without notice—Order to re attach whether res Judicata against person agreeing to buy—Execution sale under Money decree—whether conveying also the right of attaching creditor to redeem—Ss 85 and 91 Transfer of Property Act (IV of 1882) A Court sale of the judgment debtor s interest in attached property puts an end to the attachment and incidentally to the attaching creditor s right of redemption under s 91 of the Transfer of Property Act It makes no difference that the Court sale was in execution of a mortgage decree and that the attaching creditor was not a party to the suit on the mortgage An attaching creditor is not a proper party to such a suit A private sale pursuant to an agreement entered into after an application for attachment but before notice is good as again t the auction pur chaser in the Court sale held pursuant to the attachment After such agreement the private purchaser is not represented by the judgment debtor and is not bound by the order of sale made against him *Held* further that a pur chaser in execution of a money decree obtained only the right title and interest of the judgment debtor and not also any right of the attaching decree holder which was purely per onal to him *e g* a right to redeem *Kashy Nath Roy Choudhry* v *Sunbanand Shaha (1886) I L R 12 C lc 317* followed *Venkata SeetharaMayya* v *Venkataramayya (1914) I L R 37 Mad 418* dissented from *Held* further by WALLIS C J (SESHAGIRI AYYAR J dissenting) that a pur chaser in execution of a money decree was not entitled to sue for redemption without setting aside the prior sale of the same properties held in execution of a mortgage decree *Lala Ganpat La* v *Birdbasini Prasad Narayan Singh (1920) 47 I A 91 s c 39 M L J 108 (P C)* discussed *Held* also by WALLIS C J (SESHAGIRI AYYAR J dissenting) that in the circumstances of the case the attachment effected by the holder of the money decree must be deemed to have been abandoned and was not subsisting on the date of the Court sale CHAMIYAPPA THARAKUN v RAMA AYYAR
I L R 44 Mad 232

ATTACK ON POLITICAL PARTY

See SEDITION I L R 38 Calc 253

ATTEMPT

See PENAL CODE (ACT XLV OF 1860) ss 4[?]7 511 I L R 37 Bom 553

[ATTE]NDANCE

— enforcement of—

[See WITN]ESS I L R 47 Calc 758

46 Calc 522

R 45 Calc 747

s 60

2 Pat L J 686

ATTESTATION—contd

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 59 I L R 37 All 474
I L R 38 All 461
I L R 36 Bom 617
I L R 41 Bom 384

ss 59 100 I L R 35 All 164

See USUFRUCTUARY MORTGAGE I L R 39 Calc 227

See WILL I L R 47 Calc 1043

——— by mortgagor—

See MORTGAGE BY MINOR I L R 36 Mad 1071

——— Gift—

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 123 I L R 44 Bom 231

——— of instrument—

See AGRA TENANCY ACT (II OF 1901) s 97 I L R 37 All 59

——— of mortgage deed—

See PARDANASHIN LADY I L R 45 Calc 748

——— Proof of whether necessary when execution admitted—

See PURDANASHIN 6 Pat L J 465

——— Scribe whether an attesting witness—

See EVIDENCE ACT 18[7]2 s 68 1 Pat L J 129

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 59 I L R 44 Bom 405

——— *Witness how far affected with knowledge of contents* The mere attestation of an instrument by a person does not nece sarily im port concurrence by him in the transaction evi denced thereby *Raj Lukhee Dabia* v *Gokool Chunder Chowdhury 13 Moo I A 209* referred to The question whether attestation of document should be held to imply assent is a question of fact and must be determined with reference to the cir cumstances of each ca e and the High Court cannot entertain it in second appeal *Deno Nath Das* v *Kotiswar Bhattacharya 1 Indian Cases 36[?]* and *Mewa Singh* v *Bhagwant Singh 6 Indian Cases 252* referred to LAKHPATI v RAMBODH SINGH (1915) I L R 37 All 350

——— *Person signing in a capacity other than that of a witness effect of* Where a deed was executed by 2 Pardanashin ladies in the presence of their husband and the latter after wards also signed below but not in the place where other witnesses had signed and apparently to evidence his approval *Held* that the husband was not an attesting witness LAMBAHADUR SINGH v *Ajodhya Singh 1 Pat L J 123* followed SRIMATI BAR KUARIN ALAH MANJARI KUARI v SIRCAR BARNARD & CO 6 Pat L J 473

——— *Document execution of—Attesting Witness—Transfer of Property Act (IV of 1882) s 59—Whether one joint executant of a deed can be treated as an attesting witn ss to the signature of the other—Purdanashin lady whether an attesting witness should actually see the signature made or the mark affixed by* When a document is

ATTESTATION—*concld*

jointly executed by more than one person in the presence of each other each executant can not be treated as an attesting witness in respect of the signature of every other executant For the purpose of valid attestation under s 59 of the Transfer of Property Act it is not essential that the witnesses should actually see the signature made or the mark seal or thumb impression affixed but it would be sufficient if the execution took place in presence of the witnesses although the executants were screened off from the gaze of the witnesses themselves SABUR JIOAP BEGUM v BARADA KANTA MITTER (1910) I L R 37 Calc 526

ATTESTATION AND RATIFICATION

See LIMITATION ACT (XV OF 1877) SCH II ARTS 120 AND 125
I L R 38 Mad 396

ATTESTING WITNESS

See ATTESTATION I L R 37 Calc 526

See MORTGAGE 14 C W N 1046
4 Pat L J 511

See EVIDENCE ACT (I OF 1872) s 68
I L R 35 All 254
1 Pat L J 369

See STAMP ACT 1899 s 2
26 C W N 585

See WILL I L R 47 Calc 1043

——— *Mortgage bond—Transfer of Property Act (IV of 1882) s 9—Evidence Act (I of 1872) s 68* A person who is present and witnesses the execution of a mortgage bond and whose name appears on the document though he is therein described merely as the writer of the deed is a competent witness to prove the execution of the mortgage bond *Raj Narain Ghosh* v *Abdur Rahim 5 C W N 454 Dinamayee Debi* v *Ban Behari Kapur 7 C W N 160* followed *Badri Prasad* v *Abdul Karim I L R 35 All 254 Ram Bahadur Singh* v *Ajodhya Singh 20 C W N 699*, not followed *Shamu Patter* v *Abdul Kader Ravuthan I L R 35 Mad 607* referred to and distinguished An attesting witness in s 68 of the Evidence Act (I of 1872) has the same meaning as an attesting witness under s 59 of the Transfer of Property Act (IV of 1882) JAGANNATH KHAN v BAJRANG DAS AGARWALA (1920)
I L R 48 Calc 61

ATTORNEY

See LEGAL PRACTITIONER

See POWER OF ATTORNEY

See PROFESSIONAL MISCONDUCT
I L R 41 Calc 113

See SANCTION FOR PROSECUTION
I L R 41 Calc 446

——— Right of audience—

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909) ss 6 27 36 AND 121
I L R 37 Bom 464

——— *Admission by attorney if binds client* An admission by an attorney unless satisfactorily explained away furnishes cogent evidence against the client KETOKEY CHURAN BANERJEE v SARAT KUMARI DABEE (1916) 20 C W N 995

——— *Application by attorney for discharge—Notice to client sufficiency of* If

ATTORNEY—*contd*

an attorney wishes to withdraw from a case even for good grounds he must give his client reasonable notice of his intention so that the client may have a reasonable opportunity of getting other advice and making arrangements before the hearing of the application of the attorney for obtaining his discharge When an attorney gave notice to the client on the day previous to his making application before Court for obtaining his discharge and obtained the order *Held* on appeal that the order must be set aside for insufficiency of notice PRABHU LAL v KUMAR KRISHNA DUTT (1916)
20 C W N 442

——— *Attorney discharging himself if may detain clients papers pending suit—Lien in such case how secured—When discharged by client except for misconduct if may detain papers* SANDERSON C J (WOODROFFE J agreeing) Where an attorney who had been acting for his client in the ordinary way refused to go on acting for him unless his out of pocket expenses were paid that amounted to a discharge of the attorney by himself and he could not claim to retain the papers when they were wanted by his former client for continuing the litigation He would at most be entitled to have his lien protected by an undertaking by the new attorney The same rule would apply where it was part of the original retainer of the solicitor that he should only be bound to act as long as the money should be supplied from time to time for the necessary out goings *Black* v *Lovering & Co 35 W R 232* and *Robins* v *Goldingham L R 13 Eq 440 22 W R 277* followed MOOKERJEE J If a solicitor is discharged by his clients otherwise than for misconduct he cannot so long as his costs are unpaid be compelled to produce or hand over the papers but if he discharges himself he may be ordered to hand over the papers to the new solicitor on the latter undertaking to hold them without prejudice to his lien A solicitor could not be treated as finally discharged till the leave of the Court had been obtained *Atul Chandra Ghosh* v *Lakshman Chandra Sen I L R 36 Calc 609* PRABHU LAL v KUMAR KRISHNA DUTT (1916) 20 C W N 437

——— *Practice—Set off—Attaching creditors* Where on an application by the defendant that satisfaction of a decree obtained against them by the plaintiff should be entered by setting off a decree upon an award in their favour against the plaintiff it appeared that a prohibitory order had been made against the plaintiff in execution of a decree obtained by a third party and the attorney for the plaintiff claimed a lien for costs on such decree *Held* that the defendants application to set off was proper but that this was not a case in which the Court ought to hold that the solicitors lien intercepts the set off claimed *Edwards* v *Hope 14 Q B D 922 Blakey* v *Lathem 41 Ch D 518 Nawab Nazim of Bengal* v *Heera Lall Seal 10 B L R 441 Supramanyan Setty* v *Hurry Froo Mug I L R 14 Calc 374 Callianji Sajibhoy* v *Raghavji Vijpal 6 Bom L R 879* and *Goodfellow* v *Bray [1899] 2 Q B 498* referred to BHUPENDRA NATH BHOSE v E D SASOON & Co (1916)
I L R 43 Calc 932

——— *Attorney if may claim lien on his clients (plaintiffs) decree as against defendants prior decree against plaintiff—Equities between attorney client and others interested in pro*

ATTORNEY—*concld*

perty The defendants had obtained a decree against the plaintiffs in a prior suit for Rs 1 451 9 0 including costs and the plaintiffs in a subsequent suit obtained a decree for Rs 1 431 8 0 and there upon the defendants applied that the satisfaction of the plaintiff's decree might be entered but the attorney of the plaintiffs made an application claiming a lien on the decretal amount of his client *Held* that the attorney could not claim any lien on the decree obtained by his client in pre ference to the claim of the defendants in respect of their prior decree An attorney's lien is subject to all the equities between the client and the parties interested in the property Meaning of attorney s lien discussed *In the matter of* RASIK LAL MULLIK (1916) 21 C W N 106

———— *Bill of costs—High Court Original Side Rules Ch XXXVIII r 67—Limitation Summary procedure* When an appli cation by an attorney for realisation of costs under the High Court Original Side Rules Chapter XXXVIII r 67 involves an enquiry it should not be dealt with in a summary manner Art 84 of the Limitation Act (Act IX of 1908) applies to such applications *Wadia Gandhy & Co v Purshotam Singh I L R 32 Bom 1 Chand Monee v Santo Monee I L R 24 Calc 707 Abba Haji Ishmail v Abba Thara I L R 1 Bom 253* re ferred to LAKHIMANI DASSI v DWIJENDRA NATH MUKERJEE (1918) I L R 46 Calc 249

———— *Held* on the unchalleng ed evidence of the attorney there might be cases where the Court would exercise its discretion unde r 59 of Ch XXXVIII of the High Court Rules in ordering payment of costs even if a claim for them was time barred NARENDRA LAL KHAN v TARUBALA DASI I L R 48 Calc 81"

———— *Practice—Refusal of attorney to proceed until payment of costs already incurred—Discharge by Attorney—Acceptance of discharge by client—Order for change of attorney—Payment of costs* A firm of attorneys refused to proceed further in the conduct of a suit unless their clients paid them as promised a certain sum on account of costs incurred *Held* that by so doing the attorneys discharged themselves and the clients were entitled to an order for change of attorney without first paying the costs already incurred to the attorneys on the record *Held* further that the mere fact that after the attorneys refusal the clients instructed them to brief counsel to apply for an adjournment of the suit which instruction the attorneys declined to accept did not amount to a refusal on the client s part to recognize the discharge of the attorneys *Basanta Kumar Mitter v Kusum Kumar Mitter 4 C W N 767* and *Atul Chandra Mukerjee v Shoshee Bhusan Mukerjee 6 C W N 210* followed MAHESHPUR COAL COMPANY LTD v JATINDRA NATH GUPTA (1912) I L R 40 Calc 386

AUCTION PURCHASER

See CIVIL PROCEDURE CODE 1882

ss 244 252 647 I L R 34 Bom 546

ss 282 287 I L R 35 Bom 275

See EXECUTION OF DECREE
I L R 38 Calc 622
I L R 39 Calc 687

———— dispossession of—

See LIMITATION I L R 41 Calc 52

AUCTION PURCHASER—*contd*

———— fraud of—

See CIVIL PROCEDURE CODE (ACT V OF 1908) ss 47 AND 50
I L R 38 Mad. 1076

———— liability of—

See SALE FOR ARREARS OF REVENUE
I L R 38 Calc 537

———— must be made parties to appeal against order confirming sale—

See APPEAL I L R 1 Lah 21

———— rights of before and after confirmation of sale—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXI R 66
I L R 38 Mad 387

———— suit by—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXI R 91
I L R 35 Bom 29

———— Resistance to taking of possession—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 47 I L R 44 Bom 977

———— suit by to recover purchase-money—

See LIMITATION I L R 40 Calc 187

———— title of—

See ADVERSE POSSESSION
I L R 40 Calc 173

———— whether a representative of decree-holder—

See CIVIL PROCEDURE CODE (ACT V OF 1908) ss 144 AND 151 AND O XXI R 90 I L R 41 Mad 467

———— whether a representative of the judgment debtor—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 47 I L R 42 Bom 411

———— *Suit by to set aside sale on account of mortgage not notified* It is not open to an auction purchaser to impugn the validity of his own purchase except on the ground that the judgment debtor had no saleable interest He buys with eyes open and if as in this case it transpires that the property is subject to a mort gage he has his remedy against the decree holder by a suit for damage KHETRO MOHAN DUTTA v SHEIKH DILWAR 3 Pat L J. 516

AUCTION SALE

See BENAMI I L R 43 Calc. 20

See CIVIL PROCEDURE CODE 1882 ss 287 293 I L R 36 Bom 329

See CIVIL PROCEDURE CODE (ACT V OF 1908)—s 68 O XXI R 100
I L R 37 Bom 488

s 115 O XXI R 89
I L R 43 Bom 735

O XXI R 89
I L R 37 Bom 367

———— Effect of Application to the Mamlat dar to set aside sale—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXI R 89
I L R 44 Bom 50

AUCTION SALE—*contd*

———— **Effect of Application to Collector to set aside sale—**

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 47 O XXI r 92 (1)
I. L. R 44 Bom 551

———— **Suit to set aside—**

See AUCTION PURCHASER
3 Pat L J 516

AURASA SON

See HINDU LAW—PARTITION
I L R 40 Mad 632

AUTHORITY TO ADOPT

See HINDU LAW—WIDOW S ESTATE
L R 46 I A 259

See REGISTRATION ACT 18 7 s 17
I L R 44 Mad 733

AUTREFOIS ACQUIT

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 107
I L R 36 Mad 315

See CRIMINAL PROCEDURE CODE s 403 (1) **I L R 36 Mad 308**

See RIOTING **I L R 48 Calc 78**

———— *Acquitted by jury of some charges and disagreement as to the others—Retrial on the latter—Acquittal of murder—Subsequent trial for culpable homicide not amounting to murder charged at the previous trial—Acquittal of constructive murder by direction of the Judge on a point of law effect of—Retrial for abetment previously charged—Tried again meaning of—Retrial after discharge of jury on disagreement whether a second trial or continuation of the previous one—Double pleas of not guilty and autrefois acquit validity of—When plea of previous acquittal or conviction may be taken—Applicability of English law as to pleas in India—Criminal Procedure Code (Act V of 1898) ss 271 272 308 403—Constructive murder—Criminal act by one and not all charged therewith—Abetment when abettor present or absent—Instigation and aid by presence at the place of occurrence—Difference between English and Indian law—Penal Code (Act XLV of 1860) ss 34 109 114—Verdict on facts against the direction of the Judge* S 403 of the Criminal Procedure Code protects an accused against a subsequent trial for the same offence and on the same facts for any other offence for which a different charge from the one made against him might have been made but was not made and not when such different charge was made at the previous trial and the jury disagreed as to it Where a prisoner was tried at the High Court criminal sessions for murder and abetment of the murder of a police officer under ss 302 and 114 and also for murder and culpable homicide of another person under ss 302 and 304 of the Penal Code and the jury returned a unanimous verdict of acquittal under ss. 302 by the direction of the Judge in the first case and of acquittal under s. 302 in the second case but differed as to the remaining charges by 5 to 4 and were discharged *Held* that s 403 of the Criminal Procedure Code did not prevent a retrial on the latter charges

AUTREFOIS ACQUIT—*contd*

Where a prisoner is unanimously acquitted of some of the charges and the jury are divided as to the rest and discharged and he is re tried under s 308 of the Criminal Procedure Code before a different jury he is not being tried again within the meaning of s 403 but his retrial is on the original indictment and plea and the Court continues the trial before another jury and the process may continue till a verdict is passed on all the counts S 403 of the Criminal Procedure Code has nothing to do with pleading being in terms a limitation on the jurisdiction of the Court and is not to be construed with reference to the English law of criminal pleading Ss 271 and 272 contain all that is necessary as to pleading without reference to the English rules Under s 271 the accused can only plead guilty or claim to be tried or he can refuse to plead but the plea of not guilty is intentionally not recognized by the Code If an accused claims to be tried he can subject to special provisions take any objection to his trial or conviction before the verdict of the jury and in any form A defence under s 403 may therefore be set up at any time before verdict and in any form and the question must be decided solely according to the terms of the section irrespective of the English law The question is one of law to be decided by the Judge without reference to the jury *Semble* That if the case was governed by English law (i) the prisoner having at the commencement of the retrial made a plea of not guilty which was still awaiting adjudication could not at the same time plead *autrefois acquit* and that the second plea was therefore unnecessary and of no effect *Rex* v *Banks* [1911] *2 K B 1095* referred to (ii) that the proper course would under that law have been to take a verdict from the jury at once on the plea *Rex* v *Barry 7 C & P 836* referred to (iii) that under the same law a verdict on one count and disagreement on the others would not in the case of a retrial affect the trial on the latter *Reg* v *Grimwood 60 J P 809* not followed S 34 of the Penal Code must be read according to its own terms without reference to the doctrine of the English law and applies only where a criminal act is done by several persons of whom the accused charged thereunder is one and not where the act is done by some person other than the latter Where therefore two persons fire at another and only one actually hits and kills him the other is not guilty of murder under ss 302 but of attempt to murder which offences do not constitute the same act *Queen Empress* v *Mahabir Tiwari I L R 21 All 263 Govindas Namasudra* v *Emperor I L R 36 Calc 659* not followed There is no reason for saying that a person must be absent in order to abet under s 109 of the Penal Code The instigation of the unknown murderer by accompanying him to the place of occurrence and by aiding him in his flight afterwards might have taken place though the accused was not present at the murder But when the evidence shows that he was so present s 114 applies Ss 109 and 114 of the Penal Code supersede the English law as to principles in the first and second degrees and accessories before the fact The provisions of the Penal Code cover all the cases provided by that law and contain the whole law in India on the points Where the Judge has directed an acquittal under s. 302 of the Penal Code on legal grounds, the

AUTREFOIS ACQUIT—*concld*

verdict of the jury to that effect has not determined any question of fact and the acquittal has no effect on the trial of charges under ss 302 and 314. Where the Judge expresses an opinion that if the facts given in evidence are believed the accused *is guilty of murder the jury have a right to disagree* with his view and acquit the prisoner of the offence EMPEROR v NIRMAL KANTA ROY (1914) I L R 41 Calc 1072

———— *Charge framed—Further inquiry ordered—Criminal Procedure Code (Act V of 1898) ss 253 (2) 350 and 437* Where a Magistrate framed charges against an accused person and was succeeded by another Magistrate who recommenced the case under s 350 Criminal Procedure Code and upon examining the complainant discharged the accused under s 253 (2) Criminal Procedure Code *Held* that the accused was *autrefois acquit* and that no further inquiry could be held into the case *Per* AYLING J—Where the proceedings recommenced under s 350 are only an inquiry they are recommenced as an inquiry where they have developed into the trial stage they *are recommenced as a trial i e* proceedings in which a charge has been framed The second Magistrate cannot ignore the charge framed by his predecessor his order must be viewed as one of acquittal SRIRAMULU v VEERASALINGAM (1914)

I L R 38 Mad. 585

———— *Trial for theft and receiving stolen property charged in the alternative—Acquittal by High Court—Subsequent trial under s 54 A of the Calcutta Police Act (Beng IV of 1866) relating to the same act or series of acts—Act or possession punishable under s 54A whether an offence—Criminal Procedure Code (Act V of 1898) s 4 (1) (o) 236 237 and 403 (1)* Under s 403 (1) of the Criminal Procedure Code an acquittal of offences under s 380 and s 411 of the Penal Code charged in the alternative bars a subsequent trial for an offence under s 54A of the Calcutta Police Act (Beng IV of 1866) in respect of the same act or series of acts which formed the subject of the previous trial the case falling within *Illustration (a)* of s 236 and the *illustration* attached to s 237 of the Criminal Procedure Code *Queen Empress v Croft I L R 23 Calc 174* distinguished An act or possession punishable under s 54A of the Calcutta Police Act is an offence within s 4 (1) (o) of the Code MANHARI CHOWDHURI v EMPEROR (1917) I L R 45 Calc 727

AVYAVAHARIKA

———— meaning of—

See HINDU LAW—DEBT
I L R 37 Mad 458

AWARD

See ARBITRATION

See ARBITRATION ACT

See ARBITRATION AWARD

See ARBITRATION BY COURT
I L R 38 Calc 421

See APPEAL I L R 39 Calc 393
I L R 45 Calc 502

AWARD—*concld*

See CIVIL PROCEDURE CODE 1908—

s 0 SCH II s 20
I L R 37 Bom 442

s 42 O XXI RR 6 AND 10
I L R 43 All 394

s 89 O XXIII R 3
I L R 37 Bom 639
I L R 40 Bom 386

ss 96 100 I L R 36 Bom 360

s 105 I L R 43 All 305

s 115 I L R 36 Bom 105

O XXXII R 7 SCH II CL (20)
I L R 43 Bom 258

SCH II

See COMPROMISE I L R 47 Calc 932

See COURT FEE I L R 39 Calc 906

See DEKKHAN AGRICULTURISTS RELIEF ACT s 15B I L R 35 Bom 310

See HINDU LAW PARTITION
I L R 48 Calc 1059

See LAND ACQUISITION
I L R 38 Calc 230

See LAND ACQUISITION ACT (I OF 1894)
s 18 I L R 35 Bom 146
s 6 I L R 44 Bom 797
ss 9 AND 11 I L R 48 Calc 892

See MOHAMEDAN LAW HUSBAND AND WIFE I L R 33 All 683

See SPECIFIC RELIEF ACT (I OF 1877)
s 30 I L R 34 All 43

———— against a Firm—

See ARBITRATION I L R 47 Calc 29

———— agreement to abide by decision of majority—

See ARBITRATION 1 Pat L J 90

———— application to file—

See CIVIL PROCEDURE CODE (1908) s 104 (f) I L R 38 All 380

———— Due in accordance with—whether appealable—

See CIVIL PROCEDURE CODE 1908 SCH II PART 15 1 Pat L J 306

———— Decree in terms of passed by consent of minor's mother (not appointed guardian ad litem)—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 443 I L R 44 Bom 202

———— during suit—

See ARBITRATION
I L R 47 Calc 752

———— ex parte—

See ARBITRATION
I L R 47 Calc 951

———— filing of—

See ARBITRATION
I L R 46 Calc 721
I L R 40 Calc 219
I L R 47 Calc 951

AWARD—*contd*

See APPEAL I L R 38 Calc 143

——— made after expiry of time—

See ARBITRATION

I L R 38 Calc 522

——— of arbitrators cannot be filed in Court if lost—

See CIVIL PROCEDURE CODE 1908 (23) SCH II PARA 20

I L R 1 Lah 45

——— remission of—

See ARBITRATION

I L R 41 Calc 313

——— Setting aside of—

See ARBITRATION 24 C W N 454

——— *Indian Arbitration Act (IX of 1899) ss 11 and 15—Civil Procedure Code (Act V of 1908) Sch I O XXI r 29* An award filed in Court under s 11 of the Indian Arbitration Act (IX of 1899) is nothing more than *an award although it is enforceable as if it were a* decree Execution of such an award cannot be stayed under O XXI r 29 of the Civil Procedure Code (Act V of 1908) TRIBHUWANDAS KALLIANDAS GAJJAR v JIVANCHAND LALLUBHAI AND Co (1910) I L R 35 Bom 196

——— *Refusal of Court to file a private award—Subsequent suit to enforce terms of award—Res judicata* Held that the refusal of a Court to file a private award will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award *Kunji Lal v Durga Prasad I L R 32 All 484* followed *Basant Lal v Kunji Lal I L R 38 All 21* referred to SHIB CHANDRA DAS v RAM CHANDRA SARUP (1911) I L R 33 All 490

——— *Judgment and decree in accordance with award—Appeal—Civil Procedure Code (Act V of 1908) Sch II cls 15 and 16—Revision non maintainability of—Civil Procedure Code (Act V of 1908) s 115 no formal petition necessary for revision under* No appeal lies from a decree which is in accordance with an award except upon grounds mentioned in clause 16 (2) of the second schedule to the Civil Procedure Code (Act V of 1908) This was also the law under the old Civil Procedure Code (Act XIV of 1882) and it is *a fortiori* under the new Civil Procedure Code according to which an application could be made under clause 15 (c) to set aside an award on the new ground *viz* the award being rather invalid *Suryanarayana Rao v Sarabhaiah 21 Mad L J 263* followed *Kanakku Nagalinga Naik v Nagalinga Naik I L R 32 Mad 510* referred to When an application is made to set aside an award but refused and a judgment is pronounced according to the award the judgment so pronounced is final under clause 16 (2) A revision petition to set aside an award is more objectionable than an appeal *Ghulam Khan v Muhammad Hassan I L R 29 Calc 167* followed *Velu Pillai v Appasami Sundaram 1 Mad W N 141* distinguished *Obiter* If an application is made to set aside an award but refused it would be open to the Court to pronounce judgment even though the ten days allowed for such an application had not expired The words after the time for making such application had expired apply only where there has been no application made to set aside the award If the application is made after the period of limitation *viz* ten days the Court can refuse to set aside the award A formal application for revision under s 115 Civil Procedure Code is not necessary BATCHA SAHIB v ABDUL GUNNY (1913) I L R 38 Mad 256

——— *Petition to set aside an award—Error of law patent on the face of the award—Contract of sale and purchase of cotton—The Bombay Cotton Trade Association Rules 13 and 52—Seller committing breach of contract cannot claim damages against buyer—Arbitrators have no jurisdiction to award damages to defaulting seller—Illegality of the award* The respondents agreed to sell to the appellants 200 bales of cotton of specified sample under two contracts which were subject to the Rules and Regulations of the Bombay Cotton Trade Association Ltd *The respondents tendered cotton against the said* contracts and on surveys being held at the instance of the appellants arbitrators held that the cotton tendered was inferior in quality and gave allowance of Rs 10 8 0 per candy The arbitrators award was confirmed on appeal by the Appeal Committee Rule 52 of the Association provided that if the final award for inferiority of quality be in excess of Rs 5 per candy the buyer shall have the option either to take the cotton at the allowance fixed by the arbitrators or the Appeal Committee or upon giving notice in writing to the seller and original tenderer to refuse the same in which latter case he may either buy in the market at a reasonable rate on account risk and expense of the seller or invoice it back to the seller at the market rate of the day upon which the final award shall have been made The appellants accordingly gave the respondents notice that they refused the cotton tendered but did not exercise either of the options mentioned in the rule as the market had considerably fallen The respondents thereupon claimed Rs 25 000 being the difference between the contract rate and the market rate when the cotton was rejected The appellants repudiated their liability as the breach was committed by the respondents *The respondents* proposed to the appellants that the matter should be referred to the arbitration of the Association under Rule 13 The appellants protested that the matter could not be referred to arbitration and in spite of this protest the Association appointed two arbitrators under the rules to decide the claim preferred by the respondents The appellants submitted their contentions in writing to the arbitrators who however awarded the respondents claim on the contracts and directed the appellants to pay Rs 25 000 to the respondents The award was confirmed by the Appeal Board The appellants thereupon filed a petition to set aside the award contending that the arbitrators had no jurisdiction in the matter as the matter was not referable to arbitration under rule 13 and that accordingly there was an error of law patent on the face of the award The trial Judge dismissed the application holding that there was no error of law patent on the face of the award and that the error if any was latent which could not vitiate the award *On appeal, Held reversing the decision of the trial Judge* (1) that the award of the arbitrators was based upon the erroneous construction of the terms of the contract and Rule 52 of the Rules of the Association (2) that upon

AWARD—*concld*

the proper construction of Rule 52 the buyer would not be liable to pay any sum of money as damages or compensation to the seller after he has rightly rejected the cotton tendered there being no compulsion upon him to invoice the cotton back to the seller if the market had fallen (3) that the liability imposed on the appellants by the arbitrators in spite of the breach committed by the respondents was opposed to the general provisions of the Contract Act and to the Common Law (4) that the award should be set aside as *there was an error of law patent on the face of it* *Landauer v Asser* [1905] 2 K B 184 referred to JITRAJ BALOO SPINNING AND WEAVING CO v CHAMPSEY BHARA & CO

I L R 44 Bom 780

——— *Setting aside of—Arbitration Act (IX of 1899) s 14—Practice* When an award is challenged on the ground that there was no submission to arbitration by the parties the remedy lies in a regular suit and not in an application under s 14 of the Arbitration Act (IX of 1899) MATTILAL DALMIA v RAMKISSENDAS MADAN GOPAL (1920) I L R 47 Calc 806

AWARD DECREE

——— against widow—

See HINDU LAW—WIDOW

I L R 43 Bom 249

——— validity of—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXXII r 7

I L R 39 Mad 853

AWARD OF COURT

See ANCIENT MONUMENTS PRESERVATION ACT (VII OF 1904) ss 10 21

I L R 42 Bom 100

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BABUANA " AND SOHAG GRANT

See HINDU LAW—CUSTOM

I L R 42 Calc 532

1 ——— *Darbhanga Raj—Government revenue and cesses whether payable to Raj—Revenue not paid to Raj—Debt whether a joint family debt—Mitakshara family—Decree against father personally—Debt not proved to be illegal or immoral—Whether the interest of the sons passes* Holders of *babuana* property in the Darbhanga Raj are liable to pay Government revenue and cesses to the Raj Where the income of the *babuana* property was appropriated by members of the family and the Government revenue and cesses payable were not paid the liability to pay the Government revenue and cesses should be considered as a joint family debt and not the personal debt of the holder for the time being Even if it were considered to be a personal debt *of the father in execution of a decree against* the father alone the entire family property could be sold and not merely the personal interest of the father as the debt could not be attached as an immoral debt Every debt incurred by the father in a Mitakshara family not for illegal or immoral

BABUANA " AND SOHAG GRANT—*concld*

purposes is of a nature to support a sale of the *entirety of the family property* In execution of a money decree against the father alone for a personal debt of the father the whole family property may be sold if the debt was not contracted for immoral purposes and it is not absolutely necessary that the son should be a party either to the suit itself or to the proceedings in execution Where it appears from the form of the suit or of the execution proceedings or from the description of the property put up for sale that only the interest of the father in the property was intended to be sold and was put up for sale the interest of the sons would not pass by such a sale and in such a case the absence of the sons from the suit or execution proceedings would be a material element for consideration Where on the other hand the proceedings show that the intention was to sell the entire property and the same was sold and bargained for then the purchaser would be entitled to the whole and the sons though not parties to the proceedings cannot claim their shares against the purchaser except by proving that the debt was contracted for immoral purposes The words right title and interest of the judgment debtor may either mean the share which the father might have sold to satisfy his debt or the share which he would have obtained on partition and the question what was intended to be sold or was sold in each case will depend upon its own circumstances Where in the sale proclamation the property to be sold at an auction sale was described as 7 as 8 gds 3 karas of Pandaul Touzi No 6473 *i e* the entire family property and the property was purchased by the decree holder for Rs 55 000 and an application for setting aside the sale was rejected on the ground that the evidence in proof of the insufficiency of price could not be deemed good and satisfactory and the sale was confirmed with the following order Whereas *M* purchased for 55 000 the rights and interests in the properties specified below and thirty days have expired and an application for setting aside the sale has been rejected the sale is hereby confirmed but in the certificate of sale the description of the property was to the same effect as that in the sale proclamation and, finally it was not suggested that the price paid was not the full value of the property purchased *Held* that the words rights and interests in the order confirming the sale do not raise any ambiguity or induce the Court to hold that only the personal interest of the father was sold and that under the circumstances the entire family property passed to the purchaser *Deendyal v Jugdeep L R 4 I A 247 Suraj Bansi Koer v Sheo Prasad Singh L R 6 I A 88* explained *Baijun Doobey v Brij Bhookun L R 2 I A 275 s c I L R 1 Calc 133 Shimboo v Golap L R 14 I A 77 s c I L R 14 Calc 573 Hari Narain v Rudar I L R 10 Calc 696* referred to *Muddun Thakoor v Kantoo Lal L R 1 I A 321 Minakshi v Immudi L R 16 I A 1 s c I L R 12 Mad 142 Nanomi Babuasin v Modun L R 13 I A 1 Bhagbut v Girija I L R 15 Calc 717 Daulat v Mehr I L R 15 Calc 70 Mahabir v Meheswar I L R 17 Calc 584 Kayal v Manjappa I L R 12 Bom 691* followed *Held* further that the words rights and interests in the order confirming the sale could not override the terms of the sale proclamation HITENDRA SINGH v RAMESHUR SINGH (1913) 18 C W N 42

BABUANA " AND SOHAG GRANT—contd

2 ——————— Darbhanga Raj —*Liability to pay its share of revenue and cesses if a charge on subject of grant—Partition by two sons of grantee with concurrence of Raj subject to condition that non defaulting share would be sold for arrears after sale proceeds of defaulting share found insufficient—Condition if creates a charge—Suit for arrears of one share—Death of owner thereof—Substitution of the other co sharer as representative and widow not admitted as party at plaintiff's instance—Decree against other co sharer only—Civil Procedure Code (Act XIV of 1882) ss 367 368—Plaintiff to choose representative of deceased defendant at his own risk—Claim to represent by person other than plaintiff's nominee—Proper procedure—Suit thereon against estate in widow's possession if maintainable —Limitation—Limitation Act (XV of 1877) Sch II Arts 120 132* The condition in a *babuana* grant to a junior member of the Darbhanga Raj family that the grantee shall regularly pay the Government revenue and cesses due from the portion of the estate given in *babuana* to the Raj treasury does not create a charge in favour of the Raj in respect of overdue arrears of revenue and cesses upon the property granted Where on the grantee s death his two sons with the concurrence of the holder of the Raj divided the estate equally and separate accounts of their liabilities were opened subject however to the condition that on default by either the Raj would be entitled to join the other in a suit to recover the arrears and that execution of the decree obtained the defaulter s share was to be put up for sale first and only on the proceeds proving insufficient the share of the other would be sold for the balance *Held* that the arrears payable by the defaulting co sharer were not by this agreement made a charge on any portion of the estate granted and if at all then on the share of the non defaulting co sharer only On the death of one of the two co sharers dispute having arisen between his widow and the surviving co sharer as to their right to represent the deceased s estate exclusively as his heir the Raja in a suit instituted against the two co sharers to recover arrears due on account of the share of the deceased only applied for substitution of the surviving co sharer in the place of the deceased and the widow s application to be added or substituted as representative of the deceased was on the Raja s opposition dismissed on the express understanding that she would not be bound by the decree and that her interests would in no way suffer and subsequently being unable to execute the decree as the share of the deceased was in the possession of his widow and the share of the surviving co sharer could not be proceeded against under the agreement until the other share was sold the Raja instituted a suit for a declaration that the share in the widow s possession was liable to pay the arrears covered by the decree in the previous suit and that the arrears were a charge on that share *Held* that the suit was not in the circumstances maintainable as a suit on a judgment and the limitation of 12 years applicable to such a suit did not apply *Ramaswami Chettiar* v *Oppilamani Chetti I L R 33 Mad 6 Kadir Mohideen Marakkayar* v *Muthu Krishna Ayyar I L R 26 Mad 230 Prosunna Chunder Bhattacharjee* v *Kristo Chytunno Pal I L R 4 Calc 342* distinguished That as the arrears in question were not a charge on the share the suit could not be treated as one to enforce a charge and the 12 years limitation applicable to such a suit also did not apply RAMESHWAR SINGH v JANESHWARI (1913) **18 C W N 129**

BAD LIVELIHOOD

See PREVIOUS CONVICTIONS EVIDENCE OF **I L R 38 Calc 403**

BAI BIL-WAFA

See CONSTRUCTION OF DOCUMENT **I L R 42 All 437**

BAIL

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 107 CL (4) **I L R 36 Mad 474**

See EXTRADITION ACT 15 ,, s 14 **15 C W N 735**

See EXTRADITION **I L R 46 Calc 31**

See EXTRADITION ACT (XV OF 1903) ss 7 8 8A 18 **I L R 43 Bom 310**

See SUICIDE **I L R 37 Mad 156**

——— application for—

See HABEAS CORPUS **I L R 44 Calc 459**

——— delay in transmitting bail orders—

See APPELLATE COURT **I L R 38 Calc 293**

——— grounds of—

See BAIL **I L R 37 Calc 412**

1 ——— High Court jurisdiction of to grant bail—*Grounds of bail—Sufficient cause for further inquiry into guilt of accused —Undue delay—Taking cognizance—Application of special procedure to the case—Power of the Lieutenant Governor—Criminal Procedure Code (Act V of 1898) ss 190 497 498—Criminal Law Amendment Act (XIV of 1908) ss 212 14 (1)* The power of the High Court to grant bail *in any case* under s 498 of the Criminal Procedure Code is not affected by Act XIV of 1908 but the Court ought in the exercise of its discretion to take into consideration the limitation imposed by s 12 of the latter The High Court refused bail where it appeared from the record and the Magistrate s explanation that there was cause for further inquiry into the case against the petitioner and that there had been till then no undue delay in the proceedings Where a police report of a dacoity was submitted to the Sub Divisional Officer of Diamond Harbour on the 24th April 1909 the date of the dacoity and the case was subsequently withdrawn by the District Magistrate to his own file and on the 20th January 1910 an order was made by the Lieutenant Governor in terms of s 2 of Act XIV of 1908 applying the provisions of Part I to the case —*Held* that the latter Magistrate had taken cognizance and that the Lieutenant Governor had power to make the order EMPEROR v SOURINDRA MOHAN CHUCKERBUTTY (1910) **I. L. R. 37 Calc 412**

2 ——— Power of Sessions Judge to grant bail— *Cases to which special procedure has been applied—Criminal Procedure Code (Act V of 1898) ss 497 498—Criminal Law Amendment Act (XIV of 1908) ss 12 14 (1)* The power of the Sessions Judge to grant bail under s. 498 of the Criminal Procedure Code is, in cases to which

BAIL—contd

the provisions of Part I of Act XIV of 1908 have been applied by s 2 thereof abrogated by s 14 of that Act EMPEROR v LALIT KUMAR CHATTERJEE (1910) I L R 37 Calc 409

3 ———————— *Grounds of admission to bail—Confession of a co prisoner materially corroborated as to applicant—Relative powers of the High Court and Subordinate Courts to grant bail—Criminal Procedure Code (Act V of 1898) ss 497 498* S 497 of the Criminal Procedure Code contains a rule founded on justice and equity and should be followed by the High Court unless anything appears to the contrary The extended powers given to the latter by s 498 are not to be used to get rid of the reasonable and proper provision of the law laid down in s 497 The High Court refused bail where a confession by a co accused implicating himself and the petitioners was materially corroborated as to the latter by other evidence taken at the preliminary enquiry into offences under ss 307 and 337 of the Penal Code ASHRAF ALI v EMPEROR (1914)
I L R 42 Calc 25

BAILABLE OFFENCE

———————— *Information to village Magistrate—Report to the police—Institution of complaint by police thereon* A man who complains to a village Magistrate of a bailable offence knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the police gives information to the police just as effectively as if he went in person to the police station and made a complaint and if the police charge the case it is a case instituted on information given to a police officer within the meaning of s 250 Criminal Procedure Code *The Sessions Judge of Tinnevelly* v *Sivan Chetti I L R 32 Mad 258* followed NACHIMUTHU CHETTI v MUTHUSAMI CHETTI (1914) I L R 39 Mad 1006

BAIL BOND

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 514 (5)
I L R 37 Mad 156

———————— *Suicide of prisoner if discharges sureties* When a person who has been let out on bail commits suicide the sureties are discharged from their obligation to produce him NRISHINGHA DEB CHATTERJEE v THE KING EMPEROR (1912) 16 C W N 550

BAILIFF

See ATTACHMENT
I L R 40 Calc 849

———————— *Writ or warrant authorising him to give possession of immoveable property—Use by bailiff of reasonable degree of force to effect removal of person refusing to vacate—Practice of bailiffs taking strangers as assistants—Time of delivery of writ of possession for execution—Piecemeal trial of lengthy cases by Magistrates—Penal Code (Act XLV of 1860) s 323—Presidency Small Cause Courts Act (XV of 1882) ss 43 48—Civil Procedure Code (Act V of 1908) O XXI rr 35 97 and First Schedule App E Form No 11—Practice* A bailiff of the Presidency Small Cause Court in the execution of a writ, issued under s 43 of the Presidency Small Cause Courts Act requiring or authorizing him to give possession of certain premises to the applicant

BAILIFF—contd

may use a reasonable degree of force in order to effect the removal of persons bound by the decree and refusing to vacate the same notwithstanding the omission in the writ of words expressly authorizing their removal *Quære* Whether the English Common Law or the Civil Procedure Code applies to the writ or warrant in question In a writ of possession under the former words expressly authorizing forcible removal are not inserted but an order to give possession authorizes such removal if need be and if the Code applies the omission of such words is immaterial O XXI r 97 of the Civil Procedure Code merely provides an additional or alternative remedy Where the bailiff proceeded to the premises and on the occupant's wife refusing to vacate pulled or dragged her out of the house and the force used for the purpose caused her when released to fall on the ground whereby she received slight injuries *Held* that he was legally justified in the employment of such amount of force and could not be convicted therefor under s 323 of the Penal Code In such cases it is impossible to calculate or apply with the utmost nicety the degree of force necessary and yet not more than sufficient Observations as to the practice of bailiffs taking with them as assistants persons unconnected with the Court and as to the time of delivery to them of writs for execution Piecemeal conduct of trials by Magistrates condemned MEREDITH v SANJIBANI DASI (1911) I L R 42 Calc 813

BAILMENT

See CARRIER

See CONTRACT ACT
I L R 4? Bom 1017

See LIMITATION ACT (IX OF 1908) SCH I ARTS 49 60 145
I L R 41 All 643

———— Rights of Bailor and Bailee against 3rd party interfering—

See PARTNERSHIP
I L R 43 Calc 733

———————— *Pledge of cotton by warehouseman to whom it had been entrusted—Pledge to Bank and return of cotton to person who pledged it—No notice by Bank of any other claim—Conversion action for—Contract Act (IX of 1872) s 178—Admissibility of evidence raising defence not pleaded* The respondent (plaintiff) purchased certain bales of cotton and entrusted them to the second defendant as a muccadam (or warehouse man) who pledged them to the appellant Bank (first defendant) in whose godowns they remained until they were sold by the second defendant in the course of his business with the Bank withdrawn from the godowns and passed out to the second defendant or to his order In a suit for the cotton the plaintiff claimed delivery of the bales or their value charging the Bank with conversion of the goods and in the alternative if it was held that he was not entitled to such relief he claimed to stand in the shoes of the second defendant and asked that his rights should be ascertained and declared and that the securities deposited by the second defendant with the Bank should be marshalled in his favour *Held* (reversing the decision of the High Court and restoring the order of the Trial Judge of the same Court) that the fact that the Bank parted with the cotton

BAILMENT—*contd*

depo ited with them to or to the order of the per son by whom it was deposited without notice of any claim by any other person afforded a com plete defence to the action. In this view their Lordships deemed it unnecessary to express any opinion on the construction of s 178 of the Con tract Act (IX of 1872) on which the Courts below had differed the first Court holding that it pro tected the Bank and that the pledge of the cotton was valid and the Appellate Court holding to the contrary effect The defence that the bales had been returned had not been pleaded by the Bank in their written statement but the fact was establi hed during the cross examination of the second defendant as a witness for the plaintiff and proved by the inspection of his books Objec tion was taken to the Banks raising the defence and an application to amend the written state ment was refused by the first Court But later on the ca e evidence of the return of the cotton was held to be admis ible in regard to the alter native claim of the plaintiff *Held* that the evidence was rightly admitted having regard to the claim of the plaintiff to marshall securities and that if properly admitted it was admissible for all purposes. BANK OF BOMBAY v NANDLAL THAKERSEY DAS (1912) I L R 37 Bom 122

BAIRAGI

See HINDU LAW—SUCCESSION
I L R 39 Bom 168

BALANCE OF MORTGAGE MONEY

——— suit for—

See SPECIFIC PERFORMANCE
I L R 43 Calc 59

BALANCE SHEET

See COMPANY I. L. R 45 Calc 486

BALLAVACHARYA GOSSAINS

See HINDU LAW—ENDOWMENT
I L R 35 All 283

BANDHUS

See HINDU LAW—BANDHUS
I L R 37 All 583

See HINDU LAW—INHERITANCE
I L R 42 Calc 384

I L R 44 Mad 114 and 121

See HINDU LAW—SUCCESSION
I L R 32 All. 640
I L R 38 All. 416
I L R 45 Bom 763 353
I L R 44 Mad 753

BANDSMAN

See WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859)
I L R 38 Mad. 551

——— *Banlati brit of Oudh —Birtias of have under proprietary right* In Oudh there exist various kinds of *birts* the inci dents of each of which differ from those of others The *pottah* of the *birtias* in this case expressly declared that the grantor had given the land of the village to the grantee to get it cultivated and populated It was for the purpose of clearing the jungle making the land fit for cultivation and bringing in raiyats which carried with it the duty of sinking wells The birt holder was to enjoy

BANDSMAN—*contd*

it free for five or six years A comparatively small but gradually ascending rent was fixed for the years 1210 to 1214 in proportion to the in creasing productiveness of the soil After 1214 he was to pay the revenue to the *sarkar* prevalent in the Taluqa and take the *daswant* prevalent in the Taluqa the *daswant* being a deduction in the nature of a rebate The rent of the tenure could not be capriciously enhanced by the Taluqdar as the assessment of the *jama* was to be in accordance with the rate prevalent in the Taluqa *Held* in view of the above and other circumstances of the case that the Judicial Commissioners were right in holding that the grantees had under proprietary rights in the village RAJA MOHAMED ABDUL HASAN KHAN v LACHMI NARAIN (P C)
26 C W N 249

BANK MEMORANDUM

See STAMP ACT (II OF 1899) s 57
I L R 38 Mad 349

BANKER AND CUSTOMER

See INSOLVENCY
I L R 34 Mad 125

See SALE OF GOODS
I L R 42 Bom 16

See SUCCESSION ACT (X OF 1865) s 190
I L R 38 Bom 618

See TRUSTEE I L R 35 Mad 712

——— Government Treasury whether a—

See NEGOTIABLE INSTRUMENTS ACT 1881 ss 5 AND 6
I L R 43 Mad 817

——— *Payment to with in structions as to disposal effect of* When *A* paid money into a bank with instructions to pay over the same to *B* who had no account with the bank and the bank wrote to *B* stating that they had received the money and held the same in suspense account pending instructions from *B* *Held Per* MUNRO *J*—That the bank became the debtor of *B* in respect of such money *Per* ABDUR RAHIM *J*—That the relationship between the bank and *B* was not that of debtors and creditor and that the bank held the money in a fiduciary capacity as bailee or agent *Official Assignee of Madras* v *Smith I L R 22 Mad 68* dissented from. OFFICIAL ASSIGNEE OF MADRAS v RAJAM AIYAR (1909) I L R 33 Mad. 299

——— *Interest on overdrafts— Practice of paying interest in a different mode from that agreed on—Compound interest charged without any objection for long time—Implied contract to pay it—Evidence Act (I of 1872) s 92—Refusal to honour cheques*] The appellants carried on business at Bombay as cotton merchants and the res pondents were their Bankers. From 1905 the Bank had allowed the appellants firm to overdraw their accounts under an agreement b tween the parties consisting of a letter in a printed form signed and given by the appellants to the res pondents on 1st December annually and p ovid ing that intere t should be charged at 7 per cent. per annum and be calculated on the daily balance due in respect of the overdraft, pledging as security the cotton s ored by them in the godowns o the Bank The practice of the Bank as to interest was to strike a balance of each of accounts on the last day of each month.

BANKER AND CUSTOMER—*contd*

interest on the amount of the balance in fact compound interest with monthly rests but the appellants though they knew it was done never objected until after 1st August 1914 In a suit by the Bank to recover a balance due by the appellants the latter counterclaimed for damages for the dishonouring of two of their cheques *Held* that the acquiescence of the appellants for 9 years in the mode of charging interest entitled the respondents to set up an implied agreement on the appellants part to pay it in that way and there was nothing in s 92 of the Evidence Act to prevent such an agreement being proved It was found by all the Courts that the respondents were justified under the circumstances at the time in not increasing the appellants overdraft by honouring the cheques and had rightly refused to do so HARIDAS RANCHORDAS v MERCANTILE BANK OF INDIA (1919) **I L R 44 Bom 474**

———— *Fiduciary relationship —Demand for repayment—Effect of* Money held by a banker after his customer has demanded repayment is not held by him in a fiduciary capacity A creditor cannot transform his debtor into a trustee by merely demanding repayment of the debt OFFICIAL ASSIGNEE OF MADRAS v KRISHNA BHATTA (1910) **I L R 34 Mad 128**

———— *Effect of a blank draft which is not addressed to any specific banker—Negligence of customer leading to payment of forged cheque by banker—Effect of negligence when not the proximate cause of payment* The plaintiffs were a Banking Corporation with their head office at Lahore and branch offices at Amritsar and elsewhere The defendants were a Banking Corporation having a branch at Bombay In 1904 the plaintiffs opened a current account with the defendants and sent the defendants a list of the officers of the plaintiffs authorized to sign for the plaintiffs including the name of Madho Ram the manager of the Amritsar office Madho Ram had acted on occasions previous to this date as the *manager of the Lahore office It was the custom* of Madho Ram when leaving the Bank premises for a short time both when acting as manager at Lahore and afterwards when manager at Amritsar to leave with the Accountant blank draft and blank letters of advice ready signed by him for use as occasion occurred These drafts were not destroyed after his return On the 2nd of October the defendants cashed a draft presented to them for payment for Rs 10 000 purporting to have been signed by Madho Ram The defendants had previously received a letter of advice also purporting to have been signed by Madho Ram The defendants debited the plaintiffs with the payment The plaintiffs repudiated the draft as a forgery and sued to recover Rs 10 000 from the defendants The defendants denied that the draft was a forgery In the alternative they submitted that the forged draft had been paid by them owing to the negligence of the plaintiffs and that the latter were not entitled to recover the amount of the draft from them *Held* that it was probable that the draft was one left by Madho Ram when acting as manager of the Lahore office of the plaintiff but that the plaintiffs were not estopped from contending that the draft was not the draft of the plaintiffs *Held* further that it was not incumbent on the plaintiffs to contemplate the perpetration of such a crime as forgery or theft and that the negligent act of Madho Ram was not the proximate cause of the draft being cashed by the defendants and that the plaintiffs were therefore entitled to recover *Société Générale v The Metropolitan Bank 27 L T 849 Swan v North British Australasian Co 32 L J Exch 273 Smith v Prosser [1907] 2 K B 735* and *Baxendale v Bennett 3 Q B D 525* followed PANJAB NATIONAL BANK LD v THE MERCANTILE BANK OF INDIA LD (1911) **I L R 36 Bom 455**

———— *Payment to Bank with instructions as to disposal effect of— In suspense account meaning of* When *A* paid money into a bank with instructions to pay over the same to *B* who had no account with the bank and the bank wrote to *B* stating that they had received the money and held the same in suspense account pending instructions from *B* *Held* on appeal from *The Official Assignee of Madras v Rajam Ayyar I L R 33 Mad 299* by MILLER and MUNRO JJ that the bank held the amount as agents of *A* for remittance to *B* and not as bankers either of *A* or *B* *The Official Assignee of Madras v Smith I L R 32 Mad 68* distinguished *Per* ABDUR RAHIM, J That the relationship between the bank and *B* was not that of debtor and creditor and that the bank held the money in a fiduciary capacity as bailee or agent A banker holding money of a person in suspense does not treat it like an ordinary customer's money *The Official Assignee of Madras v Smith I L R 32 Mad 68 69* dissented from OFFICIAL ASSIGNEE OF MADRAS v RAJAM AYYAR (1913) **I L R 36 Mad 499**

BANKING COMPANY

See COMPANY **I L R 42 Bom 264**

BANKRUPTCY

See UNDISCHARGED BANKRUPT **I L R 37 Calc 961**

———— *Straits Settlements Bankruptcy Ordinance—Debt contracted by a Hindu in Singapore—Adjudication of bankruptcy and discharge by the Singapore Court operating to discharge debt—Non maintainability of a suit in India for the balance of the debt against the bankrupt or his undivided son—Liability of an undivided Hindu son not a joint liability* A Hindu who was domiciled in India but who carried on trade in Singapore was adjudicated a bankrupt by the Supreme Court at Singapore for debts incurred at Singapore and he eventually obtained at Singapore an order of discharge under the Straits Settlements Bankruptcy Ordinance The plaintiffs who as one of the creditors proved his debt and received two of the dividends due to him was a party to the order of discharge Under the above Ordinance a discharge operated as an extinguishment of the debt *Held* that the extinguishment of the debt by the Bankruptcy Laws of Singapore operated as a discharge of it everywhere and the creditor had no right to sue in India the debtor and his undivided sons for the balance of the debt as if it was still subsisting Under the Hindu Law a Hindu son is not jointly bound with his father to pay the debts contracted by the father Hence the said Ordinance under which a discharge of a bankrupt does not discharge a person jointly bound with him does not affect the undivided son. NARAYANAN v VEERAPPA (1916) **I L R 40 Mad 581**

BANKRUPTCY ACT 1883 (46 & 47 VICT C 52)

——— ss 27 118—

See INSOLVENCY I L R 38 Calc 542

——— ss 33 102—

See MINOR I L R 42 Calc 225

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909) ss 7 36 AND 90 I L R 40 Mad 810

——— s 40—

See INSOLVENCY I L R 42 Calc 289

BARADARAN JAGIR (ORISSA)

See RENT I L R 38 Calc 278

BARBER

——— Right to officiate on ceremonial occasions—

See VATANDAR BARBERS I L R 44 Bom 733

BAR COUNCIL, RESOLUTIONS OF

——— *Etiquette affecting Counsel—Counsel as witness—Retainer acceptance of—Professional ethics* The following resolutions of the Bar Council approved — (a) If counsel knows or has reason to believe that he will be an important witness in a case he ought not to accept a retainer therein (b) If he accepts a retainer not knowing or having reason to believe that he will be such a witness but at the opening or at any subsequent stage before evidence is concluded it becomes apparent that he is a witness on a material question of fact he ought not to continue to appear in the case unless he cannot retire without jeopardising the interest of his client (c) If counsel knows or has reason to believe that his own professional conduct on matters out of which the action arises is likely to be impugned in the case he ought not to accept a retainer (d) If he accepts a retainer not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned but finds in the course of the case that it is so impugned he ought to adopt the same course of conduct as is mentioned in clause (b) *ante* (e) In either of the cases mentioned in clauses (b) and (d) there is no rule of professional ethics which debars counsel if he continues to act as counsel in the case from going into the witness box and being cross examined

Although the resolutions of the Bar Council are not binding on the Courts the Bar Council is the recognised authority on matters of professional conduct and etiquette affecting counsel and its opinion is of the greatest weight and value There is nothing necessarily unprofessional in counsel giving evidence in a case in which he appears as such *Sellna* v *Mirza Mahomed Shiraz* [illegible] *Bom L R 1044 Cobbett* v *Hudson 1 E & B 11 Stones* v *Byron 4 Dowl & L 393 Deare* v *Packwood 4 Dowl & L 39an Corea* v *Peiri [1909] A C 549 14 C W N 86 Nundo Lal Bose* v *Nistarini Dassi I L R 27 Calc 428* referred to *Curry* v *Walter 1 Esp 456* distinguished As a general practice however it is undesirable when the matter to which counsel depose is other than formal that they should testify either for or against the party whose case they are conducting Under s 118 of the Evidence Act counsel although they may be engaged

BAR COUNCIL RESOLUTIONS OF—*contd*

in the case are competent to testify whether the facts in respect of which they give their evidence occur before or after their retainer *Cobbett* v *Hudson 1 E & B 11* referred to WESTON AND OTHERS v PEARY MOHAN DASS (1912) I L R 40 Calc 898

BARRISTER

See LIMITATION ACT (IX OF 1908) s 5 I L R 37 All 267

——— *Counsel receiving instructions direct from client—Non return of fees for professional work not performed—Usage and etiquette of the profession—Duties of counsel—Nomination of juniors by seniors and of seniors by juniors practice of—Practice* The usage of the profession of a barrister that counsel should take his instructions only from an attorney in respect of any professional work on the Original Side of the High Court is a most beneficial one from the point of view of the public and the Bar and though founded upon no rule of law ought to be maintained In a certain suit counsel accepted a brief containing instructions for him to appear at the trial on behalf of a party and was paid the consultation fee and the fee for attending the trial which were marked thereon Counsel attended the consultation and subsequently left Calcutta to attend to an urgent professional call having previously returned the brief to the attorney but not the fees *Held* that counsel should have returned the whole fee (both for consultation and for attending the trial) It was given to him for the purpose of attending the trial and the consultation was held with a view to his so doing The practice for seniors to name their juniors or for juniors to nominate their senior is contrary to the traditions of the profession and to its best interest and such a practice ought to be discouraged It is however quite legitimate for a senior to ask a junior to hold brief for him when he is temporarily unable to attend to a case *In re* AN ADVOCATE (1917) I L R 44 Calc 741

——— *English barristers practising both as barrister and solicitor at Shanghai—Partnership between them if contrary to etiquette and law—Sale by partner of share of business to co partner—Covenant not to practice for a reasonable time—Suits by the other partner for injunction—Agreement by solicitor to pay a share of proceeds of business to clerk if unprofessional* There is no reason why a person who carries on both the barrister and the solicitor's branches of the profession (as at Shanghai) should not enter into an agreement not to practice for a reasonable time Where one of two persons who carried on at Shanghai in partnership the business of both solicitor and barrister sold his interest in it to his partner covenanting at the same time not to practise law for a term of five years *Held* that the latter was entitled to an injunction restraining the former from practising before the expiry of the period. HOME v EDWARD DOUGLAS (1912) 17 C W N 215

BARGA KABULIYAT

——— *Agreement to pay rent in kind mentioning equivalent amount in money in case of default—Landlord if can claim current value of stipulated quantity of produce—Evidence Act (I of 1872) s 92—Admissibility of oral evidence to modify significance of terms in kabuliat* The

BARGA KABULIYAT—*contd*

defendant had executed a *kabuliyat* in favour of the plaintiff which was headed as a *barga kabuliyat* and in the body of the *kabuliyat* he agreed that if he failed to deliver half the crops he would pay Rs 25 yearly The plaintiff sued for *barga* rents claiming price of half the produce defendant pleaded that the plaintiff was entitled to only Rs 25 yearly according to the *kabuliyat* *Held* on a construction of the *kabuliyat* that if the tenant made default in giving half the crops the landlord is entitled to recover only the fixed sum of Rs 25 mentioned in the *kabuliyat* and that under s 92 of the Evidence Act oral evidence is not admissible to show that the sum of Rs 25 was mentioned in the *kabuliyat* for purposes of registration only BASIRUDDIN CHOWDHURY v AYSARUNNESSA BIBI (1916) 21 C W N 860

BARGAIN

——— onerous but not unconscionable—
See SPECIFIC PERFORMANCE
I L R 38 Calc 805

BARODA COURT

——— decree in—
See CIVIL PROCEDURE CODE (ACT V OF 1908) s 48 AND SCH I O XXI
I L R 35 Bom 103
See DECREE I L R 39 Bom 34
I L R 40 Bom 504

BARKI SERVICE

——— grant for—
See GRANT I L R 39 Bom 68

BED OF RIVER

——— right to—
See NAVIGABLE RIVER
I L R 46 Calc 390

BELCHAMBERS' RULES AND ORDERS

——— r 370—
See REVIVOR I L R 43 Calc 903

BEMIADI PUTTAH

——— *Held* to be a lease without a term and not a permanent lease even where it recites that the Lessee and his heirs and successors should hold possession of the property and have rights in the minerals MUSSAMAT PARSHAN KUER v MUSSAMAT TULSHI KUER
2 Pat L J 180

——— *Held* that although it does not necessarily convey a permanent heritable right it may do so KANGALI CHARAN MUKHARJI v SURJA NARAIN SAH 6 Pat L J 687

BENAMI

See CIVIL PROCEDURE CODE 1882 s 317
I L R 35 Bom 342
See CIVIL PROCEDURE CODE 1908 s 66
I L R 35 All 138
I L R 43 All 416
See DEKKHAN AGRICULTURISTS RELIEF ACT (XVII OF 1789)
I L R 40 Bom 483
See PUTNI 15 C W N 5

BENAMI—*contd*

See RELIGIOUS ENDOWMENT
I L R 43 Calc 1019
See SALE FOR ARREARS OF REVENUE
I L R 44 Calc 573
See SALE IN EXECUTION 15 C W N 648
See SECOND APPEAL
I L R 33 All 122
See TITLE I L R 47 Calc 1108

——— PROOF OF—*Circumstantial evidence sufficient*—Direct evidence to prove a transaction *benami* cannot be expected since the whole object of such a transaction is to suppress evidence of the real facts The true facts can be proved by circumstantial evidence SAMBHO KUER v HARIHAR PERSHAD (1914) 18 C W N 1071

——— *Benami purchase allegation of—Proof —Subsequent conduct—Surrounding circumstances—Motive—Suspicion only if sufficient to justify finding of benami—Loan given by executor to person who succeeds him as executor after his death—Limitation—Previous statements use of* Subsequent conduct of the parties affords valuable evidence as to whether the person in whose name a conveyance is taken is intended to be the beneficial owner or a mere *benamidar* In cases of alleged *benami* purchaser the decision of the Court ought not to be rested on mere suspicion Reliance in such a case must be largely placed not only upon the surrounding circumstances and the position of the parties and their relation to one another but also upon the motives which could govern their actions and their subsequent conduct Previous statements, unless used to contradict or discount the evidence of a witness given in the suit cannot be legitimately used and even then the particular matter or point must be placed before the witness as one for explanation in view of its discrepancy with the evidence tendered. The principle that the effect of the appointment of a debtor to the office of the executor is that the debt due from the debtor executor is considered to have been paid to him by himself and that the executor is accountable for the amount of his debt as assets is not applicable where the alleged loan was by a former executor to one who subsequently to his death was appointed executor and the loan was already time barred at the latter date and there was nothing to show that the debt was kept alive up to that date The principle that the grant of probate operates retrospectively from the date of the death of the testator did not apply here where there was an intermediate executor who created the debt for which the executor who followed him was sought to be made liable as debtor In a suit for the construction of a will and for the administration of the estate left by the testator the costs in the absence of grounds established in favour of a departure should ordinarily be paid out of the estate UPENDRO NATH NAG v JOGENDRO NATH NAG (1915) 21 C W N 280

——— *Purchaser at a benami sale depositing putni rent before sale set aside from money belonging to his beneficiary—Suit to recover if lies* Defendant No 7 made a *benami* purchase at an auction sale of property belonging to defendants Nos 1 to 7 in the name of plaintiff The sale was subsequently set aside but before the date the plaintiff deposited a sum of money in order to save the property from a sale under the

BENAMI—*contd*

Putni Regulation In a suit by plaintiff the money so deposited was found to have been defendant No 7's Defendant No 7 however made no claim to it *Held* that the plaintiff was entitled to recover the amount deposited. SATYA CHARAN MUKHERJI *v* DINANATH BISWAS (1916) **21 C W N 1130**

——————— *Auction sale—Civil Procedure Code (Act V of 1908) s 66—Object of the section* S 66 of the Code of Civil Procedure 1908 lays down that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or some one through whom the plaintiff claims The section is clearly aimed at *benami* purchases at execution sales The clear intention of the section is to stop *benami* purchases by making it impossible for the real owner to question the *benamidar's* title *Bhishan Dial* v *Ghazi ud din* *I L R 23 All 175* referred to *Sasti Churn Nundi* v *Annopurna I L R 23 Calc 699* doubted HANUMAN PERSHAD THAKUR *v* JADU NANDAN THAKUR (1915) **I L R 43 Calc 20**

——————— *Right of benamidar to sue in his own name—Position of beneficial owner in relation to benamidar—Estoppel—Evidence Act (I of 1872) s 115—Doctrine of feeding the estoppel —Transfer of Property Act (IV of 1882) s 43* The benami system in India under which property is acquired and held and business carried on in names other than those of the real owner has long been a common practice in the country there is nothing inherently wrong in it and it accords within its legitimate scope with the ideas and habits of the people So far therefore as a benami transaction does not contravene the provisions of the law the Courts are bound to give it effect The statement of the rule applicable to such transactions given in *Bilas Kunwar* v *Desraj Ranjit Singh I L R 37 All 557 L R 42 I A 242* followed The benamidar though he has no beneficial interest in the property or business standing in his name represents in fact the real owner and is so far as their relative legal position is concerned a mere trustee for him *Held* (reversing the decision of the High Court) that an action could be maintained in the name of the benamidar in respect of the property though the beneficial owner is not a party to it the latter being fully affected by the rules of *res judicata* It was open to him to apply to be joined in the action but whether or not he is made a party a proceeding by or against his representative is in its ultimate result fully binding on him A suit was brought to set aside as invalid not having been made for purposes which made it binding on the reversioners an alienation in 1880 of family property to the predecessors of the defendant by one *M* in conjunction with her daughter *B* and her grandson *H* while *M* was in possession of the property by virtue of her right of succession to her son *S* who died in infancy in 18.. *H* was a predecessor in title of the plaintiffs to whom in 1895 after the death of *M* the then nearest reversioners conveyed all their right title and interest in the property now in suit It was contended by the defendants that as *H* was party to the alienation his successors in title the plaintiff were estopped from questioning the transaction, and the High Court differing from the Trial Judge decided in favour of that contention relying on the general doctrine of equitable estoppel embodied in s 115 of the Evidence Act and also were of opinion that *H's* purchase from the reversioners accrued to the benefit of *M's* vendees in consequence of the fact that he had joined with her in conveying the property to the defendants predecessors resting their judgment on the equitable doctrine of feeding the estoppel and on the provisions of s 43 of the Transfer of Property Act *Held* (reversing those decisions) that s 115 of the Evidence Act did not apply there being absolutely no evidence that the vendees were induced to alter their position in consequence of *H's* representation contained in the deed of conveyance *H* was merely a passive instrument in the hands of his elders and his statement could not have materially influenced either the vendors or vendees conduct in the matter The theory that *H's* subsequent purchase of that property in 1895 from the reversioners should accrue to the benefit of the purchaser from *M* was based on the assumption that what happened in 1880 created an estoppel against *H* but that was not the case Moreover *H* did not acquire the property as a contingent reversioner to *M* the title on which the plaintiffs brought the suit was based on an independent purchase by *H* from the rightful heirs GUR NARAYAN *v* SHEOLAL SINGH (1918) **I L R 46 Calc 566**

——————— *Purchase onus—Benami purchase allegation by decree holder of—Burden of proof—Suspicion and proof difference between* Where a decree holder sued for a declaration as against a purchaser from his judgment debtor that the purchase was merely a *benami* conveyance *Held* that the burden of proof lay on the decree holder and though there were some elements of suspicion in this case the burden had not been discharged In matters of this description it is essential to take care that the decision of the Court rests not upon suspicion but upon legal grounds established by legal testimony *Sreemanchundar Dev* v *Gopaulchunder Chuckerbutty 11 M I A 28 43 (1866)* referred to SETH MANIKLAL MANSUKHLAL *v* RAJA BIJOY SINGH DUDHORIA (P C) **25 C W N 409**

——————— *Proof that transfer is benami—Onus* In regard to *benami* transactions Courts of law should not approach them with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest positive evidence that the *ex facie* owner of a property is a trustee for or holds the same for the interest of another *Benami* transactions are very familiar in Indian practice and even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose Still, such a transfer cannot be considered as nothing The person who impugnes its apparent character must show something or other to establish that it is a *benami* or sham transaction The decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony MAHBUB ALI KHAN *v* BHARAT INDU (1918) **23 C W N 321**

——————— *Hindu with wives and a Muhammadan mistress—Purchase with his own funds in name of mistress and registration of deed in her name—Property treated as his own and no possession or use of it by mistress—Landlord and tenant—Estoppel as to denial of title by tenant—*

BENAMI—*concld*

Evidence Act (I of 1872) 116 —*No inference against litigant as to contents of documents he considers irrelevant—Omission of opposing litigant to put them in evidence in proper way* A Hindu taluqdar who had two wives and a Muhammadan mistress and had already made substantial provision for the latter purchased a house with his own money in the name of the mistress and registered the deed also in her name He treated the house however as his own during his life time living in it paying for repairs and taxes and receiving rent for it when let as did his senior widow after his death and the mistress had no possession or use of the house In a suit by the senior widow to eject after due notice to quit a tenant to whom she had let the house whose defence was a denial of the plaintiff's title and an assertion that he held under the Muhammadan mistress who claimed title under the deed of sale in her name of which she had obtained possession *Held* (reversing the decision of the High Court and restoring that of the Subordinate Judge) that on the evidence in and under the circumstances of the case the deed of sale was and had remained throughout a *benami* transaction The general rule in India in the absence of all other relevant circumstances laid down in *Dhurm Das Pandey* v *Shama Soondri Dibiah 3 Moo I A 229* that the criterion in these cases is to consider from what source the money comes with which the purchase money is paid followed It is open to a litigant to refrain from producing any documents which he considers irrelevant and if the opposing litigant is dissatisfied it is for him to apply for an affidavit of documents and he can so obtain inspection and production of all that appear to him in such affidavit to be relevant and proper If he fails to do so neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way if he fails to do so no inference in his favour can be drawn as to the contents of them A tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he has not openly restored possession by surrender to his landlord BILAS KUNWAR v DESRAJ RANJIT SINGH (1915)

I L R 37 All 557

———————— Court represents admit contention that a transaction regarding immoveable property was part genuine and part *benami* APPA DHOND v BABAJI KRISHNAJI

I L R 40 Bom 85

BENAMIDAR

See CIVIL PROCEDURE CODE (1908) s 11
I L R 36 All 446

See EXECUTION OF DECREE
14 C W N 774

See LIMITATION ACT (IX OF 1908) SCH I ARTS 91 AND 120
I L R 35 All 149

See RESULTING TRUST
I L R 48 Calc [illegible]

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 59 **I L R 37 All 414**

See VENDOR AND PURCHASER
I L R 35 Bom 269

BENAMIDAR—*contd*

———— right of—

See EX PARTE DECREE
I L R 45 Calc 920

———— right of to sue—

See BENAMI
I L R 46 Calc 566

———— transferee from right of suit of—

See MORTGAGE **I L R 41 Mad 493**

1 ———————— *beneficiary taking mokurari from and mortgaging it how far bound by the mortgage* A a wife of a Mahomedan K in whose *benami* A purchased a certain property purported on K's death to grant to KK who on K's death would inherit 5 as 14 gd 15 cowries of K's estate a *mokurari* interest in 8 as 6 gds of the property A mortgagee of this interest obtained a decree for sale of a 5 as 15 gds of the *mokurari* in a suit in which KK was made a party and the plaintiff purchased the same at the sale *Held* that persons representing KK could not oppose the plaintiff's suit to recover possession of a *mokurari* interest in J K's 5 as 14 gds 15 cowries share BASAR KHAN v MOULVI SYED LEAKAT HOSSEIN (1919)

23 C W N 841

2 ———————— *Benamidar if may sue on mortgage—Sons of may object to benamidar's decree against father* A usual mortgage decree was obtained by mortgagee who put it into execution and the sale of the mortgaged property was notified to take place on a certain date when the sons of the mortgagor brought a suit for declaration that they were not bound by the mortgage or by the decree made on the basis thereof on the ground that the decree holder was not the real mortgagee but only the ostensible mortgagee for the benefit of a real creditor and consequently he was not entitled to enforce the security though it stood in his name *Held* that the person named in the mortgage deed was entitled to sue on it and it was not competent to the mortgagor to dispute that the ostensible mortgagee was entitled to maintain the suit and the sons of the mortgagor were bound by the mortgage bond equally with the executant and did not stand in any better position KIRTIBAS DAS v GOPAL JIU (1913) **18 C W N 814**

3 ———————— *Right of suit Held* on suit for sale on a mortgage that the facts that the mortgagee named in the bond is only a *benamidar* and that the real owner of the bond is known to the Court are no bar to the maintenance of the suit by the person named in the bond as mortgagee *Yad Ram* v *Umrao Singh I L R 23 All 380* referred to PARMESHWAR DAT v ANARDAN DAT (1914) **I L R 37 All 113**

4 ———————— The view taken in *Ram Behari Sarkar* v *Surendra Nath Ghose 19 C L J 31* that a *benamidar* defendant in a mortgage suit represents the interests of the persons beneficially entitled approved KANAI LAL JALAN v RASIK LAL SADHUKHAN (1914)

19 C W N 361

5 ———————— *Suit on mortgage by maintainability of—Real owner whether a necessary party to Held* by the Full Bench that a person who is not the real mortgagee but only a benamidar for him can institute a suit to enforce the mortgage and that the real mortgagee need not be a party *Choudhri Gur Narayan* v *Sh o*

BENAMIDAR—*contd*

Lal Singh 36 Mad L J 68 46 I A 1 followed VAITHESWARA AIYER *v* SRINIVASA RAGHAVA IYENGAR (1919) I L R 42 Mad 348

6 ———— *Partition—Joint immoveable property suit for partition of* A *benamidar* cannot maintain a suit for partition of joint immoveable property ATRABANNESSA BIBI *v* SAFATULLAH MIA (1915) I L R 43 Calc 504

6 (A) ———— *Appellant bought land in Burmah conveyed it to the name of his wife and built on it*—Both parties were born in India of English parent Appellant sued for a declaration that his wife held the houses as his benamidar *Held* that the rights of the parties were to be determined according to the law to be applied by the English Court of Chancery Whereby there was a rebutable presumption that the transaction was intended for her advancement KERWICK *v* KERWICK L R 47 I A 275

7 ———— *Decree against benamidar—Sale of property held in benami in execution of decree if binds beneficiary—Symbolical possession delivered if binds beneficiary* Although a decree against a *benamidar* may bind the beneficiary symbolical possession delivered in execution thereof is of no avail except against the actual party to the suit or the proceeding in execution and the beneficiary who was no party to either is not affected by it *Quære* Whether when a money decree has been obtained against the *benamidar* the beneficiary is necessarily bound by the sale of the property held in *benami* in execution of the decree SATISH CHANDRA SARKAR *v* BROJO GOPAL DUTTA (1918) 22 C W N 807

BENCH OF MAGISTRATES

See MAGISTRATE BENCH OF

———— Absence of one (whether trial valid)—

See CRIMINAL PROCEDURE CODE s 16 I L R 44 Bom 400

350 I L R 2 Lah 287

BENEFIT

———— to donor's family—

See MAHOMEDAN LAW—WAKF L R 44 I A 21

BENEFITS OF DECREE

———— suit for—

See PRINCIPAL AND AGENT I L R 40 Calc 335

BENGAL ACTS

———— 1825—XI

See BENGAL ALLUVION ACT

———— 1847—IX

See BENGAL ALLUVION AND DILUVION ACT

———— 1859—X

See BENGAL RENT ACT

XI

See SALE FOR ARREARS OF REVENUE

———— 1865—VIII

See BENGAL RENT ACT

See RENT RECOVERY ACT

BENGAL ACTS—*contd*

———— 1866—II

See CALCUTTA SUBURBAN POLICE ACT

IV

See CALCUTTA POLICE ACT

———— 1868—VII

See BENGAL LAND REVENUE SALES ACT

See SALE FOR ARREARS OF REVENUE

See REVENUE SALES ACT

———— 1869—VIII

See BENGAL RENT ACT

———— 1870—VI

See VILLAGE CHAUKIDARI ACT

See CHAUKIDARI CHAKRAN LANDS

———— 1875—V

See BENGAL SURVEY ACT

———— 1876—VI

See CHOTA NAGPUR ENCUMBERED ESTATES ACT

VII

See LAND REGISTRATION ACT (BENGAL)

VIII

See ESTATES PARTITION ACT

———— 1878—VII

See BENGAL EXCISE ACT

———— 1879—I

See CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT

VIII

See RENT SETTLEMENT ACT

IX

See BENGAL COURT OF WARDS ACT

See COURT OF WARDS ACT (BENGAL.)

———— 1880—VI

See BENGAL DRAINAGE ACT

IX

See BENGAL CESS ACT

———— 1882—II

See BENGAL EMBANKMENT ACT

———— 1884—III

See BENGAL MUNICIPAL ACT

———— 1885—I

See BENGAL FERRIES ACT

III

See BENGAL LOCAL SELF GOVERNMENT ACT

See LOCAL SELF GOVERNMENT ACT

———— 1887—XII.

See BENGAL AGRA AND ASSAM CIVIL COURTS ACT

See BENGAL, N W P AND ASSAM COURTS ACT

See CIVIL COURTS ACT

———— 1890—IX.

See CALCUTTA PORT ACT

BENGAL ACTS—*concld*

——— 1894—IV

See BENGAL MUNICIPAL (AMENDMENT) ACT

——— 1895—I

See PUBLIC DEMANDS RECOVERY ACT

V

See BENGAL SURVEY ACT

——— 1897—V

See ESTATES PARTITION ACT

——— 1899—III

See CALCUTTA MUNICIPAL ACT

I

See BENGAL GENERAL CLAUSES ACT

——— 1903—III

See BENGAL MOTOR CAR ACT

——— 1906—IV

See CENTRAL PROVINCES LAND REVENUE AMENDMENT ACT

——— 1907—II

See EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT

——— 1908—VI

See CHOTA NAGPUR TENANCY ACT

——— 1909—III

See CHOTA NAGPUR ENCUMBERED ESTATES AMENDMENT ACT

——— 1909—V

See BENGAL EXCISE ACT

——— 1911—V

See CALCUTTA IMPROVEMENT ACT

——— 1914—VI

See BENGAL MEDICAL ACT

——— 1920—III

See CALCUTTA RENT ACT

BENGAL, AGRA AND ASSAM CIVIL COURTS ACT (XII OF 1887)

——— ss 8 and 21—

See BENGAL N W P AND ASSAM COURTS ACT

——— Where the value of a suit is less than Rs 5 000 and the first Court dismisses the claim or awards less than Rs 5 000 and the appeal court thinks Rs 5 000 should be awarded it has power to award it The Right to specifically enforce an agreement for a lease is barred after three years SATYA KINKAR SAHANA v RAJA SRI SRI SHIBA PRASAD SINGH 4 Pat L J 447

——— s 21—An appeal lies to the High Court and not the District Court for an order refusing to set aside an *exparte* decree where the suit for Court fee is valued at more than Rs 5 000 RAGHU SINGH v USUF ALI 4 Pat L J 202

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825)

See ALLUVION

See DILUVION 24 C W N 211

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825)—*contd*

See FISHERY I L R 42 Calc 489

See LANDLORD AND TENANT I L R 41 Calc 683

See NAVIGABLE RIVER I L R 46 Calc 390

See REGULATION XI OF 1825 1 Pat L J 536

——— Whether accretion must be slow and imperceptible *Held* it is not the extent of the land formed which decides whether newly formed land is an accretion but the manner in which the formation takes place LALA LACHMI NARAIN LAL v MAHARAJA KESHO PRASAD SINGH 5 Pat. L J 1

——— Land submerged and reformed *in situ* *Held* that the Act did not apply to land which has been washed away and which reforms on its old site and is identifiable as land belonging to the owner of the site GAJADHAR PRASHAD v DULHIN GULAB KUER 5 Pat L J 632

BENGAL ALLUVION AND DILUVION ACT (IX OF 1847)

See RECORD OF RIGHTS 5 Pat L J 681

——— *not applicable to Sunderban lands not paying revenue directly to Government—Bengal Alluvion and Diluvion Regulation (XI of 1825) applicability of to such lands—Lease of Sunderban lands by Government as owner—No distinction between rent and revenue in the lease—Relation of lessor and lessee regulated by contract subject to the provisions of Reg XI of 1825—Diara proceedings confirmed by Board of Revenue for assessment with revenue under s 6 of Act IX of 1847—Suit in Civil Court for declaration that such proceedings are a nullity if governed by s 10 cl (3) of Reg III of 1828 and if to be treated as a regular appeal from the decision of the Board of Revenue—Proof—Onus on the Secretary of State to show addition to original lands—River boundary—Riparian owner s right to the middle of the stream* Under Act IX of 1847 (B C) it must be shown that land has been added to any estate paying revenue directly to Government Where the Government as owner of the Sunderbans granted a lease of certain lands for a certain term with a covenant for perpetual renewal on a progressive rental and in the lease there was no distinction between rent and revenue and the relation created by it was that of a lessor and lessee and the lessee was not allowed to claim an abatement of rent on the ground of diluvion and in addition to his lease hold interest his other properties moveable and immoveable were liable to be sold in the event of the accrual of the arrears of the *jama* reserved by the lease *Held*—That having regard to the position of the Government as owner of the Sunderbans and to the terms and the conditions of the lease the lessee in the present case was not the holder of an estate paying revenue directly to Government and as such Act IX of 1847 was not applicable and that the relation between the parties was regulated by the contract between them subject to the provisions of Reg XI of 1825 The entire proceedings confirmed by the Board of Revenue assessing the lands with revenue in the present case under s 6 of Act IX of 1847 were

BENGAL ALLUVION AND DILUVION ACT (IX OF 1847)—*contd*

declared a nullity In the present case the onus lay on the grantor *i e* The Secretary of State for India to shew addition to original lands The present suit being one for a declaration that the proceedings under Act IX of 1847 were a nullity it could not be dealt with as if it were a regular appeal from the decision of the Board of Revenue under s 10 cl (3) of Reg III of 1828 Having regard to the boundaries of the land demised in this case and in the absence of evidence to show that the rivers at the date of the grant were public navigable rivers *Held*—That the boundaries on the south and west extended to the middle of the two rivers *The Secretary of State for India in Council* v *Bijoy Chand Mahatab 22 C W N 872 (1918)* referred to SECRETARY OF STATE FOR INDIA *v* JATINDRA NATH CHOWDHURY
24 C W N 737

BENGAL CESS ACT (IX OF 1880)

See CESS ACT

See ROAD CESS ACT

See ROAD CESS RETURNS
I L R 39 Calc 1005

See TEISHKHANA PAPER
I L R 39 Calc 995

——— In a suit for rent claim of tenant s share of cess was disallowed on ground that there was no provision for payment of cess when rent was payable in kind JOGESH CHANDRA ROY *v* ANNADA CHARAN CHOWDHURY **26 C W N 368**

BENGAL CHAMBER OF COMMERCE

See ARBITRATION
I L R 40 Calc 219
I L R 42 Calc 1140
20 C W N 365

See STAMP DUTY
I L R 39 Calc 669

BENGAL COURT OF WARDS ACT (IX OF 1879)

See COURT OF WARDS

——— **s 6 (a)**—*Debtor s widow made Ward of Court—Suit to recover debt from widow without making manager of Court party as her guardian if maintainable when whole estate not taken over* Where the creditor of a deceased zemindar sued his widow who had been declared a disqualified proprietor under s 6 (a) of Ben Act IX of 1879 (Court of Wards Act) for recovery of the debt from the assets left by her husband without describing her as a ward of the Court or as being represented by the manager of the Court of Wards as her guardian as required by s 51 of the Act *Held* that the suit was badly framed even though it appeared that one of her husband s properties had not been taken over by the Court at the date of the suit and was taken over only after the lower Court had passed a decree against the lady in the suit as framed *Dhanpal Das* v *Raja Maneshar Singh I L R 33 I A 118 s c 10 C W N 849 Dhunput Singh* v *Surendra Kumari I L R 8 Cal 610* and *Krishna Prosad* v *Cossa Pelary I L R 8 Calc 149 s c 5 C W N 113* referred to ANANDA KUMARI DEBI *v* DURGA MOHAN CHUCKERBUTTY (1915)
20 C W N 31

BENGAL COURT OF WARDS ACT (IX OF 1879)—*contd*

——— **s 6(a)**—*contd*

——— **ss 11 13A 51 55**—*Estate retained by Court after some co sharers ceased to be disqualified on account of unpaid debt —Sale of property in execution—Application to set aside sale by judgment debtors not acting through Court of Wards if lie —Estate released pending appeal from order dismissing application—Effect* Some properties of the judgment debtor whose estate was in charge of the Court of Ward was sold in execution of a decree on 15th April 1912 As the Court of Wards would not apply to set aside the sale the judgment debtors themselves applied under s 47 and O XXI r 90 of the Civil Procedure Code The application was rejected on 11th January 1913 and the judgment debtors applied on 11th April 1913 The estate was released by the Court of Wards on the 18th June 1914 before the appeal was heard One of the judgment debtor *B* had ceased to be disqualified before the sale but as there were unpaid debts of the estate the Court of Wards under s 13A of the Court of Wards Act was authorised to retain possession of the estate *Held* that under s 55 of the Court of Wards Act the application to set aside the sale was incompetent That the release of the estate did not give a fresh start to limitation as the judgment debtor *B* not being a minor at the time the right to apply accrued was not entitled to claim the benefit of s " of the Limitation Act UMAKANTA SEN CHOWDHURY *v* HIRA LAL RAY (1916) **20 C W N 852**

——— **s 14**—

See CIVIL PROCEDURE CODE 1882

——— **s 375**
25 C W N 797

——— **s 18**—

See LIMITATION **I L R 43 Calc 211**

——— **ss 18 51**—

See COMPROMISE **I L R 44 Calc 829**

——— **ss 48 60A**—*Decree obtained against ward before estate taken over if may be executed in the ordinary manner* A decree obtained against the ward before his estate came under the management of the Court of Wards can be executed against the ward s property in the hands of the Court of Wards in the usual manner under the provisions of the Civil Procedure Code without reference to the order in which under s 48 of the Court of Wards Act the manager is directed to satisfy the ward s liabilities out of the free fund at the manager s disposal UPENDRANATH SEN ROY CHOWDHURY *v* BIMALA KANTA SEN CHOWDHURY (1914)
18 C W N 1055

——— **s 55**—*Suit instituted in anticipation of sanction of Court of Wards to save limitation—Duty of manager to have proceedings stayed until sanction obtained* Where a manager under the Court of Wards instituted a suit relating to some *chur* lands in anticipation of sanction sought and obtained from the Court of Wards *Held* that having regard to the difficulty of fixing the precise time when any *chur* appeared above water and formed into land the suit was not wrongly instituted simply because it was later on found that there was still some time before the period of limitation actually expired but the manager should after instituting the suit have had all proceedings there

BENGAL COURT OF WARDS ACT (IX OF 1879)—*contd*

——— s 55—*contd*

in stayed until an tion was duly obtained That all proceedings which took place before sanction was obtained must be set aside and the su t tried *de novo* DIGENDRO CHANDRA SEN *v* NRITYA GOPAL BISWAS (1917) 22 C W N 419

——— *Institution of suit by manager to save limitation—Subsequent filing of sanction of Court of Wards after conclusion of hear ing but before judgment—Suit for balances of sale price of garh of suit for rent—Bengal Tenancy Act (VIII of 1885) s 193* A manager of an estate under the Court of Wards instituted a suit to have limitation The suit was for recovery of the balan e of the sale price of a *garh* or forest and was based on a document de cribed as an agre ment for s ttlement of a reserved *garh* for a certain period at a *thicca jammah* pro vidin for instalments for payment of rent and giving the defendants among others the right to cut down and sell valuable trees and to grant sub leases of such right The sanction of the Court of Wards was filed after evidence on both side had been recorded and arguments heard in part *Held* that s 55 of Act IX of 1879 which simply lays down that if a manager files a suit to save limitation he shall not p oceed with it without the san tion of the Court of Wards is intended for the guidance of managers It is not a question of jurisdiction of the Court in which the suit has been instituted but it s eks to con trol the action of the manager and there is nothing in the section wai h prevents the defendants from waiving the stay To proceed with uch a suit is not an assumption of jurisdiction which the trial Court does not possess but is at most an irre gularity which do s no vitiate the proceedings That the suit in the present case was a suit for arrears of rent and as such was excepted under s 55 and was maintainable being authori ed by the manager The expression rent has a more ext nsive meanin than the definition given to it in the Bengal Tenancy Act JOY CHUPN DUTTA *v* SARAJUBALA DEBI (1919) 23 C W N 876

BENGAL DISTRICT GAZETTEER

——— reference to—

See SIMANADARS I L R 43 Calc 227

BENGAL DRAINAGE ACT (BENG VI OF 1880)

——— ss 32 35 42(b) 44 sub ss (1) and (2)—*Drainage charges suit by landholder to recover from tenant—Plaintiff if must prove land to have been benefited—Commissioners report appor tioning liability if admissible to prove benefit—Tenants' liability if must be determined by Collector —Notice on tenant if necessary—Jurisdiction of Civil Court—Second Appeal—Civil Procedure Code (Act XIV of 1882) s 586* A sum payable by a tenant to a landholder under cl (*b*) of s 42 of the Bengal Drainage Act (Beng VI of 1880) being recoverable under the provisions of sub s (*1*) of s 44 of that Act as if the same were an arrear of rent a suit to recover the same comes under cl. (*8*) of Sch II of the Small Cause Courts Act and is not a suit of a Small Cause Court nature within the meaning of s 586 of the Civil Pro e dure Code of 1882 The mere fact of a sum of money having been declared under the Act to be payable by a landholder in respect of any land is not sufficient to make a tenant of the land liable to contribute towards it Cl (*b*) of s 42 of the Act requires that the landholder should show in the first instance that the land of any parti cular tenant against whom a claim has been made has been benefited by any scheme or works The Commissioners report under s 32 of the Act cannot be treated as *primâ facie* evidence in favour of the landlord in a suit to recover drainage charges against tenants *Quære* Whether the power of determining any question as to the amount which any tenant is to pay in respect of drainage charges is not intended to be exclusively vested in the Collector and whether a notice under sub s (2) of s 41 would not therefore be a necessary preli minary to the maintainability of a suit to recover such charges from a tenant BASANTA KUMAR RAI *v* RAM CHANDRA ROY CHAUDHURY (1903) 17 C W N 499

——— ss 36 36A 38—*Costs of drainage construction—Apportionment—Person made liable engagement to pay in instalments by—Recovery by certificate from purchaser* The Provisions of the Public Demands Recovery Act for summarily recovering the amount due from a landholder under an engagement entered into under s 38 of the Bengal Drainage Act can only be put in force against the person who gave it They cannot be enforced against a person who has subsequently purchased his properties and who has not been made liable for the costs of construction under s 36A of the Bengal Drainage Act NAGENDRA BALA CHOWDHURANI *v* THE SECRETARY OF STATE FOR INDIA (1914) 18 C W N 944

BENGAL EMBANKMENT ACT (BENG II OF 1882)

See SALES FOR ARREARS OF REVENUE I L R 42 Calc 765

——— ss 6 76 (b) 79 80—

See EMBANKMENT I L R 46 Calc 825

——— ss 54 to 59 68 74—

See EMBANKMENT I L R 41 Calc 139

——— s 76 cls (a) (b)—

See EMBANKMENT I L R 38 Calc 413

BENGAL ESTATES PARTITION ACT

See ESTATES PARTITION ACT

BENGAL EXCISE ACT (BENG VII OF 1878)

——— s 16—Sanction for pro ecution—*Criminal Procedure Code (Act V of 1898) s 195—Statement not neces arily false—License if personal* Under the excise law the holder of an excise license is fo bidd n to sub let his shop or transfer his license or allow anybody to sell liquor und r his license Where therefore a licensee made a statem nt in a criminal ca e that a wine shop was exclusively owned by him while it was found in a civil suit that he had a dormant partner and the decision in that suit was under appeal —*Held* that as the int rest claimed by the alleged

BENGAL EXCISE ACT (BENG VII OF 1878)—contd

———— s 16—*contd*

par ıer may be without legal justification the licen ee in making the statement may have uncon s iou ly deviated into the truth and that in these circumstance no sanction to pro ecute the licensee for perjury should be granted RAKHAL CHANDRA SHAHA v DAMODUR SHAHA (1909)
15 C W N 169

BENGAL EXCISE ACT (V OF 1909)

See EXCISABLE ARTICLE

———— ss 2 (12) 46 (a) 52 61—

See COCAINE
I L R 41 Calc 537 545

———— ss 2, 46 48 75 81 84—

See EXCISE I L R 41 Calc 694

———— s 19 cl (4)—*Government Notification —Po session of cocaine* A notification issued by Government under s 19 cl (4) of the Excise Act has the force of law and under the notification dated the 20th November 1911 it is an offence for any person other than those specified to have any cocaine at all, except with a medical man s pre scription and then only 5 grains In all cases the burd n of proof to show under what authority he obtained cocaine lies on the accused EMPEROR v MUKUND SAHU (1914) 18 C W N 1023

———— ss 46 52 55 57—

See EXCISABLE ARTICLES
I L R 39 Calc 1053

———— ss 2 (7) (14) 46 (a)—

AS AMENDED BY BENG ACT VII OF 1914

See EXCISABLE ARTICLE
I L R 45 Calc 82

———— ss 2 46 52 and 61—

See COCAINE I L R 41 Calc 537

———— s 2 (14)—*Liquor meaning of* Liquor as defined in s 2 (14) of the Bengal Excise Act mu t be intoxicating liquor and the enumeration of all the liquids that follow does not make them liquor unle s they are intoxicating EMPEROR v MOTI LAL CHANDER (1912)
I L R 39 Calc 1053
16 C W N 785

———— s 2 (20)—*Cocoanut milk of if excis able* The expres ion juice drawn from any cocoanut in s 2 (20) of the Excise Act does not mean the milk of the cocoanut but the juice of the tree EMPEROR v MOTI LAL CHANDER (1912)
16 C W N 785

———— s 46 52 56 57—*Illegal transport and posses ion of e cisable article—Taking orders to supply if abetem nt of tran port* Where medicinal dru s containing spirit which had been manufac tured in Chandernagar within French territories were con igned from Chandernagore station by rail to Howrah and f om there taken to a Calcutta shop in pursuance of orders given to the manufac turer by the manager of the Calcutta shop *Held* that as uming that the articles were excisable after they had passed undetected by the cu toms authoritie no charge could be framed at the instance of the Exci e authorities again t persons concerned in the transaction of importing excis able articles but the Excise authorities could pro ceed for illegal transport or export or possession of the articles imported *Held* on the evidence that delivery of the articles to the Calcutta firm had taken place before the transport of the same com menced and the mere fact of the persons who despatched them from French territory having arranged that an agent of theirs should be present at the Calcutta shop to see that the goods were in order when opened did not prevent possession passing to the Calcutta firm and they were not liable to conviction for illegal transport or posses sion of excisable articles Taking an order for foreign goods which are excisable may constitute abetment of their import but not of their transport EMPEROR v MOTI LAL CHANDER (1912)
16 C W N 785

———— ss 46 (a) 56—

See MASTER AND SERVANT
I L R 39 Calc 344

———— ss 67 70—

See RIOTING I L R 41 Calc 836

BENGAL FERRIES ACT (BENG I OF 1885)

———— ss 6 16 28—

See FERRY I L R 37 Calc 543

———— s 11—*Held* that a District Magistrate had no power to establish a subsidiary ferry more than 2 miles from a Public Ferry and that the right to establish a ferry over the property of another is a right of easement within s 26 of the Limitation Act 1908 PARDIP SINGH v SECRE TARY OF STATE 5 Pat L J 500

BENGAL GENERAL CLAUSES ACT (BENG I OF 1899)

See EXECUTION OF DECREE
I L R 40 Calc 623

BENGAL LAND REVENUE SALES ACT (XI OF 1859)

See PROVINCIAL SMALL CAUSE COURTS ACT 1887 ss 2 AND 23
5 Pat L J 248

See SALES FOR EXCESS OF REVENUE

———— When the Proprietor himsel makes a settlement under the Regulation of 18 he is not entitled under s 8 to an extra 10 per cent on the Government Revenue SECRE TARY OF STATE FOR INDIA IN COUNCIL v KHAJA MAHOMED JAN 2 Pat L J 266

———— *Held* that the perma nent settlement referred to in this section is that of 1793 LALJIT UPADHYAY v MUSSAMAT WAJIH UNISSA BEGAM 5 Pat L J 79

BENGAL LAND REVENUE SALES ACT (BENG VII OF 1868)

———— s 8—

See REVENUE SALE
I L R 41 Calc 276

BENGAL LAND REVENUE SETTLEMENT REGULATION 1822

———— Where the Proprietor himself takes settlement of an estate under the

BENGAL LAND REVENUE SETTLEMENT REGULATION 1882—contd

I egulation he is not entitled under s 8 to an additional 10 per cent on the Government Pevenues fixed upon the estate for the cultivated and uncultivated portions SECRETARY OF STATE v KHAJA MAHOMED JAN 2 Pat L J 266

BENGAL LICENSED WAREHOUSE AND FIRE BRIGADE ACT (I OF 1893 B C)

——— ss 7 9 15—*Prosecution if lies where application for license was refused by Vice Chairman—Bengal Municipal Act (III of 1884 B C) s 45*] Under s 45 of the Bengal Municipal Act the Chairman can delegate to the Vice Chairmen his powers under that Act only and not those under the Licensed Warehouse and Fire Brigade Act s 9 of which provides for the delegation of these powers to a special committee and no prosecution under s 15 lies on the basis of refusal of license by the Vice Chairman SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS v J S MULL 25 C W N 960

BENGAL LOCAL SELF GOVERNMENT ACT (BENG III OF 1885)

See ENCROACHMENT I L R 37 Calc 671

See NEGLIGENCE 5 Pat L J 359

BENGAL MEDICAL ACT (BENG VI OF 1914)

——— s 27—*Rules framed under the Act by Local Government if ultra vire —Specific Relief Act (I of 1877) s 45—Mandamus—Omission of qualified candidate s name from Election Roll—Mistake of Returning Officer—Jurisdiction of High Court to interfere* The petitioner was a Licentiate in Medicine and Surgery of the University of Calcutta and as such was admittedly entitled to be registered under s 4 of the Bengal Medical Act The petitioner s name was omitted from the preliminary list of persons qualified to vote at the first elections under the Act published by the Returning Officer appointed by the Local Government His name was also omitted from the final Election Roll The petitioner s application to the Returning Officer to have his name entered was not considered by that officer The petitioner applied to the High Court under s 45 of the Specific Relief Act for an order compelling the Returning Officer to include and publish his name in the final Election Roll *Held* that the High Court had no jurisdiction to interfere Under rule 16 of the rules framed by the Local Government under the Bengal Medical Act the decision of the Local Government on any question that may arise as to the intention construction or application of the rules shall be final and under s 27 of the Act no suit or other legal proceedings shall lie in respect of any act done in the exercise of any power conferred by the Act on the Local Government or the Council or the Registrar The act which is referred to in s 27 is not one done by the Local Government but done in exercise of any power conferred by the Act on the Local Government *Per* CHAUDHURI J —It is quite clear that under s 33 of the Bengal Medical Act the Local Government has power to make rules for the purpose of carrying out the Act and the rules framed and published were not *ultra vires* *Per* WOODROFFE and COXE JJ —Even assuming that the rules were *ultra vires* the application must fail for it

BENGAL MEDICAL ACT (BENG VI OF 1914) —contd

——— s 27—*contd*

was based on the assumption that the rules were not *ultra vires* but that they were valid rules which had not been given effect to in one particular by the Returning Officer NARENDRA NATH BASU v H L STEPHENSON (1914) 19 C W N 129

BENGAL MOTOR CAR AND CYCLE ACT (III OF 1903)

——— ss 3 and 4—

See MOTOR VEHICLES I L R 38 Calc 415

BENGAL MUNICIPAL ACT (BENG III OF 1884)

——— ss 3 and 15—A person whose income is below the limit does not qualify for a vote by submitting to a levy The word owner in Ch II of s 6 is restricted in the case of an owner not in possession to one who is in receipt of rent from an occupier NARENDRA NATH SINHA v NAGENDRA NATH BISWAS 15 C W N 586

——— ss 6 cl (3) 85—

See ASSESSMENT EXEMPTION FROM I L R 37 Calc 697

——— ss 6 15 103 105—

See MUNICIPAL ELECTION I L R 38 Calc 501

——— ss 6 (3) 29 108—

See MUNICIPALITY I L R 46 Calc 784

——— ss 6 (5) 101 (proviso)—

See MACHINERY I L R 46 Calc 910

——— ss 6 (3) 85 97 97A 102 103—*Area of holding increased owing to extension of Municipal limits—Tax fixed as for area formerly within Municipal limits if may be increased owing to enhanced area during quinquennium—Added area if may be assessed as a new holding— Holding what is* Where no damages are claimed against the officers of a Municipality for any wrong done by them personally and relief is sought against the Municipality itself the only proper defendant in the suit is the Chairman of the Municipality in whose name only the Municipality can be properly sued under s 29 of the Bengal Municipal Act and the joinder in the suit as defendants of the Vice Chairman of the Municipality and its officers was not proper Where a portion only of a holding being within the Municipal limits was assessed with Municipal tax but later on the Municipal limits having been duly extended the remainder of the holding was during the quinquennium following upon such assessment (with the sanction of the Local Government) assessed with additional tax as a separate holding *Held* that the entire plot which was held by the assessees under one title constituted one holding and was liable to assessment as such upon the extension of the Municipal limits S 85 (a) which relates to a tax upon persons had no bearing on the matter That the tax fixed with reference to the area formerly within the Municipality could not be enhanced during the quinquennium on the ground of the area of the holding having increased by reason of the extension of the Municipal limits neither

BENGAL MUNICIPAL ACT (III OF 1884)—*contd*

———— s 6—*contd*

s 97A nor s 107 nor s 108 being applicable to the case KUSHTEA MUNICIPALITY v SATISH CHANDRA SAHA (1919) 23 C W N 611

———— ss 6 (3) 85 101 103— *Holding meaning of—How to be delimited—Assessment—Owner's liability when there are intermediate interests—Occupier* The term holding as used in s 85 of the Bengal Municipal Act means land held by an occupier under one title or agreement and surrounded by one set of boundaries The rates assessed upon holdings according to s 10 are payable by the owner that is to say the person above the occupier if the occupier himself is not the owner under s 103 Where there is an intermediate interest between the owner and the occupier such intermediate holder and not the ultimate owner is the person liable to pay rates HAMID HOSSAIN v PATNA MUNICIPALITY (1911) 17 C W N 812

———— ss 14 and 15—*Bengal Municipal Election rr 5 6 9 11—Qualified elector who has failed to have his name placed in register under r 6 if may apply under r 11—Rules if ultra vires—Proviso to r 11 if applies to bye elections—Right of suit—Civil Procedure Code (Act V of 1908) s 9—Specific Relief Act (I of 1877) s 42—Costs* S 15 of the Bengal Municipal Act authorizes the Local Government to frame rules in all matters necessary to the proper conduct of election including the preparation of a register of voters Rr 6 and 11 of the Bengal Municipal Election Rules are not *ultra vires* In the case of persons possessing the qualification referred by the proviso to s 15 or by the rules framed under such section entry in the register is to be regarded not so much as in itself a qualification but as the evidence upon which the polling officer must proceed For this purpose the register is conclusive and if the result is that a duly qualified person finds himself debarred from voting the conclusion to be drawn is not that the Government by rule has improperly deprived him of his rights but that he himself has failed to furnish the necessary evidence of his title The 15 days interval allowed by r 9 between the republication and the election is obviously intended to give electors who have failed to secure amendment of the register under r 6 a further opportunity MOLLA ATAUL HUQ v CHAIRMAN OF MANICKTOLLAH MUNICIPALITY 24 C W N 969

———— ss 6 (4) 204 218— *Patit land adjoining house but not shown as being enjoyed as part of it if house—Obstruction in front of patit land if punishable* In the absence of a definite finding that a piece of *patit* land or orchard adjoining the accused's house was held and engaged along with the house or as part of the premises a heap of broken pottery stacked on the road and in front of the *patit* land or orchard could not be regarded as an obstruction placed against or in front of the accused's house within s 204 of the Bengal Municipal Act BHUSAN CHANDRA DUTTA v CHAIRMAN OF KOTE CHANDPUR MUNICIPALITY (1917) 22 C W N 376

———— ss 6 and 101—

See MACHINERY I L R 46 Calc 910

———— ss 9 and 363—

See NEGLIGENCE 5 Pat L J 359

BENGAL MUNICIPAL ACT (III OF 1884)—*contd*

———— s 15—*Rules under—Commissioners election of qualification for—Person authorised to vote for corporation if eligible for election* Any one possessing qualifications set out in Rule 2 of the rules framed under s 15 of the Bengal Municipal Act and duly registered as a voter as provided by rules 4 to 12 of the said Rules is eligible under those rules for election as a Commissioner and the fact that such a person is registered as voter under Rule 8 as a representative of a corporation instead of being registered in his own capacity does not disqualify him for election RASH BEHARY GHOSAL v J C STALKART (1912) 16 C W N 710

———— *Held* that income of Jatha and Son having been assessed both were qualified to vote CHARU CHANDRA MAZUMDAR v CHAIRMAN OF FARIDPUR MUNICIPALITY 26 C W N 413

———— ss 15 69—

See MUNICIPAL ELECTION I L R 47 Calc 524
I L R 48 Calc 378

———— ss 30 31—

See MUNICIPALITY I L R 43 Calc 130

———— ss 44 45 271 230 353—*Order or consent of Commissioners necessary for prosecution under the Act—Power of Chairman to give such order or consent on behalf of the Commissioners—Vice Chairman exercise by of powers of Chairman—Consent of Chairman subsequently obtained validating effect of* The accused was prosecuted under s 271 of the Bengal Municipal Act for disobeying a requisition under s 230 The report of the offence was made by the Outdoor Inspector and it was submitted to the District Magistrate by the Chairman with a recommendation to prosecute the accused The Inspector appeared before the Magistrate and was examined as the complainant The document which was submitted by the Chairman to the Magistrate bore an eight anna stamp It further appeared that the notice against the accused was issued on the authority of the Vice Chairman There was no written order of delegation of duties or powers by the Chairman to the Vice Chairman which could cover the order made by the Vice Chairman *Held* that because the report of the offence made by the Inspector which was submitted by the Chairman to the District Magistrate bore an eight anna stamp it did not follow that it must be regarded as a petition of complaint and that the Chairman was merely in the position of a complainant That the order or consent of the Commissioners necessary under s 353 for the institution of a prosecution under the Act is an order or consent by the Chairman as representing the Commissioners which the Chairman can give under s 44 That in the present case the order of the Chairman was an order or consent in writing by the Chairman within the meaning of s 353 and was sufficient That it being clear that the act of the Vice Chairman was done with the express consent of the Chairman subsequently obtained the case was covered by the proviso to s 45 CHAIRMAN OF HOOGHLY CHINSURA MUNICIPALITY v KRISTO LAL MULLICK (1916) 20 C W N 824

BENGAL MUNICIPAL ACT (III OF 1884)—*contd*

——— s 45—

See BENGAL LICENSED WAREHOUSE ACT 25 C W N 960

——— ss 46 112 113 114 and 351A—*Appointment of a paid Assessor at a meeting of the Commissioners within six months from the date of a lost amendment at a previous meeting effect of—Assessment by such an officer confirmed by the Appeal Committee whether impeachable—Rule 33 of the Model Rules under s 351A of the Act* The question of appointing a paid assessor under s 46 of the Bengal Municipal Act (Beng III of 1884) was raised at a meeting of Municipal Commissioners as an amendment to a substantive motion the amendment was lost but the same question was again raised as a substantive proposition within six months from the date of the first meeting the proposal being carried an assessor was appointed who revised the assessment of the plaintiff The plaintiff applied for a review under s 113 but the assessment was confirmed under s 114 of the Act —*Held* that the appointment of the paid assessor was not *ultra vires* inasmuch as the subject of the appointment of an assessor had not been finally disposed of at the first meeting and therefore its re consideration was permissible and that whether the assessor was or was not legally qualified to make any assessment, the validity of such an assessment when once confirmed by the Appeal Committee under s 114 of the Act could not be impeached CHAIRMAN OF CHITTAGONG MUNICIPALITY *v* JOGESH CHANDRA RAI (1909) I L R 37 Calc 44

——— s 61—*Sale of holding when owner unknown for arrears of rates—Purchaser s title if superior to mortgagee s* The purchaser of a holding sold under s 361 of the Bengal Municipal Act does not acquire it free from incumbrances there being no provision in the Act creating any charge or other preferential right in favour of the purchaser MOHAMMED SOLEMAN *v* RAGHUNATH DUTTA (1917) 21 C W N 425

——— s 85—*Held* that income derived from property situate outside the municipality does not come within the phrase circumstances and property within the municipality in this section and is not liable to assessment CHAIRMAN OF THE MUNICIPALITY OF BIHAR *v* MAHANT RUMDEO DAS 4 Pat L J 673

——— The term cess and property of a person depends on what he got and spent while in a Municipality CHAIRMAN JALPAIGURI MUNICIPALITY *v* JALPAIGURI TEA CO 26 C W N 311

——— *Taxing power of Municipality if limited to circumstances and property within the Municipality* Under s 85 cl (*a*) for the purpose of assessment the Municipality cannot take into account the circumstances and property of the assessee outside the Municipality but must restrict itself to the circumstances and property that is the means and property within the Municipality and further to measure the means and property within the Municipality the test is not what is spent but what is earned within the Municipality DEBENDRA NATH PAI CHOUDHURI *v* CHAIRMAN TAKI MUNICIPALITY 25 C W N 45

BENGAL MUNICIPAL ACT (III OF 1884)—*contd*

——— ss 85 87—*Assessment—Tax on persons—Circumstances and property within the Municipality as used in s 85 cl (a) meaning of—Circumstances if include income earned by resident tax payers from outside the local limits of a Municipality and if liable to assessment* The word circumstances as used in cl (*a*) of s 85 of the Bengal Municipal Act is not restricted to income earned or accruing from sources within the Municipality but includes income earned by resident tax payers from outside the local limits of the Municipality and such income brought from outside to be spent and enjoyed within the Municipality becomes a part of the circumstances' of the resident tax payers within that Municipality and is liable to assessment there under s 85 *Kameshuar Pershad v Bhabua Municipality I L R 27 Calc 849 (1900)* explained and distinguished The words within the Municipality as used in cl (*a*) of s 85 of the Bengal Municipal Act govern both circumstances and property and the word circumstances must be interpreted to be in substance the equivalent of means *D b Narain Dutt v Chairman of Baruipur Municipality I L R 39 Calc 141 (1901) Deb Narayan Dutt v Chairman of Baruipur Municipality I L R 41 Calc 168 s c 17 C W N 1230 (1913)* and *Chairman of Giridih Municipality v Srish Chandra Mozumdar I L R 35 Calc 859 s c 12 C W N 709 (1908)* referred to CHAIRMAN JAYNAGAR MUNICIPALITY *v* SAILABALA DUTTA 25 C W N 47

——— ss 85 and 86—

See ASSESSMENT I L R 48 Calc 443

——— s 85 113 114 116—*Assessment of property outside the Municipality whether* ultra vires—*Civil Court whether can modify the assessment* The defendant had property within the jurisdiction of the plaintiff Municipality the annual value of which was only Rs 76 The circumstances and property of the defendant outside the Municipality were taken into consideration by the Commissioners in assessing the defendant with a tax of Rs 9 *Held* that it is only the circumstances and property within the Municipality and not circumstances and property outside the Municipality that are to be considered The assessment of tax with reference to the circumstances and property outside the Municipality is *ultra vires* The defendant objected to the assessment and under s 113 of the Bengal Municipal Act (III B C of 1884) applied to the Commissioners to review the amount of assessment the application was heard by a Committee under s 114 and disallowed It was urged that the Civil Court had no jurisdiction to modify the assessment under s 116 *Held* that if the question relates to the amount of assessment according to the circumstances and property within the Municipality then the decision of the Commissioners under s 114 is final and the Civil Court has no power to reopen the question of assessment Here the assessment being made with respect to the circumstances and property not only within the Municipality but also outside it the assessment was *ultra vires* RAJPUR MUNICIPALITY *v* NAGENDRO NATH BAGCHI (1919) 23 C W N 475

BENGAL MUNICIPAL ACT (III OF 1884)—*contd.*

——— ss 85 114.—

See MUNICIPAL ASSESSMENT I L R 39 Calc 141

——— ss 85 116—*Principle of a c ment—Valuat on of property basis of—Appeal—Committee—Bengal Municipal Act (Ben III of 1884) ss 85 114* In as es ing tax upon persons under cl. (a) of s. 85 of the Bengal Municipal Act both the circumstances and the property referred to in the section mus be within the municipality in que tion S 114 of the Bengal Municipal Act does not lay down that application shall be heard and determined by all the Commi ioners appointed as members of the Appeal Committee DEB NARAIN DUTT v CHAIRMAN OF THE BARUIPUR MUNICIPALITY (1911) I L R 39 Calc 141

——— *Assessment of tax on circumstances and property — Circumstances meaning of—Valua on of c rc mstances and property by Municipality if may b rev ewed by Civil Court—Court if may qu st on a essment when circumstances and property o tside Mun c pality are considered—Onus on Munic pality to di clos basis of assessment—Non d sclosure presumption from* The circumstances and property within the Municipality according to which a tax upon persons occupying holdings within the Municipality is authorized to be impo ed by s 85 of the Bengal Municipal Act signify the means and property of the person in question within the Municipality *Chairman of Gir dhi Municipal ty v Suresh Chunder Mazumdar I L R 35 Calc 859 12 C W N 709* followed It is not op n to the Courts to assess the value of the circumstances and property for the purposes of s 85 Where in a suit brought to question the legality of a tax imposed upon the plaintiff under s 85 the defendant Municipality averred that the tax had been imposed upon the circumstances and property of the plaintiff within the Municipality but in the evidence did not disclose the facts showing that this was done and the lower Appellate Court found facts inconsistent with the case that only the circum tances and property within the Municipality were considered *Held* that the presumption in s 106 of the Evidence Act applied and the plaintiff must be taken to have made out his case that the assessment was not according to the plaintiff s circumstances and property within the Municipality DEBNARAIN DUTT v CHAIRMAN OF THE BARUIPUR MUNICIPALITY (1913) 17 C W N 1230

——— s 101—

——— *Machinery meaning of—Balancing tank of Calcutta Municipality with supporting structure at its pumping station if machinery and exempted from assessment as such* *Held* that neither the balancing tank at No 1 Khelat Baba s Lane within the Cossipore and Chitpore Municipality (which is u ed to regulate the supply of water at the Calcutta Corporation) nor its supporting structure nor both combined are machinery within the meaning of s 101 of the Bengal Municipal Act There is nothing in the language of the Act or in the objects it was designed to effect to suggest that the word machinery was used in any special sense differing from its ordinary sense CORPORATION OF CALCUTTA v CHAIRMAN COSSIPORE AND CHITPORE MUNICIPALITY 26 C W N 761

BENGAL MUNICIPAL ACT (III OF 1884)—*contd*

——— s 116—

See ASSESSMENT I L R 37 Calc 374

——— s 155—*The two mile limit within which private ferry boats may not ply if a radius of two miles from Municipal ferry or two miles along the land—Reference to another Statute when provision not ambiguous—Construction of Statute—Interpretation of penal provision* The distance of two miles above and below the Municipal ferry within which private persons are prohibited from keeping a ferry boat for the purpose of plying for hire without leave by s 155 of the Bengal Municipal Act means di tance along the bank s of the river The section cannot be con trued in the light of the provi ions of s 16 of the Public Ferries Act having regard specially to s 4 of that Act *Per* RICHARDSON J —To come within the prohibition of that ection the *t rm a quo* and the *terminus ad quem* of the unli ens d boat must both be within the pre cribed area KASIM ALI v CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF CHITTAGONG (1916) 21 C W N 601

——— ss 176 177 235 237 238 239 and 240A— *erect or re erect —material alteration* Where permis ion was given to the plaintiff under s 23 of the Bengal Municipal Act 1884 to repair the roof and certain walls of his house and in order to effect such repairs he found it necessary to ren w some of the walls or parts of the walls of the upper storey and al o to renew some of the woo l worl of a balcony which he was thus obliged to pull down and put up again *H ld* that there wa neither an erection nor a re erection of a hou e within the meaning of s 240 of the Act nor was there any material alteration of the hou e within the meaning of the same section *Per* CHAMIER C J —The addition of a second storey to a hou e is a material alteration or enlargement of the hou e within the meaning of s 240 The Chairman or Vice Chairman of a Municipality is the proper authority to di po e of objections rai ed by a person served with a notice under s 238 CHAIRMAN OF GAYA MUNICIPALITY v SHAM LAL GUPTA 3 Pat L J 33

——— s 178 179—*Procedure preliminary prosecution—s 18* The ac used was served with a notice by the Municipality requiring him to remove a fence which was said to be an obstruction The accused preferred an objection, whereupon the Chairman passed an order to move the District Magi trate for the prosecution of the accu ed He was then tried and convicted under s 218 *Held* that there was a complian e with ss 175 176 of the Act but not with ss 178 179 There being thus a failure to observe the e sential preliminary steps before an application could be made to the Magistra e under s 202 the proceedings were without juri diction NOBIN CHANDRA AICH v NOAKHALI MUNICIPALITY (1916) 21 C W N 470

——— s 259—

See CREMATION 14 C W N 1057

——— s 260A—Where a Municipality granted under s 260A of Bengal Municipal Act a license which created in favour of the defendant No 2 an exclusive right to employment as a cremation priest and to sell fuel in the burning ground *Held* that the action of the Municipality was *ultra vires* S 260 of the Bengal Municipal Act

BENGAL MUNICIPAL ACT (III OF 1884)—*contd*

———— s 250A—*contd*

was never intended to be so applied as to enable the Municipal Commissioners to create an exclusive right in favour of any person to sell fuels for burning dead bodies GOUR MONI DEBI *v* CHAIRMAN OF PANIHATI MUNICIPALITY (1910)
14 C W N 1057

———— ss 261 273 cl (2)—*Carrying on offensive or dangerous trade—Scope of s 261—Fixing of local limits a condition precedent to prosecution under s 273—Proceedings of Municipal bodies how to be proved—Presumption as to the regular performance of official acts if applies to supply deficiency in proof—Evidence Act (I of 1872) ss 78 (5) 114 illustration (e)* Where the petitioner was convicted under cl (2) of s 273 of the Bengal Municipal Act for having used without a license certain premises within the Cuttack Municipality for the purpose of storing hides in contravention of s 261 of the Act but no resolution passed by the Commissioners at a meeting fixing the local limits within which licenses should be required under s 261 for offensive or dangerous trades was on the record nor was there any secondary evidence of any such resolution *Held* that the conviction must be set aside as the prosecution had failed to prove the existence of the resolution and if from other circumstances it were assumed that such a resolution was passed the prosecution had failed to prove its purport in the manner required by law The presumption that official acts have been regularly performed [s 114 Evidence Act illustration (e)] cannot supply the deficiency in the proof As a rule the contents of documents cannot be proved inferentially A legitimate way of proving the proceedings of a Municipal body in British India is by a copy of such proceedings certified by the legal keeper thereof or by a printed book purporting to be published by the authority of such body as laid down in cl 5 of s 78 of the Evidence Act The language used in s 261 of the Bengal Municipal Act is wide enough to enable the Commissioners of a Municipality to apply the section to all places within Municipal limits or the entire area within the Municipal boundaries *Quære* Whether the penultimate clause of s 261 empowers the Commissioners to do more than withhold the license in individual case each case being considered on its own merits MOKRAM ALI *v* THE CUTTACK MUNICIPALITY (1913) **17 C W N 531**

———— ss 261 273 (2)—*Carrying on offensive or dangerous trade—Scope of s 261—Fixing of local limits a condition precedent to prosecution under s 273—Proceedings of Municipal bodies how to be proved—Presumption as to the regular performance of official acts if applies to supply deficiency in proof—Evidence Act (I of 1872) ss 78 (5) 114 illustration (e)* Where the petitioner was convicted under cl 2 of s 273 of the Bengal Municipal Act for having used without a license certain premises within the Cuttack Municipality for the purpose of storing hides in contravention of s 261 of the Act but no resolution passed by the Commissioners at a meeting fixing the local limits within which licenses should be required under s 261 for offensive or dangerous trades was on the record nor was there any secondary evidence of any such resolution *Held* that the conviction must be set aside as the prosecution had failed to prove the existence of the resolution and if from other circumstances it were assumed that such a resolution was passed the prosecution had failed to prove its purport in the manner required by law The presumption that official acts have been regularly performed [s 114 Evidence Act illustration (e)] cannot supply the deficiency in the proof As a rule the contents of documents cannot be proved inferentially A legitimate way of proving the proceedings of a Municipal body in British India is by a copy of such proceedings certified by the legal keeper thereof or by a printed book purporting to be published by the authority of such body as laid down in cl (5) of s 78 of the Evidence Act The language used in s 261 of the Bengal Municipal Act is wide enough to enable the Commissioners of a Municipality to apply the section to all places within Municipal limits or the entire area within the Municipal boundaries *Quære* Whether the penultimate clause of s 261 empowers the Commissioners to do more than withhold the license in individual cases each case being considered on its own merits SYED MOKRAM ALI *v* THE CUTTACK MUNICIPALITY (1913)
17 C W N 531

———— ss 279 83 322 86—*Co owner not residing on premises if occupier—Rateable occupation what is Bare ownership does not* constitute rateable occupation In order to constitute rateable occupation there must be a use and enjoyment which *is or is capable of being* beneficial *Held* that when four only out of five co owners of a municipal holding were residing on the premises the other merely because he was a co owner was not liable for the water rate and the latrine fee payable for the holding by the occupiers under the provisions of the Bengal Municipal Act KHAJA SHAMSUDDIN *v* CHAIRMAN DACCA MUNICIPALITY **25 C W N 282**

———— Expression using a place as a kiln for making bricks defined SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS *v* TRAILAKHYA NATH CHATTERJEE
26 C W N 926

———— ss 290 to 297—

See MUNICIPALITY
I L R 47 Calc 423

———— s 321—*Bengal Municipal Act (III of 1884) ss 321 322—Latrine tax assessment when ultra vires—Valuation of premises for purposes of assessment* The assessment and levy of latrine tax when no scale for the levy thereof has been fixed by the Commissioners at a meeting as enjoined by s 321 of the Bengal Municipal Act could be *ultra vires* The meaning of the Proviso to s 322 of the Act is that when a shop keeper lives elsewhere and pays latrine tax for his house he shall not be made to pay again for his shop unless the shop contains a privy or cess pool Where the owner of the house *lived in the upper storey* thereof and let out eight shops in the verandah of the ground floor none of which were thus occupied by him *Held* that he could not claim exemption under the proviso to s 322 and the house including the shops was liable to be valued for the purpose of the assessment of latrine tax BECHU LAM *v* THE CHAIRMAN CHAPRA MUNICIPALITY (1911) **15 C W N 519**

BENGAL MUNICIPAL ACT (III OF 1884)—*contd*

——— s. 321—*contd.*

——— *Thakurbari where pilgrims found shelter for three days at a time of a dwelling house.* A Municipal holding contained a *Thakurbari* where pilgrims who did not find shelter elsewhere remained for up to three days at a time during festivals and received *prasad* from the *Thakurbari*. There were no privies on the premises and the pilgrims used privies in the houses of the *shebaits* and there was no evidence as to what action the Municipality took for the purposes of conservancy within the holding. *Held* that the holding was not and did not contain a dwelling house within s. 321 of the Bengal Municipal Act. CHAIRMAN NABADWIP MUNICIPALITY v. GOUR CHANDRA GOSWAMI

25 C W N 827

——— ss. 321, 322 (4)— *Dwelling house what is* To dwell is to live and occupy for all the purposes of life. A house in which a person occupied rooms though he was absent occasionally on duty might be properly described as his dwelling house. Where however all that was found was that a holding was used as a place of business but the owner used the place for residence while he was in a state of unsound mind it was not his dwelling house though there was a cookshed or cowshed on the property for there may be a cookshed or a cowshed on a property which is not a dwelling house but merely a place of business. *Ford* v *Barnes* 55 *L J Q B* 24 and *Riley* v *Read* 48 *L J Exch* 437 *L R* 4 *Exch Div* 100 referred to. *Lawson* v *Fraser* 8 *L R* (Ir) 65 distinguished. Semble The provisions of the proviso to sub s (4) to s 322 of the Bengal Municipal Act have been made superfluous by the amendment by Beng Act IV of 1894 and Beng Act II of 1896 of s 321. RADHA GOBINDA MOJUMDAR v. KUMARKHALI MUNICIPALITY (1914)

19 C W N 1027

——— s 345—It is necessary for a conviction under s 345 of the Bengal Municipal Act to prove that the Magistrate on the application of the Commission rs had ord red the land to be closed as a market place and had taken order to prevent such land being so used. PUTI KABARINI v VICE CHAIRMAN BERHAMPUR MUNICIPALITY (1916)

20 C W N 1015

——— s 353—*Municipal offence prosecution for—Consent of the Commissioners to prosecution how to be evidenced—Sanction of prosecution by public authority if should be in writing signed and sealed by the authority* The only evidence of a public authority is a writing under the seal and signature of that authority. Where the Vice Chairman of a Municipality in starting two prosecutions against the accused under s 217 of the Bengal Municipal Act and Municipal Bye law No 50 respectively merely signed two Forms called Forms of prosecution in the remarks column of one of which was written I have seen myself and in that of other prosecute. *Held* that neither of these documents disclosed any authority written or otherwise showing the consent of the Commissioners or the Vice Chairman on their behalf to a prosecution. RASUL BUKSH v MUNICIPAL BOARD OF CHAPRA (1912)

16 C W N 934

BENGAL MUNICIPAL ACT (III OF 1884)—*contd*

——— s 363—*scope of—Notice required by section— Done under the Act* The Defendant as Vice Chairman of the local Municipality served the Plaintiff with a notice of demand for dues claimed as fees payable for removal of filth from a receptacle in his house and subsequently a bailiff under the orders of the Vice Chairman entered the house of the Plaintiff and attempted to execute a distress warrant as no payment had been made in response to the notice of demand. The Plaintiff sued the Defendant for damages alleging that the proceedings taken by him were malicious. *Held*—That s 363 requires the service of notice upon the Commissioners in every instance and also upon the person concerned if the suit is intended to be brought against an officer of the Commissioner or any person acting under their direction. An act is to be regarded as done under a Statute if the doer had a reasonable and *bona fide* belief that he was so acting. SASHANKA SEKHAR BANERJEE v. SUDHANSU MOHAN GANGULY

24 C W N 891

BENGAL MUNICIPAL (AMENDMENT) ACT (IV OF 1894)

——— s 30—

See ASSESSMENT EXEMPTION FROM

I L R 37 Calc 697

BENGAL MUNICIPAL ELECTION RULES

——— *r 4 register of voters —R 7 application for removal of name of a voter from the register—Rr 6 and 10 application by the said voter for inclusion of his name in the register if lies when his name was already in the register— R 29 District Magistrate s powers* A certain name was entered in the Register of voters prepared under r 4 of the Bengal Municipal Election Rules. Several applications were made to the Chairman of the Municipality under r 7 for removal of his name and the said voter too made an application under r 6 for inclusion of his name in the Register. All these applications were disposed of by the Chairman on the same date. He allowed the applications under r 7 and directed the name of the said voter to be removed from the register. The said voter thereupon applied to the District Magistrate under r 10 who restored his name in the register. On appeal it was contended that r 10 was inapplicable because the name of the said voter was already on the register when he made the application under r 6 for inclusion of his name therein. *Held* that the Chairman could not have dealt with the application of the voter in question before he had decided the applications under s 7 and he had not rejected the application of the said voter as premature. In these circumstances the application might well be regarded as having been presented on the day and after the applications under s 7 were disposed of although it was on the record from before. In that view the Magistrate had power under r 10 to make an order for the insertion of the name in the register. Besides r 29 gives a general power to the Magistrate to decide all disputes arising under the Rules so the Magistrate had power to decide the point under r 29. SYAM CHAND BASAK v NAGENDRA NATH BASAK

26 C W N 147

BENGAL N W P AND ASSAM CIVIL COURTS ACT (XII OF 1887)

See BENGAL AGRA AND ASSAM CIVIL COURT ACT

See CIVIL PROCEDURE CODE 6 Pat L J 54

See CIVIL COURTS ACT

——— s 8—

See JURISDICTION I L R 41 Calc 866

See TRANSFER I L R 42 Calc 842

——— ss 8 20—*Act No III of 1907 (Provincial Insolvency Act) ss 43 46 3—Appeal—Jurisdiction—Effect of order of District Judge assigning work to Additional Judge* Where an Additional District Judge sentenced an applicant for insolvency under s 43 of the Provincial Insolvency Act 1907 acting in the matter under an order of the District Judge assigning the particular class of work to him under s 8 of the Bengal North Western Provinces and Assam Civil Courts Act 1887 it was *held* that an appeal from the Additional Judge s order lay to the High Court and not to the District Judge MAKHAN LAL *v* SRI LAL (1912) I L R 34 All 383

——— ss 8 (2) 21 (3)—*Assignment to Additional Judge of cases coming from a particular district—Jurisdiction* A District Judge has power not merely to make over appeals to an Additional Judge for hearing but to direct that all appeals and other cases coming from a particular area within the judicial division shall be filed in his Court MUTSADDI LAL *v* MULE MAL (1912) I L R 34 All 205

——— s 11—*Held* that on an appeal from a decree for less than Rs 5 000 the Appeal Court can increase the award SATYA KINKAR SAHANA *v* RAJA SRI SRI SHIBA PRASAD SINGH 4 Pat L J 447

——— s 18—

See CENTRAL PROVINCES LAND REVENUE ACT 1881 s 136 1 Pat L J 290

——— s 21—

See JURISDICTION I L R 41 Calc 915

——— *Act No VII of 1870 (Court Fees Act) s 11—Valuation of suit—Appeal—Jurisdiction* So long as there has been no order accepted by the plaintiff to make good a deficiency in Court fees the original value assigned by the plaintiff must be taken as the value of the suit for the purpose of regulating the jurisdiction of the Appellate Court but when there has been such an order made and accepted by the plaintiff from that moment the value of the suit must be taken as being in accordance with the fee actually paid by the plaintiff *Ijjatulla Bhuyan* v *Chandra Mohan Banerjee I L R 31 Calc 954* followed. *Madho Das* v *Ramji Patak I L R 16 All 286* distinguished GOSWAMI SRI RAMAN LALJI MAHARAJ v BOHRA DESRAJ (1910) I L R 32 All. 222

——— *Held* that an appeal lies to the High Court and not to the District Court from an order refusing to set aside an *ex parte* decree where the suit for the purposes of a Court fee is valued at not more than Rs 5 000 RAGHU SINGH *v* USAFALI 4 Pat. L. J 202

BENGAL N W P AND ASSAM CIVIL COURTS ACT (XII OF 1887)—*contd*

——— s 19—

See CIVIL PROCEDURE CODE 1908 s 24 5 Pat L J 588

——— ss 21 22—*Notification by the High Court authorising appeals from Munsifs to be preferred to Subordinate Judges—Jurisdiction* *Held* that where the High Court in the exercise of powers conferred upon it by section 21 (4) issued a notification that appeals from the decree of any particular Munsif should be preferred to the Court of Subordinate Judge named or designated therein the Subordinate Judge in question had power not merely to receive such appeals but also to hear and decide them *Sohan Lal* v *Baldeo Pershad* 7 Oudh Cases 321 approved SHEO HARAKH *v* RAM CHANDRA (1914) I L R 37 All. 76

——— s 22, cl (3)—*Agra Tenancy Act (II of 1901) s 197—Transfer of an appeal in a suit cognizable by a Revenue Court to a Subordinate Judge—Powers exercisable by the latter* *Held* that where under section 22 clause (1) of Act XII of 1887 a District Judge transfers an appeal to a Subordinate Judge the latter may if the section be applicable exercise any of the powers vested in the Appellate Court by section 197 of the Agra Tenancy Act *Babu Nandan Prasad* v *Changur I L R 16 All 360* followed AFZAL SHAH *v* MUHAMMAD ABDUL KARIM (1915) I L R 37 All 232

BENGAL POLICE MANUAL, 1911

——— rule 124—

See REGISTER OF DEATHS I L R 46 Calc 152

BENGAL REGULATIONS

See REGULATION

——— 1793—I s 8 cl (4)—

See CHAUKIDARI CHAKARAN LANDS I L R 44 Calc 841

XV—

——— *Mortgage—Redemption—Limitation—Act No XIV of 1859 (Limitation Act) s 1 (12)—Accounts* A usufructuary mortgage was executed in the year 185? in a place to which the provisions of Bengal Regulation XV of 1793 applied It provided that the mortgagees should enter into possession and collect the rent and pay the Government revenue and defray collection charges etc therefrom and retain the balance in lieu of interest There was to be no accounting on either side and the mortgagor was to be entitled to redeem on payment of the principal sum of Rs 252 *Held* on suit by the representative of the mortgagor to redeem brought within 60 years from the date of the mortgagee that the suit was within time that the mortgagee could not be considered as redeemed in the strict sense of the term from the moment when the profits received by the mortgagees became equal to the amount due to them for principal and interest and that the mortgagor was notwithstanding anything contained in the deed entitled to an account of the profits received by the mortgagees *Sudarshan Das Shastri* v

BENGAL REGULATIONS—contd

XV—contd

Ram Pra ade I L R 35 All 97 followed *Shafi un nissa v Fazl Rab 7 All L J 787 and Badri Prasad v Murlidhar I L R All 593* distinguished. HABIB ULLAH v ABDUL HAMID (1912) **I L R 34 All 261**

XXXVII s 15—

See JAGIR **I L R 46 Calc 683**

——— **1805—II s 2 (2)—**

See ASSESSMENT **I L R 43 Calc 973**

——— **1816—XIX s 9—**

See NAVIGABLE RIVER **I L R 46 Calc 390**

——— **1819—VIII—**

See CHOTA NAGPUR ENCUMBERED ESTATES ACT APPLICATION OF **I L R 46 Calc 1**

——— **ss 8 and 14—**

See LIMITATION **I L R 46 Calc 670**

See LANDLORD AND TENANT **I L R 41 Calc 493 and 926**

——— **1822—VII**

See BENGAL LAND REVENUE SETTLEMENT REGULATION

——— **1825—VI, s 2**—*Joint Magistrate —Jurisdiction—Criminal Procedure Code s 435—Power of Sessions Judge to make reference* It is only the Collector who can take action and impose a fine under Bengal Regulation VI of 1825 A Joint Magistrate has no jurisdiction under s 2 of the Regulation even though the case may have been made over to him by the District Magistrate EMPEROR v MUHAMMAD ALAM (1910) **I L R 33 All 84**

——— **1828—III, s 10**

See RIVER BED **24 C W N 813**

——— **1829—X—**

See EVIDENCE **I L R 38 All 494**

——— **1872—III**

See JURISDICTION **I L R 42 Calc 116**

BENGAL RENT ACT (X OF 1859)

——— **s 6—**

See BENGAL TENANCY **I L R 48 Calc 443**

——— **s 10—**

See ILLEGAL CESS **I L R 45 Calc 259**

——— **s 21**—*Held* that a usage of payment of rent by instalment is only relevant when there is no written agreement MANINDRA CHANDRA NANDI v DURGA SUNDARI DASIA **20 C W N 660**

——— *Landlord and Tenant Procedure Act (VIII B C of 1869) s 6—Raiyat meaning of—Distinction between raiyat and under raiyat if recognised before the Bengal Tenancy Act (VIII of 1885)—Under tenant holding under a raiyat if he can be a raiyat and if can acquire occupancy right—Ejectment* The distinction between a raiyat and an under raiyat was recognised from before the passing of the Bengal Tenancy

BENGAL RENT ACT (X OF 1859)—contd

Act (VIII of 1885) Act X of 1859 and Act VIII B C of 1869 contemplate the existence of an under raiyat *Dhunpat Singh v Cooman Singh (1864) W R Cap No Act X Rulings p 61 Kalee Kishore Chatterji v Ram Churn Saha 9 W R 344 (1868)* and *Kali Charan Singh v Ameeroodden 9 W R 579 (1868)* referred to *Held* in a case governed by Act VIII B C of 1869 that an under tenant who holds under a raiyat cannot be a raiyat and cannot acquire a right of occupancy KAMINI SUNDARI DASI v PROSONNO KUMAR SIL **24 C W N 685**

——— **s 23 (6)**—*Tenant dispossessed by landlord—Possessory suit in Civil Court if lies—Specific Relief Act (I of 1877) s 9— Illegal ejectment meaning of* Per CURIAM (N R CHATTERJEA J contra) So long as the relation of landlord and tenant is subsisting between the parties the tenant if forcibly dispossessed of his land by the landlord is precluded by cl (6) of s 23 of Act X of 1859 from suing under s 9 of the Specific Relief Act in areas where Act X of 1859 applies No distinction can be drawn between the words forcible dispossession as used in s 9 of the Specific Relief Act and the words illegal ejectment as used in s 23 cl (6) of Act X of 1859 *Per* N R CHATTERJEA J—Illegal ejectment which gives rise to a cause of action under s 23 (6) of Act X of 1859 is ejectment nominally in conformity with but really in contravention of the provisions of the rent law for the ejectment of tenants by landlords Where therefore a tenant who has been dispossessed by his landlord sues to recover possession on the strength of his previous possession *s 23 (6) of Act X of 1859 is no bar* to such a suit under s 9 of the Specific Relief Act *Janardan Acharjee v Haradhan Acharjee 9 W R 513* referred to *Khettra Nath Ghattak v Peru Bauri 15 C W N 38* distinguished JAMLA SINGH v E J KINGSLEY (1915) **17 C W N 1201**

——— **ss 27 105 to 110—**

See UNDER TENURE SALE OF **I L R 37 Calc 823**

——— **s 82—**

See UNDER RAIYAT **1 Pat L J 543**

——— **s 108**—*Sale of under tenure in contravention of—Suit to set aside sale—Bona fide purchaser if protected when sale without jurisdiction—Civil Procedure Code (Act XIV of 1882) ss 244 311 if apply* Ss 244 and 311 of the Civil Procedure Code (Act XIV of 1882) have no application to cases arising under Act X of 1859 Where therefore an under tenure was sold in contravention of the provisions of s 108 of that Act without execution having been taken out against the moveable properties of the judgment debtor *Held* that a suit lay to set aside the sale as being without jurisdiction notwithstanding that the purchaser might have been a stranger *Zain ul abdin v Asghar A P 15 I A 1* distinguished DAMOODAR MISRA v ISWAR CHANDRA CHOUDHURI **15 C W N 78**

See JURISDICTION OF HIGH COURT **I L R 38 Calc 862**

——— **s 109**—*Execution against immoveable property of one of several judgment debtors—Moveable property of all if must be first exhausted—Arrest of judgment debtor if a condition precedent—L [illegible] must proceed*

BENGAL RENT ACT (X OF 1859)—*contd*

——— s 109—*contd*

against moveables first, even when insufficient to satisfy decree S 109 of Act X of 1859 contemplates the case of a single execution creditor and a single judgment debtor it does not specifically refer to the case of a joint and several decree against a number of judgment debtors Where therefore a joint and several decree has been passed against several judgment debtors and the decree holder elects to proceed against some only of them he is bound to proceed against their person and moveable property before he can apply for execution against their immoveable property But he is not bound before so applying to proceed against the persons and moveable properties of the other judgment debtors The decree holder must first take out execution against the moveable property of the judgment debtor against whom he wishes to proceed even when the moveable property of the judgment debtor is insufficient to satisfy the decree in full When once the moveable property of the judgment debtor has been exhausted the decree holder can proceed against his immoveable property and he is free to do so in successive applications and it is not obligatory on him to seek out and proceed, upon each of such application, against such moveable properties as may have come into the judgment debtor's possession in the interval An application for the arrest of the judgment debtor is not a condition precedent to the decree holder's proceedings against the immoveable property of the judgment debtor BHIKARI SUKUL *v* GADADHAR RAMANUJ DAS (1912) **17 C W N 87**

BENGAL RENT ACT (VIII OF 1835)

——— Non transferable occupancy holding in Sylhet where Act VIII of 1869 is in force can be sold in execution of a rent decree obtained by the sixteen annas landlords NRIPENDRA KUMAR DUTTA *v* NADIR KHAN **25 C W N 554**

——— s 3—

See SALE FOR ARREARS OF RENT **I L R 44 Calc 715**

——— s 11—

See CHOTA NAGPUR TENANCY ACT 1908, ss 208 209 **5 Pat L J 101**

——— s 13—*Under tenant meaning of—Sarbarahi tenure holder whether is an under tenant—Bengal Rent Recovery (Under tenures) Act VIII of 1865* The word under tenant in s 13 of the Bengal Rent Act 1859 is not used in the technical sense in which it is used in English Statutes *i e* in the sense of a tenant holding under another tenant but in the sense of a tenure holder or tenant holding directly under the proprietor BRAJMOHAN JATTASINGH *v* CHOUDHURI BAMDEB DAS **2 Pat L J 75**

——— s 22—

See OCCUPANCY HOLDING **5 Pat L J 302**

——— ss 48 and 158—

See RENT DECREE **5 Pat L J 641**

——— s 21—*Interest—Registered kabuliyat containing stipulation for interest at 300 per cent per annum—Imposition practised on tenants by giving them to understand that they would not have to pay the stipulated rate—Whether there was a valid contract with regard to interest under s 21* Where the first Court found that the interest in the registered *kabuliyat* at 300 per cent per annum was extortionate and unconscionable and gave the plaintiff a decree for interest at 12 per cent per annum under s 21 of Act VIII of 1869 (B C) and the lower Appellate Court concurred with the first Court in holding that the interest was extortionate and unconscionable but awarded interest at 75 per cent by way of compensation under s 74 of the Contract Act finding at the same time that there must have been some sort of imposition practised on the defendants by giving them to understand that they would not have to pay at the stipulated rate *Held* that there was no contract which so far as the interest was concerned was capable of being enforced and therefore it cannot be said that this was a matter provided for by a written agreement in terms of the provisions of s 21 of Act VIII of 1869 (B C) JAGAT CHANDRA SAHA *v* BIRENDRA NATH DATTA CHOWDHURY (1918) **23 C W N 291**

——— s 52—*Transferee of a portion of non transferable holding whether can make deposit under s 52* Where in execution of a decree for rent the landlord decree holder proposed to eject the tenant of a non transferable holding under the provisions of s 52 of the Bengal Act VIII of 1869 and to avoid the ejectment a third person claiming to be a transferee from the tenant sought to make the deposit provided for by the section *Held* that having regard to the principles laid down in the Full Bench case of *Dayamoyi v Ananda Mohan I L R 42 Calc 172 s c 18 C W N 971* the transferee could make the deposit KALI KISHORE DAS *v* GOPAL RAM SHAHA (1918) **23 C W N 132**

——— ss 59 64 65—*Bengal Tenancy Act (VIII of 1885) sale of non transferable holding in execution of a decree for rent if permissible under in Sylhet District—Bengal Act VIII of 1869 ss 59 64 and 65 whether govern such cases* The respondents who are 8 annas co sharer landlords of a jote in the District of Sylhet obtained a decree for rent in a suit in which the other co sharer landlords were parties and applied for execution of the decree by sale of the non transferable jote of the judgment debtors The lower Courts treated the case as one falling under the provisions of the Bengal Tenancy Act *Held* that the case is governed by the provisions of Bengal Act VIII of 1869 and not the Bengal Tenancy Act As the holding is not transferable the decree holder cannot obtain satisfaction of his decree by the attachment and sale of the non transferable holding of the judgment debtors under the provisions of s 59 or s. 64 or s 65 of the Bengal Act VIII of 1869 ALOK CHANDRA PAL *v* JALURAM NAMASUT (1918) **22 C W N 566**

——— s 158—

See OCCUPANCY RAIYAT **5 Pat L J 406**

See RENT DECREE **5 Pat L. J 641**

BENGAL SURVEY ACT (BENG V OF 1875)

——— ss 4 5 6 and 45—*Publication of notice prior to demarcation whether necessary—Resistance to amin—Penal Code (Act XLV of 1860) ss 147 149 and 353* An amin was directed to survey

BENGAL SURVEY ACT (BENG V OF 1875)—contd

——— ss. 4 5 6 and 45—*contd*

certain land under s 45 of the Bengal Survey Act, 1875 and he was given a notice stating that the survey was to be completed by the 27th June 1915 Subsequently this time was extended by the Collector The *amin* proceeded to the land on the 23rd December 1915 and showed the accused the notice which stated that the survey was to be completed by the 27th June They forcibly resisted him and were eventually convicted of an offence under s 147 of the Penal Code *Held* that the accused were not entitled to resist the *amin* merely because the time which appeared upon his warrant had expired *Held also* that the law did not require the *amin* to show any notice to the petitioners The latter part of s 45 of the Bengal Survey Act 1875 does not require the publication of a proclamation previous to the demarcation of land under that section The proclamation required by s 6 refers only to a survey carried on under ss 4 and 5 of the Act JUDAGI PAUT *v* KING EMPEROR 2 Pat L J 18

——— s. 41—

See DISPUTE CONCERNING LAND
I L R 37 Calc 331

See LIMITATION ACT 1903 S II I ART 142 6 Pat L J 51

——— s 41 62—*Order—Effect of—Suit for confirmation of possession—Relief inconsistent with plaint* S 62 of the Survey Act is a bar to a suit by a plaintiff against whom an order determining a boundary dispute has been made under the Survey Act for confirmation of possession on the allegation that he has been in continuous possession from prior to such order having been made under s 41 of the Act the effect of a Civil Court decree which is binding on the parties as regards the question of possession When the plaintiff sues for confirmation of possession on declaration of title alleging that he is in possession and proves his title but fails to prove possession the Court on it not to award him recovery of possession unless on the facts alleged in the plaint the action amounts to one for restoration of possession *Amir Hossain v Imambandi* 11 C L R 443 and *Champa Dasi v Umi Das* 11 C L R 451 distinguished BIJESHURI KOERI *v* RAM PURTAP SINGH (1909) 14 C W N 366

——— ss 41 63—*Register kept in Survey Office showing what are daripan lands—Admissibility* An order under s 41 of the Bengal Survey Act does not bind the Civil Court upon the question of title and does not preclude it from finding that during a period anterior to that order the party against whom the order was passed was in possession. GRAHAM *v* PHANINDRA NATH MITRA (1915) 19 C W N 1033

BENGAL TENANCY

——— *Deficiency of area of tenure—Reduction of rent—Statutory right—Contracting out—Land in Sundarbans—Permanently settled area—Bengal Tenancy Act (VIII of 1885) s 52 sub-s 1 (b) s 179* The respondents were tenants of land in the Sundarbans, holding from the deceased appellant under a permanent mukarrari lease They claimed a reduction of the agreed rent under s 52 sub s (1)(b) of the Bengal Tenancy Act (VIII of 1885) on the ground that a part of the land leased had been washed away The appellant denied their right to a reduction relying on the terms of the lease and on s 179 which provides that nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent mukarrari lease on any terms agreed between him and the tenant The land was granted by the Government in 1880 to the appellant s predecessor at a rent increasing for a period of years after which it was liable to survey and re assessment and the proprietary right in the grant was to be under conditions generally applicable to owners of estates not permanently settled —*Held* that the appellant had failed to establish that the land was in a permanently settled area and that consequently the respondents were entitled to a reduction of rent under s 52 sub (1) (b) KHETRAMONI DASI *v* JIBAN KRISHNA KUNDU AND OTHERS (1920)
I L R 48 Calc 473

——— *Occupancy right—Construction of patta—Jote Res judicata—Issue determined adversely to successful party—Civil Procedure Code (Act V of 1908) s 11—Bengal Rent Act (X of 1859) s 6* In 1864 a zamindar granted to the appellant s predecessors in title an *ijara* settlement for eight years on an annual rent the patta and kabuliyat provided as to part of the land namely *char* land for the possession of which the zamindar was then suing them as follows that the zamindar creating a jote of it and fixing Rs 1 300 as the yearly rent should include it in the *ijara* rent that after the expiry of eight years a fair rent should be settled in the zamindar s *nij* share that until a fair rent was settled the yearly rent of Rs 1 300 should continue In 1912 occupation of the *char* land having continued without a fresh rent being settled the zamindar after notice to the appellants sued them for possession —*Held* that upon the true construction of the *ijara* the appellants had not a permanent right of occupation of the *char* land and the zamindar was entitled to possession *Jardine Skinner & Co* v *Surat Soondari Debi L R 5 I A 164* followed A jote is a general term and is not necessarily equivalent to a raiyati jote it is little suited to the recognition of a pre existing right In 1877 the zamindar had sued for possession of the *char* land and the tenants had pleaded (i) an occupancy right and (ii) that the suit was premature no attempt having been made to settle a fresh rent The trial Judge made a decree dismissing the suit he held that there was no occupancy right but that the suit was premature Upon an appeal by the zamindar to the High Court the tenants filed a cross objection to the finding that there was no occupancy right The High Court affirmed the decree on the ground that the suit was premature and upon the cross objection affirmed the finding that there was no occupancy right —*Held* that the absence of an occupancy right was not a *res judicata* against the appellants since the tenants had succeeded upon the other plea but that it created a paramount duty on the appellants to replace the finding and that they had failed to perform that duty MIDNAPUR ZAMINDARI COMPANY LD *v* NARESH N[illegible] OY (1920)
[illegible]R 48 Calc. [illegible]

BENGAL TENANCY ACT (VIII OF 1885)

See SALE **I L R 45 Calc 294**

——— when character of Tenancy changes—

See EJECTMENT

26 C W N 389

——— Rule 40 under—

See JUDICIAL PROCEEDINGS

I L R 37 Calc 52

——— suit under—

See SPECIAL OR SECOND APPEAL

I L R 46 Calc 189

——— *Raiyat person inducted on land subject to agreement as to rent to be concluded in future but never concluded in fact—His status* Where in a suit for ejectment it was found that the defendant had been permitted by the plaintiff to enter upon the land subject to an agreement to be afterwards arrived at as to the rent etc but no concluded agreement was ever come to *Held* that the defendant did not come within the definition of raiyat in the Bengal Tenancy Act because he had not acquired a right as against the plaintiff to hold the land for the purpose of cultivating it *His possession was* permissive At the highest his position was that of a person known in England as a tenant at will or a tenant by sufferance He is subject to eviction at the mere will of the plaintiff though doubtless he is entitled to reasonable time to remove his effects BEPIN CHANDRA SIRKAR *v* BASANTO KUMAR CHAKRAVARTI (1918) **23 C W N 773**

——— A suit for a mere declaration *is not one under the Bengal Tenancy* Act 1885 Even when a suit is not one under the Bengal Tenancy Act 1885 evidence of long payment at an unchanged rate is relevant as showing that the plaintiff has a holding at fixed rates The proposition that evidence of payment anterior to the publication of the *Record of Rights* is not admissible to show that the plaintiff has a holding at fixed rates is erroneous PIRTHI CHAND LALL CHOUDHARY *v* SHEIKH MOHAMED TAHIR

1 Pat L J 67

——— *Hindu joint family whether manager of can sue under the Act as representing the whole family* The head of a joint Hindu family governed by the *Mitak Iara* is com petent to sue as managing member of the family a person who has trespassed on the waste lands of the family *Query*—Whether such a manager can sue as representing the whole family in a suit under the Bengal Tenancy Act 1885? MUHAMMED SADIK *v* KHEDAN LALL

1 Pat L J 154

——— *Bengal Rent Act (VIII of 1869)—Annulment of under tenure—Erroneous rulings effect of* A tenure was sold after the Bengal Tenancy Act had come into operation in execution of a decree passed before that Act was enforced It was at that time erroneously held by Courts that the provisions of the Bengal Rent Act (VIII of 1869) and not those of the Bengal Tenancy Act governed such sales and the plaintiff had annulled the under tenures in a manner sufficient under the old Rent Act though not by a formal notice as required by the Bengal Tenancy Act In a suit by an under tenure holder for declaration of title and recovery of possession of his under tenure *Held* that the

BENGAL TENANCY ACT (VIII OF 1885)— *contd*

provisions of the Bengal Tenancy Act would govern the annulment of under tenures and that the under tenure not having been annulled under the provisions of the Bengal Tenancy Act this annulment was inoperative though based on erroneous decisions of Court BIRENDRA KISHORE MANIKYA *v* AHAMMAD ALI (1912)

17 C W N 619

——— s 1—*Land in suburb of Calcutta let out in 1898 for 5 years—Lessee holding on till sued in ejectment in 1910—Status of lessee non occupancy raiyat— Town of Calcutta extension of by amending Act—Limitation—Bengal Tenancy Act Sch III Art 1* (a) Defendant on 16th December 1898 took a five years lease from plaintiff of an agricultural holding situated within the present Municipal limits of Calcutta but beyond the limits of the town of Calcutta as determined by the proclamation of the *Governor General in Council* dated the 10th September 1794 issued under s 159 of statute 33 Geo III c 52 Plaintiff on 9th November 1910 having sued to eject the defendant *Held* that until the Bengal Tenancy Amendment Act of 1907 came into force the Bengal Tenancy Act applied to the case and defendant had in consequence acquired the status of *a non occupancy raiyat* when the Amendment Act came into force and this status was not affected by the provisions of s 3 of the Amendment Act which gave a new definition of the expression Town of Calcutta as used in s 1 of the Bengal Tenancy Act making it co extensive in area with the *present municipal* limits of Calcutta *The* explanation added to sub (3) of s 1 of the Bengal Tenancy Act by s 3 of Act I B C of 1907 is an amending statute and not merely one of a declaratory character and cannot therefore be given retrospective operation *Held* that the suit was barred by Art 1 (a) to Sch III of the Bengal Tenancy Act JOTIRAM KHAN *v* JONAKI NATH GHOSE (1914)

20 C W N 258

——— ss 2 (12) 52 (1) (b) 179—*Suit by tenant for reduction of rent on account of reduction of area—Stipulation in lease precluding such reduction not enforcable— Permanently settled area meaning of* By the terms of the lease the plaintiffs (tenants) were precluded from denying their obligation to pay to the defendant (landlord) the full rent thereby fixed on the ground of flood or diluviation A large portion of the holding having been washed away the plaintiffs *sued for reduction of rent under* s 52 (1) (b) of the Bengal Tenancy Act The terms of the grant from Government under which defendant held the land within which the tenure was situated were not *such as to render the land to which it referred* a permanently settled area The settlement by *Government with the defendant* was not permanent settlement as defined in s 2 (12) of the Act *Held* that the lease to the plaintiff was not excepted from the operation of s 52 (1) (b) of the Bengal Tenancy Act s 179 not applying to it KHETROMONI DASI *v* JIBAN KRISHNA KUNDU (P C) **25 C W N 386**

——— Cess whether rent — Money payable under the *Bengal Drainage Act is* rent MANMATHA NATH MITTER *v* ANATH BANDHU PAL **23 C W N 201**

BENGAL TENANCY ACT (VIII OF 1885)— *contd*

———— ss 3 (3) 4 116 Sch III Art 1(a)—*Khamar land tenant of for a term—Suit to eject after expiry of term—Limitation—Tenant of non occupancy raiyat—Effect of repeal of s 45* It is only under Chap VI of the Bengal Tenancy Act that the status and rights of a non occupancy raiyat can be acquired and as that chapter does not apply to the private lands of a proprietor a tenant of such land for a term of 9 years did not acquire the status of a non occupancy raiyat and at the expiry of his term became liable to be ejected as a trespasser Art I (a) of Sch III of the Bengal Tenancy Act did not apply to the landlord s suit to eject such a person Art I (a) of Sch III of the Act did not extend the limitation of six months to suits to eject persons who had not been non occupancy raiyats within the meaning of the repealed s 45 S 3 (3) is merely a definition and s 4 merely a section specifying the classes of tenants to which the Act applied Ss 3 (3) and 4 did not separately or conjointly create or confer upon any one any status or any right JAGANNATH DASS v JANKI SINGH (P C)

26 C W N 833

———— ss 3 (5) 104 107—

See RENT **I L R 38 Calc 2?8**

———— s 3 cl (9) 30—*Holding meaning of —Suit to enhance rent of undivided share of land comprised in a tenancy maintainability of* Where the land held by a *raiyat* consisted of entire parcels of agricultural land and an undivided share of a parcel of homestead land *Held*—That it was not a holding within the definition of holding in s 3 cl (9) of the Bengal Tenancy Act and a suit for enhancement of rent under s 30 of the said Act did not lie in respect of such undivided share The law is the same whether the undivided interest is created by a co sharer landlord or a sole landlord or where as in the present case the original tenancy has not been proved and is based on the result of settlement proceedings under the Bengal Tenancy Act *Harnanandan Rai v Maharaja Kesho Prasad Singh 2 P L J 553 1 P L W ?98 (1917)* referred to BINAYAK DAS ACHARJI CHOWDHURY v SOMINUDDI *alias* SAKI MATBAR (1919) **24 C W N 1022**

———— ss 3 (16) 58 (3)—

See COLLECTOR **I L R 40 Calc 465**

———— s 4—

See S 3

See MORTGAGE **2 Pat L J 353**

———— *Raiyat at fixed rent who is kaimi of implies fixity of rent— Sthayee in an under raiyat s kabuliyat if imports permanent heritable grant—Under raiyati interest if heritable* The use of the word kaimi imports not fixity of rent but only permanence of occupation of land The description of a sub lease granted by an occupancy *raiyat* as *sthayee karsha kabuliyat* did not necessarily imply that the grantee was intended to have a permanent heritable interest—an interest which the *raiyat* was not authorised to create by law The interest of an under raiyat is not heritable *Arip Mondal v Ramratan Mondal I L R 31 Cal 757 8 C W N 479* referred to MEHER ALI v KALAI KHALASI (1914) **19 C W N 1129**

BENGAL TENANCY ACT (VIII OF 1885)— *contd*

———— ss 4 5 20 44 45 116 180—

See NON OCCUPANCY RIGHTS **3 Pat L J 1**

———— ss 4 49 113 183—

See OCCUPANCY RIGHT **I L R 46 Calc 43**

———— s 5—

See LAND TENURE IN BENGAL **L R 45 I A 193**

See NON OCCUPANCY RIGHTS **3 Pat L J 1**

———— *Tenure holder or raiyat—Original terms when unambiguous if may be altered by conduct* Where the terms of the original lease are not ambiguous the question whether the tenant is a tenure holder or a raiyat must be determined from those terms and without reference to the subsequent conduct of the parties The nature of the tenancy cannot be altered by the subsequent conduct of the parties to the detriment of under tenants PROMOTHO NATH KUMAR v NILMANI KUMAR (1911) **15 C W N 902**

———— *Erroneous entry in Settlement Rent Roll as to tenant s status—Suit by tenant for declaration of status—Limitation—Tenure holder or raiyat tenant whether—Original purpose ascertained evidence of subsequent conduct and surrounding circumstances to show change of purpose whether admissible—Change of status by agreement —Area presumption from—Rebuttal Held* that the tenant who was admittedly in occupation of 1?81? bighas of land had succeeded in rebutting the presumption under s 5 (5) of the Bengal Tenancy Act and established that he was an occupancy raiyat *Per* N CHATTERJEA J — It is only in cases where the terms of the lease creating the tenancy are ambiguous or in cases where there is no written lease and it is not clear what the original purpose of the tenancy was that the Court should look into the subsequent conduct of the parties and surrounding circumstances to determine the nature of the tenancy Once however the original grant is clearly shown to be raiyati by a lease unambiguous in its terms or by other evidence where there is no written lease the mere fact that the tenants subsequently sublet the land would not alter the character of the tenancy There is nothing to prevent the landlord and tenant notwithstanding the existence of an unambiguous lease to alter the original nature of the tenancy by agreement and there may possibly be cases where subsequent conduct may be set up as evidence of such agreement But where no such agreement is set up and it is clearly proved that the land was originally acquired by the tenant for cultivating it himself or by hired servant or by members of his family the character of the tenancy is not affected by the mere fact that the land was subsequently let out to tenants *Midnapur Zemindary Co Ld v Shyam Lal Mitter 15 C W N 918* expl ned PROMODA NATH ROY v ASIRUDDIN MANDAL (1911) **15 C W N 836**

———— *Tenure holder or raiyat —Construction of lease—Presumption* In deciding the question of the character of a holding not only the origin of the tenancy but also the subse-

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 5—*contd*

quent conduct of the parties should be taken into consideration Where the original area of the lands taken was considerably more than what could be cultivated by the tenant himself or by members of his family or by hired servants or with the aid of partner and the tenant himself was not a member of the cultivating class and where subsequent settlements were also of large areas and the total area held by the tenants exceeded 1 300 bighas —*Held* that the e circum stances led to the conclusion that the e lands were taken for the purpose of ettling tenants on them and that the lease was a tenure Where a lease stated you shall enjoy the jungle lands on bring ing the same under cultivation and on causing the same to be held in jote by other persons *Held* that there was nothing in these words to render it improbable that it was intended that the land should be brought under cultivation by establishing tenants thereon MIDNAPUR ZEMINDARY CO LD *v* SHAM LAL MITTER (1910) **15 C W N 218**

——— *Tenure holder or raiyat —Reclamation lease if necessarily raiyati lease— Raiyat u ed loosely for all tenants— Korfa if means under raiyat only —Suit to establish plaintiff's status as raiyat—Under tenant if neces sary party* Casual mention of the tenants as raiyats in judgments in suits in which no issue had been framed or question raised as to the status of the tenants cannot be regarded as the recognition by Courts of the tenants status as raiyats The word raiyat is sometimes used in official documents to mean tenants in general A korfa tenant is not necessarily an under tenant of a raiyat He is a sub lessee whether of a *talukdar* or of a raiyat The reservation by the *chakdars* of certain portions of the land for their own cultivation did not militate against the conclusion that they were tenure holders The definition of tenure holder in s 5 (*1*) of the Bengal Tenancy Act merely formulates the pre existing law and the insertion of the words bringing it (the land) under cultivation by establishing tenants in it introduced no change in the law The section subject to s 195 applies to tenancies created before as well as after the Bengal Tenancy Act In a suit to establish the status of the plaintiffs as raiyats the under tenants are proper but not neces ary parti s Reclama tion lease if necessarily raiyati lease considered SECRETARY OF STATE FOR INDIA *v* JADAV CHANDRA MISRA (1916) **21 C W N 452**

——— s 5 (*1*) (*1*) (b) (*5*) s 103B—*Stati s of tenant whether tenure holder or raiyat—Purpo e for which land was acquired and extent of holding or tenure—Mode of determining status—Presump tion of correctness of entry in Record of Rights —Rebuttal of by proof of attendant circum stances showing incorrectness* The defendant held more than 250 acres of land in a village which formed part of the plaintiff s zemindari in the district of Cuttack under a lea e granted by the plaintiff s predecessor in title in 1901 to a person who assigned it to the defendant in 1907 In proceedings taken to prepare the Record of Rights for the land covered by the lease the defendant was entered as a tenure holder but on his objection the Assi tant Settlement Officer recorded him as a settled raiyat at a fixed rent

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 5 (*1*) (*4*) (b) (*5*) s 103B—*contd*

The lease was an ordinary reclamation lease of the land permanently to the le see at a fixed rent to make it fit for cultivation according to your will and you shall hold the same by culti vating it or having it cultivated and you shall be competent to make such other arrangements or adopt such other convenient steps as you consider nece sary for cultivating the same ' In a suit brought under the provisions of s 106 of the Bengal Tenancy Act (VIII of 1885) for rectifica tion of the entry by recording the defendant as tenure holder *Held* on the construction of the Act that in determining the status of a tenant whether he is a tenure holder or a raiyat what has to be considered is (*a*) the purpose for which the land was acquired and (*b*) the extent of the tenure or holding Fixity of rent was no criterion for the determination of that question for a tenure may be held at a fixed rent equally with a raiyati holding The statutory presumption under s 5 sub s (*5*) applied to the defendant as holding more than 100 acres and the purpose appeared to be that the land should not be cultivated by the personal agency of the defendant himself Here the land was leased to a man of means a resident of another place for the purpose of reclaiming the land and rendering it fit for cultivation the agency to be employed for cultivating it being left to his discretion The Courts were right in looking at the attendant circumstances to judge of the purpose for which the lease was acquired and to determine the status of the defendant The presumption under s 103 B that an entry in a Record of Rights finally published shall be presumed to be correct until it is proved by evidence to be incorrect was fully rebutted by the circumstances referred to by the majority of the Courts in India in arriving at the conclusion that the defendant was a tenure holder and not a raiyat DEBENDRA NATH DAS *v* BIBUDHENDRA MANSINGH BHRAMARBAR ROY (1918) **I L R 45 Calc 805**

——— ss 5 (*1*) (*2*) (*5*) 19—*Lease before the Act—Land partly cultivated by tenant if neces sarily raiyati—Reclaiming lease land taken to be cultivated by settling tenants area exceeding 100 bighas—Evidence of conduct if admissible when lease unambiguous—Tenant recorded raiyat without contest* S 5 (*5*) of the Bengal Tenancy Act applies to tenancies created before the Act The Bengal Tenancy Act which was intended to regulate the relations of the various classes of the agricultural community applies and was intended to apply to tenancies in respect of agri cultural land whether created before or after the passing of the Act Where a *prajagiri* settle ment was made of land in area far in excess of what is usually held by a raiyat and the full rent was payable after a period—a term which usually finds place in leases of tenures *Held*, that the word *praja* means a tenant—and the presumption that the lease was a tenure applied and was not negatived by the fact that by the terms of the lease the lessee undertook to reclaim jungle in the hope of acquiring a *jungleburi* right in future and was to continue to hold and enjoy the lands from heirs to heirs by bringing the land under cultivation by settling tenants The definition of a tenure as contained

BENGAL TENANCY ACT (VIII OF 1885)— *contd*

——— s. 5 (1) ( ) (5) 19—*contd*

in the Bengal Tenancy Act (s 5 sub s (1)) introduced no new law and in any ca e the Act applies to a tenancy created before the pa sing of the Act *Held* that the language of the lease being consistent only with the interest granted thereby being a tenure evidence of the subsequent conduct of the parties was inadmi sible The rule is that evidence may be given to explain but not to contradict documents the meaning of which is doubtful and such evidence may consi t of proof of the mode in which property has been held and enjoyed thereunder But where the meaning of the words in the document is unambiguous the sub equent acts of the parties are not admissible to construe it whether the document be ancient or modern Where in a proceeding under Reg VII of 1822 held in 1877 it was clear that there was no di pute as to the status of the tenant within s 14 and no official proceedings were incorporated in the *rubekari* of settlement the mere fact that the tenant was recorded as a raiyat does not preclude the Government from contesting his claim as such e pecially as at the time of the record the sharp distinction which now exists between raiyats and tenure holders was not so well recognized SECRETARY OF STATE FOR INDIA v GOVIND PRASHAD BARIK (1916) **21 C W N 505**

——— s 5 (2)—

See PASTURE LANDS **14 C W N 372**

——— s 5 (2) 20 (3) 44 and 82—

See NON OCCUPANCY RIGHT **I L R 41 Calc 1108**

——— s 5 (5)—

See OCCUPANCY RAIYAT **I L R 36 Calc 160**

——— *Its effect—Presumption applicable to a tenancy existing before the commencement of the Bengal Tenancy Act* Cl (5) of s 5 does not create any new rights or purport to affect any right created before the commencement of the Bengal Tenancy Act It simply furnishes a mode of proof of the character of tenancies of certain de criptions If the area held by a tenant exceeds 100 standard bighas and a question arises as to the status of such a tenant the Legislature lays down that the tenancy is to be presumed to be that of a tenure holder but the presumption thus raised is rebuttable The clause is consequently a provision not of substantive but of adjective law It lays down a presumption and changes the burden of proof Whereas in the absence of the presumption the party who affirmed that the tenancy was of particular de cription would have to give evidence in support of his contention the pre umption where it applies relieves the party relying thereon from the obligation to furnish such proof in the first instance There is no valid reason why the presumption should not be applied to a tenancy which existed before the commencement of the Bengal Tenancy Act The presumption embodied in s. 5 clause (5) does not incorporate a novel principle into our law but merely codifies what had been a recognized doctrine under the old law The only difference caused by the adoption of the presumption is that we have now a definite rule of evidence a crystallized mode of proof *Dhanput Singh* v *Cooman Singh (1864) W R Gap Act Y 61 Gopee Mohan* v *Sibchunder 1 W R 68 Sara Chandra* v *Ratubuddin 16 C L J 271 Cogdel* v *Railway Co 132 N C 852* followed The fact that a tenancy had been sub divided into two tenancies before the Bengal Tenancy Act would not prevent the application of sub s (5) of s 5 in determining the character of the tenancy The tenure was divisible and the fact of sub division was not a breach of its continuity Each fragment carved out of the original tenure retained its incident *Adit* v *Sukhraj 17 C L J 435 Chandra Kanta* v *Ram Krishna 20 C W N 1002* followed Proof of the purpose of the original grant determines the real nature of the tenancy *Durga* v *Kalidas 9 C L R 449 Promotho Nath Kumar* v *Nilmoni Kumar 14 C L J 58 Promoda Nath Roy* v *Asiruddin Mandal 15 C W N 896* followed *Mahabir* v *Fox 9 C L J 467 Bu lul Karim* v *Satish Chandra 13 C L J 418 Nityananda* v *Nandi Kumar 13 C L J 415 In re School Board Election for Parish of Pulborough [1894] 1 Q B 725 In re Athlumney [1898] 2 Q B 547 Main* v *Stark 15 App Cas 384 Reynolds* v *Attorney General [1896] A C 240 Bengal Indigo Company* v *Roghobur Das I L R 24 Calc 272* referred to *Maharam Chaprasi* v *Tclam ud din Khan 15 C L J 220* distinguished JAGABANDHU SHAHA *v* MAGNAMOYI DASSEE (1916) **I L R 44 Calc 555**

——— *Held* that a tenant s possession under a Zurpe gi lease which merely provided that part of the rent be paid in advance was that of cultivators and not c editors as well and tenants could acquire occupancy rights DAMODAR NARAYAN CHOWDHRI v DALGLEISH **15 C W N 345**

——— Where the lower Appellate Court held that the presumption under s 5 cl (5) of the Bengal Tenancy Act that a holding comprising an area of more than 100 bighas of land was a tenure and not a raiyati holding had not been displaced by the contrary being shown *Held* that it was not open to the High Court in second appeal to interfere with the finding of the lower Appellate Court that the holding was a tenure *Sulatu Dass* v *Jadurath Dass 8 C W N 774* referred to RAMANUJ DAS MOHANTA v THE MIDNAPUR ZEMINDARY Co LD (1912) **16 C W N 725**

——— ss 5 (5) 103 (b) 104 (h)— *Tenure holder or raiyat —Quest on of fact—Definition in the Act if reproduced the meaning the words had previously borne* Where the question in a suit under s 104 (h) of the Bengal Tenancy Act was whether they were raiyats or tenure holders *Held* that the que tion ultimately depended on questions of fact and that one must look to the attendant circumstances to judge of the purpose for which the land was acquired. That it lay on the plaintiffs who had been entered in the record of rights as tenure holders to rebut the statutory presumption that the record-of rights was correct [s 103 (h)] and as the holding exceeded 100 bighas, the further statutory presumption that the holders of it were holders [s 5

BENGAL TENANCY ACT (VIII OF 1885)—contd

——— ss 5 (5) 103 (b) 104 (h)—contd

(5)] The judgment of FIELD J in *Durga Prosunno Ghose v Kalidas Dut I L R 21 Calc 244* does not support the proposition that the definition of raiyats and tenure holders given in the Bengal Tenancy Act did not reproduce the meaning which they had previously borne RAJANI KANTA GHOSH v SECRETARY OF STATE FOR INDIA (1918) 23 C W N 649

——— ss 5 (5) 116—

See LANDLORD AND TENANT
I L R 38 Calc 432

——— s 6 and 7— *Permanent tenure held at fixed rent—Enhancement of rent by compromise if makes rent enhancible under the Bengal Tenancy Act (VIII of 1885) ss 6 and 7* A permanent tenure the origin of which could be traced back to 1818 was held under a lease in which it was stipulated that there shall be no increase or diminution of the rent of Rs 17 sicca In 1865 there being litigation the tenant for the time being entered into a compromise with the zemindar by which he agrees to pay an enhanced rent of Rs 108 13 12 gds *Held* that from the mere fact that the rent had been once enhanced it did not follow that it could be enhanced again That although by mutual agreement the rent was enhanced from Rs 17 to Rs 108 13 12 the tenancy which was identical with that which had been traced to 1818 continued to be subject to the provision against increase in the original lease RAMANUJ DAS MOHANTA v THE MIDNAPUR ZEMINDARY Co LD (1912)
16 C W N 725

2 ——— *Rent enhancement of—Part of tenure created before Permanent Settlement but separated by assignment and held at proportional rent by assignee—Confirmatory sanad if creates new tenure* When a part of a tenure existing at the date of the Permanent Settlement was assigned subject to confirmation by the landlord a *sanad* granted by the landlord in favour of the assignee confirming the transfer and allowing the assignee to hold his purchased share on payment of a proportionate share of the original rent did not create a new tenure and the rent payable was not *liable to enhancement* except in the circumstance specified in clauses (a) and (b) to s 6 of the Bengal Tenancy Act MOOKERJEE J —It is well settled that the continuity of transferable tenure is not affected by sub division or by consolidation *Udoy Chandra Karji v Nripendra Narayan Bhup I L R 36 Calc 287 s c 13 C W N 410* commented on CHANDRA KANTA CHAKRABARTI v RAM KRISHNA MAHALANABI II (1916) 20 C W N 1002

——— s 7—

See s 6 16 C W N 725
20 C W N 1002

——— *Lease for reclamation of jungle—Rate fixed in perpetuity rent varying with area—Nature of tenancy question of law—Enhancement* Where a lease found to be hereditable contained a stipulation providing for assessment of additional rent for excess lands found on measurement at the rate of 5 as 4 p per bigha (the rate fixed for the lands leased) and was from time to time renewed as additional area as were

BENGAL TENANCY ACT (VIII OF 1885)—contd

——— s 7—contd

reclaimed and included in the lease subject to the same stipulation and in this way the same rate of rent prevailed for over 60 years though the total rent went on increasing with the increase in the area and it appeared that during this time there was one instance of transfer and several of succession *Held* that the proper inference to be drawn was that the rate of rent was permanently fixed *Robert Watson & Co v Radha Nath Singh 1 C L J 572* referred to That the rate being fixed by contract no enhancement could be allowed under s 7 Bengal Tenancy Act The question as to the nature of the tenancy was a question of law *Sulatu Das v Jadu Nath 8 C W N 774* RAMDAYAL GIRI v MIDNAPUR ZEMINDARY Co LD (1910) 15 C W N 263

——— *Enhancement of rent—Permanency—Limitation* In proceedings under Chapter X plaintiff made an application for enhancement of rent defendant resisted on the ground that it had not been changed since the Permanent Settlement and could not be enhanced. Plaintiff withdrew his application with liberty to apply again which he did more than 12 years afterwards under s 7 *Held* that Limitation Act did not bar his action BIRENDRA KISHORE v MAHOMED DOULATKHAN 22 C W N 856

——— ss 7 30—

See BENGAL TENANCY ACT s 188
I L R 38 Calc 270

——— ss 7 and 188—*The institution of a suit for enhancement of rent is a thing authorised within s 188 in the case of tenure holders as well as occupancy raiyats* ROY JOTINDRA NATH CHOWDHURI v PRASANNA KUMAR BANERJI
15 C W N 74

——— s 11—

See s 195 (e) 18 C W N 338

——— ss 11 12, 18 and 85—*The word Transfer as used in s 18 (a) includes a Lease—S 85 is controlled by s 18*—When two co ordinate sections are apparently inconsistent an effort must be made to reconcile them If this is impossible the later will generally override the earlier but a particular enactment must be construed strictly against a general provision AMAR CHAND ROY v PRASANNA DASI 25 C W N 9

——— s 12—

See s 195 (e) 18 C W N 338

——— *Amending Act I B C of 1905—Portion of tenure sale of by registered instrument—Non payment of landlord's fee—Title if passes—Purchaser allowing vendor to represent him to landlord—Effect on rent sale* The transfer of a portion of a tenure was complete upon registration although the landlord s fee was not paid and no notice of the transfer was given to him *Kristo Bullub Ghose v Kristo Lal Singh I L R 16 Calc 642 Chintamoni Dutt v Rash Behary Mondal I L R 19 Calc 17 Hemendra Nath Mukerjee v Kumar Nath Roy 12 C W N 478* and *Girish Chandra Guha v Khagendra Nath Chatterjee 16 C W N 64* relied on But where the purchaser subsequent to his purchase allowed his vendor to represent him before the landlord paying rent in the latter s name the landlord

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 12—*contd*

was entitled to frame his suit for rent without impleading the purchaser and the sale in execution of the decree obtained therein passed the entire tenure ALI MAHAMUD v AFTABUDDIN BHUYA (1915) 20 C W N 355

——— ss 12 63 Sch II—*Permanent tenure transfer of—Tenant transferor or transferee—Tender of rent by transferee coupled with demand of statutory receipt if valid tender—Landlord if may insist on giving receipt in another form* The transfer of a permanent tenure under s 12 of the Bengal Tenancy Act is complete as soon as the document is registered and a valid transfer under that section operates to discharge the transferer from the liability to payment which thereupon passes to the transferee As a consequence the *transferee becomes by operation of law the tenant* of the tenure and the transferer ceases to be the tenant though he is not thereby necessarily absolved from liability under the terms of the contract between him and the landlord Such a transferee when he tenders rent as tenant is entitled under s 63 Bengal Tenancy Act to claim a receipt with his name thereon as that of the tenant Where the landlord upon the transferee s demanding it refused to grant such a receipt and proposed to grant another describing the original tenant as still the tenant of the tenure and the transferee as merely the person in occupation thereof *Held* that there was a valid tender wrongly refused by the landlord A tender is not vitiated because a receipt is asked A tenant who tenders rent with a request for a receipt in the statutory form does not seek to impose on the landlord any condition on which he is not entitled to insist and when the landlord refuses to give such a receipt and offers to grant a receipt in a form which would compromise the position of the transferee there is an improper refusal of a valid tender PULP CHAND GHOSE v NARENDRA KRISHNA GHOSE (1914) 19 C W N 112

——— s 15—Failure on the part of heirs to comply with s 15 does not necessarily entitle the landlord to treat one of several heirs of the original tenure holders as representative of the Tenancy SRIMATI FAIZUNNESA v RAJITARAN CHOWDHURY 26 C W N 138

——— ss 15 16—*Joint landlords one of whom failed to comply with the requirements of s 15—Effect—Civil Procedure Code (Act V of 1908) s 115—Charter Act (24 and 25 Vict Chap 104) s 15* s 16 of the Bengal Tenancy Act was not intended to defeat in its entirety a suit brought by one of several landlords who is not in default in respect of the requirement of s 15 merely by reason of the failure of his co sharers to comply with those requirements Where a co sharer of the plaintiff landlord not having complied with the requirements of s 15 of the Bengal Tenancy Act the plaintiff brought a suit against the tenants for the entire rent making the defaulting co sharers *pro forma* defendant *Held* that the plaintiff was not entitled to get a decree in respect of the entire rent payable jointly to himself and his co sharer but a decree should be made in favour of the plaintiff in respect of the share of rent payable to himself and if his co sharer does not comply with the requirements of s 15 before the decree is made the claim in respect of the share of rent payable to the co sharer should be dismissed Where the lower Court dismissed the plaintiff s suit for rent in its entirety on the ground that his co sharer not having complied with the requirements of s 15 of the Bengal Tenancy Act the whole suit must fail *Held* that the High Court could interfere in such a case under s 115 Civil Procedure Code 1908 and under s 15 of the Charter Act TARINI CHARAN BANERJEE v CHANDRA KUMAR DEY (1910) 14 C W N 788

——— *Permanent tenure succession to—Notice of succession to landlord—Notice given after decision of first Court effect of* In a suit for recovery of rent by a person who had succeeded to a permanent tenure the defendant pleaded that the suit was barred by s 16 of the Bengal Tenancy Act 1885 on the ground that the provisions of s 15 had not been complied with but this objection was not seriously pressed and the suit was decreed The defendant appealed and pending the disposal of the appeal the provisions of s 15 were complied with *Held* that *the plaintiff was entitled to recover the rent sued for* NARAYAN PROSAD v GAJO MAHTON 2 Pat L J 701

——— 16—

See s 15 14 C W N 788

——— 17—

See s 19 (c) 18 C W N 338

——— s 18—*Raiyat at fixed rent—Proof of permanency—Such raiyat if may grant leases—Sub lessee if may apply for deposit under s 170 (3)* Where a raiyati lease explicitly stated that it was granted upon a rent of Rs 5 a year that the tenant would enjoy the land from generation to generation and that the landlord would not claim more rent than what was settled the lessee was a raiyat at a fixed rate of rent and his interest was under s 18 of the Bengal Tenancy Act subject to the same provisions with respect to the transfer of and succession to the holding as that of *a permanent tenure holder under s 11 The term* transfer as used in s 11 or s 18 of the Bengal Tenancy Act includes a lease The provisions of s 85 of the Act are subject to those of s 18 and the former section has no application where s 18 applies Where a raiyat at a fixed rate of rent granted a *mukurari maurasi* sub lease in favour of certain persons and the latter in order to save the holding from sale in execution of a rent decree obtained against the raiyat applied to deposit the decretal amount under s 170 (3) of the Bengal Tenancy Act *Held* that they were entitled to do so HARI MOHAN PAL v ATUL KRISHNA BOSE (1913) 18 C W N 1127

——— *Raiyat holding at fixed rate if can cut and appropriate trees—Trees—Presumption under s 50 as to fixity of rent if applicable in a Small Cause Court suit—Status of tenant if can be determined in such suit* A raiyat holding at a fixed rate of rent has the right to cut and appropriate trees PADHIKA NATH RAY v SAMIR FAKIR (1917) 21 C W N 636

——— s 19—Section 19 of the Bengal Tenancy Act can refer only to persons who being raiyats within the definition to be found in s

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 19—*contd*

5 had acquired a right of occupancy prior to the passing of the Act SECRETARY OF STATE *v* GOVIND PRASHAD BAPIK (1916)
21 C W N 505

——— s 19 21—*Person claiming to be raiyat at fixed rates under invalid lease if may have acquired occupancy right by possession—Permanent lease by Hindu widow twelve years occupation under—Right of occupancy acquired before Act saving of Bhut Nath Naskar v Surendra Nath Dutta 13 C W N 1025* is no authority for holding that a person who claims the higher status of *raiyat* at fixed rates cannot if the claim is disallowed, fall back upon and establish if he can the lower status of an occupancy *raiyat* A permanent *raiyati* lease of land in which the grantor has the qualified interest of a Hindu female heir is invalid But the lessees would nevertheless acquire occupancy right in *the holding after 12 years possession as raiyat* Where such lease commenced in March 1873 *Held* that irrespective of whether the provisions of the Bengal Tenancy Act operate to prevent the acquisition of occupancy right by a person claiming to be a *raiyat* at fixed rates or not in this case occupancy right was acquired before the Bengal Tenancy Act came into force and was saved by s 19 of that Act ICHHYAMOYI *v* KAILASH CHANDRA MUKHOPADHYA (1913)
18 C W N 358

——— s 20—

See NON OCCUPANCY RIGHTS
3 Pat L J 1

——— The presumption under s 20 does not arise in a suit for rent which is not a proceeding under the Bengal Tenancy Act *Pramada Nath Roy v Ramani Kanta Roy I L R 35 Calc 331 s c 12 C W N 249* referred to MULLUK CHAND DAS *v* SATIS CHANDRA DAS (1909)
14 C W N 335

——— In the Province of Bihar and Orissa the word Raimi denotes a settled raiyat and not a raiyat at a fixed rent PUNIA MAHTO *v* SHAIK BUNDEY ALI
5 Pat L J 287

——— The presumption under s 20 cl 7 of the Bengal Tenancy Act that a raiyat has continuously held the land as such for 12 years arises only in proceedings under the Bengal Tenancy Act but a suit for rent is not a proceeding under that Act *Pramada Nath v Ramani Kanta I L R 35 Calc 331 s c 12 C W N 249 7 C L J 159 Mulluk Chand v Satis Chandra 11 C L J 56* relied on JAHANDAR BAKSH MULLIK *v* RAM LAL HAZRA (1910)
14 C W N 470
I L R 37 Calc 449

——— ss 20 and 21—

See ORISSA TENANCY ACT
s 1 4 2 **3 Pat L J 475**

——— s 21—

See s. 19 **18 C W N 358**

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 22—

——— *Third person who the co sharer proprietor may be* A co sharer proprietor may be a third person within the meaning of s 22 if he was inducted on the land as a tenant and not as a proprietor EJAHUDDIN *v* SAIYAD MOHAMMAD RASHIDUL HUQ **4 Pat L J 540**

——— *Thika taken by a cultivating raiyat—Conversion into tenure holder—Merger—Liability to eviction after expiry of the period of thika—Construction of lease* A thikadar is liable to eviction after the expiry of the period of his lease even though *it is found that he was a* cultivating raiyat with respect to the lands of which he took the *thika prior to it* His interests as a raiyat became merged into the rights he acquired under the lease MANNERS *v* SATRO OHAN DAS (1916) **20 C W N 800**

——— s 22 (2)—*Acquisition of occupancy right by landlord—Holding if ceases to exist—Occupancy holding and occupancy right distinction between* The plaintiff who was an occupancy raiyat subsequently purchased the superior tenure Thereafter A, who was an under raiyat on the holding transferred his interest in the land to B The plaintiff s suit was for ejecting B *Held* that the effect of the purchase by the plaintiff which must be determined with reference to s 22 (2) of the Bengal Tenancy Act was to vest the holding in the purchaser subject to the limitation that the occupancy right ceased to exist and not that the holding itself ceased to exist and A continued to be an under raiyat under *the purchaser That a comparison* of the phraseology of sub s *(2)* with that of sub s *(1)* of s. 22 shows that in sub s *(1)* a distinction is made between occupancy holding and occupancy right and when the occupancy right ceases to exist it does not follow that the holding also vanishes AKHIL CHANDRA BISWAS *v* HASAN ALI SADAGAR (1913) **19 C W N 248**

——— ss 22 (2) 49 85 167—

See LANDLORD AND TENANT
I L R 43 Calc 164

——— ss 22, cl (2) 159 160 cl. (g)—

See LANDLORD AND TENANT
I. L. R. 37 Calc 709

——— s 23—

See LANDLORD AND TENANT
I. L. R 37 Calc 815

——— ss 23 86 and 87—*Held* that transfer of part of a holding does not amount to abandonment so as to entitle the landlord to re enter When there are several tenants in a holding and each holds a separate portion each does not constitute a separate holding KARIM CHAKLADAR *v* SRIMATI SAFORANNESSA BIBI
25 C W N 717

——— s 25—

See LANDLORD AND TENANT
I. L. R. 40 Calc. 870

——— s 26—*Occupancy holding if may be bequeathed by will* Except under local usage an occupancy holding is not capable of being bequeathed by will *Imulya Ratan Sircar v Tarini Nath Dey 18 C W N 1 10* followed

BENGAL TENANCY ACT (VIII OF 1885)—contd

——— s 26—*contd*

Dwarmoyi v Ananda Mohan Roy 18 C W N 91 referred to KUNJA LAL ROY v UMESH CHANDRA ROY (1914) 18 C W N 1294

——— ss 26 178 sub s (3) cl (d)—

See OCCUPANCY HOLDING
I L R 42 Calc 254

——— s 29—

See LANDLORD AND TENANT—ENHANCEMENT OF RENT I L R 37 Calc 610

——— of the Bengal Tenancy Act controls merely cl (a) and not cl (b) *Bepin Behari Mondal v Kristhra Dhone Ghose* I L R 32 Calc 395 s c 9 C W N 265 referred to If therefore rent has been enhanced by more than two annas in the rupee the mere fact of payment at the enhanced rate for three years does not entitle the landlord to realise at that rate MULLUK CHAND DASS v SATISH CHANDRA DASS (1909) 14 C W N 335

——— *Occupancy raiyat—Enhancement of rent by contract-stipulation in original kabuliyat—Colourable evasion of statute* Where a kabuliyat executed by an occupancy raiyat contained a statement that the rent for the holding was Rs 57-4 in all but that out of this the sum of Rs 17 2 was remitted and the rent was fixed at Rs 40-2 for the period of the kabuliyat and it was further stipulated that at the end of the term the tenant shall take a settlement at the rate of Rs 57-4 and if he does not the landlord shall be entitled to realise that rent by suit and the lower Appellate Court found that the rent really settled was Rs 40 2 and that the reference to Rs 57 4 was merely a device to evade the provisions of s 29 of the Bengal Tenancy Act *Held* that s 29 was a bar to the recovery of the rent by the landlord at Rs 57 4 MOHAMAYA KAR v KISHORE CHUNG (1913) 18 C W N 738

——— *Class of agreements in kabuliyats not affected by the section* An agreement embodied in a *kabuliyat* to pay a certain amount of rent agreed upon by the parties in settlement of a *bonâ fide* dispute regarding the rate of rent and to avoid further litigation is not an agreement in violation of the terms of s 29 of the Bengal Tenancy Act BATA MONDAL v MANINDRA CHANDRA NANDI (1914) 19 C W N 321

——— *Kabuliyat construction of—Hajat allowance of for a term at the end of which full rent payable—Suit for full rent at the end of the term if suit for enhancement* In a kabuliyat dated 1st of Baisakh 1295 executed in respect of a *mcadi sarasari jote* which was to have effect for three year the amount of rent was stated to be Rs 19 odd but it was provided that a *hajat* (deduction) of Rs 10 8-4½ gandas was to be allowed till the end of the term but that on the expiry of the term the full *jama* of Rs 19 odd was to be paid The landlord sued upon the *kabuliyat* to recover arrears of rent for the year 1299 onward at Rs 19 odd The tenant did not set up any case that the document was never intended to be acted upon and nothing in regard to conduct amongst themselves was placed by the parties for determination before the Court *Held* upon a construction of the *kabuliyat* that the suit was not for enhancement and that s 29 of the Bengal Tenancy Act was no bar to recovery by the landlord at the rate claimed ROMES CHANDRA BISWAS v GOLAM NABI FAKIR (1898) 19 C W N 867

——— In a suit for arrears of rent the plaintiff claimed an enhanced rent on the basis of a kabuliyat The tenant proved the previous rent and that the enhancement claimed was in excess of two annas in the rupee The plaintiff claimed the benefit of a decision under s 105 of the Bengal Tenancy Act pronounced subsequent to the institution of the rent suit and before the trial thereof *Held* that as the previous rent of the tenant had been proved it was for the plaintiff to justify the enhancement of the rent claimed which was obviously in excess of the enhancement allowed by s 24 RAJENDRA NARAIN MAZUMDAR v SHEIKH HALIM
20 C W N 758

——— ss 29 30—

See LANDLORD AND TENANT
I L R 47 Calc 280

——— ss 29 30 32 39—

See LANDLORD AND TENANT
I L R 37 Calc 742

——— ss 29 31—

See ENHANCEMENT OF RENT
2 Pat L J 574

——— ss 29 33 and 179—*Kabuliyat enhancing existing rent and creating permanent Mukarrari interest effect of* A landlord entered into an agreement with his tenant for the payment of rent at a certain rate The agreement was contained in a *patta* and *kabuliyat* The latter recited that the tenants were to have a perpetual status at a fixed rate of Rs 5 *per bigha* and that the landlord was not to have any power of enhancement It contained no provision as to the heritability or transferability of the holding The landlord sued for rent at the rate stipulated in the *kabuliyat* The tenant pleaded that the real rent was at a lesser rate that the *kabuliyat* was executed under undue influence and that its provisions infringed the Bengal Tenancy Act 1885 s 29 *Held* that even if the *kabuliyat* had been executed under undue influence a notice sent by the tenant to the landlord calling upon the latter to sink a *pakka* well on the land in accordance with the terms of the *kabuliyat* amounted to ratification of the *kabuliyat* *Held* further that the *kabuliyat* created a permanent *mukarrari* interest within the meaning of the Bengal Tenancy Act 1885 s 179 and that therefore s 29 of that Act did not apply In order to make out a claim for enhancement under s 29 of the Bengal Tenancy Act it is necessary to comply strictly with the provisions of s 33 of that Act GUR SAHAI MAHTO v KESHWAR SAHU
1 Pat L J 76

——— s 30—

See BENGAL TENANCY ACT s 188
I L R 38 Calc 270

See ENHANCEMENT OF RENT
2 Pat L J 574
I L R 40 Calc 29-

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

———— s 49—*contd*

———————— *Under raiyat ejectment of—Notice to quit—Length of notice—English law if applicable* S 49 of the Bengal Tenancy Act prescribes no form of notice to quit nor has it given any indications as to the length of the notice the reason being that the Act itself protects the under raiyat from ejectment until the end of the agricultural year next following the year in which the notice to quit is served upon him by the landlord The rules of English law or even of the law prevailing in the Presidency towns concerning the length of the notice should not be applied in such matters Where a notice to quit which was served on the under raiyat on the 10th April 1908 (about the end of Chaitra 1314) asked the tenant to leave within the first of Baisak 1315 and the suit was instituted on the 3rd August 1909 *Held* that the notice was not insufficient in law HARIFULLAH GAZI v BENODE BEHARY MANDAL (1913) 17 C W N 932

———— *Suit to eject under raiyat—Notice to quit signed by one co sharer landlord—Validity* When a notice to quit under s 49 (*b*) Bengal Tenancy Act is signed by one co sharer landlord the question whether he signed it on behalf of himself and the other landlords cannot be in issue in a suit for ejectment under that section JAFFER MAHMUD MANDAL v KHATER MAHMUD SHEIKH (1918)

23 C W N 76

———————— *Ejectment of under raiyat holding under harsana patta not for specified time—Notice necessary to terminate tenancy—S 85 lease in contravention of—Grantor if may challenge validity—Estoppel* In a suit for ejectment of the defendant an under raiyat holding under *harsana patta* not for any specified time it appeared that the plaintiff (who was the raiyat) before the expiry of a year served a six months notice *to quit on the defendant* and on non-compliance therewith brought the suit more than one year after the service of notice *Held* that the tenancy was lawfully terminated and the plaintiff was entitled to recover possession of the land *Per* MOOKERJEE J —That for agricultural tenancies of this description the provision for notice is to be found in s 49 of the Bengal Tenancy Act which prescribes no form of notice and gives no indication as to its length but only protects the under raiyat from ejectment until the end of the agricultural year in which a notice to quit is served upon him by his landlord *Per* BEACHCROFT J —That if it be found as a fact that a raiyat giving a permanent sublease in contravention of the provision of s 85 (2) has induced his lessee to accept it on the faith of a representation that his own status was such as to validate such a sublease he will not afterwards be allowed to prove in a suit against his lessee that his status was other than it was in the first instance represented to be That it is absolutely necessary to plead estoppel if it is intended to rely on it This is not a technical rule of pleading but a matter of substance for if estoppel is pleaded it may be possible for the other side to shew that there could be no estoppel, the real facts being known That the validity *of a lease granted in contravention* of s 85 of the Bengal Tenancy Act can be questioned by the grantor Cases on the point reviewed OBHOY CHARAN NATH v SAMLA BIBI (1917) 22 C W N 173

———————— *Under raiyat holding under an occupancy raiyat if can be ejected without notice—Landlord and tenancy of* An under raiyat who is under an occupancy raiyat cannot be ejected by the landlord without notice prescribed by s 49 ( ) of the Bengal Tenancy Act The in creation of a tenure by the landlord and the under tenant makes no difference *Imrat v Na* I L R 31 Cal 937 followed The term landlord includes a person who on the extinction of other interests comes into direct relationship with the tenant or under tenant as the case may be RASIK LAL SEN v KRISHNA MOHAN MANDAL (1913) 17 C W N 731

———— ss 49 85—*Under raiyati lease for a term not exceeding nine years if holds over—Incidents of tenancy when term expires* A sublease granted by a raiyat for a term not exceeding nine years carries with it the ordinary incidents of a lease for a term of years—one of such incidents being that if the lessee holds over before the end of the term [illegible] *Mahapore Zamindary Company v Hrishikesh Ghose I L R 41 Cal 1198 s c 18 C W N 9 8 ... Mondal v Panchanan Mondal I L R 31 Cal 757 s c 8 C W N 4 3 and Jamini Sundari Dasi v Pyarilal Nath Chatterjee 11 C W N 519* referred to ARFAN BIBI v IMAM ALI (1915) 20 C W N 756

———— ss 49 183—*Under raiyat if can acquire occupancy right by custom or usage—Status of under raiyat with right of occupancy if he remains an under raiyat—Ejectment of such an under raiyat if s 49 Bengal Tenancy Act applicable* An under raiyat can acquire a right of occupancy by custom or usage and on acquisition of such occupancy right continues to be an under raiyat and is not liable to be ejected under s 49 of the Bengal Tenancy Act GOPAL MANDAL v JAPAI SANKHARI (1918) 22 C W N 618

———— ss 49 167—

See NOTICE TO QUIT

I L R 46 Calc 783

———— s 50—

See s 30 22 C W N 993

See LANDLORD AND TENANT

I L R 45 Calc 930

———————— (1) (2) (3)—*Presumption in favour of raiyat if rebutted by acquisition of non transferable holding as representing creation of a new tenancy—Subdivision and amalgamation of raiyati holdings—New holding if rent not varying the rent but stating it to be variable if rebuts presumption* Where in a proceeding instituted by the landlord for the settlement of fair rent under s 105 Bengal Tenancy Act the landlord contended that the presumption arising under s 50 sub s (2) to the benefit of which the tenant was *primâ facie* entitled was rebutted by the acquisition of non transferable holdings which represented the creation of a new tenancy *Held* that the purchaser of a non transferable occupancy holding cannot claim recognition by the landlord as a *matter of right but if he obtains recognition from* the landlord whether by payment or otherwise

BENGAL TENANCY ACT (VIII OF 1885)—contd

——— s. 50 (1) ( ) (1)—contd

then in the absence of special circumstances he is admitted into the original tenancy with all its incidents and becomes the successor in interest of the vendor ABHOYA SANKAR MAJUMDAR v PAJANI MONDAL (1918) 22 C W N 904

——— s 50 (2)—

See s 30 1 Pa L J 409

——— *Amalgamation of several tenures and stipulation by tenant to pay enhanced rents—New tenancy* Where four originally separate tenures were in 1853 amalgamated and by a kabuliyat of that year the tenant expressly stipulated to pay enhanced rent *Held* that the presumption under s 50 (2) of the Bengal Tenancy Act arising from proof of payment of rent at the same rate for 20 years before the suit was rebutted UPENDRA NATH ( ) v GOPI CHARAN SAHA (1916) 22 C W N 321

——— *Tenants producing rent receipts showing payment by themselves of same rent for 20 years—Presumption that tenancy commenced from permanent settlement—Onus to show former tenant predecessor or not of present tenants on whom* In a proceeding under s 105 of the Bengal Tenancy Act brought by a landlord against a raiyat for settlement of fair rent *Held* that when once the defendants have produced rent receipts covering a period of over 20 years showing that they paid rent at a uniform rate for that period, they are entitled to the presumption under s 50 (2) of the Bengal Tenancy Act and it is for the landlord to show that the persons who were formerly on the land were not the predecessors of the defendants GOPAL CHANDRA BANERJEE v MAHOMED SOLEMAN MULLICK (1916) 22 C W N 128

——— *Kabuliyat of 1840 agreeing to pay enhanced rent at pargannah rate—Presumption rebuttal of* A Kabuliyat of 1840 by which the tenant expressly stipulated to pay enhanced rate according to the pargannah rate rebutted the presumption arising from payment of the same rate of rent during 20 years before the suit UPENDRA NATH GHOSH v DWARKA NATH BISWAS (1916) 22 C W N 322

——— *Slight variations in the rent paid with corresponding variations in area—Presumption of permanency if arises* Where a raiyat proved that for over 20 years that is to say from 1882 he had been paying the same rent for the holding *Held* that the presumption arising under s 50 (2) of the Bengal Tenancy Act that he had held the land at a uniform rate of rent from the time of the Permanent Settlement was not rebutted by the landlord proving slight variation in the rents paid between 1864 and 1898 which was sufficiently explained by a very nearly corresponding variation in the area *Haronath v Amir 1 W P 95* and *Annandolt v Hills 4 W R Act X 33* relied on. *Bissessur v Woomachurn , W R. 44* and *Gopal Murdi v Nobbo Kishen 5 W R Act X 83* referred to GRANT v HAR SAHAY SINGH (1913) 19 C W N 117

——— After the Record of Right becomes final in respect of a tenancy under Ch X of the act the tenant is precluded by s 115 for claiming the presumption under s 50 BAMAN DAS VIDIASAGAR BHATTACHARJA v SADHU MAJHI. 26 C W N 945

——— The expression thereafter in s 115 means after particulars have been fully recorded and finally settled after under Ch X PRASANNA KUMAR SEN v DURGA CHARAN CHAKRABARTY 26 C W N 947

——— ss 50 105—*Question of enhancibility of rent if a question under s 105—Presump on under s 50—Kabuliyat executed since Permanent Settlement—Confirmatory lease* Where in a proceeding for settlement of rent under s 105 of the Bengal Tenancy Act, the Settlement Officer held that the rent of the tenant was not enhancible by reason of the application of s 50 of the Bengal Tenancy Act and the Special Judge on appeal held that the tenure having originated in a kabuliyat of 1238 the rent was enhancible *Held* that the question decided being a question relating to an incident of the tenancy did not come under s 105 of the Act and a second appeal was not barred by s 109A of the Act that as the kabuliyat was a document by which a previously existing lease was recognised the presumption under s 50 of the Act applied. BISHESHUR RAY CHOWDHURY v RAJENDRA KUMAR SINGH (1914) 18 C W N 943

——— ss 50 105 and 115—

See LANDLORD AND TENANT I L R 37 Calc 33

——— s 52—

See MEASUREMENT OF LAND I L R 47 Calc 286

See s 30 1 Pat L J 409

See ENHANCEMENT OF RENT

——— *Civil Procedure Code (Act V of 1908) O XLI r 12—Appeal if may be limited to specified grounds—Jurisdiction of Appellate Court—Bengal Tenancy Act (VIII of 1885) ss 52 105 and 105—Enhancement of rent for increase of area within specified boundaries—Increase of area proof of* In a suit for enhancement of rent on the ground of any increase in area the landlord must prove the area for which rent has been previously paid as well as the area now held by the tenant and that such area is in excess of the original area Where therefore, a landlord proved that lands were once measured according to a known standard that the rent was assessed on that measurement that the area as well as the rent payable was entered in the *kabuliyats* and that the area of the lands measured by the same standard is in excess of the original area *Held* that unless it is established that the rent payable was a consolidated rent for lands within specified boundaries irrespective of the precise quantity the landlord was entitled to claim additional rent *Go rs Patra v H R Peily I L R 20 Calc 579* *Rajendra Lal Goswami v Chunder Bhusan 6 C W N 313* explained and distinguished *Rajendra Lal Goswami v Chunder Bhusan 6 C W N 313* *Suryakan v Bimrear I L R 24 Calc 501* *Rajkumar v Ram Lal 5 C L J 548* referred to Where it is specifically shown that the area of a land was ascertained by measurement and rent assessed on such measurement

BENGAL TENANCY ACT (VIII OF 1885)— *contd*

——— s 52—*contd*

the mere fact that boundaries of the land are mentioned in the *kabuliyat* does not exclude the operation of s . Bengal Tenancy Act In settling additional rent for increased area it is *open to the Settlement Officer in consideration* of possible errors in the original measurement to allow the enhancement at a somewhat reduced rate LUKHI NARAIN SERWOJI v SRI RAM CHANDRA BHUIYA (1911) 15 C W N 921

———*Landlord and tenant—Encroachment by tenant—Adverse possession for over twelve years—Tenant if bound to pay additional rent* A tenant is entitled to hold this land of his landlord upon which he has encroached as part of his original holding if more than 12 years before the landlord's suit he denied the landlord's right to any separate rent from him in respect of the land and has forcibly in assertion of his claim appropriated the entire crop and continued in possession The landlord apart from s 52 of the Bengal Tenancy Act cannot recover additional rents in respect of such land *Ishan Chandra Mitter v Ijya Ramna jan Chakraverty 2 C L J 125* and *Lalloo Singh v Sudhran Ahir 8 C L J 357* referred to TARAN CHANDRA GHOSE v GANENDRA NATH ROY (1912) 16 C W N 235

——— *Enhancement of rent on account of excess area—What the landlord has to prove—Shifting of onus* In a suit for enhancement of rent on the ground that the tenants are in possession of land proved by measurement to be in excess of the area for which rent has been previously paid the burden of proving an increase in the area for which rent has been previously paid is on the landlord who may discharge the burden in two ways viz —(i) By proving that the tenant is in possession of excess land outside the boundaries of land originally settled with him for instance land obtained by encroachment or alluvial increment (ii) by proving that at the original settlement of the land the rent was fixed at a rate per bigha or other unit of measurement or at differential rates according to the quality of the land and so forth and that in fact and substance the agreement was that the tenant should pay at that rate or at those rates for all the land of which he was put in possession according to its true area and by further proving that the existing rent is less than the rent payable under such agreement Proof by the landlord of the existence of excess area shifts the burden of proof from the landlord to the tenant DURLPAD CHANDRA KOLEY v HARI NATH SINGH (1918) 22 C W N 826

——— The expression at the time the measurement upon which the claim is based was made in s 52 (6) of the Bengal Tenancy Act refers to the measurement upon which the area in excess or deficit as the case may be is found out before action 571 (575) considered NILMANI KAR v SATI PROSAD GARGA (F B) 25 C W N 230

——— ss 52 188—

See MADRAS ESTATES LAND ACT (I OF 1908) s 42 CL 1 (a) AND (b) AND 2 I L R 38 Mad 524

——— s 53—*Agreement to pay rent in monthly kists and interest on each kist from*

BENGAL TENANCY ACT (VIII OF 1885)— *contd*

——— s 53—*contd*

date of its falling due Ane frail—Landlord if can impose obligation on tenant to pay monthly kist—Interest on arrears—Applicability of the Interest Act Where there was a contract between the landlord and the tenant executed after the passing of the Bengal Tenancy Act whereby provision was made for payment of the rent in monthly kists and also for payment of interest on each kist from the time when it fell due and the interest so calculated exceeded 12 per cent per annum *Held* that the landlord was entitled to impose on the tenant an obligation to pay the monthly kists The words of s 53 of the Bengal Tenancy Act indicate that there may be an agreement in modification of the provision for four equal instalments But having regard to s 178 sub s 3 cl (h) of the Bengal Tenancy Act the landlord was entitled only to the interest secured to him by s 67 of the Bengal Tenancy Act the Interest Act not being applicable *Heramba Kumari v Jogendra Nath I L R 32 Calc 214* distinguished MONOHAR MUKERJEE v KHETTRA NATH SADUI (1913) 17 C W N 820

——— ss 54 61 62, 195—

See s 1-1 25 C W N 209

See DEPOSIT IN COURT I L R 41 Calc 1000

——— ss 55 and 66—*Ejectment for arrears—Estoppel* A landlord receiving rent for one year cannot eject for rent due on previous year KALA NAND SINGH v GUNPAT SINGH 16 C W N 104

——— s 58—

See COLLECTOR I L R 40 Calc 465

——— *Rent receipt omission to give whether an offence—Complaint to Collector—Malicious prosecution—Reasonable and probable cause* An omission to give a rent receipt as required by the provision of the Bengal Tenancy Act 1885 s 58 is an offence and a proceeding under this section upon the complaint of a tenant is a *criminal prosecution* In a suit for malicious prosecution the question of reasonable and probable cause and of malice is in India in a trial without a jury a question of law NAIK PANDEY v BIDYA PANDEY 1 Pat L J 149

——— s 60—

See LAND REGISTRATION ACT (VII OF 1876) ss 78 81 I L R 38 Calc 512

——— *Held* that a person registered as proprietor under the Bengal Land Registration Act 1876 is entitled to receive rent without any further proof of title MASAMMAT NAND KUER v JODHAN MAHTON 6 Pat L J 658

——— s 61—

See DEPOSIT IN COURT I L R 41 Calc 1000

——— *Manager tender of rent to but not at village office if valid—Tender of part as whole—Deposit of portion of rent due if valid—Contract Act (IX of 1872) s 38* A deposit in Court by a tenant of less than the amount of arrears of rent due is not a valid deposit under s 61 of the Bengal Tenancy Act Any officer of the zemindar authorised to receive

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 61—*contd*

rent who happens to be in the village office can receive it and give a valid acquittance But because a man happens to be the manager of the zamindari he cannot be compelled to take rent tendered wherever he may happen to be and at whatever time or place it may be offered Nor can he be asked to take a small proportion of the rent due as the whole amount SATI PROSAD GARGA v MONMOTHA NATH KAR (1913)

18 C W N 84

——— ss 61 62, Sch III, Art 2 (a)—*Rent payable partly in cash and partly in kind and in lieu of latter a fixed sum—Deposit by tenant—Amount deposited less than amount due—Suit by landlord to recover rent—Limitation* The provisions of ss 61 and 62 of the Bengal Tenancy Act taken as a whole support the view that the period of limitation prescribed in Art 2 cl (a) of Sch III of the Bengal Tenancy Act is applicable to a suit for rent wherever rent has been deposited under s 61 even though the allegation of the tenant that what he had deposited was the full amount due at the time, may ultimately prove to be incorrect *Sridhur Roy* v *Rameswar Singh I L R 15 Calc 166* and *Sati Prosad Garga* v *Monmotha Nath Kar 18 C W N 84* considered No deposit can be made of rent in kind under s 61 of the Bengal Tenancy Act But where the parties have agreed that upon failure to deliver the rent payable in kind a fixed sum is to be paid in lieu thereof the entire rent is payable in cash and s 61 is applicable to such a case *After Morole* v *Prosunna Kumar Ghosh 12 C L J 649 15 C W N 249* referred to SASIBHUSAN DEY v UMA KANTA DEY (1914)

19 C W N 1143

——— s 62—

See DEPOSIT IN COURT

I L R 41 Calc 1000

See s 61 19 C W N 1143

——— s 63—

See s 12 19 C W N 112

——— s 65—

See DECREE

14 C W N 352

See LIMITATION

I L R 46 Calc 870

See PUTNI TENURE

I L R 37 Calc 747

——— *Tenure sold for rent again sold for previous arrears—First charge—Notice—Application by purchaser to set aside sale on the ground that judgment-debtor had no saleable interest—Civil Procedure Code (Act V of 1908) ord r XXI rule 91—Limitation—Limitation Act (IX of 1908) Sch I Arts 166 181* After a tenure has been sold in execution of a decree for arrears of rent the decree holder cannot again put up a portion of the tenure to sale in execution of a decree for previously accrued arrears of rent on the ground that such rent constituted a first charge on the tenure When therefore it did not appear that the tenure was sold at the first sale subject to a charge for previously accrued arrears of rent *Held* that a subsequent sale in execution of a decree for such rents passed no title and the sale was liable to be set aside on the ground that the judgment debtor had no saleable interest The second sale took place when the first sale had been set aside but in consequence of an appeal the sale was ultimately confirmed *Held* that the right of the purchaser at the second sale to apply for setting aside the sale did not accrue till the first sale was confirmed and limitation therefore ran under Art 181 of Sch I of the Limitation Act 1908 from such date and not from the date of sale GOPAL SARAN NARAIN SINGH v SHEIKH MD AHSAN (1910)

14 C W N 1008

——— *Bengal Tenancy Act (VIII of 1885) ss 163 164 165—Decree for rent against tenant in possession if one under Bengal Tenancy Act—Irregular sale effect of—Tenure if passes by sale not held strictly in accordance with the provisions of the Act—Right title and interest in sale proclamation if may include the whole tenure—Mortgagee who purchases mortgage property in execution if may fall back on mortgage to protect it against purchaser at rent sale* A decree obtained in a suit for rent against a person in possession who is also the legal representative of the last registered tenant is a decree for rent within the meaning of the Bengal Tenancy Act Where a tenure was sold in execution of a decree for rent but on the first day the bidding did not come up to the decretal amount and the property was sold notwithstanding without any fresh proclamation and sale under s 165 *Held* that as the sale could not in the circumstances be under s 164 it was not a sale under the Bengal Tenancy Act and did not operate to transfer more than the right title and interest of the judgment debtor The special and stringent provisions of the Bengal Tenancy Act relating to sales is part of a public policy intended for the benefit of all parties concerned If the landlord wants special results to follow from it under the Act he must proceed strictly in accordance with its provisions Where a mortgagee of a tenure gets a decree and purchases the mortgaged tenure at a sale in execution of his mortgage decree, and the tenure is subsequently sold again in execution of a rent decree against the original tenant it is open to the mortgagor to fall back on his mortgage as a shield against the purchaser under the rent sale when that sale is not free from incumbrances *Lakhoy Kumar* v *Lejoy Chand I L R 29 Calc 813* not followed *Bhawani Koer* v *Mathura Prosad 7 C L J 120* referred to BAN BEHARI KAPUR v KHETTERPAL SINHA ROY (1911)

16 C W N 259

——— *Co sharer landlords—Separate decrees for rent for the same period—Sale of the tenure in satisfaction of one of the decrees—Subsequent sale of the same tenure in execution of the other decree if permissible—First charge—Priority* Where two co sharer landlords obtained separate decrees for rent for the same period (each making in his own suit his co sharer a party) and the tenure was sold in satisfaction of the decree obtained by one of them *Held* that the other co sharer landlord could not execute his decree by sale of the same tenure after it passed into the hands of the auction purchaser and all that he was

was

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 52—*contd*

the mere fact that boundaries of the land are mentioned in the *kabuliyat* does not exclude the operation of s [illegible] Bengal Tenancy Act In settling additional rent for increased area it is open to the Settlement Officer in consideration of possible errors in the original measurement to allow the enhancement at a *somewhat reduced* rate TUKHI NARAIN SERWOJI *v* SRI RAM CHANDRA BHUIYA (1911) **15 C W N 921**

——— *Landlord and tenant—Encroachment by tenant—Adverse possession for over twelve years—Tenant if bound to pay additional rent* A tenant is entitled to hold *that* land of his landlord upon which he has encroached as part of his original holding if more than 12 years before the landlord's suit he denied the landlord's right to any separate rent from him in respect of the land and has forcibly in assertion of his claim appropriated the entire crop and continued in possession The landlords apart from s 52 of the Bengal Tenancy Act cannot recover additional rents in respect of such land *Ishan Chandra Mitter v Raja Ramranjan Chakraverty* 2 *C L J* 125 and *Lakhi Singh v Sudhram Ahir* 8 *C L J* 557 referred to TARAN CHANDRA GHOSE *v* GANENDRA NATH ROY (1912) **16 C W N 235**

——— [illegible] *[illegible]tance nent of rent on* arrears of rent against a te[illegible] non transferable occupancy holding reco[illegible] the purchaser of the holding who had bought it long before the institution of the suit for rent as his tenant without any liability being taken by the purchaser for the decretal debt *Held* that the sale in execution of the decree for arrears of rent did not affect the interest of the previous purchaser from the tenant that the sale could not be regarded as a rent sale and the old tenancy having come to an end the landlord could not put up to sale the holding which had passed to the purchaser as the holding of the old tenant GIRISH CHANDRA MONDAL *v* NARENDRA NATH HALDAR (1919) **23 C W N 654**

——— **ss 65 66 148 (h)—**

See LANDLORD AND TENANT **I L R 41 Calc 926**

——— **ss 65 167**—*Rent sale of holding after mortgage decree but before mortgage sale —Purchaser at rent sale if must annul mortgage incumbrance—Priority* Where between the date of a decree obtained by a mortgagee of an occupancy holding and purchase in execution thereof by the mortgagee the holding was sold in execution of the landlord's decree for rent *Held* that the mortgage incumbrance subsisted at the date of the rent sale and not having been annulled under s 167 of the Bengal Tenancy Act within the time allowed by the section the purchaser at the rent sale could not avoid it but was entitled to redeem the mortgagee purchaser The purchaser at a rent sale who does not annul a subsisting mortgage incumbrance upon the holding does not acquire priority over the purchaser at a subsequent sale in execution of the decree obtained on the mortgage by reason of the rent being a first charge upon the holding under s 65 of the Bengal

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——— s 53—*contd*

due of it falling due low for rent—Landlord if can impose obligation on tenant to pay monthly kist—Interest on arrears—Applicability of the Interest Act Where there was a contract between the landlord and the tenant executed after the passing of the Bengal Tenancy Act whereby provision was made for payment of the rent in monthly *kists* and also for payment of interest on each *kist* from the time when it fell due and the interest so calculated exceeded 12½ per cent per annum *Held* that the landlord was entitled to impose on the tenant an obligation to pay the monthly *kists* The word of s 53 of the Bengal Tenancy Act indicate that there may be an agreement in modification of the provision for four equal instalments But having regard to s 178 sub s 3 cl (*h*) of the Bengal Tenancy Act the landlord was entitled only to the interest secured to him by s 67 of the Bengal Tenancy Act the Interest Act not being applicable *Hemanta Kumari v Jagadindra Nath* I L R [illegible] *Calc* [illegible] distinguished MONOHAR MUKERJEE *v* KHETTRA NATH SAHU (1913) **17 C W N 820**

——— **ss 54 61 62, 105—**

See s [illegible] **25 C W N 209**

See DEPOSIT IN COURT **I L R 41 Calc 1000**

——— **ss 55 and 66**—*Ejectment for arrears—Estoppel* A landlord receiving rent for one year [illegible] for rent due on previous year KALA NATH S[illegible] [illegible]T SINGH [illegible]**C W N 104**

——— **ss 67 and [illegible]**—*security for payment of rent—*[illegible] and 178 (3) (*h*) of the Bengal Tenan[illegible] 465 apply only to contracts between landlo[illegible] tenants as to the terms upon which the lat[illegible] shall hold their tenancy A mortgage bond executed by tenants as security for the payment of rent which has fallen into arrears and which provides for a higher rate of interest than the rate laid down in s 67 is not in contravention of s 178 (3) (*h*) and is not therefore void A suit on such a bond is not a suit for rent within the meaning of s 67 RAI HARI PRASAD LAL *v* DAMPI SINGH **2 Pat L J 367**

——— **ss 67 179**—*Permanent mokurari lease—Stipulation to pay interest on arrears of rent at 75 per cent with full damages by way of penalty—Contract Act (IX of 1872) s 74—Mere high rate if sufficient to demand interference—Facts and circumstances to be proved—Position of tenant under permanent lease and a debtor compared—Onus of proof* Per N R CHATTERJEA J—S 179 of the Bengal Tenancy Act does not exclude the consideration of the question whether a stipulation in a permanent *mokurari* lease to pay interest at a higher rate than that provided by s 67 is affected by provisions of law other than the Bengal Tenancy Act and although Courts should not lightly interfere with contracts between landlords and tenants in cases of permanent *mokurari* leases, a stipulation for payment of interest on arrears of rent at rate which is unconscionable should not be allowed to be enforced even in such cases No hard and fast rule can be laid down as to

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——— s 61—*contd*

rent who happens to be in the village office can receive it and give a valid acquittance But because a man happens to be the manager of the zamindari he cannot be compelled to take rent tendered wherever he may happen to be and at whatever time or place it may be offered Nor can he be asked to take a small proportion of the rent due as the whole amount SATI PROSAD GARGA v MONMOTHA NATH KAR (1913)

18 C W N 84

——— ss 61 62, Sch III, Art 2 (a)—*Rent payable partly in cash and partly in kind and in lieu of latter a fixed sum—Deposit by tenant—Amount deposited less than amount due—Suit by landlord to recover rent—Limitation* The provisions of ss 61 and 62 of the Bengal Tenancy Act taken as a whole support the view that the period of limitation prescribed in Art 2 cl (a) of Sch III of the Bengal Tenancy Act is applicable to a suit for rent wherever rent has been deposited under s 61 even though the allegation of the tenant that what he had deposited was the full amount due at the time may ultimately prove to be incorrect *Sridhur Roy* v *Rameswar Singh I L R 15 Cal 166* and *Sati Prosad Garga* v *Monmotha Nath Kar 18 C W N 84* considered No deposit can be made of rent in kind under s 61 of the Bengal Tenancy Act But where the parties have agreed that upon failure to deliver the rent payable in kind a fixed sum is to be paid in lieu thereof the entire rent is payable in cash and s 61 is applicable to such a case *After Morole* v *Prosunna Kumar Ghosh 12 C [illegible] 619 15 C W N 249* referred [illegible] s 69 of the DEY v UMA KANTA D[illegible] the landlord does not [illegible] ue share of the crops the remedy [illegible] ts is by way of an application to the [illegible]ctor but if it is found that the tenants have actually appropriated all the crops they are plainly liable to indemnify the landlord KAMALESHWARI PERSHAD SINGH v KANHARI SINGH (1913)

17 C W N 1159

——— ss 69 70—

See APPRAISEMENT

I L R 48 Calc 1086

See SANCTION FOR PROSECUTION

I L R 45 Calc 336

——— *Batai System*—Omission to give the landlord notice under s 70 ( ) is not a mere irregularity but is an illegality which vitiates the whole proceeding An *Amin* appointed to appraise or divide the crops is not entitled to sell them without an order Where lands were held on the *batai* system and the Collector ordered the money to be deposited in the Treasury without any direction to pay it to any one *Held* that (1) an order having finality and enforcible as a decree is as necessary in case of *ba a* a of appraisement ( ) an order merely directing the deposit of sale proceeds of crops in the Treasury without direction to pay them to anyone i not an order having finality or enforcible as a decree within the meaning of s 70 (5) SURAJ PRA AD MAHAJAN v KARU SINGH

3 Pat L. J 325

——— *Order under s 0 (5) finality of—Execution of order—Limitation—Exclusion of time during which landlord was prevented*

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 65—*contd*

and the sale was liable to be set aside on the ground that the judgment debtor had no saleable interest The second sale took place when the first sale had been set aside but in consequence of an appeal the sale was ultimately confirmed *Held* that the right of the purchaser at the second sale to apply for setting aside the sale did not accrue till the first sale was confirmed and limitation therefore ran under Art 181 of Sch I of the Limitation Act 1908 from such date and not from the date of sale GOPAL SARAN NARAIN SINGH v SHEIKH MD AHSAN (1910)

14 C W N 1098

——— *Bengal Tenancy Act (VIII of 1885) ss 163 164 165—Decree for rent against tenant in possession if one under Bengal Tenancy Act—Irregular sale effect of—Tenure if passes by sale not held strictly in accordance with the provisions of the Act— Right title and interest in sale proclamation if may include the whole tenure—Mortgagee who purchases mortgage property in execution if may fall back on mortgage to protect it against purchaser at rent sale* A decree obtained in a suit for rent against a person in possession who is also the legal representative of the last registered tenant is a decree for rent within the meaning of the Bengal Tenancy Act Where a tenure was sold in execution of a decree for rent but on the first day the bidding did not come up to the decretal [illegible] *Court for execution* was sold [illegible] expressly permits either the landlord or tenant to apply to the executing Court for execution of an order made under that section but this procedure should not be encouraged further than the law allows BALUK CHAND LAL v NATHUNI SINGH

2 Pat L J 24

——— *Order under s 70 finality of—Ground for impugning the order* A dispute as to whether the crops grown on a holding are to be appraised or divided is a dispute which the Sub Divisional Officer is competent to determine under s 70 (5) of the Bengal Tenancy Act 1885 *Per* POE J —It is open to the Civil Courts to inquire whether in the circumstances of the holding as admitted or proved in proceedings under ss 69 and 70 of the Bengal Tenancy Act 1885 the Collector had jurisdiction to take action under those sections Where the question whether a holding is a *batai* or a *danabandi* holding has been investigated by the Collector in a proceeding under ss 69 and 70 his decision is final for the purposes of such proceedings *Quære* Whether if it was admitted that the holding was a *batai* holding an order for appraisement would be without jurisdiction ? THAKUR SINGH v PARDIT SINGH

2 Pat L J 183

——— ss 69 75 and 40—Where there is a dispute as to the share of a landlord and tenant the Revenue Court is empowered to decide the dispute or refer it to a Civil Court BHAJAN AHIR v MUSSAMMAT GANGE SWAR KUAR

5 Pat L J 76

——— s 71—*Proof of removal of crops by tenant —The ft—Penal Code (Act XLV of 1860) s 379—Value of crops taken above Rs 50—Summary trial* After a summary trial a landlord was convicted under s 379 of the Indian Penal Code of

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——— s 71—*contd*

having cut and taken away a part of the paddy crops belonging to his tenant The landlord and tenant were each entitled to half of the crops and the value of the paddy stolen was Rs 88 *Held* that under s 71 of the Bengal Tenancy Act 1885 the tenant was entitled to possession of the whole of the crop until it was divided and that therefore the landlord could not be tried summarily since the value of the crop was more than Rs 50 SHEIKH HABOO v SHEIKH KARIMAN 1 Pat. L J 230

———sub s (4)—*Scope of—Wrongful removal of crops by tenant—Penal Code (Act XLV of 1860) s 421* S 71 (4) of the Bengal Tenancy Act 1885 merely provides the Courts with a definite rule as to the value of crops wrongly removed by the tenant If the tenant in removing the crops of a field which he holds under the *batai* system acts dishonestly he is liable to be convicted under s 421 of the Penal Code KULDIP PANDEY v KING EMPEROR 1 Pat L J 353

——— s 74—

See ABWAB I L R 40 Calc 806

See PESHKOSH I L R 45 Calc 866

——— ss 74 179—*Written lease—A definite amount over and above amount stated as rent but forming part of consideration if abwab—High rate of interest and damages in mokurari lease if penalty—Contract Act (IX of 1872) s 74* The question whether any particular item is or is not an *abwab* must depend upon the construction of the contract of lease in each case and the question in each case is whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease The question whether in a case where there is a written engagement specified sum which is neither indefinite nor arbitrary and which is agreed upon to be paid as part of the rent in the lease creating the tenancy can be recovered was not referred to the Full Bench in *Radha Prosad Singh v Bal Kower Koeri I L R 17 Calc 726* A stipulation in a *kabuliyat* creating a *mokurari* lease to pay interest at 75 per cent on arrears of rent and damages at 300 per cent is intended to secure punctual payment of rent rather than represent the loss to which the landlord is put for the non payment of the rent Being by way of penalty such a stipulation comes under s 74 of the Contract Act and is also unconscionable UPENDRA LAL GUPTA v MEHERAJ BIBI (1916) 21 C W N 108

——— s 75—

See s 69 5 Pat L J 76

——— ss 76 and 155—*Improvement—execution of a dwelling house by tenants* The clauses which specify what constitutes improvements within the meaning of s 76 of the Bengal Tenancy Act 1885 are not exhaustive A tenant is entitled to effect on his holding any improvement which would add to the value of the holding The mere fact that the tenant has a house in an adjacent *mouza* does not deprive him of his right to erect upon his occupancy holding another house for the purpose of making a residence for himself and his family MAHADEO PAI v SHEOGULAM MAHTO 2 Pat L J 634

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 88—*Sub division of tenancy—Express consent in writing how established—Rent roll what is jama wasil baki papers if—Road cess return how far evidence of consent* An express consent in writing within the meaning of s 88 of the Bengal Tenancy Act as amended by Act I B C of 1907 means a consent opposed to one which is to be implied from the document produced to prove it *Jama wasil baki* papers which are annual statements of the rents payable and received from a particular estate are not landlord s rent roll within the meaning of the proviso to the section. Road cess returns filed by a co sharer of the landlord having been produced to prove a sub division of the tenancy within the meaning of s 88 of the Bengal Tenancy Act *Held* that before such a document could be referred to establish express consent in writing it must be proved first that there had been consent in writing and secondly that the consent in writing though sought for could not be produced and therefore must be presumed at any rate against the person who made it The road cess return could not be taken in evidence as principal evidence to prove consent in writing which apparently did not exist RAJANI SUNDARI DASSI v HARA SUNDARI DASSI (1917) 22 C W N 693

——— ss 83 and 85—

See s 11 25 C W N 9

——— s 85—

See s 49 20 C W N 256

See LANDLORD AND TENANT I L R 43 Calc 164

See TITLE I L R 44 Calc 771

1 ——— *Lease exceeding nine years—Under raiyat right of to sue for recovery of possession on declaration of title—Possession* Although an under raiyat s lease was in excess of what a raiyat is entitled to grant to an under raiyat under the provisions of s 85 of the Bengal Tenancy Act yet if the under raiyat was in possession of the property on the basis of the *kabuliyat* he has sufficient interest in the property to recover the land GOUR MONDAL v BALARAM MANJI (1917) 22 C W N 61

2 ——— An agreement by a raiyat to grant a sub lease to an under raiyat after the expiry of a lease is valid ALI MAHAMMAD BEPARI v NAYAN RAJAH BHUIYA (1903) 16 C W N 620

3 ——— A permanent sub lease by a riyat is binding as between the parties to the contract *Basaratullah v Kasirunnessa 11 C W N 190* doubted Where an under raiyati lease provided that the tenant was at no time to be ejected from the land but that after the expiry of nine years a fresh settlement would be made and until it was made the conditions of the *kabuliyat* were to remain in force *Held* that the lease was intended to be a permanent lease ABDUL KARIM PATWARI v ABDUL RAHAMAN (1911) 16 C W N 618

4 ——— *Registered mokurari under raiyati lease—Under raiyats dispossessed by strangers—Suit to recover possession—Proof of title if necessary* Where certain persons in whose favour an occupancy raiyat had executed

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 85—*contd*

a registered *mokurari pattah* were in possession of the holding as tenants of the occupancy raiyat when they were dispossessed by the defendants who had no title to the land *Held* that assuming that the permanent *mokurari* under *raiyati* lease was void under s 85 of the Bengal Tenancy Act it was open to them to prove their tenancy *aliunde* *Lal Surabh Narain* v *Catherine Sophia 1 C W N 248* *Fazel Sheikh* v *Keramuddi Sheikh 6 C W N 916* followed That their suit to recover possession of the holding from the defendants who were trespassers should succeed upon proof of their bare possession when dispossessed *Premraj* v *Narayan I L R 6 Bom 215* followed BANKA BEHARY CHRISTIAN v RAJ CHANDRA PAL (1909) **14 C W N 141**

5 ——— *Permanent under raiyati lease—Raiyat's holding purchase of by landlord in rent decree—Suit for khas possession—ss 167 49 22—Notice* Where a permanent lease was given to an under raiyat by a registered instrument and the landlord purchased the holding of the raiyat in execution of a decree for arrears of rent and sued to eject the under raiyat *Held* that the under raiyati lease was invalid under the provisions of sub (2) of s 85 of the Bengal Tenancy Act and that the landlord was entitled to take *khas* possession by ejecting such under raiyat without annulling the same under s 167 and without giving a notice in the terms of s 49 of the Bengal Tenancy Act *Held* also that the rights of the under raiyat were not protected by sub s (1) of s 22 of the Bengal Tenancy Act *Peary Mohun Mookerjee* v *Badul Chandra I L R 28 Cal 205* followed GANGADHAR MONDAL v RAJENDRANATH GHOSE (1913) **17 C W N 860**

6 ——— *Under raiyati lease for term exceeding 9 years erroneously registered if passes title—Previous possession as tenant not claimed—Oral evidence if admissible to prove tenancy—Evidence Act (I of 1872) s 91* A sub lease created by a raiyat for a term exceeding nine years and erroneously registered in contravention of the provisions of s 85 cl (2) of the Bengal Tenancy Act is not admissible in evidence to prove the tenancy Oral evidence to prove the tenancy in such a case is inadmissible under s 91 of the Evidence Act Where the sub lease registered in contravention of s 85 cl (2) of the Bengal Tenancy Act was the only title on which the grantee relied so that he could not fall back on any prior possession as tenant or otherwise his suit to recover *khas* possession was dismissed *Lala Sorabh Narain Lal* v *Catherine Sophia 1 C W N 248* *Manick Borai* v *Bani Charan Mandal 13 C L J 649* referred to Recognition of the plaintiff by the superior landlord as tenant was in the circumstances of no avail to him JARIP KHAN v DORFA BEWA (1912) **17 C W N 59**

7 ——— *Permanent under raiyati lease registered effect of—Registration Act (XVI of 1908) s 49—Registration in contravention of law effect of* *Held* upon the view of authorities, that a permanent sub lease by a raiyat does not confer any title on the under raiyat and is inadmissible to prove the tenancy even when registered as registration in contravention of the statutory prohibition contained in sub s (2) of s 85 of the Bengal Tenancy Act is of no effect *Jarip Khan* v *Dorfa Bewa 17 C W N 59* followed TELAM PRAMANIK v ABU SHEIKH (1913) **17 C W N 468**

8 ——— *Under raiyat sub lease by—Permanent lease by under raiyat if invalid—Application by analogy of statutory provision to cases outside it—Permanent lease described as on for nine years to meet objection of Registering Officer* S 85 of the Bengal Tenancy Act has no application to a permanent lease created by an under raiyat in favour of a sub lessee nor can the provisions of that section be applied to such a case by analogy *Ram Chunder Dutt* v *Jughes Chunder Dutt 19 W R 353* referred to The leases in this case were held to be permanent leases GURUDAS DAS v KALI DAS CHANGA (1914) **18 C W N 828**

9 ——— *Under raiyati lease for 9 years with covenant of renewal if valid—Ejectment suit for at termination of term* Notwithstanding the provisions of s 85 of the Bengal Tenancy Act a stipulation in a lease granted by a raiyat to an under raiyat that after the expiry of the nine years for which the lease was granted the raiyat would grant the under raiyat a fresh lease of the land is valid *Ali Mohamed* v *Nayan Rajah 15 C L J 122* followed *Abdul Karim* v *Abdul Rahaman 15 C L J 672 s c 16 C W N 618* referred to When there is a covenant for renewal if the option does not state the terms of the renewal the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself If it is possible to interpret an agreement between the parties so as to make it operative effect should be given to it and the contract should not be pronounced unenforceable *Held* that the only reasonable interpretation of the convenant in this case was that the parties agreed that the lease would be renewed on the same terms and for the same period as the original lease LAVI MIA v MUHAMMAD EASIN MEA (1915) **20 C W N 948**

10 ——— *If excludes operation of rules of equity in the relation of landlord and tenant* The Bengal Tenancy Act is not a complete Code even in respect of the law of landlord and tenant much less does it profess to incorporate the general principles of the law of contract and the doctrines of equity jurisprudence in so far as they may have to be applied in the determination of disputes between landlords and tenants BAMANDAS BHATTACHARYYA v NILMADHAB SAHA (1916) **20 C W N 1340**

11 ——— *Under raiyati lease for a term exceeding nine years if void—Objection by trespasser—Oral evidence and admission by the raiyat if admissible to prove tenancy—Prior possession as tenant—Putra poutrad kramay meaning of* Where an under raiyat by virtue of a registered sub lease created in his favour by a raiyat for a term described as *putra poutradikramay* sued the defendants for ejectment on the ground that they were trespassers and he also sought to prove his tenancy irrespective of the lease by an admission of the raiyat that he nted the lease to the

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

———— s 85—*concld*

plaintiff and took *selami* from him and that plaintiff obtained possession of the remainder of the land covered by the lease *Held* that plaintiff's lease was for a term exceeding nine years and as such it was not admissible in evidence and did not create any title in the plaintiff *Janip Khan v Dorfa Bewa 17 C W N 53* followed *Held* that the admission of the raiyat being evidence relating to the transaction of the lease in respect of which there was a document was not admissible in evidence and possession by plaintiff of other land covered by the lease even if proved was not sufficient to prove plaintiff's tenancy in the land in suit *Held* further that having regard to the expression *putra po tra dikramay* the *patta* granted to the plaintiff was perpetual lease KARTICK MANDAL v BAMA CHARAN MANDAL (1915) **20 C W N 182**

———— *Lease granted by raiyat who represents himself to be a tenure holder or raiyat at fixed rate effect of—Lessor and lessee collusion between to evade Statute effect of—Estoppel* Where a lease purporting to be of a permanent character is granted on the face of the document by a raiyat (not being a raiyat holding at a fixed rate) to an under raiyat the lease is not operative as a permanent lease between the raiyat and the under raiyat—Registration of such a lease being in violation of the statutory prohibition contained in s 85 (2) of the Bengal Tenancy Act is null and void in law But as the tenancy of an under raiyat may be created without a written lease the grantee in such a case is an under raiyat who holds otherwise than under a written lease and his tenancy is liable to be terminated in the manner provided by s 49 (b) of the Bengal Tenancy Act Till the tenancy has been terminated the grantor cannot treat him as a trespasser Where the lease purporting to be of a permanent character is granted by a person who on the face of the document professes to be a higher status than that of a raiyat (for example that of a tenure holder or a raiyat holding at a fixed rate) the grantee when his title as permanent lessee is challenged by his grantor may invoke the aid of the doctrine of estoppel and plead that the grantor cannot be permitted to prove the falsity of the recitals in the document (on the faith of which he took the lease) so as to enable him to derogate from his grant Where the lease purporting to be of a permanent character is granted by a person who on the face of the document professes to have a higher status than that of a raiyat (for example that of a tenure holder or a raiyat holding at a fixed rate) and the grantee invokes the aid of the doctrine by Estoppel in answer to a challenge of his title as permanent lessee by his grantor *Quære* Whether such plea may be defeated by the grantor on proof that they had conspired by false recitals to evade the provisions of the statute CHANDRAKANTA NATH v AMJAD ALI HAZI (F B) **25 C W N 4**

———— ss 85 159 161—

See APPEAL **I L R 43 Calc 178**

———— s 86—

See s 23 **25 C W N 717**

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

———— s 86—*contd*

See RAIYATI HOLDING **I L R 47 Calc 129**

See RENT **I L R 47 Calc 133**

1 ———— *Sale of part of a holding if an incumbrance* An incumbrance must imply a limitation of the rights of the tenant and not a total extinction of them A sale of a portion of a non transferable occupancy holding is not an incumbrance within the meaning of s 86 sub ss (6) and (7) of the Bengal Tenancy Act *Jogeshwar Mazumdar v Abed Mahomed 3 C W N 13* distinguished TAMIZUDDIN KHAN v KHODA NAWAZ KHAN (1909) **14 C W N 229**

2 ———— *Non transferable holding transfer of portion of—Collusive surrender by transferor to landlord—Landlord if may eject transferee* Where after transferring a portion a raiyat surrenders the whole of his holding to the landlord *Held* that if the surrender be collusive the tenancy subsists and so long as the tenancy subsists the landlord is not entitled to eject the transferee of a portion of the holding *Quære* Whether a purchaser of a portion of a holding is not protected under sub s (6) of s 86 Bengal Tenancy Act *Tamizuddin Khan v Khoda Nawa Khan 14 C W N 229* commented on *Gagan Chandra Choudhury v Abel Chand Saha 17 C W N 698* distinguished ASKAR ALI v GOUPEE MOHAN CHOWDHURY (1913) **18 C W N 601**

3 ———— *Non transferable raiyati holding—Sale of a portion by raiyat—Subsequent surrender of same by him—Landlord if may eject transferee—Fraud—Knowledge* Per TEUNON J —Irrespective of fraud collusion or knowledge a landlord who accepts from a raiyat the surrender of a portion of the holding after the same had been sold by him is not entitled to eject the transferee The raiyat's rights in the portion having been extinguished by the surrender or grant to the landlord the latter took nothing Sale of a part of a holding may be reasonably argued to be an incumbrance or limitation of the raiyat's rights in the whole and should therefore operate to prevent a surrender whether of the whole or the part *Per* RICHARDSON J (*contra*) On the authorities sale of a part of a raiyati holding is not an incumbrance within the meaning of cl (6) of s 86 of the Bengal Tenancy Act On the authorities the landlord (apart from fraud) has the right to re enter if the whole or a part of a non transferable raiyati holding be relinquished or surrendered by the raiyat after the same has been sold by him DASTUR ALI v RAM KUMAR GOPE (1918) **22 C W N 972**

4 ———— *Vendee of portion of non transferable raiyati holding if may be evicted by landlord in whose favour vendor surrenders the portion after sale* A raiyat who has sold a portion of his non transferable occupancy holding has parted with all his rights in the portion in favour of the purchaser and has no interest in it to surrender Moreover surrender may be looked upon as a transfer or grant and whatever binds the raiyat binds the landlord in whose favour he surrenders The landlord cannot on accepting a surrender of the part of the holding sold by the raiyat sue to evict the transferee

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———— s 86—*contd*

ANANDA MOHAN ROY CHOWDHURY v GURUDAYAL SAHA (191) 22 C W N 965

5 ———— *Sale of portion of non transferable raiyati holding—Surrender by vendor of area and re settlement taken by him of rest—Implied surrender—Landlord if may evict purchaser* Where a raiyat expressly surrendered a part of his non transferable holding which prior to such surrender he had sold and took a new settlement of the remainder *Held* that this operated as a surrender of the whole holding (express as to a portion and implied as to the rest) and as no fraud on the part of the landlord was established he was entitled to evict the purchaser from the portion sold TAMIJ MUNSHI v PROJENDRA KISHORE ROY CHOWDHURY (1918) 22 C W N 967

6 ———— *Surrender by occupancy raiyat of portion of holding sold by him—Landlord if may eject vendee* An occupancy raiyat having sold a portion of his holding surrendered his tenancy in respect of the portion sold to his landlord who thereupon sued his vendee for khas possession *Held* that the vendor having transferred a portion of the holding had nothing left in him in that portion to surrender *Ananda Mohan Roy Chowdhury v Gurudayal Saha* 2 C W N 965 (191) followed *Sheikh Tamij Munshi v Brojendra Kishore Roy Choudhury* 2 C W N 96 (1915) distinguished SHEIKH DASTUR ALI v PAI KUMAR GOPE (1919) 24 C W N 571

7 ———— *Surrender of portion of occupancy holding sold by tenant if binds transferee* A surrender by a raiyat of a part of his holding which he has already sold to another is not binding on the transferee *Ramoni Mohan Pay v Sheikh Kalimuddi* 17 C W N 1101 (1912) *Sheikh Tamij Munshi v Brojendra Kishore Roy Choudhury* 2 C W N 967 (1918) *Ananda Mohan Roy Choudhury v Gurudayal Saha* 22 C W N 965 (191) and *Dastur Ali v Ram Kumar* 24 C W N 5 1 (1919) considered Apart from authority a person who has parted with his interest in property cannot deal with that interest by surrendering it in favour of the landlord and he cannot confer upon the landlord a higher right than he could have passed to any other person by assignment It would be different in the case of the surrender of the entire holding because then the tenancy would cease to exist and the landlord would be in a position to re enter on the land SAILESH CHANDRA BOSE v UMESH CHANDRA RUDRA (1919) 24 C W N 573

8 ———— *Non transferable occupancy holding transfer of—Recognition what amounts to—Rent receipts granted by patwari whether amount to recognition of transfer* K the occupancy holder of 8 bighas of land sold 5 bighas of his holding and put the purchaser in possession thereof K having died without heirs the landlord took possession of the 3 bighas which he had not parted with and let the other 5 bighas to two other persons In a suit for possession by the latter against the purchaser the latter admitted that there was no right of transfer in the village but pleaded that (1) certain rent receipts and (2) a letter from one patwari to another stating that the rent would be paid by him (the defendant) amounted to a recognition of the transfer *Held* that these documents did not amount to a recognition of the transfer *Per* CHAMIER *C J*—It is not within the scope of the authority of a *patwari* or rent collector to consent on behalf of his master to the transfer of an occupancy holding That is an important act to be performed only by a person having at least some of the powers of a manager The onus does not lie on the landlord to show that his *patwari* had no authority to consent to a transfer *Per* KINGSFORD *J*—The transfer of 5 bighas out of 8 bighas amounted to a division of a holding and a distribution of the rent which under s 86 of the Bengal Tenancy Act 1885 was not binding upon the landlord because not made with his express consent in writing A W N WYATT v SEOGOBIND SAHU 1 Pat L J 414

9 ———— *Occupancy raiyat transferring a portion of the holding if may destroy the transferee s title by subsequent surrender of the whole or that portion of the holding—Equitable bar to such action—Bengal Tenancy Act if excludes application of equitable doctrines—Donee of power if may derogate from grant by its exercise* An occupancy raiyat who has transferred part of his non transferable holding is not competent to surrender to his landlord the portion so transferred either by surrender of that portion alone or by surrender of the whole inclusive of such portion This follows from the principle which is of wide application that no one is permitted to defeat or derogate from his own grant a principle the application of which is not excluded by the terms of s 86 of the Bengal Tenancy Act since that Act does not purport to be a complete code even in respect of the law of landlord and tenant and does not profess to incorporate the general principles of the law of contract and the doctrine of equity jurisprudence in so far as they may have to be applied in the determination of disputes between landlord and tenant KRIPA SINDHU v *Annada Surdari* I L R 35 Calc 34 s c 11 C W N 983 (F B) (1907) referred to SYED MOHSENUDDIN v BAIKUNTHA CHANDRA SUTRADHAR (F B) 25 C W N 22

10 ———— *Surrender of raiyati interest by Hindu widow whether effects merger—Re letting to new tenant effect of* A Hindu widow has not an unqualified right or power to surrender the entire *raiyati* interest in a *raiyati* holding to which she succeeds as heir of her husband in the absence of proof of legal necessity or pious purpose If the power of surrender conferred by s 86 of the Bengal Tenancy Act 1885 is applicable to a Hindu widow who for the time being may be a *raiyat* of a holding such power of surrender can only operate to effect the interest which she has in the *raiyati* holding and no more A Hindu widow may without necessity and irrespective of the provision of the Bengal Tenancy Act as to the power of surrender transfer or assign her limited interest in a part of the property to which she succeeds as a Hindu widow to a stranger and such assignment or transfer is valid during the continuance of the widow s life Such a contract is not void but voidable and until avoided or set aside it is binding and operative as against the widow at the instance of such stranger or trans

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 86—*concld*

force The *surrender* to her landlord by a Hindu widow *of her entire interest in a raiyati* holding of which she is for the time being in occupation if it forms merely a part of the estate to which she succeeds is a transfer of her limited interest in such holding which the law recognises Apart from the act the question of merger depends on intention JAMNA PRASAD SINGH v BASDEO SINGH 4 Pat L J 548

——— ss 86 (6) 88—*Surrender of holding without the consent of mortgagee of portion of holding—Suit to eject mortgagee after settlement of remaining land with another—Sub division of holding* The provision of s 86 (6) of the Bengal Tenancy Act embodies within certain bounds the principle that the lessee has no power to effect by surrender anything he could not do by assignment to a third person *Walter v Yalden [1902] 2 K B 304* referred to A surrender of a *raiyati* holding by the *raiyat* without the consent of a usufructuary mortgagee of a portion of the holding does not entitle the landlord to eject the mortgagee and where the landlord after such surrender himself settled the rest of the land with another the sub division of the holding was effected by the landlord and so did not offend against s 88 RAGHUNATH SINGH v WILLIAM COX (1914) 19 C W N 268

——— s 87—

See OCCUPANCY HOLDING I L R 42 Calc 172

——— *If exhaustive—Abandonment by tenant* S 87 of the Bengal Tenancy Act is not exhaustive and the landlord may proceed by suit if he can prove that the facts and circumstances of the case lead to an inference of abandonment MATOOKDHARI SHUKUL v JUGDIP NARAIN SINGH (1914) 19 C W N 1319

——— Mere execution of a usufructuary mortgage is not an abandonment but coupled with other facts might be MONOHARPAL v ANANTHA MOYEE DASYA 17 C W N 802

——— s 88—

See s 86 16 C W N 268

——— The rent roll mentioned therein means a permanent document kept in the estate office of the husband with particulars of tenants and rents and kept up to date. RAJANI SUNDARI DASI v HARI SUNDARI DASI 22 C W N 693

———*Proviso—Sub division of holding with consent of thikadar whether binding on landlord* The consent by a *thikadar* given in good faith for the benefit of the estate to an alteration of the area of the holdings under him and the apportionment of rent upon the new holding is binding upon the landlord MAHMAD NAZIRUL HUSSAIN v CHUNI KAMTI 2 Pat L J 151

——— s 91—*Application for requiring attendance of tenants at measurement of holdings by landlord—One application against several tenants if competent* S 91 of the Bengal Tenancy Act does not contemplate that there should be separate applications under that section by the landlord against each tenant An application by the landlord with reference to the several tenants

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 91—*contd*

having holdings in the land which the zemindar desires to measure is competent under the section HAJI SHAH MOMTAZ HOSSAIN v RAGHU NANDAN SAHU (1909) 14 C W N 231

——— s. 93—

See COMMON MANAGER I L R 43 Calc. 888

——— *Common manager appointment of—Dispute amongst some co sharers as to their shares— Estate meaning of—Opening of separate accounts if bars appointment of manager to whole estate* A dispute between some of the co owners of an estate as to the management of their shares is sufficient for the appointment of a common manager of the estate under s 93 of the Bengal Tenancy Act A dispute as to the terms on which or the person with whom a particular holding or a number of holdings should be settled is a dispute as to the management of the estate though only a part of the estate is involved A dispute as to the boundaries between the common estate of the co owners and another contiguous estate of which one of the co owners of the common estate is the sole proprietor is not a bar to the appointment of a common manager when there are other disputes between the co owners An estate remains a single estate for revenue purposes though separate accounts may have been opened in respect of it SARADINDU RAY v GRISH MOHINI DEBI (1916) 21 C W N 240

——— s 95—

See COMMON MANAGER I L R 44 Calc 800

——— A common manager appointed under s 95 is a public officer within s 2 (17) of the Civil Procedure Code and a notice under s 80 must precede a suit for accounts BENI MADHAB SUKUL v DEB NARAYAN SUKUL 24 C W N 138

——— ss 95 98—

See COMMON MANAGER I L R 40 Calc 150

——— s 98 cl. (3)—*Common manager of representative of proprietors—Suit against common manager if properly framed—Owners not all made defendants within time—Limitation—Limitation Act (XV of 1877) s 22* A common manager under s 98 cl. 3 of the Bengal Tenancy Act is a representative of the proprietors for the purpose of defending a suit as well as for instituting suits Where therefore a suit was brought making the common manager as well as some of the proprietors parties but some of the co proprietors were made parties after the period of limitation allowed by law *Held* that the suit against the common manager was rightly brought and that as the suit as against him was in time it was immaterial whether some of the proprietors were brought on the record out of time CHOUDHRY KIRTIBASH DAS v UMESH CHANDRA DUTT (1911) 16 C W N 96

——— s. 98 (4)—*Common Manager power of—District Judge jurisdiction of* Where subsequent to the appointment of a common manager the title of an alleged co owner being disputed had to be decided by a competent Court *Held*

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 93 ( )—*contd*

that the District Judge under cl (d) of s 93 of the Bengal Tenancy Act had jurisdiction to direct the common manager to retain the disputed share of the rent in his hands till the title of the co owner was adjudicated upon BHABANGANA DEBYA v HORENDRA NARAIN ROY (1919)

17 C W N 445

——— s 99—*Common manager—Application to District Judge for restoration of the management of the estate to the co owners—Common manager if can be made a party to such proceeding* In an application by the co owners under s 99 of the Bengal Tenancy Act for restoration of the management of their estate the common manager is not and cannot be made a party to the proceeding BHAGABATI DEBYA CHAUDHURANI v NILKANTO CHATTERJEE (1919) 24 C W N 927

——— 100 and 120—*Record of Right limitation for alteration of entry* Where there is a definite challenge to the plaintiff s rights by an entry made in the record of rights and where the fact is patent that the plaintiff must have been aware of that challenge to his rights a suit if brought upon that challenge must be brought in accordance with the six years rule of limitation If in spite of the challenge the plaintiff retains possession of the property he is not required to institute any suit upon that challenge but may institute a suit at any time within six years of any new challenge which has the effect of prejudicing his rights RAMJI RAM v LALA SADHU SARAN LAL 2 Pa L J 493

——— s 101 2(a) 3—

See RECORD OF RIGHTS

5 Pat L J 681

See ULTRA VIRES

I L R 40 Calc 123

——— s 102—*Bengal Tenancy Act (VIII of 1885) s 102 as amended by Act III of 1898 s 10 cls (a) (c) ( ) s 106—Trespasser in possession of holding—Name erroneously recorded—Suit to declare him trespasser under s 106—Amending of entry* The terms occupier and occupant in cls (a) and (c) s 102 were presumably added to cover the case indicated in clause (i) added at the same time A purchaser of a non transferable occupancy holding being a trespasser is not entitled to have his name entered in the record of rights under cls (a) or (c) of s 102 of the Bengal Tenancy Act Where such a person s name was recorded *Held* that the Revenue Officer proceeding under s 106 acted properly in adding a note to the effect that he was a trespasser UMEDULLA SARDAR v RAM CHANDRA BHADURI (1910)

14 C W N 812

———*Its amendment in 1898—Effect of s 10—Settlement Officer power of* S 102 of the Bengal Tenancy Act has now been amended by the insertion of a new clause which expressly authorises the Settlement Officer to decide when the land is claimed to be held rent free—whether or not rent is actually paid and if not paid whether or not the occupant is entitled to hold the land without payment of rent and if so entitled under what authority The very circumstance that the Legislature has inserted this clause in s 102 points to the conclusion that the matter provided for thereunder is not covered by the other clause of s 102 The Legislature could not possibly have intended to accord finality to a decision of a dispute by a Settlement Officer which it was beyond the jurisdiction of the Revenue Officer to decide under s 105 of the Bengal Tenancy Act *Radha Kishore v Durganath I L R 32 Calc 16 Doray Dass v Kes ub Prohit 8 C W N 741 Nabin Chandra v Radha Kishore 11 C W N 859 Nikunja Behary v Radha Kishore 22 C L J 143 Secretary of State for India v Nitye Singh I L R 21 Calc 38 Dharani Kanty Lahiri v Gaber Ali Khan I L R 36 Calc 339 Karim Khan v Brojo Nath Das I L R 22 Calc 244* and *Birendra v Bhoirab 9 C L J 295* referred to BIRENDRA KISHORE MANIKYA v KALITARA DEBI (1916) I L R 43 Calc 547

——— ss 102 (b) (e) 104H (3) (g) 158—*Suit under s 104 H—Court if has general jurisdiction to revise rent roll* A suit under s 104H of the Bengal Tenancy Act does not lie on the ground that an enhancement of rent made by reason of a rise in the price of staple food crops should not have been made The special conditions and incidents of the tenancy mentioned in s 104H (3) (g) of the Bengal Tenancy Act refer to the special conditions and incidents mentioned in s 102 (h) whilst the rent payable comes under s 102 (e) of the Act KALI PRASONNO MAITY v SECRETARY OF STATE FOR INDIA (1918)

23 C W N 383

——— s 103A—*Draft record of rights entries in if admissible in evidence in rent suits* Entries in a draft record of rights published under s 103A of the Bengal Tenancy Act are not admissible in evidence in a suit for rent It is not until the record of rights is finally published that the presumption of correctness arises GULAB KOER v RAMRATAN PANDE (1913) 18 C W N 896

——— ss 103A, 105 108A—*Record of rights final publication of—Settlement of fair and equitable rent upheld by Special Judge on appeal—Subsequent amendment of record of rights—Correction of clerical or arithmetical error—Inherent jurisdiction of Court—Application and scope of s 108A* Where after the final publication of the record of rights fair and equitable rent was settled by the Settlement Officer by his order dated the 21st December 1908 in a proceeding under s 105 of the Bengal Tenancy Act an appeal by the tenants against which order was dismissed by the Special Judge on the 9th April 1900 the substantial matter in controversy before the Special Judge being whether the rate of rent settled was or was not equitable no question being raised as to the area and subsequently it being discovered that the area had been erroneously put down the Settlement Officer on the 2nd September 1907 amended the record so as to alter the entry about area and the rent payable *Held* that the amendment of the record was not under s 108A of the Bengal Tenancy Act and was not without jurisdiction. The Settlement Officer acted in the exercise of a power inherent in every Court to correct obvious errors or incidental slips in its own record. *Mellor v Sw re 30 Ch D 239 247 Lowrie v Lees 7 App Cas 19 26 Hu on v Harris [1892] 1 C 54 560* referred to. *Held* further s. 108 [illegible] Bengal Tenancy Act applies only to [illegible] ers especially empowered by the Lo[illegible] t in that behalf. The section has a [illegible] cope than the

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 106—*contd*

3 ——— *Revenue officer if can pass decree for possession—Suit transferred to Civil Court* S 106 of the Bengal Tenancy Act provides for the institution of suits before revenue officers and indicates the points that can be decided by the revenue officer but it does not vest the revenue officer with power to pass a decree for possession Where suits under s 106 of the Bengal Tenancy Act were not heard by the revenue officer but were transferred to a competent Civil Court for trial under the first proviso to that section *Held* that the mere fact that they were transferred to a Court which in its ordinary jurisdiction might have been passed a decree for possession could not widen the permissible scope of these particular suits NILMANI KUMAR *v* KEDAR NATH GHOSH (1913) **17 C W N 750**

4 ——— *Bengal Tenancy Act (VIII of 1885) ss 103B 106 109 111A—Record of rights—Suit to declare entry erroneous and on establishment of title—Maintainability* The failure of a person to institute a suit under s 106 of the Bengal Tenancy Act for correction of an entry in the record of rights is no bar to his instituting a suit in the Civil Court for the establishment of his title *Jogendra Nath v Krishna Pramada 12 C W N 1032 s c I L R 35 Calc 1013* distinguished *Gulab Misser* v *Kalanand Singh 12 C L J 107 s c 14 C W N 884* and *Pandab Dowari v Ananda Kisun 14 C W N 897* referred to MUKTI NATH THAKUR *v* RAMESWAR SINGH (1910) **15 C W N 57**

5 ——— *Suit under proper scope of—Suit for ejectment if can be brought under this section* Where plaintiff not only seeks for the correction of an entry in the record of rights in favour of the defendant but also for recovery of possession from the latter who he concedes has been in possession from before the date of final publication *Held* that these reliefs could not properly be secured by a suit under s 106 Bengal Tenancy Act and the proper course for the plaintiff was to bring a civil suit As between landlords of neighbouring estates the only question that can be raised in a proceeding under s 106 is as to possession at the date of the final publication *Mohunt Padmalab Ramanuj Das* v *Lukhi Rani 10 C W N 8* and *Jogendra Nath Ray v Krishna Pramoda Dasi 12 C W N 1032* referred to KALI SUNDARI DEBYA *v* GIRIJA SANKAR SANYAL (1911) **15 C W N 974**

6 ——— *Person out of possession claiming land recorded as mal to be lakheraj if may sue under s 106—Recovery of possession if may be given in such suit—Declaration of right when out of possession if proper* A person who is not in possession of land which is claimed as rent free at the date of the record of rights cannot have the mere question of his title to hold the land rent free tried in a suit under s 106 of the Bengal Tenancy Act *Padmalav* v *Lakhi Rani 12 C W N 8 Kali Sundari Debya v Girija Sankar Sanyal 15 C W N 974* and *Ram Chandra* v *Nandanananda Gossain 18 C W N 938 19 C L J 197* referred to A plaintiff cannot sue for possession under s 106 of the Bengal Tenancy Act Nor if he is out of possession at the date of the suit can he be given a declaration of his right to get possession. He can obtain complete remedy only in a suit in the Civil Court *Nilmani Kumar v Kedar Nath Ghosh 17 C W N 750* followed The words "or as to any other matter" in s 106 must have reference to the matters indicated in s 102 PRAN KRISHNA SAHA *v* TRAILAKHYA NATH CHOUDHURI (1915) **19 C W N 911**

7 ——— *Suit under—Plaintiff if may pray merely for a negative declaration that entry erroneous—Duty of Settlement Officer to record facts as at date of record of rights* In a suit under s 106 of the Bengal Tenancy Act the plaintiff is not entitled to a declaration that a specific entry in the record of rights is not correct as it stands he must go further and establish in what respect it is incorrect and how it should be amended if he is unable to do this his suit must fail It is the duty of the Settlement Officer to enter in the record of rights the rent payable at the time the record-of rights is in course of preparation When therefore it appears to him that the landlord has evicted the tenant from a portion of the land of his tenancy he is correct in showing that no rent is payable by the tenant to the landlord for the lands recorded as in his possession DWIJENDRONATH RAY CHOWDHURY *v* AFTABUDDI SARDAR (1916) **21 C W N 492**

8 ——— *Scope of enquiry under—Title if can be determined* A Revenue Officer in deciding disputes between rival proprietors under s 106 of the Bengal Tenancy Act is confined to the question of possession alone and is not competent to determine the question of title *Padmalav v Lukhi Rani 12 C W N 8* followed RAM CHANDRA BHANJA *v* NANDANANANDA GOSSAIN (1913) **18 C W N 938**

——— *If bars civil suit to correct entry* S 106 of the Bengal Tenancy Act does not provide the only method of obtaining correction of the entry in a finally published record of rights and a civil suit instituted with that object is maintainable *Jogendra Nath Roy v Krishna Pramoda Dassi I L R 35 Calc 1013 (1908)* not followed MAHOMED AYEJUDDIN MEA *v* PRODYOT KUMAR TAGORE **25 C W N 13**

——— ss. 106 107—*Suit dismissed for default of plaintiff after evidence of defendants taken and examined—Formal decree drawn up—Order of dismissal if appealable— Decision meaning of if excludes dismissal for default* The decision of a Settlement Officer to which the force and effect of a decree of a Civil Court is given by s 107 of the Bengal Tenancy Act does not include an order of dismissal of a suit under s 106 of the Act for default the word "decision" implying an adjudication on the merits Where in such a suit the plaintiff being absent the Court received the evidence of the defendants expressed an opinion on the merits but ultimately made an order of dismissal for default under r 8 of O IX of the Civil Procedure Code *Held* that the order was as it could only have been made under r 8 of O IX. The Court should not have received the defendant s evidence or examined the merits of the case That a formal decree which was unnecessarily drawn up did not alter the nature of the order which was not a decree and was not open to appeal PARBATI *v* TOOLSHI KAPRI (1913) **18 C W N 604**

BENGAL TENANCY ACT (VIII OF 1885)—contd

——— ss 106 and 109A (2)—

See APPEAL I L R 45 Calc 638

——— s 106 AND 109—Where a suit under s 106 of the Bengal Tenancy Act was withdrawn with liberty to bring a fresh suit a suit subsequently brought in the Civil Court for declaration of title and recovery of possession was not barred by the provisions of s 109 of the Bengal Tenancy Act SOROJ KUMAR ACHARJA CHOWDHURY v UMED ALI HOWLADAR 25 C W N 1022

——— ss 106 and 111—

See RECORD OF RIGHTS 3 Pat L J 361

See s 105 24 C W N 225

See s 106 18 C W N 604

——— s 107—

See s 105 6 Pat L J 585

See RENT I L R 38 Calc 278

See SUIT I L R 40 Calc 478

——— s 108—

See s 105

See LANDLORD AND TENANT I L R 37 Calc 449

——— 109—

See s 30 1 Pat L J 409

See s 40 I L R 45 Calc 769

See Enhancement of Rent 2 Pat L J 574

See SUIT I L R 40 Calc 478

———*Its scope and operation* To attract the operation of s 109 of the Bengal Tenancy Act it is essential to establish that the civil suit has for its subject a matter which has already formed the subject of an application under s 105 The introduction of s 105A has not altered the scope of s 109 which must be construed on the same lines as before the introduction of s 105A It cannot be held under s 109 that a matter has been the subject of an application under s 105 whenever it might if the defendant had so chosen have been raised and decided under s 105 read with s 105A To hold that would be to read into s 109 words which are not there *Pandab Dowari v Ananda Kisun 11 C W N 897 Shashi Bhusan v Eshabar Ali 19 C W N 636 Basi Bhusan Hazra v Aswini Kumar Samarta 19 C W N 637 (n)* referred to NAWAB BAHADUR OF MURSHIDABAD v AHMAD HOSSEIN (1916) I L R 44 Calc 783

——— ss 109 105—*Suit for enhancement of rent if maintainable after dismissal of application for enhancement under sec 105* Where an application for enhancement of rent under s 10[illegible] Bengal Tenancy Act on the ground *inter alia* of increase in area was dismissed for non prosecution and a suit for enhancement on the same ground was subsequently brought *Held*—That the suit was barred by s 109 An application which has been made whether it is withdrawn or whether it is dismissed for non prosecution is nevertheless an application made within the meaning of s 109 SRIMOTI ABEDA KHATUN v MAJUBALI CHOUDHURY (1919) 24 C W N 1020

——— s 109A (2)—

See APPEAL I L R 45 Calc 638

BENGAL TENANCY ACT (VIII OF 1885)—contd

——— s 109A—

See s 30 2 Pat L J 574

See s 105 5 Pat L J 473

See PROCEDURE L R 45 I A 183

———*When bars an appeal—Question of jurisdiction* S 109A of the Tenancy Act is no bar to an appeal in a case of settlement of rent in which a question of jurisdiction is definitely raised RAMDAS MUKHERJEE v BIPRODAS PAL CHOUDHERY (1913) 19 C W N 35

——— s 109B—*Scope of enquiry under* The enquiry under sub s (1) of s 109B is obviously contemplated in a case where the agreement or compromise has been made for the purpose of settling a dispute namely a dispute which the Revenue Officer would be called upon to decide on the merits but for the agreement or compromise S 109B clearly does not apply to a case where the contract between the parties was made several years before the settlement proceedings BATA MONDAL v MANINDRA CHANDRA NANDI (1914) 19 C W N 321

——— s 111—

See RECORD OF RIGHTS 3 Pat L J 361

———*Suit for alteration of rent brought within three months of final publication of record of rights if should be dismissed or stayed* A suit for alteration of rent instituted within three months of the final publication of the record of rights should not be dismissed altogether but should be stayed until the expiry of this period. On appeal from a decision of the lower Appellate Court dismissing such a suit the three months having expired long ago the High Court directed a trial of the suit on the merits *de novo* the appellant being directed to pay the costs of the lower Appellate Court and of the High Court *Ram Narayan v Lachmi Narayan 17 C L J 239 17 C W N 408* followed HIRA KOER v LACHMAN GOPE (1913) 19 C W N 1141

——— s 111A—

See COURT FEE I L R 44 Calc 352

See LIMITATION I L R 45 Calc 64[illegible]

———Where no question as to entry of a rent settled or an omission to settle rent is concerned a suit by a tenant for a declaration that an entry in the record of rights describing him as a tenure holder is erroneous and for a declaration that he is an occupancy raiyat is not a suit under s 104H but falls within the category of suits alluded to in the proviso to s 111A of the Bengal Tenancy Act and may be brought within 6 years PRAMADA NATH RAY v ASIRUDDI MONDAL (1911) 15 C W N 893

——— Decision as to what amounts to an application within the meaning of this section and what is the period of limitation SHEIKH AMIRUDDIN v SHEIKH SAIDUR 1 Pat. L

——— ss 111A 104H, right suit for declaration of after final of record-of rights—Limitat correctness of record rebutting of The brought his suit for a d an occupancy raiyat suit was brought more final publication of

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 111—*contd*

holding was of an extent of 203 bighas and the tenancy in its inception was created for cultivating purposes All the tenants on the land were *bhag chasis* under the plaintiff who and his predecessors had been recorded as raiyats in former settlements *Held* that the plaintiff and his predecessors having held the land for more than 12 years had a right of occupancy in the land That the presumption created by s 103B of the Bengal Tenancy Act was rebutted That the suit came within the proviso to s 111A and not under s 104H and was not barred by limitation KUMEDA I POSUNNA BHUIYA v SECRETARY OF STATE FOR INDIA (1914)
19 C W N 1017

——— s 111B—*Suit brought within the prohibited period—Proper procedure—Rejection or return of plaint at once—Civil Procedure Code (Act V of 1908) O VII rr 10 and 11—Plaint kept in the file until expiry of three months—Suit if may be dismissed later on—Jurisdiction of the Court to proceed to try suit on the merits* In view of the provision of s 111B of the Bengal Tenancy Act that a suit shall not be instituted in any Civil Court for the decision of certain issues within three months from the date of the certificate of final publication of the record of rights the proper course for the Court when such a suit is brought within that period is to reject the plaint under O VII r 11 cl (*d*) of the Civil Procedure Code If the defect being overlooked the plaint is registered the Court on subsequently discovering it when the three months have expired would not be justified in dismissing the suit As the section does not take away the Civil Court s jurisdiction altogether it should in such a case proceed to try the suit on the merits *Per* RICHARDSON J —If a plaint presented during the prohibited period be not at once returned or rejected under O VII r 10 or r 11 of the Civil Procedure Code (as the Legislature undoubtedly contemplates) and remains on the file of the Court the suit may be treated subject always to any question arising under s 109 as though the plaint had been received and the suit instituted on the day following the expiration of such period PRAN KRISHNA SHAHA v KRIPANATH CHOWDHURY (1916)
21 C W N 209

——— s 113—

See LANDLORD AND TENANT
I L R 45 Calc 930

1 ——— *Stipulation for payment of additional rent on waste land becoming cultivated—Realization of the same* Where there is a stipulation between a landlord and his tenants that the *khila* lands included in the tenancy would be assessed with rent on becoming *hasila* the increase in the rental would accrue automatically on any portion of the waste becoming cultivated To such a process neither s 113 nor any other section of the Bengal Tenancy Act can operate as a legal bar The mere realization of the admitted rent for the years before suit does not preclude the landlord from recovering additional rent for the same period for such lands where there is nothing to show that the landlord received his dues and the tenants paid him on the understanding that no further demand would be made MAKBUL ALI v JOGESH CHANDRA ROY (1910)
21 C W N 534

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 113—*contd*

2 ——— *Application and scope of—if controlled by s 105B—Enhancement of rent settled under Chap X* S 113 of the Bengal Tenancy Act applies to rents settled under Chap X Where rent is finally settled under one or other of those provisions it cannot be enhanced except on grounds mentioned in the section within the period mentioned therein A consideration of Chap X as a whole shows that the effect of the plain language of s 113 is not in any way controlled or cut down by anything in s 103B MIRAJAN BHUIYAN v SRIMATI JOYMALA (1916)
21 C W N 548

——— s 115—

See s 50 26 C W N 945 & 947

See BENGAL TENANCY ACT
1 Pat L J 67

See LANDLORD AND TENANT
I L R 45 Calc 930
I L R 37 Calc 30

——— s 116—

See s 3 26 C W N 833

See LANDLORD AND TENANT
I L R 38 Calc 432

See NON OCCUPANCY RAIYATS
I L R 44 Calc 267
3 Pat L J 1

——— s 120—

See s 100 2 Pat L J 493

——— *Land let out to tenant claimed as zerait—Tenant s admission in kabuliyat if admissible* The new sub s (2) (a) to s 120 which shows that any other evidence that may be produced does not include an agreement or a compromise between the landlord and the tenant Confirms the view taken in the case of *Sher Bahadur v Macken ie 7 C W N 400* that a statement made in a *kabuliyat* executed after the 2nd March 1883 that the land is *zerait* was not admissible not on the ground that it was not included in the expression any other evidence that may be produced but for the reason that when the Legislature expressly made evidence of letting before the 2nd March 1883 admissible in proof of the character of the land they must be intended to exclude evidence of letting after the 2nd March 1883 Where therefore the only evidence to prove that land let out for a term of seven years expiring on 4th June 1909 was *zerait* was a recital to the effect in the *kabuliyat* dated the 19th September 1902 *Held* that the recital was no evidence of the alleged *zerait* character of the land *Nilmoney Chakarburty v Bykant Nath Bera I L R 17 Calc 466 Ajodhya Prosad v Ram Golam 13 C W N 661 Bhagtu Singh v Raghunath 13 C W N 911 s c 9 C L J 15* and *Madusudan Sing v Goodar Nath Pandey 1 C L J 456* referred to GANPAT MAHTON v RISHAL SINGH (1914)
20 C W N 14

——— *Recitals in agreement made subsequent to 1883 whether admissible in evidence—Khudkasht whether connotes proprietor s private land* Recitals in deeds executed subsequently to the 1st March 1883 are rendered inadmissible in evidence by s 120 (2) (a) of the

BENGAL TENANCY ACT (VIII OF 1858)—contd

———— s 120—*contd*

Bengal Tenancy Act 1885 The word Khud Kasht does not conclusively connote proprietor s private land The fact that in an agreement to lease land it is stipulated that the lessee will not claim an occupancy right goes to show that the parties had in contemplation a *raiyati* settlement and not the creation of a tenure SUKHAN SAO v KURU MAHATA 5 Pat L J 87

———— ss 121 54 (3)—*Indian Penal Code (Act XLV of 1860) ss 143 424—Cutting of paddy attached in pursuance of an order of distraint made under s 121 of the Bengal Tenancy Act* The petitioner was placed on his trial under ss 143 424 I P C for cutting some paddy attached under an order of distraint made under s 121 Bengal Tenancy Act The rent in question fell due on the 1st December and the distraint and attachment order were made on the 2nd and 4th respectively and thereafter the petitioner cut the paddy The trying Magistrate acquitted the petitioner on the ground that a distraint order under s 121 Bengal Tenancy Act is legal only for the rent of the holding for the year preceding the current year *Held* that under s 54 (3) of the Bengal Tenancy Act the rent was in arrear on the 2nd December and the distraint order was legally made and the accused was wrongly acquitted THE GOVERNMENT OF BENGAL v KOJAL HAOLA DAR 25 C W N 209

———— s 133—

See s 49 22 C W N 618

———— s 147A—*Decree made at suit for rent on compromise—Additional land given to tenant and new rent settled—Objection in execution on the ground of non compliance with section* In a suit for rent a decree was made on compromise and the tenant took some additional land and a rent was fixed for the area formerly held by him together with the added area When execution was sought objection was taken on the ground of non compliance with s 147A of the Eastern Bengal and Assam Tenancy Act *Held* that the objection raised to the validity of the decree could not be raised in execution proceedings That the case was distinguishable from *Sarajugsharan Lal v Dukhit Mahto 17 C W N 496 (1913)* which lays down that a decree for rent passed in accordance with a compromise in contravention of the provisions of s 147A of the Bengal Tenancy Act without recording evidence to show what the rent was before the dispute arose is made without jurisdiction HEM CHANDRA CHOUDHURY v CHANDRA MOHAN NAMODAS 24 C W N 107

———— s 147A—*Decree for enhanced rent passed on compromise—Amount of previous rent not ascertained—Tenant if bound by decree—Irregularity or nullity* A decree for rent passed in accordance with a compromise in contravention of the provisions of s 147A of the Bengal Tenancy Act i e without recording evidence to show what the amount of rent was before the dispute arose is made without jurisdiction and the tenant is not bound to have it set aside As the tenant cannot waive the irregularity it amounts according to the test laid down in *Holmes v Russel 9 Dowl 487* to a nullity SARJUG SARAN v LAL DUKHIT MAHATO (1913) 17 C W N 496

BENGAL TENANCY ACT (VIII OF 1858)—contd

———— ss 147A and 29—*Compromise not confined to matters of dispute—Registration* A compromise under s 147A of the Bengal Tenancy Act is valid even if it deals with matters extraneous to the suit An agreement by which a tenant is changed from an occupancy raiyat to a raiyat at fixed rent and the rent increased is not invalid under s 29 Such a compromise is not a lease requiring registration RAMPADARATH SINGH v SOHRAI KOERI 4 Pat L J 667

———— s 148 cl (A)—A co sharer landlord has a right to claim the whole rent on behalf of the entire body s 148 being only an enabling section SASTEE CHARAN CHAKRABATTI v AKUTIYAN BIBI 26 C W N 639

———— s 148 cl (h)—

See LANDLORD AND TENANT I L R 41 Calc 926

See LANDLORDS INTEREST MEANING OF I L R 40 Calc 462

———— s 148A— *Landlord and tenant meaning of—Nature of suit under the section—Usufructuary mortgagee if a landlord—S 158B—Co sharer landlords who are—Usufructuary mortgage of a portion from a co sharer if a co-sharer landlord —Decree for rent obtained by such mortgagee how to be executed—Civil Procedure Code (Act V of 1908) O III r 14 if applies to such a decree—Revisional jurisdiction of the High Court circumstances warranting the exercise of* The petitioner was a usufructuary mortgagee from a co sharer landlord who was interested in the property to the extent of one fourth the opposite parties being entitled to the remaining three fourths share The petitioner as usufructuary mortgagee brought a suit for rent against the tenant under s 148A of the Bengal Tenancy Act and joined the proprietors of the three fourths share as also the mortgagor as parties defendants The co sharers did not enter appearance and the plaintiff obtained a decree for rent and applied for execution under sub s (1) of s 158B of the Bengal Tenancy Act whereupon the co sharers appeared and objected that the execution could not proceed under s 158B The objection was overruled by the Court of first instance but the lower Appellate Court directed the first Court to hold the sale not under sub s (?) of s 158B of the Bengal Tenancy Act but in accordance with the Code of Civil Procedure *Held* that the term landlord " means a person immediately under whom a tenant holds and the term tenant " is defined to mean a person who holds land under another person and is or but for a special contract would be liable to pay rent for that land to that person, and a usufructuary mortgagee is consequently a person immediately under whom a tenant holds and is in the position of a landlord and is entitled to sue for rent in his character as such That the co sharer landlords are the entire body of persons who are entitled to collect rent and a usufructuary mortgagee from one of the proprietors is in the position of a co-sharer landlord within the meaning of s 158B sub-s (1) cl ( ) of the Bengal Tenancy Act That the plaintiff having sued for the recovery of what to his information was the whole arrear due the suit was in essence a suit for rent due to all the co-sharers within the meaning of s 148A of the Bengal Tenancy Act and the suit as framed was within the scope of the

BENGAL TENANCY ACT (VIII OF 1885)— *contd*

——— s 148A—*contd*

section and the decree should be executed under s 158B sub (1) cl (e) of the Bengal Tenancy Act That r 14 of O XXXIV of the Civil Procedure Code had no application to the execution proceedings in the present case That the result of the decision of the District Judge was that the Court of first instance had to proceed to sell the tenure in accordance with the provisions of the Code of Civil Procedure which it had no jurisdiction to do and to refuse to sell the tenure in accordance with s 158B of the Bengal Tenancy Act which it had jurisdiction to do and the circumstance that this result followed from an erroneous interpretation of the scope and requirements of ss 148A and 158B of the Bengal Tenancy Act was clearly no bar to the exercise of the revisional jurisdiction of the High Court BROHMANAND NATH DEB v HEM CHANDRA MITRA (1914) **18 C W N 1016**

——— ss 148A 158B and 188—*Suit for rent by co sharer—Fram of suit* The essential principles underlying s 148A of the Bengal Tenancy Act 1885 are (1) that the suit should in form be for the whole rent and in substance for the separate share of the rent in arrears (2) that the whole body of landlords are impleaded with the allegation that the plaintiff has not been able to ascertain what if any rents are due to the former PAMDHYAN SINGH v PARDIP SINGH

4 Pat L J 500

——— s 148 (a) 166 and 167—*Sale in execution of decree for rent—Whether donee from judgment debtor has power to deposit decretal amount to have the sale set aside* The interest of a donee of a holding at fixed rates is not an interest voidable on a sale of the holding and therefore such a donee has no *locus standi* to deposit the decretal amount and have the sale set aside GOPAL RAI v HITNARAYAN SINGH **3 Pat L J 145**

——— s 149—

See INTERPLEADER **14 C W N 784**

——— *Question of title if to be decided in suit under—Appeal—Bengal Tenancy Act (VIII of 1885) s 153—Suit framed as for determination of title* S 149 of the Bengal Tenancy Act provides a very simple and expeditious machinery for the purpose of protecting a tenant against the harassment of litigation consequent on *rival claims of title to the reversion of the tenant's* interest Sub s (3) of s 149 of the Bengal Tenancy Act contemplates a suit which culminates not in a decree but *in an order of a limited kind* an order restraining payment out of the money It is not necessary to decide the question of title in issuing an injunction under that section In a suit brought under s 149 sub s (3) of the Bengal Tenancy Act in which the plaintiff keeps within the terms of the section and asks only for the relief contemplated by it no question of title can be decided *It would be otherwise if the suit be framed as one* for determination of the Plaintiff's title *Semble* An appeal would not lie under s 153 of the Bengal Tenancy Act against an order under s 149 sub s (3) of the Act TIRTHABASI SINGH v PURNA CHANDRA NAG (1912)

I L R 39 Calc 915
16 C W N 558

BENGAL TENANCY ACT (VIII OF 1885)— *contd*

——— s 153—

——— *Suit for rent by lessee contested by tenant—Denial of lessee's title—Appeal* Where the plaintiff claiming to have derived title under a lease from defendant No 3 the landlord sued the tenants on the land for rent but the tenants contested his claim on the ground that the lease given to him by defendant No 3 was invalid though defendant No 3 *himself did not appear or* oppose plaintiff's claim and the lower Appellate Court sustained the tenants plea and dismissed the suit *Held* by JENKINS C J (agreeing with RAY J COXE J *contra*) that the decree decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto within s 153 Bengal Tenancy Act and an appeal lay *Held per* COXE and RAY JJ — *An ex parte* decree for rent obtained by the plaintiff against defendants in a previous suit is *res judicata* in a subsequent rent suit unless the defendants can establish that the relationship of landlord and tenant established by the decree ceased since the passing of the decree GAUHAR ALI v SAMIRUDDIN SHEIKH (1913) **18 C W N 33**

2 ——— *Commutation order by Revenue Court if bars trial of tenant's status in Civil Court—Jurisdiction of Revenue Courts—Question as to amount annually payable* Where the landlord sued to recover rent at an annual rate of Rs 30 the price stated in the tenant's *kabuliyat* of the paddy payable by the tenant as rent and the latter on the strength of a commutation order made under s 40 of the Bengal Tenancy Act alleged that the rent was recoverable at the rate of Rs 13 6 6 a year *Held* that the decision of the lower Appellate Court upholding the tenant's plea was a *decision on a question* of the amount of rent annually payable within s 153 of the Bengal Tenancy Act *Apurba Krishna Roy* v *Ashutosh Dutt 9 C W N 122 approved* A proceeding under s 40 is founded on the assumption that the tenant whose rent is sought to be commuted is an occupancy raiyat A dispute as to the status of the tenant cannot be finally decided by the Revenue Court in such a proceeding so as to make such decision conclusive between the parties in the Civil Court The tenant being found in this case to be an under raiyat *Held* that the order under s 40 made by the Revenue Court was without jurisdiction *Lalla Saligram Singh* v *Mohunt Ramgir 3 C W N 311* distinguished KALI KRISHNA BISWAS v RAM CHANDRA BAIDYA (1915) **19 C W N 823**

3 ——— *Explanation —Rent sale —Purchase by decree holder—Judgment debtor's application to set aside on ground of fraudulent suppression of notices—Dismissal on ground that case not brought within s 18 of Limitation Act if appealable* Where more than 30 days after a sale in execution of a decree passed in a suit for recovery of rent in which the amount claimed did not exceed fifty rupees an application was made to set it aside on the ground that no processes of attachment or proclamation were served upon the properties and that the decree holder fraudulently and *in collusion with the peon got* all the processes suppressed and having thus brought about the sale purchased the property himself but the Munsif refused to set aside the sale on the ground that there was no such *fraudulent concealment as to*

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

———— s 153—*contd*

bring the case within s 18 of the Limitation Act *Held per Curiam* that this was not a finding upon a question as to the irregularity of the proceedings in publishing or conducting the sale within the meaning of the explanation to s 153 of the Bengal Tenancy Act and an appeal lay from the Munsif s decision under the Full Bench ruling in *Kali Mundal v Parmeshwar Chakrabutty I L R 32 Calc 957 9 C W N 771* Per N R CHATTERJEA J —A question as to fraud in publishing or conducting a sale is not covered by the explanation Per MULLICK J —An irregularity in publishing or conducting a sale may be accompanied with or without fraud The explanation does not exclude from its scope an irregularity tainted by fraud NABIN CHANDRA CHOUDHURY v BEPIN CHANDRA CHOUDHURY (1915) 19 C W N 953

4 ———— *Question of title raised but not decided by Munsif exercising final Jurisdiction—Appeal to District Judge if lies—District Judge deciding question of title in appeal—second appeal if lies* In a suit to recover arrears of rent (the amount in claim being less than Rs 50) the defendant objected that the Plaintiff was his benamidar The Munsif who had final jurisdiction under s 153 of the Bengal Tenancy Act—declined to go into the question of title but dismissed the suit on the ground that the plaintiff had failed to prove realisation of rent from the defendant in previous years The plaintiff appealed to the District Judge and also preferred an application for revision under the proviso to s 153 The District Judge overruled the defendant s objection in the appeal that no appeal lay under s 153 and found for the plaintiff on the merits *Held* that no appeal lay to the District Judge from the decision of the Munsif as no question of conflicting title was decided by it and the decision of the District Judge to the contrary was erroneous in law That a second appeal lay against this decision *Kalipada v Shekhar Basini 23 C L J 235* overruled *Held per* SANDERSON C J That an appeal lay from the decision of the District Judge which decided a question of conflicting title under s 153 Bengal Tenancy Act *Bhagabati Bewa v Nanda Kumar Chuckerbutty 12 C W N 835* explained *Per* MOOKERJEE J —Where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction *Bhagabati Bewa v Nanda Kumar Chucker butty 12 C W N 835 Abdul Hossein v Kashi Shahu I L R 27 Calc 362 Meenakshi Naidoo v Subramaniya Sastri L R 14 I A 160* and *Ranjit Misser v Ramudar Singh 16 C L J 77* discussed The Court directed the District Judge to deal with the application for revision under the proviso to s 153 of the Bengal Tenancy Act GANGADHAR KARMAKAR v SHEKHAR BASINI DASYA (1916) 20 C W N 967

5 ———— *Rent suit valued below Rs 100—Whether second appeal lies—Setting up title by the defendant in himself whether involves a question of title or land between parties having conflicting claims thereto—Concurrent findings of fact of Courts below dismissal of appeal for* Where the plaintiff brings a suit for rent the value of which is less than Rs 100 against the defendants claiming that she is a raiyat of the land and that the defendants are her under raiyats and liable to pay rent to her and the defendants deny that they are under raiyats under the plaintiff but plead that their father had purchased the land from the heir of the admitted previous raiyat of the land and that they had been holding the land as the raiyat of the landlord and both the Courts below found that the plaintiff was in possession for a large number of years and that the defendants failed to prove that they ever held the land as raiyat of the landlord *Held* that a second appeal was not barred under s 153 of the Bengal Tenancy Act as the Courts below decided a question of title to land between parties having conflicting claims thereto The appeal was dismissed there being concurrent findings of fact of the Courts below BADUA v SATLI (1916) 20 C W N 1352

6 ———— *Second Appeal whether lies tenant claiming mafi as jeth raiyat—Meanings of jeth raiyat and mafi* Where in a rent suit valued at less than Rs 100 the tenant claimed Rs 3 5as as *mafi* on the whole rent on the ground that he was a *jeth raiyat* and the District Judge allowed the *mafi* and the landlord preferred a second appeal *Held* that no second appeal lies under s 153 of the Bengal Tenancy Act as it does not involve a question of the amount of rent annually payable by the tenant *Jeth raiyats* have to perform certain duties under the landlord as for example calling tenants for the collection of rent and such similar duties and for that they are allowed by the landlord by way *of wages and instead of payment in cash a mafi* from the total rent instead of payment in cash *Mafi* is not rent because it is a sum of money payable by the landlord to the tenant whereas rent is money payable by the tenant to the landlord and *mafi* is a set off against the rent SAFAIT HOSAIN v WAIZUDDIN (1916) 20 C W N 1207

7 ———— *Rent decree—Order in execution passed by officer not specially authorised if appealable —Ex parte decree set aside on deposit—Money deposited to be applied in satisfaction of decree ultimately passed in landlord's favour* A decree for rent was passed by an officer empowered to exercise final jurisdiction in the matter under s 153 of the Bengal Tenancy Act *Held* that the section is no bar to an appeal from an order passed in execution of the decree by an officer not so empowered Whether an appeal lies or not must be determined with reference to the qualification of the officer who passes the order against which the appeal is preferred SHEO PARGAS PAY v BISHEN PARGASH NARAIN (1911) 15 C W N 760

8 ———— *Rent suit—Decision as to amount of mafi due to tenant—Appeal* In a suit for the recovery of rent the amount of which was not disputed a question arose as to whether the defendant was entitled to a deduction from the rent by way of *mafi* The first Court disallowed the defendant s claim to *mafi* and decreed the suit On appeal the District Judge held that the defendant was entitled to a deduction for *mafi* The plaintiff appealed to the High Court *Held* that [illegible] lay *Mafi* is not rent It is a [illegible] the rent allowed

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 148A—*contd*

section and the decree should be executed under s 158B sub (1) cl (e) of the Bengal Tenancy Act That r 14 of O XXXIV of the Civil Procedure Code had no application to the execution proceedings in the present case That the result of the decision of the District Judge was that the Court of first instance had to proceed to sell the tenure in accordance with the provisions of the Code of Civil Procedure which it had no jurisdiction to do and to refuse to sell the tenure in accordance with s 158B of the Bengal Tenancy Act which it had jurisdiction to do and the circumstance that this result followed from an erroneous interpretation of the scope and requirements of ss 148A and 158B of the Bengal Tenancy Act was clearly no bar to the exercise of the revisional jurisdiction of the High Court BROHMANAND NATH DEB v HEM CHANDRA MITRA (1914) **18 C W N 1016**

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4 Pat L J 500

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——— s 149—

See INTERPLEADER **14 C W N 784**

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I L R 39 Calc 915
16 C W N 558

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 153—

——— *Suit for rent by lessee contested by tenant—Denial of lessee s title—Appeal* Where the plaintiff claiming to have derived title under a lease from defendant No 3 the landlord sued the tenants on the land for rent but the tenants contested his claim on the ground that the lease given to him by defendant No 3 was invalid though defendant No 3 himself did not appear or oppose plaintiff's claim and the lower Appellate Court sustained the tenants plea and dismissed the suit *Held* by JENKINS C J (agreeing with RAY J COXE J *contra*) that the decree decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto within s 153 Bengal Tenancy Act and an appeal lay *Held per* COXE and RAY JJ —An *ex parte* decree for rent obtained by the plaintiff against defendants in a previous suit is *res judicata* in a subsequent rent suit unless the defendants can establish that the relationship of landlord and tenant established by the decree ceased since the passing of the decree GAUHAR ALI v SAMIRUDDIN SHEIKH (1913) **18 C W N 33**

2 ——— *Commutation order by Revenue Court if bars trial of tenant s status in Civil Court—Jurisdiction of Revenue Courts—Question as to amount annually payable* Where the landlord sued to recover rent at an annual rate of Rs 30 the price stated in the tenant s *kabuliyat* of the paddy payable by the tenant as rent and the latter on the strength of a commutation order made under s 40 of the Bengal Tenancy Act alleged that the rent was recoverable at the rate of Rs 13 6 6 a year *Held* that the decision of the lower Appellate Court upholding the tenant s plea was a decision on a question of the amount of rent annually payable within s 153 of the Bengal Tenancy Act *Apurba Krishna Roy v Ashutosh Dutt 9 C W N 12* approved A proceeding under s 40 is founded on the assumption that the tenant whose rent is sought to be commuted is an occupancy raiyat A dispute as to the status of the tenant cannot be finally decided by the Revenue Court in such a proceeding so as to make such decision conclusive between the parties in the Civil Court The tenant being found in this case to be an under raiyat *Held* that the order under s 40 made by the Revenue Court was without jurisdiction *Lalla Saligram Singh v Mohunt Ramgir 3 C W N 511*, distinguished KALI KRISHNA BISWAS v RAM CHANDRA BAIDYA (1915) **19 C W N 823**

3 ——— *Explanation—Rent sale—Purchase by decree holder—Judgment debtor s application to set aside on ground of fraudulent suppression of notice —Dismissal on ground that case not brought within s 18 of Limitation Act if appealable* Where more than 30 days after a sale in execution of a decree passed in a suit for recovery of rent in which the amount claimed did not exceed fifty rupees an application was made to set it aside on the ground that no processes of attachment or proclamation were served upon the properties and that the decree holder fraudulently and in collusion with the peon got all the processes suppressed and having thus brought about the sale purchased the property himself but the Munsif refused to set aside the sale on the ground that there was no such fraudulent concealment as to

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 153—*contd*

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4 ——— *Question of title raised but not decided by Munsif exercising final Jurisdiction—Appeal to District Judge if lies—District Judge deciding question of title in appeal—second appeal if lies* In a suit to recover arrears of rent (the amount in claim being less than Rs 50) the defendant objected that the Plaintiff was his *tenamidar* The Munsif who had final jurisdiction under s 153 of the Bengal Tenancy Act—declined to go into the question of title but dismissed the suit on the ground that the plaintiff had failed to prove realisation of rent from the defendant in previous years The plaintiff appealed to the District Judge and also preferred an application for revision under the proviso to s 153 The District Judge overruled the defendant s objection in the appeal that no appeal lay under s 153 and found for the plaintiff on the merits *Held* that no appeal lay to the District Judge from the decision of the Munsif as no question of conflicting title was decided by it and the decision of the District Judge to the contrary was erroneous in law That a second appeal lay against this decision *Kalipada v Shekhar Basini 23 C L J 235* overruled *Held per* SANDERSON C J That an appeal lay from the decision of the District Judge which decided a question of conflicting title under s 153 Bengal Tenancy Act *Bhagabati Dewa v Nanda Kumar Chuckerbutty 12 C W N 835* explained *Per* MOOKERJEE J —Where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction *Bhagabati Dewa v Nanda Kumar Chuckerbutty 12 C W N 835 Abdul Hossein v Kashi Shahu I L R 27 Calc 362 Meenakshi Naidoo v Subramania Sastri L R 14 I A 160* and *Ranjit Misser v Ramudar Singh 16 C L J 77* discussed The Court directed the District Judge to deal with the application for revision under the proviso to s 153 of the Bengal Tenancy Act GANGADHAR KARMAKAR v SHEKHAR BASINI DASYA (1916) **20 C W N 967**

5 ——— *Rent suit valued below Rs 100—Whether second appeal lies—Setting up title by the defendant in himself whether involves a question of title in land between parties having conflicting claims thereto—Concurrent findings of fact of Courts below dismissal of appeal for* Where the plaintiff brings a suit for rent the value of which is less than Rs 100 against the defendants claiming that she is a raiyat of the land and that the defendants are her under raiyats and liable to pay rent to her and the defendants deny that they are under raiyats under the plaintiff but plead that their father had purchased the land from the heir of the admitted previous raiyat of the land and that they had been holding the land as the raiyat of the landlord and both the Courts below found that the plaintiff was in possession for a large number of years and that the defendants failed to prove that they ever held the land as raiyat of the landlord *Held* that a second appeal was not barred under s 153 of the Bengal Tenancy Act as the Courts below decided a question of title to land between parties having conflicting claims thereto The appeal was dismissed there being concurrent findings of fact of the Courts below BABUA v SARLI (1916) **20 C W N 1352**

6 ——— *Second Appeal whether his tenant claiming mafi as jeth raiyat—Meanings of* jeth raiyat *and* mafi Where in a rent suit valued at less than Rs 100 the tenant claimed Rs 3 5as as *mafi* on the whole rent on the ground that he was a *jeth raiyat* and the District Judge allowed the *mafi* and the landlord preferred a second appeal *Held* that no second appeal lies under 153 of the Bengal Tenancy Act as it does not involve a question of the amount of rent annually payable by the tenant *Jeth raiyats* have to perform certain duties under the landlord as for example calling tenants for the collection of rent and such similar duties and for that they are allowed by the landlord by way of wages and instead of payment in cash a *mafi* from the total rent instead of payment in cash *Mafi* is not rent because it is a sum of money payable by the landlord to the tenant whereas rent is money payable by the tenant to the landlord and *mafi* is a set off against the rent SAFAIT HOSAIN v WAIZUDDIN (1916) **20 C W N 1207**

7 ———*Rent decree—Order in execution passed by officer not specially authorised if appealable—Ex parte decree set aside on deposit—Money deposited to be applied in satisfaction of decree ultimately passed in landlord's favour* A decree for rent was passed by an officer empowered to exercise final jurisdiction in the matter under s 153 of the Bengal Tenancy Act *Held* that the section is no bar to an appeal from an order passed in execution of the decree by an officer not so empowered Whether an appeal lies or not must be determined with reference to the qualification of the officer who passes the order against which the appeal is preferred SHEO PARSAN RAY v BISHEN PARGASH NARAIN (1911) **15 C W N 760**

8 ——— *Rent suit—Decision as to amount of mafi due to tenant—Appeal* In a suit for the recovery of rent the amount of which was not disputed a question arose as to whether the defendant was entitled to a deduction from the rent by way of *mafi* The first Court disallowed the defendant s claim to *mafi* and decreed the suit On appeal the District Judge held that the defendant was entitled to a deduction for *mafi* The plaintiff appealed to the High Court *Held* that no appeal lay *Mafi* is not rent It is a deduction from the rent allowed

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

———— s 153—*contd*

to *jeth raiyats* by the landlord in consideration of their performing certain duties SHEIKH SAFAIT HOSSEIN v SHEIKH WAIZUDDIN

1 Pat L J 504

———— The expression amount annually payable by tenant means to the land lord who has instituted the suit SUDHARMA SASTRA v BASANTA KUMAR SARKAR

26 C W N 96

———— ss 153 143 sub s (2)— *Appeal against dismissal of suit for recovery of arrears of rent for less than Rs 100 ex parte decree in—Order refusing application for re hearing of appeal if appealable—Suit meaning of if includes appeal —Application for re hearing of appeal if an application in the suit—Civil Procedure Code application of to suits between landlord and tenant* A suit for recovery of arrears of rent for less then Rs 100 was dismissed on the merits The plaintiff s appeal against this decree was decreed *ex parte* The respondent s application under O XLI r 21 Civil Procedure Code to have the appeal re heard in his presence having been refused an appeal was preferred against this order to the High Court *Held* that s 153 of the Bengal Tenancy Act was a bar to the appeal The term suit includes the appellate stage and an application to re hear the appeal is clearly an application in the suit Sub s (2) of s 143 of the Bengal Tenancy Act which makes O XLIII r 1 cl (t) Civil Procedure Code applicable to suits between landlord and tenant makes it applicable subject to the oper ation of the restrictive provision of s 153 of the Bengal Tenancy Act and the absence of the res trictive words in a case open to appeal from cl (t) does not give the right of appeal CHAMED SHEIKH v NABA GOPAL GHOSH (1914)

19 C W N 359

———— s 153A— Although s 153A of the Bengal Tenancy Act does not specifically pre scribe the mode of application of the money deposited by the person at whose instance the *ex parte* decree has been set aside the Legislature clearly intended that the landlord in whose favour a decree is ultimately made on the retrial should apply the sum deposited by the judgment debtor to his credit towards satisfaction of the decree and execute the decree for the balance left if any SHEO PARSAN ROY v BESHEN PARGASH NARAIN (1911)

15 C W N 760

2 ———— Ex parte *decree or rent application to set aside—Tenant when bound to deposit rent admitted—Tenant alleging land in suit only part of holding bearing another* jama—*Application made out of time entertained by Court without adjudication of question of limitation—Revision by High Court—Civil Procedure Code (Act V of 1908) s 115* The admission contemplated in s 153A of the Bengal Tenancy Act is an admission that rent is due in respect of the holding for which the suit has been instituted Where the tenant de fendant alleged that the land mentioned in the plaint as constituting a holding of a *jama* of Rs 3 10 was in fact a part of a holding bearing an annual *jama* of Rs 7 12 *Held* that there was no admission of liability to pay rent in respect of the holding in suit but in respect of a different holding and s 153A did not apply TARA SANKAR GHOSH v BASIRUDDI (1915)

19 C W N 970

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

———— s 155—

See s 76 2 Pat L J 634

See DECREE I L R 44 Calc 954

———— *Notice object of—Notice re quiring tenant to quit even if he remedied breach of contract complained of if a proper notice* The object of a notice to quit given under s 155 is to give the tenant an opportunity of remedying the breach (if it is capable of being remedied) *so that on remedying the breach and on payment* of a reasonable compensation he may avoid eject ment A notice requiring the tenant to quit the land even if he remedied the breach is not a valid notice under the section KALI CHANDRA CHU CKERBUTTY v KALI KUMAR MAJUMDAR (1916)

23 C W N 569

———— *Ejectment—Bengal Tenancy Act (VIII of 1885) s 25 misuse of land by tenant—Decree for compensation in addition to ejectment legality of—S 155 scope of—Decree of Appellate Court for ejectment without fixing a date for the ejectment if bad in law* A decree under s 155 of the Bengal Tenancy Act cannot direct payment of compensation in addition to eject ment The decree to be executed is a decree for ejectment and not a decree for compensation because ejectment is to follow in the event of non compliance with the order of the Court directing payment of compensation and remedying of the misuse complained of It is no doubt better to fix a date for ejectment in the judgment of the Appellate Court but if the original decree fixed a date the Appellate decree must be presumed to incorporate the terms of the original decree and as such is not liable to be set aside for the omission *Noor Ali v Koni Meah I L R 13 Calc 13 (1886)* referred to KORIM v ASWINI KUMAR SIKDAR

25 C W N 658

———— s 158—

See s 105 18 C W N 466

See OCCUPANCY RAIYAT 5 Pat L J 641

See RENT DECREE 5 Pat L J 406

———— *Tenant holding same land under separate leases of undivided shares from co sharers if may proceed against co sharers separately* An application under s 158 of the Bengal Tenancy Act to determine the incidents of a tenancy cannot be made against persons who have only a portion of the proprietary interest in the land of the ten ancy even when the tenant applicant appears to have taken separate leases from different landlords of their respective undivided interests therein HARI MOHAN MAJUMDAR v SRI MOHAN GHOSH (1913)

18 C W N 168

———— s 158 (B)—

See CIVIL PROCEDURE CODE 1908 O XXI R 16 5 Pat L J 390

See RENT DECREE 5 Pat L J 641

———— *Omission to serve notice of sale in execution of rent decree obtained by a co sharer landlord on other co sharer landlords effect of* If a co sharer landlord wants to have the sale of a tenure or holding the provision of sub s (2) of s 158 (b) which is mandatory must

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 158B—*contd*

be complied with and the failure of the Court o serve notice thereunder renders the sale invalid The purchaser at such a sale is in the position of an ordinary purchaser under a money decree AHAMAD BISWAS *v* BENOY BHUSAN GUPTA (1919) 23 C W N 931

——— *Sole landlord* — *Decree obtained by landlord including period for which he was a co sharer—Sale in execution of decree* It is sufficient for the purposes of s 158B of the Bengal Tenancy Act 1885 that the decree holder was the sole landlord at the time of obtaining the decree and the holding will pass to a purchaser in execution of such decree even though the period for which the decree was obtained included a period for which the plaintiff was only a co sharer landlord SARUP SAHU *v* JAGARNATH MODI 2 Pat L J 194

———ss 158B 163 and 167—*Sale in execution of decree for arrears of rent—Right to annul incumbrances—Sale proclamation heading of—Code of Civil Procedure (Act V of 1908) s 6 O XXI, rr 66 and 70* *Held* that the purchaser of a holding at a sale held in execution of a decree for arrears of rent who has complied with the provisions of s 167 of the Bengal Tenancy Act 1885 has power to annul encumbrances notwithstanding (1) that the heading of the proclamation of sale issued under s 163 of the Tenancy Act referred to s 287 of the Code of Civil Procedure 1882 (O XXI rr 66 and 70 of the Code of 1908) and not to s 163 of the Tenancy Act and (2) that the proclamation did not state that the holding would be sold with power to annul all encumbrances The right to annul encumbrances depends not on the statement in the sale proclamation that the purchaser will have that right but upon the nature of the decree and of the property put up for sale *i e* the purchaser will have that right on the sale being duly confirmed by the Court if the property sold was a holding and the decree satisfies the requirement of s 158B of the Tenancy Act MAHABIR PROSAD *v* BAIJU LAL 2 Pat L J 177

——— s 159—

See APPEAL I L R 43 Calc 178

See LANDLORD AND TENANT I L R 37 Calc 709

1 ——— *Suit by auction purchaser to annual incumbrance—Onus of proof—Defendant if must prove his interest to be protected —Evidence Act (I of 1872) s 106—Second appeal —Evidence adduced on both sides but evidence considered only as produced by the party on whom onus wrongly placed—Finding of fact* In a suit by a purchaser of a tenure or holding at a rent sale to annul an alleged incumbrance the onus is in the first place on the plaintiff to show that the interest sought to be annulled is an incumbrance but when once that is established the onus shifts on to the incumbrancer to prove that his incumbrance is saved through being a protected interest *Narmada Sundari Debi* v *Tarip Mollah 9 C L J 490* referred to *Samir Jama* v *Mahabharat Baktu 16 C W N 777* approved The existence of such a protected interest as a right of occupancy is a matter specially within the knowledge of the person claiming it and the onus under s. 106 Evidence Act is on him The proposition that as soon as there is conflict of evidence the question of onus disappears presupposes not only the existence of evidence on both sides but also consideration of both by the Court so that where the Court of Appeal below dismissed the plaintiff's suit on the ground of his failure to discharge an onus wrongly placed on him and ignoring altogether the evidence adduced by the defendant the High Court on second appeal interfered HARI MONI DEBI *v* MOTI SHEIKH (1912) 16 C W N 773

2 ——— *Suit to annul incumbrance—Burden of proof—Separated share of tenure dealt with as distinct tenure* When a share in a tenure has been duly and effectually recognised by both landlords and tenants as a separated share and as constituting a distinct tenure the purchaser of such a share at a sale for its arrears acquires the rights of a purchaser of an entire tenancy within the meaning of s 159 of the Bengal Tenancy Act The burden is on the purchaser of a tenure at a sale for its arrears to prove that the interest sought to be annulled was an incumbrance within the meaning of cl (*a*) of s 161 of the Bengal Tenancy Act and if he proves this he starts his case sufficiently and the burden shifts upon the defendant to prove that he has a protected interest within the meaning of s. 160 *Durga Prosanna Ghose* v *Kali Dass Dutt 9 C L R 449 Collinda Nath Shaha Chowdhury* v *Reily I L R 13 Calc 1 Narmoda Sundari Debi* v *Tarip Mollah 9 C L J 490* distinguished SOMIR JAMA *v* MOHABHARAT BAKTU (1910) 16 C W N 777

3 ——— *Suit for rent of holding against one of several heirs of the raiyat—Decree rent decrees and sale if passes whole tenure—One tenant when representative of the rest—Question of fact* Although under s 43 of the Contract Act a landlord may bring a suit for the whole rent of the holding against one of several raiyats, all the tenants of the holding must ordinarily be joined as parties in order that the decree and the sale in execution of it may pass the entire holding and not merely the right title and interest of the judgment debtor Where however one of a number of tenants is put forward by the rest as their representative he can be regarded as the sole tenant for the purposes of a suit for the arrears of rent within Ch XIV of the Bengal Tenancy Act Whether one of several tenants can be regarded as a representative of the rest must depend on the circumstances of each case and is largely if not essentially a question of fact *Doolar Chand Sahu* v *Chabeel Chand L R 6 I A 47* distinguished CHAMATKARI DASSI *v* TRIGUNA NATH SARDAR (1913) 17 C W N 833

———s 159 161 163 and 170—(3)—*Unregistered purchaser of part of non transferable occupancy holding whether entitled to deposit arrears of rent and costs* *Held* by the Special Bench (MULLICK J dissenting) that a purchaser without the landlord s consent of a part of a non transferable occupancy holding which has been proclaimed for sale under s 163 of the Bengal Tenancy Act 1885 is not entitled to deposit the amount of the landlord s decree and costs under s 170 (3) of the Act Such a purchaser is not the holder of an incumbrance within the meaning of s 161

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— ss 159—*contd*

of the Act The words any other right or interest created by the tenant on his holding or in limitation of his own interest therein in s 161 (1) refer to some right which is *ejusdem generis* with the words lien sub tenancy easement ' in the same sub section *Per* MULLICK J —A purchaser of a part of non transferable occupancy holding is entitled to deposit the arrears under s 170 (3) of the Act The word interest in s 170 is a wider term than incumbrance and includes rights other than those falling within the limits of s 161 A transferee who is liable to be ejected by the auction purchaser after the sale has an interest voidable on the sale The interest referred to in s 170 is not limited to an interest valid against the landlord MAHADEO LAL v LANGAT SINGH 2 Pat L J 457

——— ss 159 to 167—The word incumbrance as used in ss 159 161 of the Bengal Tenancy Act includes statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding and such incumbrance cannot be annulled in any manner other than what is provided in s 167 At the time when the Bengal Tenancy Act was passed the term incumbrance had a well recognised meaning in connection with provision in statutes in *pari materia* and since the Bengal Tenancy Act came into operation the word incumbrance has been interpreted to include a statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding ISAN CHANDRA BAKSHI v SAFATULLA SIRDAR 26 C W N 703

——— ss 159 163 to 167—

See SALE I L R 43 Calc 263

——— ss 159 cl (b) 179—

See LEASE I L R 45 Calc 940

——— s 160

See LANDLORD AND TENANT

I L R 39 Calc 138
I L R 37 Calc 709

——— *Protected interest*—*Mortgage by a putnidar if protected interest*—*Sale under the Bengal Tenancy Act*—*Putni Regulation (VIII of 1819) s 11* Where a putni kabuliyat provided as follows I in succession to my sons grandsons etc. heirs and representatives shall with felicity hold and enjoy the aforesaid share with right to make gift sale mortgage etc and *dar putni mourasi mokurari jatnidari* etc settlements at a proper *jama* and to every way make alienations and create encumbrances and the *putnidar* created a mortgage in favour of the plaintiff *Held* that the recitals in the *kabuliyat* merely set out the ordinary incidents of a *putni* grant as laid down in s. 3 of the Putni Regulation and did not give the *putnidar* an express authority in writing by the landlords to create a mortgage and the mortgage created in favour of the plaintiff by the *putnidar* was not a protected interest within the meaning of s 160 cl (g) of the Bengal Tenancy Act The right of a *putnidar* to give the tenure on mortgage is subject to the conditions imposed by s 11 of the Putni Regulation. The express authority referred to in that section

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 160—*contd*

means such authority apart from the conditions of the lease The effect of s 160 cl (g) of the Bengal Tenancy Act would further be subject to the saving provisions of cl (e) of s 195 of the same Act. KRISTO DAS LAHA v JOTINDRA NATH BASU (1912) 16 C W N 561

——— *Protected interest*—*Sepatni created by darputnidari authorized in dar patni lease to create such encumbrance if a protected interest*—*Separate document expressly giving permission executed at the time when encumbrance created if necessary*—*S 167* A darputni lease expressly stated that the *darputnidar* would have authority to grant a *sepatni* and pursuant to the power so conferred the *darputnidar* created a *sepatni* *Held* that the lease contained an express permission in writing sufficient for the purpose of cl (g) of s 160 Bengal Tenancy Act and the *sepatni* was a protected interest which could not be annulled under the provisions of s 167 Bengal Tenancy Act That s 160 (g) does not contemplate that the permission should be expressly given at the time of the creation of the encumbrance by a document especially executed in this behalf BIDHU MUKHI CHOWDHURANI v ASMATULLA (1916) 21 C W N 829

——— A Raiyat holding at a fixed rent may subsequently acquire a right of occupancy SAILESWAR PATRA v MAHARAJAH SIR BEJOY CHAND MOHATAP 26 C W N 15

——— ss 160 165 167—*Sepatni if a protected tenure*—*Darputni extinguished under s 167*—*Effect on sepatnidar who has not been ejected*—*Right to collect rent* A sepatnidar who has not been ejected in a proceeding under s 167 of the Bengal Tenancy Act is not entitled to continue collecting rents from the tenants when the *dar putni* under which he holds has been extinguished under that section On the extinction of the *dar putni* the tenants became liable to pay their rent directly to the *putnidar* The extinction of the *dar putni* necessarily carries with it the extinction of the *sepatni* which is not a protected tenure under the definition in s 160 of the Bengal Tenancy Act MAKHAM DAS KULI v RAM CHANDRA GOSSWAMI (1912) 17 C W N 1064

——— ss 160 (c) 167— *Protected interest* — *Plantation meaning of*—*Boroj or betel plantation if protected interest* *Date of sale meaning of* The word plantation is one of wide significance and would include an assemblage of growing plants of any kind that have been planted As to whether or not a particular assemblage of plants comes within the policy of s 160 cl (c) of the Bengal Tenancy Act must be largely if not exclusively a question of fact The lower Appellate Court having held a *boroj* or betel plantation to be a plantation within the meaning of the section *Held* that it could not be said on the materials on the record that that Court s determination of the question was erroneous BANKO BEHARY DAS v KRISHNA CHANDRA BHOWMICK (1915) 18 C W N 349

——— s 161—

See s 159 2 Pat L J 457

See s 167 25 C W N 424

See RENT DECREE 5 Pat L J 83

BENGAL TENANCY ACT (VIII OF 1885)—
contd

——— s. 161—contd

See ENCUMBRANCE
I. L. R. 46 Calc 891

1 ——— *Permanent under raiyati lease registered—Landlord of occupancy holding purchasing holding if bound to annul it as incumbrance or protected interest* An under raiyati lease registered in contravention of s 85 sub s (2) of the Bengal Tenancy Act is no operative against the superior landlord of the occupancy raiyat *Jarip Khan v Durga Dasi 17 C W N 59* and *Manik Lorai v Bani Ch Mandal I C L J 619* referred to The landlord of the occupancy holding purchasing that holding at a sale for its arrears cannot be called upon to annul a permanent under raiyati lease created without his consent as an incumbrance within the meaning of cl (a) of s 161 of the Bengal Tenancy Act nor is such an interest a protected interest within s 161 cl (c) of the Act so far as the landlord auction purchaser of the occupancy holding is concerned ARU TOSH SINGHA v BANOMALI SAIN (1913) 19 C W N 412

2 ——— *Stranger purchasing raiyati holding at sale for arrears of rent if may eject under raiyat without annulling his interest* The interest of the under raiyat is an incumbrance within the meaning of s 161 of the Bengal Tenancy Act which a stranger purchasing at a sale for arrears of rent is bound to annul according to the procedure laid down in s 167 of the Bengal Tenancy Act and where this procedure has not been followed the purchaser is not entitled to eject the under raiyat JANAKI NATH HORE v PRABHASINI DASI (1915) 19 C W N 1077

3 ——— *Bengal Tenancy Act (VIII of 1885) Chap XIV ss 3 cl 9 161 167—Incumbrance title by adverse possession if—Holding if includes under raiyati—Under raiyati if may be sold under Chap XIV Bengal Tenancy Act—Sale of under raiyati for arrears of rent purchaser if can annul incumbrances* Title acquired by adverse possession for the statutory period by a trespasser in the lands of a defaulting tenant is an incumbrance within the meaning of s 161 of the Bengal Tenancy Act *Gocool Lagdi v Debendra Nath Sen 14 C L J 1 6* followed An under raiyat s interest cannot be sold for arrears of rent under Chap XIV of the Bengal Tenancy Act so as to attract to the sale the special consequences attached to such sales a purchaser of an under raiyat s interest has therefore no right to annul incumbrances under s 167 of the Bengal Tenancy Act which applies only in cases of sales under Chap XIV The word holding except where it has been used in the Act expressly to include lands held by an under raiyat has the meaning given to it in s 3 cl (9) and does not include lands held by an under raiyat The word as used in Chap XIV does not include such lands MUNSAB ALI v ARSADULLA (1912) 16 C W N 831

——— ss 161 163 (2) (b)—167—*Mortgage of share of holding if incumbrance to be annulled* A mortgage of a portion of a non transferable occupancy holding is an incumbrance within s 161 of the Bengal Tenancy Act and a purchaser of the holding at a rent sale under s 163 ( ) (b) of the Act takes the property subject to the mortgage unless it is annulled by him in the only mode provided by law *viz* under s 167 of the Act In a suit by the mortgagee to enforce his bond against the tenants of the holding and the purchaser at the rent sale the landlord is not a necessary party PRAN KRISH v LAL ... ATUL KRISHNA MUKERJI (191) 22 C W N 662

BENGAL TENANCY ACT (VIII OF 1885)—
contd

——— ss 161 167—

See INCUMBRANCE
I. L. R. 43 Calc 558

See LANDLORD AND TENANT
I. L. R. 45 Calc 756

——— ——— *Incumbrance portion of putni tenure purchased from tenant if—Sale of tenure in execution of rent decree against registered tenant—Purchaser if must annul transferee s interest* JENKINS C J (agreeing with N R Chatterjea J)—The interest of an unregistered purchaser of a portion of a *putni* tenure is not an incumbrance within the meaning of s 161 of the Bengal Tenancy Act and need not be annulled under s 167 of the Act by the purchaser of the tenure at a sale in execution of a rent decree obtained against the registered tenant *Chander Sahai v Kali Prosunna Chakerbutty I L R 23 Calc 254* referred to Per MULLICK J (contra) —A purchaser from a registered tenant is in the position of a rent free sub tenant and is an incumbrancer within the meaning of s 161 of the Bengal Tenancy Act ATIUR RAHMAN CHOWDHURI v AHMADAR RAHMAN (1915) 19 C W N 1217

——— ——— ——— *Person acquiring title by adverse possession against sub tenant if an incumbrancer and if entitled to notice* When a person has by adverse possession against a sub tenant acquired a statutory title to a portion of the lands comprised in the sub tenancy he has an interest in the sub tenancy so that when on a sale of the superior tenancy for arrears of rent the purchaser seeks to annul the sub tenancy as an incumbrance such person stands in the position of an incumbrancer and is entitled to notice under s 167 of the Bengal Tenancy Act BHUSAN CHANDRA GHOSH v SRIKANTA BANERJI (1916)
21 C W N 155

——— In a suit under s 167 of the Bengal Tenancy Act by the purchaser at a rent sale of a *putni taluk* which was created in 1807 to recover lands which the defendants were holding as *lakhiraj* for periods greatly exceeding twelve years and apparently from as far back as anything could be traced *Quære* Whether an interest not directly created by the *talukdar* but allowed to grow up by his sufferance and negligence is an incumbrance as defined in s 161 of the Act But assuming for the purpose of the decision that it was *Held* that it lay upon the plaintiff to show an origin of the holdings as *lakhiraj* either by creation or by the sufferance of a *putnidar* subsequent to 1807 the proper presumption being that they ran back to a period antecedent to the creation of the *putni taluk* BIPRADAS PAL CHOWDHURY v KAMINI KUMAR LAHIRI (P C.)
26 C W N 465

——— s 161 and 170 (?)—*Occupancy holding—Unregistered transfer of entire holding Whether transferee has an interest ... to holding sale* An unregistered transferee

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— ss 159—*contd*

of the Act The words any other right or interest created by the tenant on his holding or in limitation of his own interest therein in s 161 (1) refer to some right which is *ejusdem generis* with the words when sub tenancy easement in the same sub section *Per* MULLICK J —A purchaser of a part of non transferable occupancy holding is entitled to deposit the arrears under s 170 (3) of the Act The word interest in s 170 is a wider term than incumbrance and includes rights other than those falling within the limits of s 161 A transferee who is liable to be ejected by the auction purchaser after the sale has an interest voidable on the sale The interest referred to in s 170 is not limited to an interest valid against the landlord MAHADEO LAL *v* LANGAT SINGH 2 Pat L J 457

——— ss 159 to 167—The word incumbrance as used in ss 159 161 of the Bengal Tenancy Act includes statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding and such incumbrance cannot be annulled in any manner other than what is provided in s 167 At the time when the Bengal Tenancy Act was passed the term incumbrance had a well recognised meaning in connection with provision in statutes in *pari materia* and since the Bengal Tenancy Act came into operation the word incumbrance has been interpreted to include a statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding ISAN CHANDRA BAKSHI *v* SAFATULLA SIKDAR 26 C W N 703

——— ss 159 163 to 167—

See SALE I L R 43 Calc 263

——— ss 159 cl (b) 179—

See LEASE I L R 45 Calc 940

——— s 160

See LANDLORD AND TENANT I L R 39 Calc 138
I L R 37 Calc 709

——— Protected interest—*Mortgage by a putnidar if protected interest—Sale under the Bengal Tenancy Act—Putni Regulation (VIII of 1819) s 11* Where a putni *kabuliyat* provided as follows I in succession to my sons grandsons etc heirs and representatives shall with felicity hold and enjoy the aforesaid share with right to make gift sale mortgage etc and *dar putni mourasi mokurari ijaradari* etc settlements at a proper *jama* and to every way make alienations and create encumbrances and the *putnidar* created a mortgage in favour of the plaintiff *Held* that the recitals in the *kabuliyat* merely set out the ordinary incidents of a *putni* grant as laid down in s. 3 of the Putni Regulation and did not give the *putnidar* an express authority in writing by the landlords to create a mortgage and the mortgage created in favour of the plaintiff by the *putnidar* was not a protected interest within the meaning of s 160 cl (g) of the Bengal Tenancy Act The right of a *putnidar* to give the tenure on mortgage is subject to the conditions imposed by s 11 of the Putni Regulation. The express authority referred to in that section means such authority apart from the conditions of the lease The effect of s 160 cl (g) of the Bengal Tenancy Act would further be subject to the saving provisions of cl (e) of s 195 of the same Act KRISTO DAS LAHA *v* JOTINDRA NATH BASU (1912) 16 C W N 561

——— *Protected interest*—*Sepatni created by darputnidar authorised in dar putni lease to create such encumbrance if a protected interest—Separate document expressly giving permission executed at the time when encumbrance created if necessary—S 167* A darputni lease expressly stated that the *darputnidar* would have authority to grant a *sepatni* and pursuant to the power so conferred the *darputnidar* created a *sepatni* *Held* that the lease contained an express permission in writing sufficient for the purpose of cl (g) of s 160 Bengal Tenancy Act and the *sepatni* was a protected interest which could not be annulled under the provisions of s 167 Bengal Tenancy Act That s 160 (g) does not contemplate that the permission should be expressly given at the time of the creation of the encumbrance by a document especially executed in this behalf BIDHU MUKHI CHOWDHURANI *v* ASMATULLA (1916) 21 C W N 829

——— A Raiyat holding at a fixed rent may subsequently acquire a right of occupancy SATLESWAR PATRA *v* MAHARAJAH SIR BEJOY CHAND MOHATAP 26 C W N 15

——— ss 160 165 167— *Sepatni if a protected tenure—Darputni extinguished under s 167—Effect on sepatnidar who has not been ejected—Right to collect rent* A sepatnidar who has not been ejected in a proceeding under s 167 of the Bengal Tenancy Act is not entitled to continue collecting rents from the tenants when the *dar putni* under which he holds has been extinguished under that section On the extinction of the *dar putni* the tenants became liable to pay their rent directly to the *putnidar* The extinction of the *dar putni* necessarily carries with it the extinction of the *sepatni* which is not a protected tenure under the definition in s 160 of the Bengal Tenancy Act MAKHAM DAS KULI *v* RAM CHANDRA GOSWAMI (1912) 17 C W N 1064

——— ss 160 (c) 167— *Protected interest — Plantation meaning of—Boroj or betel plantation if protected interest Date of sale meaning of* The word plantation is one of wide significance and would include an assemblage of growing plants of any kind that have been planted As to whether or not a particular assemblage of plants comes within the policy of s 160 cl (c) of the Bengal Tenancy Act must be largely if not exclusively a question of fact The lower Appellate Court having held a *boroj* or betel plantation to be a plantation within the meaning of the section *Held* that it could not be said on the materials on the record that that Court s determination of the question was erroneous BANKO BEHARY DAS *v* KRISHNA CHANDRA BHOWMICK (1913) 18 C W N 349

——— s 161—

See s 159 2 Pat L J 457

See s 167 25 C W N 424

See RENT DECREE 5 Pat L J 83

BENGAL TENANCY ACT (VIII OF 1885)—contd

——— s. 161—contd

See ENCUMBRANCE

I L R 46 Calc 891

1 ——— *Permanent under raiyati lease registered—Landlord of occupancy holding purchasing holding if bound to annul it as incumbrance or protected interest* An under raiyati lease registered in contravention of s 85 sub s (2) of the Bengal Tenancy Act is no operative against the superior landlord of the occupancy raiyat *Janip Khan* v *Dorfa Bewa 17 C W N 59* and *Manik Ecrai* v *Bani Ch Mandal 16 C L J 619* referred to The landlord of the occupancy holding purchasing that holding at a sale for its arrears cannot be called upon to annul a permanent under raiyati lease created without his consent as an incumbrance within the meaning of cl (a) of s 161 of the Bengal Tenancy Act nor is such an interest a protected interest within s 161 cl (c) of the Act so far as the landlord auction purchaser of the occupancy holding is concerned ASHUTOSH SINGHA v BANOMALI SAIN (1913) 19 C W N 412

2 ——— *Stranger purchasing raiyati holding at sale for arrears of rent if may eject under raiyat without annulling his interest* The interest of the under raiyat is an incumbrance within the meaning of s 161 of the Bengal Tenancy Act which a stranger purchasing at a sale for arrears of rent is bound to annul according to the procedure laid down in s 167 of the Bengal Tenancy Act and where this procedure has not been followed the purchaser is not entitled to eject the under raiyat JANAKI NATH HORE v PRABHASINI DASI (1915) 19 C W N 1077

3 ———*Bengal Tenancy Act (VIII of 1885) Chap XIV ss 3 cl 9 161 167—Incumbrance title by adverse possession if—) Holding if includes under raiyati—Under raiyati if may be sold under Chap XIV Bengal Tenancy Act—Sale of under raiyati for arrears of rent purchaser if can annul incumbrances* Title acquired by adverse possession for the statutory period by a trespasser in the lands of a defaulting tenant is an incumbrance within the meaning of s 161 of the Bengal Tenancy Act *Gocool Lagdi* v *Debendra Nath Sen 14 C L J 136* followed An under raiyat s interest cannot be sold for arrears of rent under Chap XIV of the Bengal Tenancy Act so as to attract to the sale the special consequences attached to such sales a purchaser of an under raiyat s interest has therefore no right to annul incumbrances under s 167 of the Bengal Tenancy Act which applies only in cases of sales under Chap XIV The word holding except where it has been used in the Act expressly to include lands held by an under raiyat has the meaning given to it in s 3 cl (9) and does not include lands held by an under raiyat The word as used in Chap XIV does not include such lands MUNSAB ALI v ARSADULLA (1917) 16 C W N 831

——— ss 161 163 (2) (b)—167—*Mortgage of share of holding if incumbrance to be annulled* A mortgage of a portion of a non transferable occupancy holding is an incumbrance within s 161 of the Bengal Tenancy Act and a purchaser of the holding at a rent sale under s 163 (2) (b) of the Act takes the property subject to the mortgage unless it is annulled by him in the only mode provided by law i.e. under s 167 of the Act In a suit by the mortgagee to enforce his bond against the tenants of the holding and the purchaser at the rent sale the landlord is not a necessary party PRAN KRISHNA PAL v ATUL KRISHNA MUKERJI (191) 22 C W N 662

——— ss 161, 167—

See INCUMBRANCE

I L R 43 Calc 558

See LANDLORD AND TENANT

I L R 45 Calc 756

——— *Incumbrance portion of putni tenure purchased from tenant if—Sale of tenure in execution of rent decree against registered tenant—Purchaser if must annul transferee s interest* JENKINS C J (agreeing with N R Chatterjea J)—The interest of an unregistered purchaser of a portion of a *putni* tenure is not an incumbrance within the meaning of s 161 of the Bengal Tenancy Act and need not be annulled under s 167 of the Act by the purchaser of the tenure at a sale in execution of a rent decree obtained against the registered tenant *Chander Sahai* v *Kali Prosunna Chakerbutty I L R 23 Calc 254* referred to *Per* MULLICK J (*contra*)—A purchaser from a registered tenant is in the position of a rent free sub tenant and is an incumbrancer within the meaning of s 161 of the Bengal Tenancy Act ABDUL RAHMAN CHOWDHURI v AHMADAR RAHMAN (1915) 19 C W N 1217

——— *Person acquiring title by adverse possession against sub tenant if an incumbrancer and if entitled to notice* When a person has by adverse possession against a sub tenant acquired a statutory title to a portion of the lands comprised in the sub tenancy he has an interest in the sub tenancy so that when on a sale of the superior tenancy for arrears of rent the purchaser seeks to annul the sub tenancy as an incumbrance such person stands in the position of an incumbrancer and is entitled to notice under s 167 of the Bengal Tenancy Act BHUSAN CHANDRA GHOSH v SRIKANTA BANERJI (1916)

21 C W N 155

——— In a suit under s 167 of the Bengal Tenancy Act by the purchaser at a rent sale of a *putni taluk* which was created in 1807 to recover lands which the defendants were holding as *lakhiraj* for periods greatly exceeding twelve years and apparently from as far back as anything could be traced *Quære* Whether an interest not directly created by the *talukdar* but allowed to grow up by his sufferance and negligence is an incumbrance as defined in s 161 of the Act But assuming for the purpose of the decision that it was *Held* that it lay upon the plaintiff to show an origin of the holdings as *lakhiraj* either by creation or by the sufferance of a *putnidar* subsequent to 1807 the proper presumption being that they ran back to a period antecedent to the creation of the *putni taluk* BIPRADAS PAL CHOWDHURY v KAMINI KUMAR LAHIRI (P C)

23 C W N 465

——— s 161 and 170 (u)—*Occupancy holding—Unregistered transfer of entire holding—Whether transferee has an interest voidable by the sale* An unregistered transferee of an occu

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 161—*contd*

pancy holding is not entitled to make a deposit under s 170 (3) of the Bengal Tenancy Act 1885 The voidable interests referred to in s 170 (3) are those interests which are encumbrances within the meaning of s 161 The interest of an unregistered purchaser of an entire occupancy holding is not an encumbrance within the meaning of s 161 *Maharaja Sir Rameshuar Singh Bahadur v Raghunandan Khabas*
1 Pat L J 403

——— s 162—
See s 159 2 Pat L J 457

——— s 163—
See ss 158 AND 159
2 Pat L J 176 457

——— ss 163 to 167—
See SALE I L R 43 Calc 263

——— ss 164 165 167—
See MORTGAGE I L R 38 Calc 923

——— s 166—
See s 148 3 Pat L J 145

——— s 167—
See INCUMBRANCE
I L R 43 Calc 558
See LANDLORD AND TENANT
I L R 43 Calc 164
I L R 45 Calc 756
See MORTGAGE DECREE
4 Pat L J 362
See NOTICE TO QUIT
I L R 46 Calc 766
See s 59 2 Pat L J 176
See s 161 22 C W N 662

1 ——— The mere circumstance that a notice under s 167 Bengal Tenancy Act is signed by a Deputy Collector does not invalidate such notice if he acted on behalf of the Collector GIRIS CHANDRA GUHA v KHAGENDRA NATH CHATTERJEE (1911) 16 C W N 64

2 ——— *Date of sale meaning of— Notice if means express notice* The words date of sale in s 167 of the Bengal Tenancy Act means the date on which the sale of the holding or tenure has actually taken place and not the date of the confirmation of the sale If the purchaser has had knowledge or intimation of an incumbrance that would be sufficient notice of it within the meaning of s 167 When the purchaser of an occupancy holding at a rent sale had intimation that persons other than the judgment debtor were cultivating the land *Held* that the lower Appellate Court was justified in holding that he had notice of the incumbrance these persons had on the holding YUSUF GAZI v ASMAT MOLLAH (1912) 17 C W N 440

3 ——— *Suit to annul incumbrance—Persons interested in incumbrance if necessary parties— Addition of parties on appeal—Prejudice—Notice of annulment—Service.* In a suit for *khas* possession of certain mouzahs comprised in a *putni* taluk purchased by the plaintiffs at an auction sale under the decree for rent obtained by the zamindar the defendants who

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 167—*contd*

with one N claimed to be *darputnidars* of the mouzahs in suit having objected that N had not been joined as a party the suit was dismissed by the subordinate Judge *inter alia* on the ground of non joinder of *N* but on the plaintiff's application to the High Court at the hearing of their appeal from the decision of the Subordinate Judge N was ordered to be made a party defendant to the suit which was remanded to the lower Court N did not appeal against the decision of the High Court *Held* that *N* was not at any time a necessary party to the suit so far as the other defendants were concerned and they were not prejudiced by the fact that N was added as a defendant when the suit was in appeal and the omission to make an original defendant did not make the suit bad for non joinder as against the other defendants who were the appellants before the Privy Council That the plaintiff having proved that the notices of annulment of incumbrances were served on the defendants in the manner prescribed for service of summons in the Civil Procedure Code the notices were duly served in accordance with Government Rules made in that behalf ANANDA GOPAL GOSSAIN v NAFAR CHANDRA PAL CHOWDHURI (1913) 18 C W N 259

——— *Sale of an under tenure under—Effect of the sale in case the landlord ceased to be the sole landlord at the date of sale—if the sale passes the under tenure to the purchaser free of incumbrances—Effect of the cessation partial or entire of the interest of the landlord on his right to enforce realization of arrears of rent by sale of the tenancy—Propriety of applying isolated dicta from judicial precedents to cases where the facts are different in essential particulars* Plaintiff obtained in February 1908 a rent decree against an under tenure holder and applied for execution of the decree in accordance with the special procedure prescribed in Chap XIV of the Bengal Tenancy Act In January 1909 one half share of the plaintiff s interest as superior landlord was sold in execution of a mortgage decree In February 1909 the defaulting under tenure was sold in execution The defendants declined to deliver up possession to plaintiff purchaser on the allegation that they were in possession as holders of a subordinate under tenure lawfully created by the defaulter In 1911 plaintiff brought the present suit to eject the defendants who pleaded that the plaintiff having ceased to be the sole landlord at the date of the sale (February 1909) the sale was not one under the Bengal Tenancy Act but only a sale of the right title and interest of the judgment debtor under the Civil Procedure Code *Held* that where the decreeholder continued to be the sole landlord at the date of the application for execution of the decree and in his character as landlord decree holder took the necessary steps for the sale of the under tenure in conformity with statutory provisions the effect of the execution sale was to pass the under tenure to the purchaser even though the decree holder had lost his interest as landlord before the actual sale The legal effect of the sale depends upon the character of the proceedings in execution duly taken and not upon the relative situation of the parties at the moment of the sale *Held* further that to apply isolated dicta from a judgment of the Judicial Committee

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s. 167—*contd*

to a case where the facts are in essential particulars different would be a manifest abuse of judicial precedents. SYEDUNNESSA KHATUN v. AMIRUDDI (1917) 21 C W N 847

5 ——— *Annulment of incumbrances—Procedure to be strictly followed—Service of notice entry in order sheet if sufficient proof of—Single suit for rent of entire taluk after same was split up—Consequential sale of rent sale* The destruction of valuable incumbrances is a very severe measure which the law allows only if a certain procedure is strictly followed and when a party wishes to enforce that severe measure he must show that he has strictly followed the procedure laid down An entry in the order sheet that notice has been served is not sufficient proof of service of notice Where it appeared that what was formerly one taluk was split up into several different taluks a sale of the entire taluk in execution of a decree obtained in a single suit for rent due upon the entire taluk was not a sale for arrears of rent within the meaning of the Bengal Tenancy Act PRAFULLA NATH TAGORE v SITAL KHAN (1918) 22 C W N 788

6 ——— *Suit by purchaser for possession—Incumbrance set up in written statement—Suit if maintainable when plaintiff was not aware of incumbrance before suit* Where the purchaser at a rent sale suing in ejectment became aware of the existence of an incumbrance in favour of the defendant only when the latter set it up in his written statement the Court passed a decree for possession in plaintiff s favour subject to the reservation that the incumbrance would stand good if not annulled within one year of the plaintiff s knowledge thereof GOPINATH BISWAS v RADHA SHYAM PODDAR (1920) 24 C W N 657

7 ——— *Suit by purchaser at rent sale for ejectment—Incumbrance set up in written statement—Notice annulling incumbrance given thereafter—Suit if maintainable* Where a purchaser at a rent sale did not become aware of the existence of an incumbrance until after the same was set up by the defendants in his written statement and notice of annulment under s 167 was in consequence given subsequently to the institution of the suit *Held* that the suit could not fail because notice of annulment was not given prior to the institution of the suit *Gopinath Biswas* v *Radhashyam Poddar 24 C W N 657 (1901)* followed FASIN v INTIJENNESSA BIBI (1920) 24 C W N 659

——— *Annulment of encumbrance—Purchaser of a holding in execution of a mortgage decree if has a subsisting encumbrance at the date of a subsequent rent sale of the holding—S 161 encumbrance meaning of* In execution of a mortgage decree *D* purchased the interest of one of the tenants of a holding the whole of which holding was subsequently purchased by *P* in execution of a rent decree *Held* that after the sale in execution of the mortgage decree the mortgagee who purchased at the sale became the owner of the property and he could not maintain that his mortgage still remained an incumbrance thereon which *P* was bound to annul under the provisions of s 167 of the Bengal Tenancy Act *Bhawani Kuwar* v *Mathura Prosad I L R 40 Calc 89 (P C) (1912)* followed *Ban Behari Kapur* v *Khetrapal Singh Roy I L R 38 Calc 9 3 (1911)* referred to SABJAN MANDAL v HARIPADA SAHA 25 C W N 424

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— ss 167 169—

See SALE I L R 45 Calc 151

——— ss 167 173—*Sale of mokurari tenure for arrears of rent—Benamidar of purchaser if can annul incumbrance under s 167—Duty of Collector in such a case—Effect of s 173—Specific Relief Act (I of 1877) s 45—Application of the section by the High Court when warranted* A mokurari tenure was sold for arrears of rent and purchased in the name of the plaintiff who was proved to be the *benamdar* for one of the judgment debtors On the Collector refusing to issue notices under s 167 Bengal Tenancy Act for annulling incumbrances on the application of the plaintiff he sued for a declaration that he had power to annul the incumbrances under s 167 and that the Collector was bound to issue and cause notices to be served *Held* that this was not a case where the Courts should be asked to give equitable relief by directing a public servant to exercise his powers under s 167 Bengal Tenancy Act and the suit was rightly dismissed That even assuming that the Collector should have issued notice on the requisition of the person in whose name the sale certificate stood the Court had to consider whether it would in equity be right to require him to do the specific act in question seeing that thereby the law prohibiting purchase by the judgment debtor would be defeated MOHAMMED SIDDIQ v BABU DURGA PROSHAD (1915) 21 C W N 342

——— s 169—

See s 167 I L R 45 Calc 151

——— *sub ss (1) (c) (2) Sch III Art 2—Rent sale—Surplus sale proceeds application by decree holder for towards discharge of subsequent arrears—Limitation plea of if may be taken* Under cl (c) to sub s (1) of s 169 of the Bengal Tenancy Act the decree holder landlord is entitled to have the surplus sale proceeds paid to him in discharge of arrears of rent due from the date of the institution of the suit to the confirmation of the sale even though on the date of his application for such payment a suit to recover those arrears would be time barred Art 2 of Sch III of the Bengal Tenancy Act provides for suits and not for applications of this kind NARENDRA LAL KHAN v SARAT CHANDRA BHATTACHARJEE (1915) 19 C W N 582

——— *Rent accrued due between the date of sale and confirmation thereof—Liability whether judgment debtor s or auction purchaser s—Liability of the surplus sale proceeds—Civil Procedure Code (Act V of 1908) s 65* In view of the alteration in the law made by s 65 of the Civil Procedure Code of 1908 the liability of the surplus sale proceeds under s 169 of the Bengal Tenancy Act is limited to arrears accrued due up to the date of the sale and cannot be extended to arrears due up to the date of confirmation Arrears accrued due between these dates cannot recovered from the judgment-de

CHAND MAHTAP v SASHI BHUSAN BOSE

18 C.

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

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1 Pat L J 403

——— s 162—
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——— s 163—
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——— s 166—
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——— s 167—
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BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 167—*contd*

with one N claimed to be *darputnidars* of the mouzahs in suit having objected that N had not been joined as a party the suit was dismissed by the subordinate Judge *inter alia* on the ground of non joinder of *N* but on the plaintiff's application to the High Court at the hearing of their appeal from the decision of the Subordinate Judge N was ordered to be made a party defendant to the suit which was remanded to the lower Court N did not appeal against the decision of the High Court *Held* that *N* was not at any time a necessary party to the suit so far as the other defendants were concerned and they were not prejudiced by the fact that N was added as a defendant when the suit was in appeal and the omission to make an original defendant did not make the suit bad for non joinder as against the other defendants who were the appellants before the Privy Council That the plaintiff having proved that the notices of annulment of incumbrances were served on the defendants in the manner prescribed for service of summons in the Civil Procedure Code the notices were duly served in accordance with Government Rules made in that behalf ANANDA GOPAL GOSSAIN v NAFAR CHANDRA PAL CHOWDHURY (1913) 18 C W N 259

4 ——— *Sale of an under tenure under—Effect of the sale in case the landlord ceased to be the sole landlord at the date of sale—if the sale passes the under tenure to the purchaser free of incumbrances—Effect of the cessation partial or entire of the interest of the landlord on his right to enforce realisation of arrears of rent by sale of the tenancy—Propriety of applying isolated dicta from judicial precedents to cases where the facts are different in essential particulars* Plaintiff obtained in February 1908 a rent decree against an under tenure holder and applied for execution of the decree in accordance with the special procedure prescribed in Chap XIV of the Bengal Tenancy Act In January 1909 one half share of the plaintiff s interest as superior landlord was sold in execution of a mortgage decree In February 1909 the defaulting under tenure was sold in execution The defendants declined to deliver up possession to plaintiff purchaser on the allegation that they were in possession as holders of a subordinate under tenure lawfully created by the defaulter In 1911 plaintiff brought the present suit to eject the defendants who pleaded that the plaintiff having ceased to be the sole landlord at the date of the sale (February 1909) the sale was not one under the Bengal Tenancy Act but only a sale of the right title and interest of the judgment debtor under the Civil Procedure Code *Held* that where the decreeholder continued to be the sole landlord at the date of the application for execution of the decree and in his character as landlord decree holder took the necessary steps for the sale of the under tenure in conformity with statutory provisions the effect of the execution sale was to pass the under tenure to the purchaser even though the decree holder had lost his interest as landlord before the actual sale The legal effect of the sale depends upon the character of the proceedings in execution duly taken and not upon the relative situation of the parties at the moment of the sale *Held further* that to apply isolated dicta from a judgment of the Judicial Committee

BENGAL TENANCY ACT (VIII OF 1885)— *contd*

——— s 170—*contd*

section A purchaser of a holding who has been recognised by the landlord as a tenant cannot make a deposit under the section TARAK DAS PAL CHOUDHURY v HARISH CHANDRA BANNERJEE (1917) 17 C W N 163

———*Occupancy holding purchaser of, if may deposit when holding put up to sale in execution of rent decree against his vendor Interest voidable on the sale* An unregistered purchaser of a non transferable occupancy holding is entitled to make a deposit under s 170 (3) of the Bengal Tenancy Act when the holding has been advertised for sale in execution of a rent-decree obtained subsequently to his purchase by the landlord against the registered tenant—and this even though he has been in possession of the holding for less than twelve years *Tarak Das Pal v Harish Chandra Banerjee 17 C W N 163* and *16 C L J 548* and *Dayamay v Ananda Mohan Roy 18 C W N 971* referred to He has an interest in the holding which is voidable on the sale AHAMADULLA CHOWDRY v PRAYAG SAHU (1914) 20 C W N 39

——— The words "an interest in the tenure or holding voidable on the sale" in s 170 (3) of the Bengal Tenancy Act mean an interest which is in existence at the time of the sale and which will become liable to be avoided on the sale taking place at the option of some one Where a decree for rent put into execution was one obtained against a Hindu widow the reversionary heir expectant of her husband on her death did not have an interest in the tenure or holding voidable on the sale within the meaning of s 170 (3) of the Bengal Tenancy Act Where the Court of execution allowed the reversioner to make a deposit under that section he exercised a jurisdiction not vested in him by law or was acting in the exercise of his jurisdiction illegally or with material irregularity within the meaning of S 115 of the Civil Procedure Code MOHENDRA NATH NANDI v BAIDYA NATH 26 C W N 167

——— ss 170 (3) and 161—*Usufructuary mortgage whether is an incumbrance voidable on sale of the holding* An usufructuary mortgagee in possession of a non transferable occupancy holding has an incumbrance which is an interest voidable on the sale of the holding entitling him to make a deposit under s 170 (3) of the Bengal Tenancy Act 1885 SHEIKH AZMAT v BIBI TAMZAN 4 Pat L J 83

——— ss 170 and 171—*Deposit by transferee of occupancy holding—Right of transferee to challenge decree enhancing the rent* Where the transferee of an occupancy holding has been allowed to deposit the amount of the arrears under ss 170 and 171 of the Bengal Tenancy Act 1885 and such amount has been withdrawn by the landlords the transferee is entitled to maintain a suit to challenge a decree obtained by the landlord collusively against the recorded tenant enhancing the rent LALA BIHARIMDEO LAL v SHEO PRASAD LAL 2 Pat L J 561

——— ss 170 AND 174—The provisions of O XXI r 90 requiring service of notice do not

BENGAL TENANCY ACT (VIII OF 1885)— *contd*

——— ss 170—*contd*

apply to an application by the judgment debtor to set aside a sale under S 174 of the Bengal Tenancy Act PAHLAD SINGH v SAJIWAN RAI 6 Pat L J 16

——— s 171—

See 170—

See LUTNI REGULATION s 13 cl (4) 15 C W N 404

See RATES AND TAXES I L R 42 Calc 625

——— *Co tenant paying decree for rent if can hold lien on co sharers share* The interest of a co tenant is void and not voidable on sale Where therefore in order to save the holding a co sharer tenant paid up the amount due on a rent decree from his co tenants he acquired no lien on the share of his co tenants ASHUTOSH GHOSE v ABINASH CHANDRA CHOWDHURI (1911) 15 C W N 782

——— *Deposit under—Court making no enquiry as to depositor having interest voidable on the sale—Revision—Civil Procedure Code (Act V of 1908) ss 47 115—Material irregularity—Appeal* Where upon an application made under s 171 of the Bengal Tenancy Act it was ordered that the applicant applies for depositing the claim in Court he may deposit the claim within 2 days but there was no enquiry as to whether the depositor had any interest voidable on the sale and no decision upon the point *Held* that the Court in passing this order acted with material irregularity in the exercise of its jurisdiction and the High Court could interfere under s 115 of the Civil Procedure Code *Held* also that the above order was not appealable as the original application having been made by a person not a party to the suit did not come within the provisions of s 47 of the Civil Procedure Code *Hira Lal Ghose v Chandra Kanta Ghose I L R 26 Calc 539* referred to *Quære* Whether under the provisions of s 173 of the Bengal Tenancy Act the District Judge had revisional jurisdiction in the matter GOBINDA SUNDAR SINGHA CHOWDRY v CHAND MEAH (1913) 17 C W N 602

——— s 173—

See s 167 21 C W N 342

——— *Civil Procedure Code (Act V of 1908) s 47— Representative — Unrecorded co sharer if representative of recorded co sharer—Bengal Tenancy Act (VIII of 1885) s 173 order under when appealable* An unrecorded co sharer in a tenancy sold in execution of a rent decree against the recorded co sharer is not a representative of the recorded co sharer within s 47 of the Civil Procedure Code *Asgar Ali v Asabodin 9 C W N 131* distinguished It cannot be laid down generally that an order under s 173 of the Bengal Tenancy Act is in no case appealable Whether an appeal will lie or not will depend upon whether the question relates to the execution of the decree and whether it is between the parties to the original suit or their representatives so as to bring the order under s. 47 Civil Procedure Code. JOY TARA v PRAN KRISTO SEAL (1910) 15 C. W N

BENGAL TENANCY ACT (VIII OF 1885)— *contd*

——— ss 173 and 174—*Order refusing to set aside sale, appeal from* When the holder of a rent decree purchases the holding in execution of his decree an appeal lies under s 47 of the Code of Civil Procedure 1908 from an order of the Court refusing to set aside the sale on deposit of the decretal amount under s 174 of the Bengal Tenancy Act 1885 The Appellate Court is entitled to examine the figures and test whether the calculation made by an officer of the Court of first Instance is correct for the purpose of ascertaining the proper sum to be deposited under s 174 ANHOURY PREM NARAIN v MUSAMMAT FAHIUNNISSA **2 Pat L J 525**

——— s 174—

See s 173 **2 Pat L J 525**

See DEPOSIT IN COURT **I L R 43 Calc 100**

1 ——— *Orissa—Sale under Act (VIII of 1865 B C)—Extension of the Bengal Tenancy Act—Repeal of inconsistent provisions of Act VIII of 1865 B C* In Orissa since the extension of Chap XIV of the Bengal Tenancy Act a sale under Act VIII of 1865 is liable to be set aside on an application under s 174 of the Bengal Tenancy Act the extension to Orissa of the provisions of the former Act having had the effect of repealing the inconsistent provisions of Act VIII of 1865 BARKAL PARIDA v JOGENDRA NATH SEN (1911) **16 C W N 311**

2 ——— *Time for depositing money if may be extended by Court—Order under if appealable—Inconsistent positions bar against taking up—Party if may treat the same order as a decree and as not a decree at different stages—Civil Procedure Code (Act V of 1908) s 47 O XLIII r 1 cl (j)—Amount payable if includes costs—Decree holder purchaser if entitled to 5 p c on purchase money—Execution petition copy of decree and vakalatnama if necessary for—Poundage fee if must be deposited with purchase money* An order under s 174 of the Bengal Tenancy Act is an order within s 47 of the Civil Procedure Code and a second appeal lie against such order The Court has no authority to extend the time within which deposit of purchase money has to be made under s 174 of the Bengal Tenancy Act *Amir Hossain v Nanak Chand 14 C W N 882 Gulab Chand v Bahuria 13 C L J 437* distinguished *Bibi Sharifan v Md Habibuddin 13 C L J 535 s c 15 C W N 685 Kabilaso v Raghunath I L R 18 Calc 48 Akbar v Sukdeo 13 C L J 467 Mathura v Bangsidhari 10 I C 880* referred to If therefore an amount shorter than the amount payable was deposited within the prescribed period and the balance paid out of time under an order of the Court the sale could not be set aside In calculating the amount which the judgment debtor must deposit 5 per cent on the purchase money (even where the purchaser is the decree holder himself) and costs must be included but the judgment debtor is not liable to deposit the costs of taking a copy of the decree or of the stamp on the vakalatnama or the poundage fee The amount deposited within the prescribed time in this case being sufficient to cover the amount payable after excluding the costs of taking a copy of the decree of the stamp on the vakalatnama and the poundage fee the order of the first Court

BENGAL TENANCY ACT (VIII OF 1885)— *contd*

——— s 174—*contd*

rejecting an application to have the sale set aside was reversed A copy of the decree of which execution is sought is not necessary for an application for execution The authority of a pleader in a case does not terminate with the decree but extends to execution proceedings A fresh vakalatnama is not therefore necessary for the purposes of execution proceedings Where the judgment debtors appealed against an order in execution treating it as one under s 174 of the Bengal Tenancy Act read with s 47 Civil Procedure Code it was not open to them on second appeal by the decree holders to urge that such appeal did not lie *Bindeswari Charan Singh v Lakpat Nath Singh 15 C W N 725* referred to RAGHUBAR DOYAL SUKUL v JADUNANDAN MISSER (1911) **16 C W N 736**

3 ——— *Order refusing to set aside sale on the ground of shortness of deposit if an order on a question of title—Appeal if lies—Poundage fee if must be deposited by judgment debtor to have sale set aside* The decision of the Full Bench in *Kali Mondal v Ramsarba Chuckerbutty I L R 32 Calc 957 9 C W N 721* has not been completely superseded by the explanation subsequently added to s 153 of the Bengal Tenancy Act Where therefore an application under s 174 of the Bengal Tenancy Act to set aside a sale in execution of a decree for rent was rejected by a Munsif who had final jurisdiction in the case under s 153 on the ground that the amount deposited was short *Held* that the decision of the Munsif was an order deciding a question relating to the title to land as between parties having conflicting titles thereto and was therefore appealable *Semble* The amount to be deposited under s 174 Bengal Tenancy Act does not include poundage fee *Raghubar Dayal v Jadunandan Messir 15 C L J 89 16 C W N 736* referred to BENI MADHAB RAY v BISSESSUR BHARTI (1911) **17 C W N 84**

4 ——— *Rent sale—Application to set aside sale by deposit—Deposit made by judgment debtor at the instance of prior purchaser and with money found by him—Subsequent withdrawal of application if to be allowed—Refund of money deposited and withdrawn order for—Enforcement as decree for money* Where some of the judgment debtors applied under s 174 of the Bengal Tenancy Act to set aside a sale for arrears of rent and also deposited the requisite amount in Court *Held* that the application was in order as in fact made by the judgment debtor though it was stated in a note appended thereto that the tenants had long before the sale transferred the holding to a stranger and that the money had been furnished by the purchaser *When therefore after the deposit the* judgment debtors withdrew the application to set aside the sale with the consent of the decree holder *Held* on the application of the purchaser that the Court should have set aside the sale The money deposited having been withdrawn by the judgment debtors they were ordered to refund it in Court within 7 days and if they failed to do so the lower Court was directed to execute the order as a decree and thus realise the money NITYANUND DAS v UDAI NARAIN MONDAL (1913) **18 C W N 175**

BENGAL TENANCY ACT (VIII OF 1885)—contd

——— s 174—contd

5 ——— *After extension to Orissa of repeal provisions of Act VIII of 1865 B C —Sale thereafter of holding in arrears in execution of rent decree passed by Collector's Court—Application to set aside sale by deposit if governed by the section or by Act VIII B C of 1865* A decree having been passed on the 12th January 1907 in a suit for rent of lands situate in Orissa instituted in the Collector's Court under Act X of 1859 the lands were sold in execution of the decree on 27th June 1907 S 174 of the Bengal Tenancy Act VIII of 1885 having meanwhile been extended in Orissa by order published in the Calcutta Gazette on 9th January 1907 the judgment debtor got the sale set aside by depositing the amount required by the section within thirty days but beyond the period of eight days provided by Act VIII of 1865 B C *Held* that it had been correctly laid down in *Barkal Parida v Jogendra Nath Sen 16 C W N 311 (1911)* that s 174 of the Bengal Tenancy Act applied to the case and not the provisions of Act VIII of 1865 B C which being inconsistent with that section were impliedly repealed by it LAKSHMIDAR MAHANTI v RATNAKAR MAHAPATRA (P C)
25 C W N 1099

6 ——— *Sale for arrears of rent —Application to set aside sale—Effect of non payment of the 5 per cent provided by the section* On the sale of his holding in execution of a decree for arrears of rent the judgment debtor applied to an officer of the Court for a statement as to the amount which he was bound to deposit in Court under s 174 of the Bengal Tenancy Act 1885 in order to have the sale set aside On ascertaining from the Officer the amount that was due under the decree together with poundage fees and charges he deposited the total amount so ascertained in Court He did not however deposit any sum to cover the *5 per cent* of the purchase money payable to the auction purchaser under the provisions of s 174 (1) The Court set aside the sale *Held* that the order setting aside the sale was without jurisdiction and that the High Court had jurisdiction to set aside the order of the first Court refusing to review the order to set aside the sale To be a valid deposit under s 174 the deposit must be made within 30 days from the date of the sale *Held* further that it was not the duty of the Court officer to inform the judgment debtor of the amount to be deposited under s 174 and that in supplying the information sought for by the judgment debtor the Officer was not acting as an officer of the Court SARJOO PRASAD MISSIR v NANNO RAI
1 Pat L J 459

7 ——— *Execution of decree—Sale—Sale set aside—Suit contesting order setting aside sale maintainability of—Code of Civil Procedure (Act V of 1908) s 9 and O XXI rr 89 90 91 and 92* A suit is maintainable at the instance of the purchaser of property at a sale held in execution of a rent decree to set aside an order setting aside a sale under s 174 of the Bengal Tenancy Act 1885 GULAB CHAND ROY v SHAIKH FIDA HUSSAIN
3 Pat L J 122

8 ——— A judgment-debtor seeking under s 174 of the Bengal Tenancy Act 1885 to set aside a sale of his holding or tenure in execution of a decree for arrears of rent is bound to deposit the amount recoverable under the decree with costs for payment to the decree holder together with a sum equal to *5 per cent* of the purchase money for payment to the purchaser He is not entitled to have the sale set aside on depositing only the amount specified in the sale proclamation together with *5 per cent* of the purchase money MAKRU RAI v SARJUG PRASAD MISSIR
4 Pat L J 55

9 ——— *Orissa—Sale for arrears of rent—Sale under Bengal Act VIII of 1865—Deposit in Court—Setting aside sale* In Orissa since the extension thereto of Ch XIV of the Bengal Tenancy Act (VIII of 1885) a sale under Bengal Act VIII of 1865 is liable to be set aside under s 174 of the Bengal Tenancy Act 1885 upon the judgment debtor depositing in the Court within 30 days of the sale the amount recoverable under the decree Judgment of the High Court affirmed LAKSHMIDAR MAHANTI v RATNAKAR MAHAPATRA (1921)
I L R 48 Calc 811

——— ss 174, 185—*Application to set aside sale made after 30 days—Allegation of fraud by which applicant kept from knowledge of sale—Extension of time if may be given—Limitation Act (XV of 1877) s 29 sub s (1) cl (b)* A judgment debtor applying to set aside a sale under s 174 of the Bengal Tenancy Act cannot rely on s 18 of the Limitation Act for an extension of the period of 30 days allowed for such an application on the ground that he had been kept from the knowledge of the sale by the fraud of the decree holder RADHASHYAM KAR v DINABANDHU BISWAS (1913)
18 C W N 31

——— s 178—

See s 67 2 Pat L J 367

See OCCUPANCY HOLDING
I L R 42 Calc 254

——— ss 178 (1) (d) 194—*Lease to tenure holder containing covenant not to excavate tank—Sub lease to raiyat without covenant—Excavation of tank by raiyat found an improvement—Suit for damages for breach of covenant who liable—Nominal damage—Vindictive damage* Where a lease created in favour of certain tenure holders contained a covenant by the latter not to excavate a tank but a tank was nevertheless excavated by a raiyat who had taken from the tenure holders a sub lease which did not impose any similar restrictions on the raiyat *Held* that s 178 sub s (*1*) cl (*d*) of the Bengal Tenancy Act being controlled by s 194 the tenure holders might have effectively inserted a restrictive covenant against excavation of tanks in the sub lease granted to the raiyat That for the breach of the covenant the tenure holders were liable but not the raiyat between whom and the superior landlord there was neither privity of contract nor privity of estate That although the tank was found to have improved the land and the plaintiff thus suffered no damage in fact he was entitled at least to nominal damage (which is not necessarily small damage) in vindication of his legal right—the breach of the covenant not appearing to have been deliberate in which case vindictive damages might have been *Medina v Comet [1900] 1 C 11?* *... v Kershaw*

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— ss 178—*contd*

16 Q B D 613 618 Williams v *Williams L R 9 C P 659 Bigsell* v *The Corporation of the School for the Indigent and Blind 8 Q B D 357 Mellor* v *Spateman* 1 Saunders 346b and *Patrick* v *Greenaway* 1 Saunders 346b note referred to AKHOY KUMAR CHATTERJEE v AKMAN MOLLA (1914) **19 C W N 1197**

——— s 179—

See s 67 **21 C W N 112**

See s 74 **21 C W N 108**

See LEASE **I L R 45 Calc 940**

——— *Covenant in a permanent lease that the lessee or his representatives should not transfer without the lessor s permission and reserving a right of pre emption in favour of the lessors validity of—Such covenant if void as offending against the rule of perpetuity* In a certain permanent lease there was a condition that if the lessee or any of his representatives intended to transfer the whole or any portion of the lease the transfer would be made in favour of the lessors for proper price that the lessee would not be able to transfer in favour of a third party without the les or s pe mission or wishes that in the case of transfer to a co sharer of the lessee lessor s permission would not be necessary and that in case of any act against the aforesaid conditions the said act would be invalid *Held* that the covenant was void as offending against the rule of prepetuity and was not therefore binding on the lessee SWARNA KUMAR GHOSH v PRAHLAD CHANDRA SARKAR **28 C W N 874**

——— s 180—

See NON OCCUPANCY RIGHTS **3 Pat L J 1**

1 ——— *Diara land tenant holding—Reduction of rent upon diluviation if may be claimed by him* A raiyat who holds *diara* land cannot until he has acquired occupancy right in his holding by twelve years continuous possession demand a reduction of rent under cl (*b*) of sub s (*1*) of s 52 of the Bengal Tenancy Act Holding in sub s (*1*) of s 180 of the Act means the holding as the tenant received it from the landlord *Jahander Baksh Mullik* v *Ram Lal Hazra 14 C W N 470* referred to SRINIVASH PROSAD SINGH v RAM RAJ TEWARY (1914) **18 C W N 598**

2 ——— *Chur land held continuously for over 12 years but during part thereof as ijaradar also—Commencement of possession as raiyat* Where the plaintiffs came into possession of certain *char* lands as raiyats in 1884 and continuously held possession thereof till 1908 but from 1890 to 1898 they held the same and other lands also as *ijaradars* *Held* that the plaintiffs acquired occupancy right in the land under s 180 sub s (*1*) of the Act The effect of the holding of the *ijara* from 1890 to 1898 discussed *Mukunda Lal* v *Crowdy 8 B L R App 95 Sarı* v *Panchanun 25 W R 503 Lal Bahadur* v *Solano I L R 10 Calc 45 Maseyk* v *Bhagbati I L R 18 Calc 191 193* referred to JASIMUDDIN SHEIKH v BENI MADHAB DAS (1913) **17 C W N 881**

3 ——— *Service tenure—Kotwali jaigir—Occupancy right if can be acquired in kotwali jagir land* A right of occupancy cannot be acquired in *kotwali jagir* land JAFARUDDIN SHAHA v BRINDARANI CHOWDHURANI (1918) **23 C W N 136**

——— s 181—*contd*

4 ——— *Occupancy rights acquisition of in char lands* Where certain *char* lands formed part of the holding for which the defendants had paid rent continuously for 12 years and the *char* lands had occasionally been submerged during that period *held* that the mere fact of submersion did not destroy the right of the tenants to acquire occupancy rights therein MAHARAJAH KESHO PROSAD SINGH BAHADUR v GIRDHARI OJHA **2 Pat L J 48**

——— s 182—

See OCCUPANCY RIGHTS **I L R 43 Calc 195**

1 ——— *Sub lease of homestead by raiyat—Permanent under raiyati lease if valid—Construction of lease* A sub lease by a raiyat of the homestead portion of his holding is governed by the Bengal Tenancy Act *Baburam Roy* v *Mohendra Nath Samanta 8 C W N 454* followed ABDUL KARIM PATWARI v ABDUL RAHAMAN (1911) **16 C W N 618**

2 ——— *Homestead owned by raiyat of different villages occupancy right if may be acquired in—Ejectment—Non occupancy raiyat* The language of s 182 Bengal Tenancy Act justifies the proposition laid down in *Kripa nath Chakraburti* v *Sheikh Anu 4 C L J 332 10 C W N 944* that in the absence of local custom or usage the provisions of the Bengal Tenancy Act are applicable to the homestead of a person who is a raiyat although he is not a raiyat of the village in which the homestead land is situated and is not a raiyat of the same landlord as the land lord of the homestead land *Quære* Whether to establish his occupancy right in the homestead the raiyat must show that he was a settled raiyat of the village in which the homestead is situated within the meaning of s 20 of the Act *Held* that if he was not an occupancy raiyat he would be a non occupancy and could not be ejected except in the manner provided by ss 44 and 45 of the Act HARIHAR CHATTAPADHYA v DINU BERA (1911) **16 C W N 539**

3 ——— *Homestead land if means land capable of being used but not actually used as homestead—Homestead land if must be held by raiyat of some village and under same landlord—Agricultural purpose storage of corn if* There is nothing in the language of s 182 of the Bengal Tenancy Act to justify its restriction to cases where the homestead and the holding are situated in one village and are held under one landlord The section is not applicable where it is established that the land is not used by the raiyat as his homestead and it is not sufficient for the raiyat to show that the character of the land is such as would justify its use as a homestead The provisions of the Bengal Tenancy Act are applicable to all lands used for agricultural purposes and are not restricted to such lands alone as are actually under cultivation Land taken with a view to gather and store thereon *crops raised in adjacent lands actually cultivated* by the raiyat is land used for agricultural purposes. DINA NATH NAG v SASI MOHAN DEY TARAFDAR (1915) **20 C W N 550**

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— s 182—*contd*

4 ——— *Raiyat giving homestead portion of his holding in sub lease to settle raiyat of another village—Sub lessee if under raiyat or has occupancy right* Where a raiyat whose holding consisted partly of agricultural and partly of home stead land let out the homestead portion to a person who held land as a settled raiyat under a different landlord in an adjoining village *Held* that the incidents of the sub lease of the home stead portion would be governed not by the Transfer of Property Act but by the Bengal Tenancy Act That as s 182 of the Bengal Tenancy Act applied the sub lessees held the homestead as a raiyat KRISHNA KANTA GHOSH v JAI U KASNA (1918)
19 C W N 914

——— s 185—

See s 174 18 C W N 31

——— s 188—

See s 7 15 C W N 74

See s 30 19 C W N 26

See MADRAS ESTATES LAND ACT OF 1908 s 42 I L R 38 Mad 524

1 ——— *Suit for enhancement of rent—Suit by one co sharer making defendants other co sharers who refused to join as plaintiffs—Meaning of act together —Suit for arrears of rent—Suits expressly authorised by Bengal Tenancy Act—Suits not requiring authority of Act—Bengal Tenancy Act ss 7 and 30* The institution of a suit for enhancement of rent being a suit authorised by the Bengal Tenancy Act (VIII of 1885) is some thing which a landlord is required or authorise to do under the Act within the meaning of s 188 and consequently a thing in which all the joint landlords must act together that is take com mon action Such a suit therefore is only pro perly framed when all the joint landlords are made plaintiffs *It is not sufficient for one or some of* the joint landlords to sue as plaintiff or plaintiffs and make those who refuse to join with him or them defendants in the suit *Pramada Nath Roy* v *Ramani Kanta Roy I L R 35 Calc 331 L R 35 I A 73* distinguished. It is otherwise with *a suit for arrears of rent the bringing of which is* not a thing which the landlord is under the Bengal Tenancy Act either required or authorised to do Rent in arrear is a debt the right to recover which arises under the general law and does not require the *authority of the Bengal Tenancy Act* and that Act does not authorise such a suit though on a decree being obtained consequences may follow which result from the provisions of the Act and from those provisions alone JATINDRA NATH CHOWDHRI v PRASANNA KUMAR BANERJEE (1910)
I L R 38 Calc 270

2 ——— S 188 of the Bengal Tenancy Act does not apply to joint tenants and a suit by a co sharer for abatement of rent is maintainable KHETTRAMANI DASI v JIBAN KRISHNA KUNDU (1914) 19 C W N 546

3 ——— *Suit by co sharer landlord for additional rent if maintainable—Parties —Right of of suit* Where a co sharer landlord brought a suit for arrears of rent and also for additional rent on the basis of a kabuliyat executed by the tenant in favour of the entire body of landlords agreeing to pay additional rent for additional area and made his co sharers parties to the suit *Held* that the suit for additional rent was not maintain able as it was not brought by all the landlords jointly under s 188 of the Bengal Tenancy Act *Held* also that the existence of the stipulation in the kabuliyat about the payment of additional rent did not take the suit out of the Bengal Tenancy Act *Gopal Chandar* v *Umesh Narain I L R 17 Calc 695 Baidyanath* v *Ilim 2 C W N 44 s c I L R 25 Calc 917* followed *Gobindra Chandra* v *Hamidullah 7 C W N 670* distinguished on the ground that there was an entirely separate agreement between the tenant and the individual co sharer landlord which did not exist in the present case The entire body of landlords must join as plaintiffs in a suit under s 188 of the Bengal Tenancy Act *Jatindra Nath* v *Prasanna Kumar 15 C W N 74* referred to DWARKA DHAKAI v MATHU LAL MAJUMDAR (1913)
18 C W N 942

——— s 189—

See RECORD OF RIGHTS 5 Pat L J 681

——— s 194—

See s 178 19 C W N 1191

——— s 195—

See DEPOSIT IN COURT I L R 41 Calc 1006

——— ss 195 cl (e) 11 12 and 17—Putni *sale of registered under the Act but not recorded in zamindar s sh rista under the* Putni *Regulation (VIII of 1819) s 3—Zemindar if must recognise sale—Inconsistent provisions of statutes.* The *Putni* Regulation provides rules for the aliena tion of the whole or a part of a *putni* taluk and these cannot be affected by anything in the Bengal *Tenancy Act in view of s 195 cl (e) of the latter* Act The registration of a sale of the whole or a part of a *putni* tenure under s 12 of the Bengal Tenancy Act does not give the purchaser an in terest in the land by force of ss 12 and 17 of the Act SHAIZUDDIN v MATHURA MOHAN SAHA *(1913)* 18 C W N 339

——— Sch III Art 1—

See s 3 26 C W N 833

——— *If Governs claim for damages made along with suit for ejectment under s 155—Suit for ejectment and damages for excavation Limitation Act (IX of 1908) Art 32—Bengal Tenancy Act (VIII of 1885) Sch III Art 1* Where the tenant has broken a condition of the lease by making excavations the landlord is entitled to damages Where a *kabuliyat* pro vides a remedy (*e g* by ejectment) for the breach of its conditions that is not the only remedy open to the landlord and the right to obtain compensa tion under the general law is not affected. Where in a suit for ejectment of a tenant under s 155 of the Bengal Tenancy Act for breach of a condition compensation also is claimed the latter claim is not ancillary to the claim for ejectment and is not governed by Art 1 Sch III of the Bengal Tenancy Act Art 32 of the Limitation Act applies to such a KRISHNA DAS ROY v MAHENDRA C- 25 C W N [illegible]

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— Sch III, Art 1 (a)—

1 ——— Khas khamar land held by tenant under lease for term—*Suit for khas possession brought more than six months after expiration of lease—Limitation—Heading of Chapter if may be looked at for construing sections* The plaintiffs sued for *khas* pos ession of land held by the defendants under a lease for five years on the ground that they were entitled to re entry at the expiration of the agreement It was found that the defendants were not in po session of the land before they entered it under their lease and that the land in suit was *khas kamar* The suit was brought more than six months after the expiration of the lease *Held* that the defendants were not included in the term non occupancy raiyat within cl. 1 (a) Sch. 3 of the Bengal Tenancy Act and the suit was not barred That the Court could look at the heading of Chap XI of the Bengal Tenancy Act for the purpose of con truing the sections DWARKA NATH CHOWDHURI *v* TAFAZAR RAHMAN SARKAR (1916) 20 C W N 1097

2 ——— Zerat land—*suit for ejectment—Limitation* A suit to eject a raiyat of *zerait* land brought more than six months after the expiry of the term of his lea e is barred by Art (1) (a) of Sch. III of the Bengal Tenancy Act s 45 of the Act which was not applicable to *zerait* lands under s 116 having been replaced by the said article which is applicable GANPAT MAHTON *v* RISHAL SINGH (1914)

20 C W N 14

——— Sch III Art 2—

——— *Limitation—Suit—for rent—Pendency of a suit for ejectment if and when prevents limitation running—Suspension of the period of limitation* It is e tablished as a general principle that the right to demand the rent which falls due during the pendency of a suit for ejectment is not in suspense during the pendency of the litigation The case of *Panee Surnamoyee v Shoshee Mukhee Burmonee 11 W R 5 (P C) 12 M I A 244 (1868)* is an exception to this general rule and another exception may be found in the ca e of *Hem Chandra Chowdhury v Kali Pra anna Bhaduri I L R 30 Calc 1033 s c 8 C W N 1 (P C) (1903)* *Held* that there were no facts in the present ca e which would justify the su pension of the period of limitation during the pendency of the suit for ejectment and that the claim for rent for that period was barred by limitation. *Huro Pershad Roy v Gopal Das Dutt L R 9 I A 82 s c I L R 9 Cal 255 (1882)* referred to NAGENDRA NATH SEN *v* SADHU RAM MANDAL. 25 C W N 955

——— *Jalkar lease due payable under if rent w thin the meaning of Bengal Tenancy Act—Suit for recovery of such money if governed by special limitation—Interest rate of upon arrears of such money* A *Jalkar* does not necessarily imply any right to the soil and a suit for the recovery of money payable under a lea e merely conferring a right of fishing and no right to land is governed by the special limitation provided by Sch III Art 2 cl. (b) of the Bengal Tenancy Act. Money reserved in such lea e is not rent within the meaning of the Bengal Tenancy Act and interest at the rate of 12½ per cent as provided in s 67 of the Act cannot be allowed in respect of arrears of such money KRISHNA LAL CHOUDHURI *v* SALIM MAHAMED CHOUDHURY (1914)

19 C W N 514

——— *Limitation—Agricultural purpo e if necessary for lea to come under the Tenancy Act—Transfer of Property Act (IV of 1882) s 117* The plaintiff sued to recover arrears of rent due under two *kabuliyats* given in re pect of agricultural lands lea ed to the defendant The leases were *mustagiri* lea es and contained the provi ion that the *mustagir* shall enjoy the *parti* land which may be converted into culturable land in the *jamabandi* of the mauza which may be increa ed till the term of the settlement *Held per* FLETCHER J That one of the purpo es for which the lea es were granted was to authori e the defendant to bring under cultivation the waste land which is obviously an agricultural purpo e and the period of limitation applicable to the suit was that provided under Art. 2 of Sch III Bengal Tenancy Act That even if the lea e were held not to be for agricultural purpo es they were governed by the Bengal Tenancy Act for the pur po es of limitation. *Burnamoyi Dassi v Burna Moyi Choudhrani I L R 23 Calc 191* *Per* RICHARDSON J Whether the lea e which were temporary leases relating to agricultural lands granted to a rent farmer were or were not lea es for agricultural purposes, the Bengal Tenancy Act applied and the period of limitation applicable was that provided by that Act. That in view of the cases *Durga Pro ad v Brindaban I L R 19 Cal 504 Peary Mohun v Sreeram Chandra 6 C W N 794* and *Burnamoyi Dassi v Burna Moyi Choudhrani I L R 23 Calc. 191* and of the terms of s. 117 of the *Transfer of Property Act* it does not follow that because a lease (of agricultural land) is not a lease for agricultural purpo es it is subject only to the Transfer of Property Act and is not governed in any respect by the Bengal Tenancy Act *Per* FLETCHER J Althou h a *mustagiri* lease is sometimes and perhaps usually a lea e to a middle man yet in Bihar the term is applied frequently to temporary leases instead of the word *thika* RASH BEHARI LAL MUNDER *v* TILUKDHARI LALL (1915) 20 C W N 485

——— *Arrears of rent suit for recovery of by assignee of landlord—Limitation* A suit by an assignee from the landlord for recovery of arrears of rent is governed by Art 110 of the First Schedule to the Limitation Act 1908 and not by cl (2) of part I of the third schedule to the Bengal Tenancy Act 1885 The fact that the tenant holds under a registered lease does not bring a suit for recovery of the rent reserved by the lease within the purview of Art 116 of the Limitation Act When a registered *patni* lea e provided that the rent should be paid in four instalments on four specified days in the year *held* that the period of limitation began to run from the date on which each instalment fell due and not from the least day of the agricultural year GAJADHAR PRASAD *v* THAKUR PRASAD SINGH

1 Pat L. J 506

——— Sch III, Art 3—

See LIMITATION I L R 41 Calc 52

BENGAL TENANCY ACT (VIII OF 1885)—*contd*

——— Sch III, Art 3—*contd*

——— *Legitimate purpose and scope of—Governs relations of landlord and tenant only—Special limitation—Dispossession sufficient to deprive tenant of right of suit* In determining what Art 3 of Sch III of the Bengal Tenancy Act means the purpose and scope of the Act which governs the relations of landlord and tenant only must not be left out of sight It was not the design of the Act to deprive a tenant of the rights that he otherwise possess against a third person between whom and himself there was no relationship of landlord and tenant It was only intended to deal with such rights as existed between landlord and tenant To deprive a tenant of his right of suit there must be a plain dispossession within the meaning of Art 3 of the Schedule KRISHNA CHANDRA BAGDI v SATISH CHANDRA BANERJI (1915) 20 C W N 872

——— Where a landlord keeps a raiyat out of possession of his holding for the period specified in Art 3 of Sch III of the Bengal Tenancy Act the raiyat s title in the holding is extinguished by adverse possession on general principles if not under s 28 of the Limitation Act NANDA KUMAR DEY v AJODHAYA SAHU (1911) 16 C W N 351

——— *Rent sale—Purchase by sole landlord—Suit by tenant to recover possession alleging decree to be fraudulent—Limitation* Where the sole landlord took possession of a holding as purchaser at a sale thereof in execution of a rent decree the tenant was not dispossessed by the landlord within the meaning of Art 3 of Sch III of the Bengal Tenancy Act Dispossession effected by the act of delivery of possession by the Court is not dispossession by the landlord within the meaning of Art 3 of Sch III of the Bengal Tenancy Act *Aminuddin* v *Ulfatunissa Bibi 9 C L J 131* dissented from KAMALDHARI THAKUR v RAMESHUR SINGH BAHADUR (1913) 17 C W N 817

——— *Suit for possession of land by raiyat or under raiyat—Relationship of landlord and tenant—Special rule of limitation when applies* The plaintiff s suit was for recovery of possession of a holding governed by the Bengal Tenancy Act which had vested in her on the death of her husband The plaintiff s aunt who came to live with her after the death of plaintiff s husband brought the defendants on to the land to assist in its cultivation The defendants by their conduct compelled the plaintiff to leave the holding and take shelter somewhere else In the plaint there was a suggestion of collusion on the part of the plaintiff's landlord *Held* that as between the plaintiff and the defendants there was no relationship of landlord and tenant so that as between them the special law of limitation embodied in Art 3 Sch III of the Bengal Tenancy Act did not apply There having been in fact no dispossession by the landlord the mere suggestion that the landlord had a hand in the ouster did not bring the suit within Art 3 Sch III of the Act BASANTA KUMARY v NANDA RAM KAIBARTA DAS (1913) 17 C W N 1149

——— *Limitation—Raiyat ejected by landlord acting in a capacity other than that of landlord—Suit for recovery of possession by tenant* A suit for recovery of land by a raiyat who has been ejected therefrom by his landlord on the ground that the land occupied by the raiyat is the landlord s *kamat* land is governed by Art 3 of Sch III to the Bengal Tenancy Act 1885 *Per* CHAMIER *C J*—The operation of Art 3 is not limited to cases where the *raiyat* or under *raiyat* has been dispossessed by his landlord *acting as such* JAI MANGLABATI MISRAIN v JHAREE LAL DAS MOZUMDAR 2 Pat L J 561

——— *Suit for joint possession by an heir of the tenant against co sharer landlords who have purchased from another heir—Special limitation—Bengal Tenancy Act (VIII of 1885) Art 3 Sch III whether applicable* The plaintiff an heir of the original tenant brought a suit for joint possession in respect of his share of the land against the defendants who were co sharer landlords who having secured a *kobala* of the entire land from another heir of the original tenant dispossessed the plaintiff from the land *Held* that the suit was governed by Art 3 Sch III of the Bengal Tenancy Act NABIN CHANDRA SAHA v SHEIKH WAJID (1920) 24 C W N 382

——— *Landlord purchasing raiyati holding at rent sale and ousting tenant—Suit by tenant to recover—Limitation* Where the landlord of a raiyati holding caused it to be sold in execution of a rent decree purchased it and settled it with new tenants a suit by the former raiyat to recover the holding would be governed by Art 3 Sch III of the Bengal Tenancy Act SATISH CHANDRA BOSU v NITYA GOPAL HALDER (1917) 21 C W N 978

——— *Limitation—Dispossession by purchaser at sale held at landlord's instance if comes within article* Dispossession by the purchaser at a sale held at the instance of the landlord is not dispossession by or at the instance of or in collusion with the landlord and the two years rule of limitation is not applicable to a suit for recovery of possession in such a case DURGAPADA PANJA v BHUSAN CH GHOSH (1916) 21 C W N 373

——— *Purchase of holding by landlord in execution and consequent dispossession of raiyat—Limitation* Art 3 of Sch III to the Bengal Tenancy Act applies even when the tenant has been dispossessed by the landlord on the strength of a purchase of the holding in execution. FANI BHUSAN SARKAR v PULIN CHANDRA MANDAL (1916) 21 C W N 976

——— *Occupancy raiyat dispossessed by persons inducted by landlord—Landlord if may sue such persons only and avoid special limitation* Where an occupancy raiyat is dispossessed by persons inducted on the holding by the landlord at his instigation and in collusion with him in a suit by the raiyat to recover possession the landlord is a necessary party and such a suit is governed by the limitation provided in Art 3 of the Sch III of the Bengal Tenancy Act RAJA PEARY MOHAN M[illegible] GHOSE

——— *Dispossession by landlord or his agent* [illegible] sued to recover possession of

BHAGDARI AND NARWARDARI ACT (BOM V OF 1862)—*contd*

———— s 3—*contd*

After the death of the plaintiffs vendor the Collector intervened under s 3 of the *Bhagdari* Act (Bom Act V of 1862) removed the plaintiffs and placed the *Bhagdar* in possession The plaintiffs having brought a suit against the Bhagdar to recover possession *Held* that s 3 of the *Bhagdari* Act (Bom Act V of 1862) was not applicable and the alienation to plaintiffs was not null and void that where rights were found to have existed before the Bhagdari Act (Bom Act V of 1862) in persons not themselves Bahagdars or Narwadars but the *locus* of whose rights fell within what were bhags or share in the Bhagdari and Narwadari village those rights never had been any portion of bhags or shares of Bhagdari or Narwadari village etc within the meaning of s 3 and therefore the prohibitions against alienations contained in s 3 had no applicability to that class of cases VENIDAS NARANDAS *v* BAI HARI (1914)

I L R 38 Bom 679

———— *Will—whether devise by will amounts to an alienation—Alienation not expressly limited to transactions inter vivos—Alienation meaning of* The devise by will of an unrecognised sub division of a *bhag* is an alienation contravening the provisions of the Bhagdari Act JHAVER JIJIBHAI *v* HARIBHAI HANSJI (1915)

I L R 40 Bom 207

————*Civil Procedure Code (Act XIV of 1882) s 424—Suit against Government—Notice—Mortgage of a narva—Collector declaring the mortgage invalid—Suit against Collector without notice* The plaintiff filed a suit against the Collector of Kaira to obtain a declaration that an order passed by that officer under s 3 of the Bhagdari and Narvadari Act (Bombay Act V of 1862) declaring some mortgages in plaintiffs favour null and void was inoperative No notice was given to the defendant as provided for by s 424 of the Civil Procedure Code of 1882 —*Held* that the notice required by s 424 of the Civil Procedure Code of 1882 was necessary to be given for the declaration was a distinct act of the Collector done in the exercise of a statutory power and therefore in his official capacity *Per Curiam* — The true test of an action for the purposes of s 424 is whether the wrong complained of as having been done by the public officer sued amount *first* to a distinct act on his part and *secondly* whether that act purported to have been done by him in his official capacity Both these elements must combine to render necessary the giving of notice under s 424 as a condition precedent to suit CHHAGANLAL KALIDAS *v* THE COLLECTOR OF KAIRA (1910)

I L R 35 Bom 42

————*Unrecognised sub division of a bhag—Mortgage—Covenant in the mortgage deed—Claim for compensation based on covenant maintainable —Contract Act (IX of 1872) s 65—Specific Relief Act (I of 1877) s 39—Mortgagor holding as tenant of mortgagee for upwards of twelve years—Adverse possession of limited interest* In 1897 the house in suit and certain other properties were mortgaged to the plaintiffs father by the defendants they having purchased the properties from the bhagdar owner in 1893 In 1901 on accounts being taken part of the property was sold to pay part of the mortgage debt while the balance of the debt was

BHAGDARI AND NARWARDARI ACT (BOM V OF 1862)—*concld*

———— s 3—*concld*

secured by a fresh mortgage of the house in suit The deed of mortgage contained a covenant in the following terms — If there should be any hindrance or obstruction concerning the house or if the house should be taken out of your possession then we and our property and our heirs and representatives are liable for any loss you may suffer and for your moneys advanced Ever since 1897 the defendants held the house as plaintiffs tenants under yearly rent notes the last of which was passed on 20th June 1908 At the termination of the last rent note that is in July 1909 the defendants refused to surrender possession to the plaintiff On the 9th November 1910 the plaintiff sued to recover possession of the house or in the alternative Rs 749 as compensation The defendants contended that both the mortgage and rent notes were void under the Bhagdari Act and that the suit was barred by limitation The lower Courts upheld these contentions and dismissed the suit The plaintiff having appealed —*Held* (i) that the mortgage as well as the rent notes were void under the provisions of Bhagdari Act 1862 (ii) that so far as the contract of mortgage was concerned the consideration failed *ab initio* and the money advanced by the plaintiff being money received by the defendants for the plaintiffs use the suit to recover it was barred under Article 62 of the Limitation Act (iii) that although the mortgage was void under the Bhagdari Act it was open to the plaintiff to claim under the covenant contained in the mortgage deed (iv) that the plaintiff's possession from February 1897 to July 1909 gave him an absolute title to the limited interest as mortgagee and so justified his claim under the covenant for compensation for disturbance (v) that the claim under the covenant was within time for the breach of the covenant did not occur till 1909 when the defendants refused on demand to surrender possession JAVERBHAI JORABHAI *v* GORDHAN NARSI (1914) **I L R 39 Bom 358**

BHAGDARI PROPERTY

See MAHOMEDAN LAW—WILL

I L R 41 Bom 377

BHAGDARI VILLAGE

———— *Lands forming part of road ways in village—Ownership of Government—Bhagdar has no right to tether cattle on such lands* The plaintiff a *bhagdar* owned a house in a village which was *bhagdari* In front of his house lay a piece of open ground which was part of a way or lane leading directly from the main public road to the collection of houses situate round about the plaintiffs house It was open to the villagers and used by them freely upon all occasions The plaintiff claimed a right to tether his cattle upon the land in question *Held* that the land in question forming a portion of a public road way was the property of Government UMAR AMANJI *v* SECRETARY OF STATE FOR INDIA (1912)

I L R 37 Bom 87

BHAGCHASIS

———— *Bhagchasis* are persons who cultivate land rendering a share of the produce to the landlord They may or may not have an interest in the land but are not hired serv

BHAGCHASIS—contd

ants as mentioned in s 5 (2) of the Bengal Tenancy Act The statement that *bhagchasis* who are elsewhere called *bhagdars burga dars bataidars or adhiars* are in general mere labourers is contrary to experience and in this ca e contrary also to the presumption arising under s 103B of the Act SECRETARY OF STATE v GOBINDO PRASAD BARIK (1916)

21 C W N 505

BHANG

See WADHWAN CIVIL STATION
I L R 37 Bom 152

BHARWAD

See DEKKHAN AGRICULTURISTS RELIEF ACT (XVII OF 1879) s 2
I L R 37 Bom 398

BHINNA GOTRA SAPINDAS

See HINDU LAW—INHERITANCE
I L R 42 Calc 384

BHOGRA LAND

See CENTRAL PROVINCES TENANCY ACT, 1898 ss 4 AND 69
4 Pat L J 505

BHOWLI RENT

See BENGAL TENANCY ACT 1885 ss 67 AND 68
4 Pat L J 282

BICYCLE

———— whether a vehicle—

See BOMBAY DISTRICT POLICE ACT (BOM ACT IV OF 1890) s 61 CL (b)
I L R 41 Bom 464

BID

———— leave to—

See MORTGAGOR AND MORTGAGEE
I L R 41 Bom 357

See APPEAL I L R 38 Calc 717

BIGAMY

See PENAL CODE s 494
I L R 33 Mad 371
I L R 1 Lah 450

———— "Person aggrieved"—*Penal Code (Act XLV of 1860) s 49—Criminal Procedure Code s 198—Procedure—Commitment* In a case of bigamy the person aggrieved is either the first husband or the second husband and not the father Where a complaint was preferred by the father of the first husband which resulted in a commitment on a charge under s 498 of the Indian Penal Code *Held* that the commitment was bad EMPEROR v LALA (1909) I L R 32 All 78

BIHAR AND ORISSA

———— Government of—

See PUBLIC PROSECUTOR.
I. L. R 41 Calc. 425

BIHAR AND ORISSA EXCISE ACT 1915

———— s 47—

See CRIMINAL PROCEDURE CODE s. 235
3 Pat L. J 433

BIHAR AND ORISSA GENERAL CLAUSES ACT (I OF 1917)

———— s 4—

See NEGLIGENCE 5 Pat L J 3?9

BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (IV OF 1914)

See CRIMINAL PROCEDURE CODE s 476
4 Pat L J 475

BILL OF COSTS

See ATTORNEY
I L R 46 Calc 249
I L R 48 Calc 817

BILL OF EXCHANGE

See C I F CONTRACTS
I L R 42 Bom 473

See NEGOTIABLE INSTRUMENTS ACT

———— *Drawer of the bill an alien—Bill drawn against goods consigned from an enemy port by an enemy steamer—Shipping documents signed by an alien—Acceptance of the bill by a British subject—Acceptance unqualified and unconditional—War breaking out after acceptance—The enemy steamer arriving at Bombay before the outbreak of war but subsequently harbouring in a neutral port to evade capture without discharging cargo—The Royal Proclamation dated 5th August warning persons not to obtain goods from the German Empire—Bill dishonoured by non payment on due date—Shipping documents tendered by the holder of the bill—Proclamation dated 19th December 1914 authorising British subjects to obtain goods from an enemy steamer in neutral port—The Negotiable Instruments Act (XXVI of 1881) ss 32 and 43—Property in the goods vests in the acceptor though the bill of lading remains with the holder of the bill of exchange to secure the price—Consideration does not fail if the acceptor is put in a position to take delivery of the goods* The plaintiffs were a British bank carrying on business in London Bombay and elsewhere The defendants were a firm of merchants British subject carrying on business in Bombay On the 24th June 1914 one G A a German residing in Hamburg drew a bill of exchange upon the defendants in favour of the plaintiffs for £65 0 6 payable at thirty days sight to the order of the plaintiffs—value received—which the drawees were to place to the account of the drawer as advised The bill purported to be drawn upon the defendants against 50 bales of goods per S S *Lichtenfels* a German steamer The bill was presented to the defendants for acceptance with the shipping documents relating to the bales of goods mentioned in the bill and was accepted by them on 20th July 1914 payable at the office of the plaintiffs in Bombay The S S *Lichtenfels* reached Bombay just before the outbreak of war between Great Britain and Germany (i e 4th August 1914) and in order to evade capture left Bombay and took shelter in the neutral port of Marmagoa The bill was presented for payment on the due date with the shipping documents for the 50 bales attached but was dishonoured by non payment On the 19th December 1914 a Proclamation was issued by which all British subjects residing or carrying on business in British India were authorized to make payments for the purpose of obtaining their cargoes in neutral ports to the agents of shipowners resident in an enemy The plaintiffs filed

BILL OF EXCHANGE—*contd*

this suit on the 30th September 1915 to recover the amount due on the bill contending that the defendant's acceptance was unqualified and absolute and that as the shipping documents for the goods mentioned in the bill of exchange were tendered at the time of presentation for payment they were entitled to payment according to the terms of the bill and the acceptance The defendants contended that the acceptance was qualified subject to the condition that the defendants should be put in a position to get the delivery of the goods referred to in the bill of lading and that owing to the outbreak of war and the King's Proclamation published in Bombay on the 7th August 1914 warning persons not to obtain goods from any person resident in the German Empire the shipping documents ceased to be any consideration for the acceptance *Held* (i) that in either view of the acceptance the plaintiffs were entitled to succeed inasmuch as if the acceptance was unqualified the defendants were bound to pay on due date and if the acceptance was qualified they were bound to pay at or after maturity when the money was demanded after the Proclamation of December 1914 whereunder consignees were permitted to take delivery of goods from enemy ships in neutral ports and (ii) the consideration for the acceptance did not fail as the last mentioned Proclamation permitted performance before it was too late of the condition alleged MOTISHAW & CO *v* THE MERCANTILE BANK OF INDIA (1916) I L R 41 Bom 566

——— *Foreign bills— Dishonour what constitutes—Notice of dishonour—Acceptance—Drawees obligation to accept—Drawers right to notice—Custom and Trade usage—Effect of war on performance of contract—Negotiable Instruments Act (XXVI of 1881) s 135—Bills of Exchange Act 1882 (45 & 46 Vict c 61) ss 42 50 (2) c (ii)* Before the outbreak of war the defendants shipped certain goods to London firms in enemy vessels destined ultimately to enemy ports These goods were covered by bills of exchange drawn in Calcutta on the said firms with their addresses given in the bills as London They were then discounted with and endorsed to the plaintiffs in Calcutta The bills of exchange reached London one on the day war was declared and the others on a date subsequent thereto The endorsees duly presented the bills for acceptance They were returned dishonoured by the drawees after 12 days in respect of the first bill and after 3 days in respect of the rest of the bills *Held* that the bills were foreign instruments and were made payable in a different place from that in which they were made and endorsed S 135 of the Negotiable Instruments Act therefore applied and the Law of England determined what constituted dishonour and what notice of dishonour was sufficient *Held* also that any further slip in the performance of the contract was rendered impossible by the outbreak of war and the acceptance of the bills by the drawees would have amounted to a trading in goods destined for enemy ports and would come within the meaning of the (King's) Proclamation and therefore the drawees were under no obligation to the drawers to accept the bills *Held* also that the further performance of the contract having become impossible and there being no obligation on the drawees to accept the plaintiffs were not bound to give notice of dishonour *Held*

BILL OF EXCHANGE—*concld*

also that the giving of notice of dishonour was an important part of the treatment referred to in s 42 and in the circumstances of the case where such notice of dishonour became unnecessary the mere fact that the bills were left with the drawees more than the customary time could not bar the plaintiffs from recovering on the bills The section assumed that the bill was capable of being accepted or dishonoured by the drawer and did not cover the bills in this case SUKHLAL CHANDANMULL *v* THE EASTERN BANK LTD (1918) I L R 46 Calc 584

BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT C 61)

——— s 23—

See HUNDI SUIT ON I L R 46 Calc 663

——— ss 42 50—

See BILLS OF EXCHANGE I L R 46 Calc 584

BILL OF LADING

See CHARTER PARTY I L R 41 Bom 119

See SHIPPING

——— Legal Impossibility—

See CONTRACT ACT (IX OF 1872) s 56
I L R 40 Bom 301
I L R 40 Bom 529

——— Payment against document—

See SALE OF GOODS I L R 40 Bom 11

See SHIPPING

——— assignment of—

See CONTRACT I L R 46 Calc 831

——— mere possession of—

See COCAINE I L R 41 Calc 537

——— pledgee of—

See SALE OF GOODS ACT (56 AND 57 VIC c 71) ss 45 AND 47
I L R 34 Bom 640

——— *Clause of exemption from liability after goods are free of ship's tackle validity of—Common carriers by sea governed by English Law and not by Indian Contract Act (IX of 1872)—Indian Contract Act (IX of 1872) s 23—Exemption clause not void under—Seaworthiness definition of—Warranty of seaworthiness not extending to lighters or boats—Binding force of Privy Council decision on India though not in an Indian case* Carriers by sea for hire are common carriers to whom the Carriers Act (III of 1865) does not apply *Hajee Ismail Sait v The Company of the Messageries Maritimes of France I L R 28 Mad 400* followed The duties and liabilities of a common carrier are governed in India by the principles of the English Common Law on that subject (except where they have been departed from in the cases of some classes of common carriers by the Carriers Act of 1865 or by the Railways Acts of 1878 and 1890)

BILL OF LADING—*contd*

and that notwithstanding some general expres ions in the Chapter on Bail nents a common carrier s re pon ibility is not within the Indian Contract Act of 1872 *The Irrawaddy Flotilla Company v Bugwandas I L R 18 Calc 670* followed A provi ion in a charter party to the effect that in all ca es and under all circumstances the liability of the company (of shipowners) shall ab olutely cease when the goods are free of the ship s tackle and thereupon the goods shall be at the ri k for all purposes and in every respect of the shipper or consignee affords complete protec tion to the shipowners against all losses in re pect of goods arising from any cause at any time after the goods are free of the ship s tackle whether the cau e of the loss be (a) as in this case the sinl ing of the boats which conveyed the goods from the ship to the shore a sinking occasioned by the negligent overloading of the boats by the hipowner s landing agents or (b) by the mi feasance and fraud of their landing agents *Sheikh Mahamad Ravuther v The British India S eam Navigation Co Ltd I L R 32 Mad 95* and *Chartered Bank of India Australia and China v British India Steam Navigation Co Ltd [1909] A C 369* followed. Such a clause as the above i according to English Law not opposed to public policy and is valid and section 23 of the Indian Contract Act has no application A decision of th Privy Council though not in a ca e arising from India is binding on the Courts in India *Obiter* The warranty of seaworthiness which is implied as to the ship does not extend to the lighters or boats employed to land the cargo Even this warranty to the ship is satisfied if the ship be originally seaworthy *i e* when she first sails on the voyage insured she need not continue so throughout the voyage *Lane v Nixon 1 C P 412* followed *Sparrow v Carruthers* 2 Strange 1236 doubted KUMBER v THE BRITISH INDIA STEAM NAVIGATION CO LTD (1913)

I L R 38 Mad 941

——— *Shipping contract—Freight paid in advance—Voyage interrupted by requisition of ship by Government—Right of shipper to refund of advance freight—Duty of shipowner to tranship goods and send them to their destination at his expense—Restraint of princes or rulers cons truction of—Requisition by Government of India whether within the exemption* Where a shippper paid freight in advance to the shipowner but the voyage of the ship was interrupted by its requisi tion by the Government of India the shipper is not entitled to refund of the advance freight nor is the shipowner bound to send the goods to their d stination by another ves el at his expense *Allison v Bristol Marine Insurance Company (1876) 1 App Cas 209* and *Hansen v Dunn (1906) 11 Com Cas 100 s c 22 L T R 408* followed Where a bill of lading provided that the shipowner should not be liable for loss or dama e occasioned *inter alia* by arrest and restraint of princes rulers or people *Held* that the requisition of the ship by the Government of India f ll within the exemption KRISHNA NAIK AND SONS v CAYZER IRWINE AND CO LTD (19 1)

I L R 44 Mad. 145

BILLS OF SALE ACT 1878 (41 and 42 Vic)

——— s 8 -

See CIVIL PROCEDURE CODE 1882 s 278
I L R. 35 Bom. 516

BIRT

See BANKATI

——— *Birt tenure in Oudh —Under proprietary right—Bankati birt—Dahyak, —Settlement decree* In 1802 the owner of a village in Oudh granted it by way of birt to get it cultivated the future rent to be at the rate for bankati prevalent in the taluqa and subject to the prevalent rebate (dasaundh or dahyak) In 1871 a Settlement Court decreed upholding the birt holder s possession and occupation as an under proprietor under Circular No 2 of 1861 upon the condition that the taluqdar could alter the rent in accordance with the practice before the annexation the birt holder being entitled to deduct a dahyak of 10 per cent and to be paid it if he refused a patta It was alleged that the birt holders were out of possession between 1871 and 1879 but regained possession in 1880 They had since 1900 been paying a rent of Rs 500 less 10 per cent dahyak *Held* that the birt holder was an under proprietor the alleged interruption of possession not affecting the rights under the deed of 1802 and the decree of 1871 Further that the taluqdar could not capriciously enhance the rent which must be at the rate prevalent in the taluqa and that in case of dispute it was wholly within the cognizance of the Revenue Court to determine whether the proposed rent was so The distinction b tween bankati birt and bishunprit birt discussed *Parmeshar Dat v Mohammad Abul Ha an Khan 14 Oudh cases* 335 distinguished RAJA MUHAMMAD ABUL HASAN KHAN v LACHMI NARAIN

I L R 43 All 355

BIRT JAJMANI

See PRAGWAL I L R 43 All 20

——— *Nature of right—Both heritable and transferable—Not confined to males* The rights known as *birt jajmani* are heritable and transferable and their descent or transfer is not confined to males LOKYA v SULLL

I L R 43 All 35

BIRTH

See SUCCESSION ACT (X OF 1865) ss 7 9 10 I L R 41 Bom 687

——— right by—

See HINDU LAW—PARTITION
I L R 38 Mad 558

BLANK TRANSFERS

See SHARES I L R 46 Calc 331 342

BLINDNESS

See HINDU LAW—INHERITANCE.
I L R 45 Calc 17

See HINDU LAW—PARTITION
L R 44 I A 229

BOARD OF REVENUE.

See MANDAMUS I L R 38 Calc. 553

——— instructions of—

See RIOTING I L R 41 Calc. 833

——— reference by—

See STAMP ACT (II OF 1899) s 57 (b)
I L R 37 All. 125

——— Revisional powers of—

See ESTATES PARTITION ACT 1897
1 Pat. L J 491

BILL OF EXCHANGE—*contd*

this suit on the 30th September 1915 to recover the amount due on the bill contending that the defendant s acceptance was unqualified and absolute and that as the shipping documents for the goods mentioned in the bill of exchange were tendered at the time of presentation for payment they were entitled to payment according to the terms of the bill and the acceptance The defendants contended that the acceptance was qualified subject to the condition that the defendants should be put in a position to get the delivery of the goods referred to in the bill of lading and that owing to the outbreak of war and the King s Proclamation published in Bombay on the 7th August 1914 warning persons not to obtain goods from any person resident in the German Empire the shipping documents ceased to be any consideration for the acceptance *Held* (i) that in either view of the acceptance the plaintiffs were entitled to succeed inasmuch as if the acceptance was unqualified the defendants were bound to pay on due date and if the acceptance was qualified they were bound to pay at or after maturity when the money was demanded after the Proclamation of December 1914 where under consignees were permitted to take delivery of goods from enemy ships in neutral ports and (ii) the consideration for the acceptance did not fail as the last mentioned Proclamation permitted performance before it was too late of the condition alleged MOTISHAW & CO v THE MERCANTILE BANK OF INDIA (1916) **I L R 41 Bom 566**

——————— *Foreign bills— Dishonour what constitutes—Notice of dishonour—Acceptance—Drawees obligation to accept—Drawers right to notice—Custom and Trade usage—Effect of war on performance of contract—Negotiable Instruments Act (XXVI of 1881) s 135—Bills of Exchange Act 1882 (45 & 46 Vict c 61) ss 42 50 (2) c (ii)* Before the outbreak of war the defendants shipped certain goods to London firms in enemy vessels destined ultimately to enemy ports These goods were covered by bills of exchange drawn in Calcutta on the said firms with their addresses given in the bills as London They were then discounted with and endorsed to the plaintiffs in Calcutta The bills of exchange reached London one on the day war was declared and the others on a date subsequent thereto The endorsees duly presented the bills for acceptance They were returned dishonoured by the drawees after 12 days in respect of the first bill and after 3 days in respect of the rest of the bills *Held* that the bills were foreign instruments and were made payable in a different place from that in which they were made and endorsed S 135 of the Negotiable Instruments Act therefore applied and the Law of England determined what constituted dishonour and what notice of dishonour was sufficient *Held* also that any further step in the performance of the contract was rendered impossible by the outbreak of war and the acceptance of the bills by the drawees would have amounted to a trading in goods destined for enemy ports and would come within the meaning of the (King s) Proclamation and therefore the drawees were under no obligation to the drawers to accept the bills *Held* also that the further performance of the contract having become impossible and there being no obligation on the drawees to accept the plaintiffs were not bound to give notice of dishonour *Held* also that the giving of notice of dishonour was an important part of the treatment referred to in s 42 and in the circumstances of the case where such notice of dishonour became unnecessary the mere fact that the bills were left with the drawees more than the customary time could not bar the plaintiffs from recovering on the bills The section assumed that the bill was capable of being accepted or dishonoured by the drawer and did not cover the bills in this case SUKHLAL CHANDANMULL v THE EASTERN BANK LTD (1918) **I L R 46 Calc 584**

BILLS OF EXCHANGE ACT 1882 (45 & 46 VICT C 61)

——— s 23—

See HUNDI SUIT ON **I L R 46 Calc 663**

——— ss 42 50—

See BILLS OF EXCHANGE **I L R 46 Calc 584**

BILL OF LADING

See CHARTER PARTY **I L R 41 Bom 119**

See SHIPPING

——— Legal Impossibility—

See CONTRACT ACT (IX OF 1872) s 56 **I L R 40 Bom 301** **I L R 40 Bom 529**

——— Payment against document—

See SALE OF GOODS **I L R 40 Bom 11**

See SHIPPING

——— assignment of—

See CONTRACT **I L R 46 Calc 831**

——— mere possession of—

See COCAINE **I L R 41 Calc 537**

——— pledgee of—

See SALE OF GOODS ACT (56 AND 57 VIC c 71) ss 45 AND 47 **I L R 34 Bom 640**

——————— *Clause of exemption from liability after goods are free of ship s tackle validity of—Common carriers by sea governed by English Law and not by Indian Contract Act (IX of 1872)—Indian Contract Act (IX of 1872) s 23—Exemption clause not void under—Seaworthiness definition of—Warranty of seaworthiness not extending to lighters or boats—Binding force of Privy Council decision on India though not in an Indian case* Carriers by sea for hire are common carriers to whom the Carriers Act (III of 1865) does not apply *Hajee Ismail Sait v The Company of the Messageries Maritimes of France I L R 28 Mad 400* followed The duties and liabilities of a common carrier are governed in India by the principles of the English Common Law on that subject (except where they have been departed from in the cases of some classes of common carriers by the Carriers Act of 1865 or by the Railways Acts of 1878 and 1890)

BILL OF LADING—*contd*

and that notwithstanding some general expressions in the Chapter on Bailments a common carrier's responsibility is not within the Indian Contract Act of 1872 *The Irrawaddy Flotilla Company v Bugwandas I L R 18 Calc 620* followed A provision in a charter party to the effect that in all cases and under all circumstances the liability of the company (of shipowners) shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee affords complete protection to the shipowners against all losses in respect of goods arising from any cause at any time after the goods are free of the ship's tackle whether the cause of the loss be (*a*) as in this case the sinking of the boats which conveyed the goods from the ship to the shore a sinking occasioned by the negligent overloading of the boats by the shipowner's landing agents or (*b*) by the misfeasance and fraud of their landing agents *Sheikh Mahamad Ravuther v The British India Steam Navigation Co Ltd I L R 32 Mad 95* and *Chartered Bank of India Australia and China v British India Steam Navigation Co Ltd [1909] A C 369* followed Such a clause as the above is according to English Law not opposed to public policy and is valid and section 23 of the Indian Contract Act has no application A decision of the Privy Council though not in a case arising from India is binding on the Courts in India *Obiter* The warranty of seaworthiness which is implied as to the ship does not extend to the lighters or boats employed to land the cargo Even this warranty to the ship is satisfied if the ship be originally seaworthy *i e* when she first sails on the voyage insured she need not continue so throughout the voyage *Lane v Nixon 1 C P 412* followed *Sparrow v Carruthers* 2 Strange 1236 doubted KUMBER *v* THE BRITISH INDIA STEAM NAVIGATION Co LTD (1913)

I L R 38 Mad 941

——————— *Shipping contract—Freight paid in advance—Voyage interrupted by requisition of ship by Government—Right of shipper to refund of advance freight—Duty of shipowner to tranship goods and send them to their destination at his expense—Restraint of princes or rulers construction of—Requisition by Government of India whether within the exemption* Where a shipper paid freight in advance to the shipowner but the voyage of the ship was interrupted by its requisition by the Government of India the shipper is not entitled to refund of the advance freight nor is the shipowner bound to send the goods to their destination by another vessel at his expense *Allison v Bristol Marine Insurance Company (1876) 1 App Cas 209* and *Hansen v Dunn (1906) 11 Com Cas 100 s c 22 L T R 458* followed Where a bill of lading provided that the shipowner should not be liable for loss or damage occasioned *inter alia* by arrest and restraint of princes rulers or people *Held* that the requisition of the ship by the Government of India fell within the exemption KRISHNA NAIK AND SONS *v* CAYZER IRWINE AND Co LTD (1921)

I L R 44 Mad. 145

BILLS OF SALE ACT 1878 (41 and 42 Vic)

——————— s 8 —

See CIVIL PROCEDURE CODE 1882 s 2 6

I L R 35 Bom 516

BIRT

See BANKATI

——————— *Birt tenure in Oudh—Under proprietary right—Bankati birt—Dahyak,—Settlement decree* In 1802 the owner of a village in Oudh granted it by way of birt to get it cultivated the future rent to be at the rate for bankati prevalent in the taluqa and subject to the prevalent rebate (dasaundh or dahyak) In 1871 a Settlement Court decreed upholding the birt holder's possession and occupation as an under proprietor under Circular No 2 of 1861 upon the condition that the taluqdar could alter the rent in accordance with the practice before the annexation the birt holder being entitled to deduct a dahyak of 10 per cent and to be paid it if he refused a patta It was alleged that the birt holders were out of possession between 1871 and 1879 but regained possession in 1880 They had since 1900 been paying a rent of Rs 500 less 10 per cent dahyak *Held* that the birt holder was an under proprietor the alleged interruption of possession not affecting the rights under the deed of 1802 and the decree of 1871 Further that the taluqdar could not capriciously enhance the rent which must be at the rate prevalent in the taluqa and that in case of dispute it was wholly within the cognizance of the Revenue Court to determine whether the proposed rent was so The distinction between bankati birt and bishunprit birt discussed *Parmeshar Dat v Mohammad Abul Hasan Khan 14 Oudh cases* 335 distinguished RAJA MUHAMMAD ABUL HASAN KHAN *v* LACHMI NARAIN

I L R 43 All 355

BIRT JAJMANI

See PRAGWAL I L R 43 All 20

——————— *Nature of right—Both heritable and transferable—Not confined to males* The rights known as *birt jajmani* are heritable and transferable and their descent or transfer is not confined to males TORYA *v* SULLL

I L R 43 All 35

BIRTH

See SUCCESSION ACT (X OF 1865) ss 7 9 10 I L R 41 Bom 687

——————— right by—

See HINDU LAW—PARTITION

I L R 38 Mad 553

BLANK TRANSFERS

See SHARES I L R 46 Calc 331 342

BLINDNESS

See HINDU LAW—INHERITANCE

I L R 45 Calc 17

See HINDU LAW—PARTITION

L R 44 I A 229

BOARD OF REVENUE

See MANDAMUS I L R 38 Calc 553

——————— instructions of—

See PIOTING I L R 41 Calc 833

——————— reference by—

See STAMP ACT (II OF 1899) s 57 (b)

I L R 37 All 125

——————— Revisional

See ESTATES P

BOMBAY CITY MUNICIPAL ACT (BOM III OF 1888 AS AMENDED BY BOM ACT V OF 1905)—*contd*

——— s 140—*contd*

from time to time approve In order to satisfy the requirements of s 21 (*1*) (c) of the Indian Universities Act and pursuant to the Regulation of the Senate the Wilson College erected three buildings known as hostels for the use of its students numbering two hundred in all In addition to the students a European Professor and an Indian Superintendent resided in the first and second hostels and a European Superintendent and an Assistant Superintendent resided in the third hostels all of them being on the staff of the College Resident students of the College paid an additional fee of Rs 23 for each of the two terms in a year over and above the fees they paid along with non resident students Pursuant to s 140 (c) of the City of Bombay Municipal Act 1888 the Municipal Commissioner caused the three hostels to be assessed for payment of general tax leviable on all buildings in the city The defendant contended that the hostels must be exempted from the general tax as they were buildings exclusively occupied for charitable purposes within the meaning of s 143 (*1*) (*a*) of the City of Bombay Municipal Act and that the additional fee of Rs 23 paid by the resident students was not rent within the meaning of s 143 (*2*) (*d*) of that Act The points of difference between the parties were stated in the form of a case for the opinion of the Court under s 90 and O XXXVI of the Code of Civil Procedure *Held* (i) that inasmuch as the hostels were erected and maintained by the College as part of the general educational scheme of the country the object of the hostel being the advancement of learning the portions occupied by the resident students were exempt from taxation as they were exclusively occupied for charitable purposes within the meaning of s 143 (*1*) (*a*) of the City of Bombay Municipal Act (ii) that the extra sum paid by resident students was not paid as rent within the meaning of s 143 (*2*) (*d*) of the City of Bombay Municipal Act but was an additional fee paid by them for the advantages derived by them and more attention paid to them for looking after their social moral and physical welfare than to the non resident students of the College who paid a less fee (iii) that the portions occupied by one Superintendent in the first and second hostels and one in the third hostel were exempt from taxation as residence for such members in the hostels was compulsory for the proper discharge of their duties of supervision and physical welfare of students as required by s 21 (c) of the Indian Universities Act (iv) that the portions occupied by a Professor and Assistant Superintendent were ordinarily liable for taxation under s 140 (c) of the City of Bombay Municipal Act unless it was shown that the duties of the Professor and Assistant Superintendents were such as to make their presence on the premises absolutely necessary *The University of Bombay* v *The Municipal Commissioner for the City of Bombay I L R 16 Bom 217 Commissioners for Special Purposes of Income Tax* v *Pemsel [1891] A C 531 583 Bent* v *Roberts 3 Ex D 66* and *Oxford Race 8 El & Bl 184* referred to It is settled practice that where a special case is stated by consent it can only be re opened by mutual consent. *Hamilton Fraser & Co* v *Staley Radford & Co (1884) Solicitor s Journal 478* MONIE v SCOTT (1918) **I L R 43 Bom 281**

——— s 251A—

See CONSTRUCTION OF STATUTES **I L R 34 Bom 496**

——— *Building— Directly over or directly under —Construction* The words directly over or directly under in s 251 A clause (*a*) of the City of Bombay Municipal Act (Bom Act III of 1888) should be understood in the restricted sense of immediately over or immediately under so that in effect under this section a water closet may be built so as to be vertically over or under any part of a building provided that a bath room intervenes Where it is not suggested that a word bears any technical sense in the context in which it occurs the construction must proceed upon the general rule that statutes are presumed to use words in their popular sense CURRIMBHOY EBRAHIM SIR v THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY (1909) **I L R 34 Bom 496**

——— s 289—

See RAILWAYS ACT (IX OF 1890) s 7 **I L R 41 Bom 291**

——— ss 289 293—*Indian Railways Act (IX of 1890) s 7—public streets—Vesting of public streets in Municipality—Laying railway lines under statutory authority over such streets—Land acquisition Act (I of 1894) s 7—Proceedings under Land Acquisition Act unnecessary in case of such street* The Great Indian Peninsula Railway in constructing a line of railway known as the Harbour Branch Railway in the Island of Bombay laid down the lines of rails in a level crossing across a public street known as Sewri Koliwada Road vested in the Municipal Corporation of Bombay under s 289 of the City of Bombay Municipal Act without permission granted by the Municipal Corporation The Municipal Corporation sued to obtain a declaration that the Railway Company could not lawfully maintain their lines of railway across the street in question without either obtaining permission granted by the Corporation and confirmed by the Government under s 293 of the City of Bombay Municipal Act or acquiring the land required for the level crossing under the Land Acquisition Act 1894 *Held* that the statutory authority under s 7 of the Indian Railways Act was established and that the application of s 293 of the City of Bombay Municipal Act was excluded by the words notwithstanding anything in any other enactment for the time being in force in the first mentioned section *Held* further that where a railway company wished to lay a line of railway upon and across a street it was neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisition of the land because if the Government under s 7 of the Act were to direct the Collector to take order for the acquisition of the land he would make his award and take possession and the land would then vest absolutely in Government for the railway company free from incumbrances and would then cease to be a portion of the street and the railway company would be unable to exercise the power given to it of constructing the rail

BOMBAY CITY MUNICIPAL ACT (BOM III OF 1888 AS AMENDED BY BOM ACT V OF 1905)—*contd*

——— s 289—*con d*

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I L R 38 Bom 565

———ss 297 299 and 300—*Public Streets—Powers—Acquisition of adjoining Land—Compen sation—Preservation of Regular Line—Collateral object—City of Bombay Municipal Act (III of 1888 and V of 1905) ss 296 297 301* By s 297 of the City of Bombay Municipal Act the Municipal Commissioner may prescribe a regular line on each side of a public street and if the line is so pre scribed that any land not vesting in the Corpor ation falls within it the Commis ioner may by s 299 take po session of it on behalf of the Corpor ation the former owner receiving compensation under s 301 Ss 297 to 301 are headed in the Act Preservation of regular line in public streets By s 296 the Commissioner has power to acquire any land required for widening extending or other wi e improving any public street subject to the payment of compensation under the Land Acqui sition Act (I of 1894) In 1909 the Commissioner prescribed a line on one side of a public street so that land belonging to the appellants fell within it and having served them with notice took possession The Commis ioner wi hed to acquire the land for the purpose of widening the street in connection with a contemplated bridge carrying the street over certain level cro sings The appellants contended that the procedure under ss 297 299 and 301 was inapplicable and the proceedings *ultra vires* and that the land could only be acquired subject to payment of compen sation under the Land Acquisition Act 1894 *Held* that the powers given by ss 297 and 299 of the Act could be exercised although the motive of the Commissioner who acted in good faith and in the discharge of his duties, was not to pre erve the regular line of the street and that consequently the compen ation payable to the appellants was to be calculated according to s 301 of the Act and not under the Land Acquisition Act 1894 NARMA v BOMBAY MUNICIPAL COMMI SIONER (1915)
I L R 42 Bom 462
L. R 45 I A 125

——— s 297 (1) (b)—*Power of the Muni cipal Commissioner to prescribe a fre h line on either s le of a street in substit t on for any line previously prescribed by him—Power to prescribe a line of the street with the view to widening the street ss 297 301—Significance of heading to clauses* In 1903 the Municipal Commissioner of Bombay prescribed the regular line of a certain public street in Bombay in accordance with the provisions of s 297 of the Municipal Act (Bom Act III of 1888) No record was kept of the said line In 1909 in ignorance of the said line previously prescribed the Municipal Commis sioner prescribed a fresh line for the same street without obtaining authority from the Corporation and entered upon the land of the plaintiff which lay within the said fresh line Subsequently having been informed of the previous line the Commissioner obtained authority to prescribe a fresh line as previously irregularly prescribed and subsequently again entered on the part of the plaintiff's land within that line Both the said line prescribed in 1903 and the sub equ nt line prescribed in 1909 were prescribed for the purpose of widening the said street for the purpose of enabling an overbridge to be built on it The plaintiff contended that as the object of the Commis ioner in pre cribing the line of the street in both ca es was to widen the street his action was illegal and that the lines p escribed were not made the regular lines of the street Further that in any event the Commi ioner should be ordered to take up the plaintiff s land and pay for it up to the line prescribed in 1903 the only legal line of the street at the date when the Com missioner first entered the plaintiff s land *Held* that subject to the provisions of s 297 of the Municipal Act the Commissioner might prescribe a line of a street whether in substitution for a previous line or not and that his action would not be invalid merely because it had for its object the widening of the street *Held* also that the headings of clauses are not to be relied on *Held* further that *Essa Jacob* v *Municipal Commis sioner of Bombay I L R 25 Bom 107* is no longer an authority since the amendment of the Act in 1905 MUNICIPAL COMMI SIONER FOR THE CITY OF BOMBAY v MUNCHERJI PESTONJI (1911)
I L R 36 Bom 405

——— ss 297 301—*City of Bombay Im provement Trust Act (Bombay Act IV of 1898) ss 41 47 45 (2)—Bombay Street Scheme—Setting back of new buildings and setting forward in form ing lines of new streets—Title of Trustees of Im provement Trust—Taking over by Trustees from Corporation the streets to be formed and revesting of them in Corporation—Title of owner on ch ing in line of street—interest—costs* The appellant was the owner of a corner block of ground in Bombay having two frontages one to the Kalba devi Road and other to Princess Street and in 1906 he was under the guardianship of his mother who was desirous of erecting new buildings on it to improve the property Proper steps as to notices and other preliminary matters were there fore given to the Municipal autho ities by whom building lines for the streets had been drawn up under statutory powers which had to be adhe l to On the Kalbadevi frontage requirements were issued that the line of the new buildings should be set back which involved a sacrifice to the owner of 541 square yards of site and that was done On the Princess Street fronta e it was required that the line should be carried forward that al o was done and the buildings were erec ed in all respects according to the requirements made and to plans which were submitted to and san tioned by both the Corpora ion and the Trus ees for the improvement of the City con tituted under Bombay Act IV of 1898 In suits one by the appellant against the Corporation for Rs [illegible] the price of the land where he line of the s re was set back and the other subsequently by the Trustees against the appellant for Rs [illegible] cal

BOMBAY CITY MUNICIPAL ACT (BOM III OF 1888 AS AMENDED BY BOM ACT V OF 1905)—*contd*

——— s 140—*contd*

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BOMBAY CITY MUNICIPAL ACT (BOM III OF 1888 AS AMENDED BY BOM ACT V OF 1905)—*contd*

——— s 140—*concld*

Radford & Co (1884) Solicitors Journal 478 MONIE *v* SCOTT *(1918)* **I L R 43 Bom 281**

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BOMBAY CITY MUNICIPAL ACT (BOM III OF 1888 AS AMENDED BY BOM ACT V OF 1905)—*contd*

——— s 289—*contd*

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I L R 38 Bom 565

———ss 297 299 and 300—*Public Streets—Powers—Acquisition of adjoining Land—Compensation—Preservation of Regular Line—Collateral object—City of Bombay Municipal Act (III of 1888 and V of 1905) ss 296 297 301* By s 297 of the City of Bombay Municipal Act the Municipal Commissioner may prescribe a regular line on each side of a public street and if the line is so prescribed that any land not vesting in the Corporation falls within it the Commissioner may by s 299 take possession of it on behalf of the Corporation the former owner receiving compensation under s 301 Ss 297 to 301 are headed in the Act Preservation of regular line in public streets By s 296 the Commissioner has power to acquire any land required for widening extending or otherwise improving any public street subject to the payment of compensation under the Land Acquisition Act (I of 1894) In 1909 the Commissioner prescribed a line on one side of a public street so that land belonging to the appellants fell within it and, having served them with notice took possession The Commissioner wished to acquire the land for the purpose of widening the street in connection with a contemplated bridge carrying the street over certain level crossings The appellants contended that the procedure under ss 297 299 and 301 was inapplicable and the proceedings *ultra vires* and that the land could only be acquired subject to payment of compensation under the Land Acquisition Act 1894 *Held* that the powers given by ss 297 and 299 of the Act could be exercised although the motive of the Commissioner who acted in good faith and in the discharge of his duties was not to preserve the regular line of the street and that consequently the compensation payable to the appellants was to be calculated according to s 301 of the Act and not under the Land Acquisition Act 1894 NARMA v BOMBAY MUNICIPAL COMMISSIONER (1918)
I L R 42 Bom 462
L R 45 I A 125

——— s 297 (1) (b)—*Power of the Municipal Commissioner to prescribe a fresh line on either side of a street in substitution for any line previously prescribed by him—Power to prescribe a line of the street with the view to widening the street ss 297 301—Significance of heading to clauses* In 1903 the Municipal Commissioner of Bombay prescribed the regular line of a certain public street in Bombay in accordance with the provisions of s 297 of the Municipal Act (Bom Act III of 1888) No record was kept of the said line In 1909 in ignorance of the said line previously prescribed the Municipal Commissioner prescribed a fresh line for the same street without obtaining authority from the Corporation

BOMBAY CITY MUNICIPAL ACT (BOM III OF 1888 AS AMENDED BY BOM ACT V OF 1905)—*contd*

——— s 297—*contd*

and entered upon the land of the plaintiff which lay within the said fresh line Subsequently having been informed of the previous line the Commissioner obtained authority to prescribe a fresh line as previously irregularly prescribed and subsequently again entered on the part of the plaintiff's land within that line Both the said line prescribed in 1903 and the subsequent line prescribed in 1909 were prescribed for the purpose of widening the said street for the purpose of enabling an overbridge to be built on it The plaintiff contended that as the object of the Commissioner in prescribing the line of the street in both cases was to widen the street his action was illegal and that the lines prescribed were not made the regular lines of the street Further that in any event the Commissioner should be ordered to take up the plaintiff's land and pay for it up to the line prescribed in 1903 the only legal line of the street at the date when the Commissioner first entered the plaintiff's land *Held* that subject to the provisions of 297 of the Municipal Act the Commissioner might prescribe a line of a street whether in substitution for a previous line or not and that his action would not be invalid merely because it had for its object the widening of the street *Held* also that the headings of clauses are not to be relied on *Held* further that *Essa Jacob v Municipal Commissioner of Bombay I L R 25 Bom 107* is no longer an authority since the amendment of the Act in 1905 MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v MUNCHERJI PESTONJI (1911)
I L R 36 Bom 405

——— ss 297 301—*City of Bombay Improvement Trust Act (Bombay Act IV of 1898) ss 41 42 45 (2)—Bombay Street Scheme—Setting back of new buildings and setting forward in forming lines of new streets—Title of Trustees of Improvement Trust—Taking over by Trustees from Corporation the streets to be formed and revesting of them in Corporation—Title of owner on change in line of street—interest—costs* The appellant was the owner of a corner block of ground in Bombay having two frontages one to the Kalbadevi Road and other to Prince's Street and in 1906 he was under the guardianship of his mother who was desirous of erecting new buildings on it to improve the property Proper steps as to notices and other preliminary matters were therefore given to the Municipal authorities by whom building lines for the streets had been drawn up under statutory powers which had to be adhered to On the Kalbadevi frontage requirements were issued that the line of the new buildings should be set back which involved a sacrifice to the owner of 28 41 square yards of site and that was done On the Princess Street frontage it was required that the line should be carried forward that also was done and the buildings were erected in all respects according to the requirements made and to plans which were submitted to and sanctioned by both the Corporation and the Trustees for the improvement of the City constituted under Bombay Act IV of 1898 In suits, one by the appellant against the Corporation for Rs [illegible] the price of the land where the line of the street was set back and the other subsequently by the Trustees against appellant for Rs [illegible]

BOMBAY CITY MUNICIPAL ACT (BOM III OF 1888 AS AMENDED BY BOM ACT V OF 1905)—*contd*

———— s 297—*contd*

culated at the same rate for 2o 16 square yards for his ejectment and for po session of the land over which he was required to set the line of the street forward, both Courts in India treating the matter as a case of set off decreed the appellant s suit but without interest or costs and the Tru tee s suit against the appellant for Rs 5 032 and for his ejectment if he did not pay that um *Held* that on the construction of the City of Bombay Municipal Act (III of 1888) and of ss 41 42 of the Improvement Trust Act (IV of 1898) there was nothing to indicate that the building line of the street must once indicated remain by reason of that original indication and not be open to change or putting forward should experi ence *suggest this to be for the best s 297 of the* Act of 1888 and the practice of the Municipality under it confuted there being any such sugges tion and it was clear the Trustees were not prohibited from prescribing a fresh line Nor was there anything to indicate that the street taken over to be formed is anything different in dimension from the street to be handed back when *formed s 41 of Act IV of 1898 (as to* taking over a street to be formed) and s 45 (2) (as to handing the formed street back) are corre lative to each other, and what is to revest in the Municipality is just that which when formed as a street had been the subject of that *interim* divesti ture to the Trustees as the street forming authority The strip of the old street remained under the jurisdiction and was in all respects as before the property of the Municipality and when the appellant was required to put forward his building over it s 301 of the Act of 1888 expre ly applied and the order of the Com missioner to set forward the building was a sufficient conveyance to the owner of the said land The site between the old street and the new one of the appellant s properties became his in ownership and was still his The title of the Trustees to it failed and with it failed their suit whether for declaration or ejectment *Held* also that while the Act III of 1888 makes provision for the compulsory expropriation of an owner it makes no provision whatever for payment by the owner in respect of what may be called compul sory impropriation The right or duty of set off failed it was not justified by law *Held* further that the appellant was entitled to interest on his decree and also to his costs Unless there be something in the contract of parties which neces sarily implies the opposite the date when one party enters into pos ession of the property of another is the proper date from which interest on the unpaid price should run on the one hand the new owner has possession use and fruits and on the other hand the former owner parting with those has interest on the price This is sound in principle and warranted by authority *Fludyer v Cocker 12 Ves Jun 25 per Sir W Grant Greenock Harbour Trustees v Glasgow and S W Railway Co (1909) S C 50 In re Stirling and Dunfermline Railway Co 19 Dunlop 598 per Lord Cowan* and *Birch v Joy 3 H L C 565 590* per *Lord St Leonards* PATANLAL CHUNI LAL *v* MUNICIPAL COMMISSIONER FOR CITY OF BOMBAY (1918) I. L. R 43 Bom. 181 L R 45 I A 233

BOMBAY CITY MUNICIPAL ACT (BOM III OF 1888 AS AMENDED BY BOM ACT V OF 1905)—*contd*

———— s 305—

———— *Municipal Com missioner—Notice disobedience of—Private streets—Levelling and draining of—Liability of owners of several premises—Owners of building sites—Build ings constructed by lessees on the sites—Premise what are—Construction of statutes* The owner of a large plot of land sub divided it into a number of building sites *which he arranged on either side of a private* street which was projected to run through the plot Those building sites were let to lessees (of whom the applicant was one) for a period of thirty years at the end of the period the le see was to remove the building put up by him unless the lessor pur chased it Under the terms of the lease the lessee was to contribute rateably to the expenses of making *repairing etc all ways roads etc The* applicant was one of those lessees He built a house upon one of those sites and let it to tenants from whom he received rent The Municipal Com missioner of Bombay issued a notice to the appli cant under s 305 of the City of Bombay Municipal Act (Bombay Act III of 1888) calling upon him to level, metal drain and light the public street in front of his building The applicant *failed to* comply with the notice for which he was prosecuted under s 471 of the City of Bombay Municipal Act 1888 He contended that he was not the owner of the premises within the meaning of s 305 of the Act The Magistrate overruled the contention and convicted him *Held* that the mere owner of the land who had let it out under a building scheme *for building purposes was not the owner* of the property because the property contemplated by s 305 necessarily embraced buildings whether erected or to be erected and the Legislature regarded him as the owner of the premises who had the right to receive rent in respect of that property The word premises occurring in s 305 of the City of Bombay Municipal Act (Bombay Act III of 1888) must be presumed to have been used by the Legis lature in its legal sense as referring to the particular kind of property which forms the subject matter of the group of immediately preceding sections of the Act That group (ss 302—307) has reference to streets made for the use of buildings or building sites The dominant idea running through the ss 302—304 is that of buildings either erected or projected That is the kind of property dealt with in what has gone before s 305 and therefore that is its *præmissa* It is a primary rule of interpretation that a word having a popular meaning ought to be construed in that sense One exception to that rule is that unless there is some thing to the contrary in the context words of known legal import are to be considered as having been used in their technical sense where the law has attached that sense to them EMPEROR *v* RAMCHANDRA BHASKAR MANTRI (1910) I L R 34 Bom 593

———— *Private street—Sewer pipe laid by Municipality before the Act of 1888 came into force—Sewer pipe carrying sullage from houses abutting on the street—Street includes houses on either side—Requisition by the Municipa lity to level and drain such streets* Along two lanes known as the Hanuman Cross lanes in the City of Bombay the Municipality of Bombay laid a sewer pipe in 1880 or 1883 for the purpose of

BOMBAY CITY MUNICIPAL ACT (BOM III OF 1888 AS AMENDED BY BOM ACT V OF 1905)—*contd*

——— s 305—*contd*

carrying sullage from houses on either side of the lanes Under the provisions of s 305 of the City of Bombay Municipal Act (Bombay Act III of 1888) the Municipality issued a notice calling upon owners of the houses to level metal drain and light the lanes in question The owners having failed to comply with the notice the Municipality prosecuted them contending that the notice was properly issued since the sewer laid in the lanes did not make them public streets and the street did not include houses on either side of the streets —*Held* that the lanes in question having been sewered since 1883 they were public street and s 305 of the City of Bombay Municipal Act (Bombay Act III of 1888) had no application *Held* further that the term street as used in the Act included houses on either side of the street EMPEROR v RAMRAO VISHVANATH (1918) **I L R 43 Bom 122**

——— s 349B—*Height of building—Addition of bath rooms at the top in the rear of the building —Passing the height* The applicant was convicted of infringing the provisions of s 349B of the City of Bombay Municipal Act (Bombay Act III of 1888) in that he added small bath rooms to the third and fourth floors of his old residential house though the additions fell below the original height of the house The applicant having applied *Held* reversing the conviction that the act of the accused fell outside the purview of s 349B of the Act because he had neither erected nor raised his building within the meaning of the section EMPEROR v KALLIANJI (1917) **I L R 41 Bom 741**

——— s 377—*Municipal Commissioner—Neglected premises—Notice to remove nuisance—Magistrate s discretion* The accused was served with a notice of requisition under s 377 of the City of Bombay Municipal Act 1888 requiring him to remove filth rubbish heaps of *cutchera* and stable refuse from a large piece of vacant land belonging to him He failed to comply with the requisition and a prosecution was instituted against him The Magistrate viewed the premises and having so viewed them but without hearing any evidence acquitted the accused as the premises did not appear to him to be in a filthy condition —*Held* that the premises having appeared to the Commissioner in a filthy condition the notice was validly issued under s 377 of the City of Bombay Municipal Act 1888 and that there having been a non compliance with the notice the offence was complete *Held* further that the Magistrate was wrong in acquitting the accused on the sole ground that the premises did not appear to him to be in such a condition as to justify the issue of a notice under s 377 S 3 of the City of Bombay Municipal Act 1888 enacts that the only condition precedent to the valid issue of a requisition is that it shall appear not to the Magistrate but to the Commissioner that the premises are in the condition specified in the section EMPEROR v RAJA BAHADUR SHIVLAL MOTILAL (1910) **I L R 34 Bom 346**

——— ss 379 379A—*Overcrowding of house—Notice to abate the nuisance—Service of notice—Owner—Rooms in a building let to different tenants—Overcrowding by tenants—Notice to the owner* The notice contemplated by s 379A of the City of Bombay Municipal Act (Bom Act III of 1888) should be given to the owner of a building in cases where the owner has let rooms in the building to separate tenants who cause overcrowding MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY v MATHURADAS (1911) **I L R 36 Bom 81**

——— s 390—*Factory—Municipal Commissioner permission of—Unauthorised factory* The accused obtained the Municipal Commissioner s permission [s 390 (*1*) of the City of Bombay Municipal Act 1888] to establish a hand loom factory worked by an oil engine but by means of this oil engine he also established a flour mill without any permission The accused was therefore charged with the offence under s 390 (*1*) of the Act *Held* that the accused was guilty of a technical offence under s 390 (*1*) of the City of Bombay Municipal Act, 1888 for although the accused had leave to establish the hand loom factory he had no leave to establish the flour mill factory which was not the less another and a separate factory because it happened to be worked by the same power which it was proposed to employ in the permitted factory EMPEROR v MULJI DAMODARDAS (1909) **I L R 34 Bom 344**

——— s 394—*Indian Railways Act (IX of 1890) s 7—Use by Railway Company of its premises for storing timber—License from the Municipal Commissioner for the use not necessary* The Agent of the Great Indian Peninsula Railway Company having been charged in the Presidency Magistrate s Court at the instance of the Bombay Municipality under s 394 (1) (*d*) of the City of Bombay Municipal Act (Bom Act VIII of 1888) with having used the Company s premises for storing timber without a license granted by the Municipal Commissioner the Presidency Magistrate recorded evidence and referred the following question under s 432 of the Criminal Procedure Code (Act V of 1898) — Do the statutory powers given to the Railway Company (s 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner to use premises in such a manner as is necessary for the convenient making altering repairing and using the Railway? *Held* that no such license was necessary S 7 (1) of the Indian Railways Act (IX of 1890) authorizes the Railway Administration to do all acts necessary for the convenient making maintaining altering repairing and using the Railway notwithstanding anything in any other enactment for the time being in force The storing of timber was necessary for the convenient making etc of the Railway line Under s 7 sub s 2 of the Indian Railways Act (IX of 1890) the Governor General in Council and not the Municipal Commissioner has the control of the Railway Administration in the exercise of its powers under sub s 1 MUNICIPAL COMMISSIONER OF BOMBAY v GREAT INDIAN PENINSULA RAILWAY COMPANY (1908) **I L R 34 Bom 252**

——— The expression oil in sch 1 includes sweet oil It is no defence for storing oil without a license to say the Commissioner refused one EMPEROR v NARANDAS **I L R 45 Bom 1076**

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BOMBAY CITY MUNICIPAL ACT (BOM III OF 1888 AS AMENDED BY BOM ACT V OF 1905)—*concld*

———— s 296—

See LAND ACQUISITION
I L R 45 Bom 725

———— ss 296 301—

See ANTE
I L R 42 Bom 462

———— ss 418 461 cl (o)—*Bye law for weights and measures—Validity of the bye law—Recognition of certain measures only for standardiza tion—All measures in use should be recogni ed—Measures of phara and pyl—New measures of maplo and mapli* The Municipal Corporation of the City of Bombay framed the following bye law under the powers vested in them by s 461 cl (o) of the City of Bombay Municipal Act (Bom Act III of 1888) :— No tenant or occupier of a shop stall, or godown or standing in a private market shall keep at such shop stall godown or standing any weight or measure which has not been duly verified by comparison with the standard weight or measure and stamped in accordance with the provisions of ss 418 and 419 of the Act *Held* that the bye law was invalid under the Municipal Act in so far as it prohibited the keep ing for use in a private market of a measure which had been in use in the City but of which no standard had been kept by the Commissioner as required by s 418 of the Act *In re* JIVRAJ DHANJI (1907) I L R 41 Bom 580

BOMBAY CITY POLICE ACT (IV OF 1902)

See CRIMINAL PROCEDURE CODE s 514
I L R 42 Bom 400

BOMBAY CIVIL CIRCULARS

See BOMBAY HIGH COURT

BOMBAY CIVIL COURTS ACT (BOM XIV OF 1869)

———— ss 8 26—

See LIMITATION ACT 1908 SCH I ART 152 I L R 43 Bom 376

———— s 16—

See LAND ACQUISITION ACT (I OF 1894) s 54 I L R 38 Bom 337

See LIMITATION ACT 1908 s 5
I L R 45 Bom 607

———— *Divorce Act (IV of 1869) ss 4 6 7 8 and 15—Decree for dissolution of mar riage—Assistant Judge—Jurisdiction* Section 16 of the Bombay Civil Courts Act (XIV of 1869) does not authorize any reference to an Assi tant Judge to decide a suit under the Indian Divorce Act (IV of 1869) THOMAS FRENCH v JULIA FRENCH (1914) I L R 39 Bom 136

———— s 24—

See JURISDICTION OF CIVIL COURTS
I L R 35 Bom 264

See RESTITUTION OF CONJUGAL RIGHTS
I L R 34 Bom 236

———— Part V—Jurisdiction of Assistant Judges —*Suit cognizable and heard by the First Class Subordinate Judge—Appl cation to the Court of the District Judge for transfer—Transfer of the application to the Assistant Judge—Order of the Assistant Judge for tran fer of the suit to the District Court—Civil Procedure Code (Act V of 1908) s 24* The plaintiff filed a suit in the Court of the first class Subordi nate Judge claiming R18 797 The suit was heard by that Judge for some days and then the defend ant filed an application in the Court of the District Judge for transfer of the suit to another Court The District Judge transferred the application to the Assistant Judge for disposal The Assistant Judge heard the application and ordered that the suit be transferred to the District Court for trial The plaintiff having objected that the order of the Assistant Judge was without jurisdiction *Held* setting aside the order that under the provisions of the Bombay Civil Courts Act (XIV of 1869) Part V the limit of the Assistant Judge s juri dic tion for the purpose of hearing suits is R10 000 and that in case of suits and applications when the value of the subject matter does not exceed R5 000 an appeal in appealable cases lies to the District Judge The Assistant Judge is therefore not a Judge of co ordinate jurisdiction to the District Judge He is therefore not a Judge of the District Court and the order complained of was not made by the District Court which alone had jurisdiction S 24 of the Civil Procedure Code (Act V of 1908) empowers the District Court to withdraw any suit *and* try and dispose of it The suit with drawn being for a sum exceeding the jurisdiction of the Assistant Judge he could not try and dispose of it He was therefore not a Judge of the District Court as contemplated by the ection which must be a Court of unlimited pecuniary juris diction HAJI UMAR ABDUL RAHIMAN v GUSTADJI MUNCHERJI (1910) I L R 34 Bom 411

———— s 32—

See BOMBAY COURT OF WARDS ACT (BOM ACT I OF 1905) s 3 (c)
I L R 37 Bom 313

———— *Civil Procedure Code (Act V of 1908) s 37—Decree—Court of Wards made party after decree—Execution—Jurisdiction of the Court to execute its own decree* The Court which passed the decree has jurisdiction to proceed with the execution notwithstanding that after the decree the Court of Wards has become a party to the execution proceeding *Gopal Apaji v Keshavrao Konherrao I L R 38 Bom 662 note* followed BANDOO KRISHNA v NARSINGRAO (1914) I L R 38 Bom 662

BOMBAY COTTON TRADE ASSOCIATION RULES

See CONTRACT ACT (IX OF 1872) s 47
I L R 40 Bom 517

BOMBAY COURT OF WARDS ACT (BOM I OF 1905)

———— s 3 (c)—*Bombay Civil Courts Act (XIV of 1869) s 32—Collector—Court of Wards—Government officer suit against—Jurisdiction of the Subordinate Judge* When the Collector is appointed a Court of Wards under s 3 (c) of the Court of Wards Act (Bom Act I of 1905) he is an officer of Government and the Subordinate Judge s Court cannot entertain a suit against him having

BOMBAY COURT OF WARDS ACT (BOM I OF 1905)—*contd*

——— s 3(c)—*contd*

regard to s 32 of the Bombay Civil Courts Act (XIV of 1869) SHIVA v MINZIS (1912)
I L R 37 Bom 313

———ss 31 32—*S 32 of the Court of Wards Act (Bom Act I of 1905) not retrospective* S 32 of the Court of Wards Act (Bom Act I of 1905) was not intended to apply to pending suits In terms it refers to suits brought by or against a Government ward S 32 must be read with s 31 which provides that before such a suit is brought notice shall be delivered to or left at the office of the Court of Wards Thus s 32 does not apply to suits pending at the time of the assumption of superintendence of the ward s estate by the Court of Wards HARI GOVIND v NARSINGRAO KONHERRAO (1913)
I L R 38 Bom 194

——— s 14—*Notice of claims—Publication of notice in Government Gazette—Further publication of notice desirable* Under s 14 (1) of the Court of Wards Act (Bom Act I of 1905) it is desirable that there should be some further publication of the notice calling for claims than the mere publication in the *Government Gazette* SHANKAR SANA v SHIVABHAI VALLAVBHAI
I L R 44 Bom 493

——— s 16—

See LIMITATION ACT 1908 s 19
I L R 44 Bom 871

——— ss 31 32—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 92 I L R 40 Bom 541

——— *Gujarat Talukdar s Act (Bom Act VI of 1888) s 29 (g)—Suit against a Talukdar on a bond—Estate of the Talukdar under the management of the Talukdari Settlement Officer—Appointment of the Talukdari Settlement Officer as Court of Wards—Suit against Talukdar by the creditor—Talukdari Settlement Officer not a necessary party—Notice of suit to the officer* A suit by a creditor against a Talukdar whose estate is under the management of the Talukdari Settlement Officer under a notification issued under s 3 (c) of the Bombay Court of Wards Act 1905 is maintainable although no notice of suit has been given to the Talukdari Settlement Officer under s 31 or that officer is not made a party to the suit under s 32 of the Act HARGOVIND FULCHAND v BAI HIRBAI (19 0)
I L R 44 Bom 986

BOMBAY DISTRICT MUNICIPALITIES ACT (BOM III OF 1901)

——— ss 2 43 and 67—*Dismissal of a Municipal Officer—Suit for damages for wrongful dismissal* When a District Municipality exercising the power given to it by the District Municipal Act (Bom Act III of 1901) or the statutory rules made under the Act dismisses an officer of the Municipality that is an act done or purporting to have been done in pursuance of the Act within the meaning of s 167 and it was consequently held that the suit was out of time MUNICIPALITY OF RATNAGIRI v VASUDEO BALKRISHNA (1915)
I L R 39 Bom 600

BOMBAY DISTRICT MUNICIPALITIES ACT (BOM III OF 1901)—*contd*

——— ss 2 46 and 67—*contd*

——— ss 2 and 65—*Held* that the Ahmedabad Municipality was competent to make Rules for the enhancement of property tax AMBALAL SARABHAI v THE AHMEDABAD MUNICIPALITY
I L R 45 Bom 611

——— s 3 (7)—*Notice of new buildings—Reconstructing side wall of a house on its old foundation not necessarily new building—Building interpretation of* The accused owned a house one of the side walls of which had fallen down He rebuilt it on its old foundation without having previously obtained permission of the Municipality He was there upon charged under s 96 of the Bombay District Municipal Act (Bom Act III of 1901) for having erected a building without permission of the Municipality *Held* that the accused committed no offence under s 96 for it could not be said as a matter of law that the material reconstruction of a small wall must constitute the erection of a building *Emperor* v *Kalekhan Sardarkhan* I L R 35 Bom 36 distinguished *Per Curiam* It is recognized in England to be a rule with regard to the effect of interpretation clauses of a comprehensive nature that they are not to be taken as strictly defining what the meaning of a word must be under all circumstances but merely as declaring what things may be comprehended within the term where the circumstances require that they should *The Queen* v *The Justices of Cambridgeshire* 41 & E 480 *Meux* v *Jacobs* L R 7 H L 481 and *Mayor etc of Portsmouth* v *Smith* L R 10 App Cas 364 followed EMPEROR v B H DE SOUZA (1911)
I L R 35 Bom 412

——— The compound wall of a house is included in the term Building as defined by s 3 EMPEROR v RAMRAO
I L R 45 Bom 1151

——— *Building interpretation of—Wire fence is not a building* The term building as defined in 3 cl (7) of the Bombay District Municipalities Act 1901 does not include an ordinary wire fence EMPEROR v PANCHODLAL (191)
I L R 41 Bom 563

——— s 22—

See CRIMINAL PROCEDURE CODE s 1[illegible]
I L R 37 Bom 365

——— s 40—

S[illegible]

I L R 45 Bom [illegible]97

——— s 42—*Liability of Councillors for misapplied funds—Misapplication by Secretary and accounts clerk of the Municipality—Misapplication interpretation of—Suit by the Secretary of State for India in Council* The Secretary of State for India in Council sued to recover a sum of money from the defendants the first two of whom were the Secretary and accounts clerks of a Municipality the rest being the Councillors thereof The sum claimed was the Municipal money embezzled by defendants Nos 1 and 2 The liability of the remaining defendants (defendants Nos 3 to 12) was based upon s 42 of the Bombay District Municipalities Act (Bo[illegible] I of 1901) Defend

BOMBAY DISTRICT MUNICIPALITIES ACT (BOM III OF 1901)—*contd*

——— s 42—*contd*

ants Nos 3 to 12 contended that s 42 was not applicable inasmuch as the embezzlements by the paid servants of the Municipality would not amount to misapplication of the Municipal funds within the meaning of the section The lower Court over ruled the contention and decreed the suit The defendants Nos 3 to 12 having appealed to the High Court *Held* confirming the decree that the operation of s 42 of the Bombay District Muni cipalities Act (Bombay Act III of 1901) was not restricted to misapplications made by any Coun cillor or Councillors but it applies to any mis application by whomsoever made *Per* BATCHELOR J — The context in which the word mis application occurs indicates that the word is employed rather in the broad and popular sense than in the narrow or etymological sense There is no requirement that the misapplication must be by the Councillors themselves or by any specified persons whatsoever and the use of the passive word happened seems to suggest also that the scope of the section extends to a mi appropriation of the Municipal funds by a Municipal employee provided only that the misapp opriation was faci litated by the Councillor ro s neglect of their duties *Per* HAYWARD J — Any diversion of funds however caused from th ir proper purposes would be covered by the wide term misapplica tion and it is in that wide sense that the term has been introduced into s 42 of the Act It has purposely not been restricted to a misapplication to which a Councillor shall have been a party but has been applied expressly to a m sapplica tion which shall have happened through or been facilitated by gross neglect of duty by a Councillor that is to say which has happened by any other agency through the gross neglect of a Councillor MANILAL CANGADAS *v* SECRETARY OF STATE FOR INDIA (1915) **I L R 40 Bom 166**

——— ss 50 54—Suit for damages against Municipality—*Hubli Municipality—Reclamation of the bed of a tank for Municipal Cotton Market—Damage caused to plaintiff s goods by sudden and extraordinary heavy rain—Burden of proof as to negligence in the reclamation work—Suit not main tainable—Vis major* The Hubli Municipality a body corporate under the District Municipal Act (Bom Act III of 1901) took steps to provide a Municipal Cotton Market and they selected for that purpose a site of a large and ancient tank which had largely silted up The southern bound ary of the tank was an embankment In reclaim ing the bed of the tank the Municipality utilized a part of the embankment and made provision to prevent the flow of water In the month of June 1907 there was a sudden and extraordinary heavy rainfall at Hubli which practically over flooded the whole Municipal area and a quantity of goods in the plaintiff s Ginning Factory which was to the south of the tank was washed away or damaged Thereupon the plaintiffs brought a suit again t the Municipality to recover damages alleging negligence on the part of the defendants in carrying out the reclamation work The defendants denied the plaintiffs allegation and answered that the damage to the plaintiffs goods was the result of the abnormal heavy rain in June 1907 and that no precautions on the part of the defendants could have averted the damage *Held*

BOMBAY DISTRICT MUNICIPALITIES ACT (BOM III OF 1901)—*contd*

——— ss 50 54—*contd*

that the suit was not maintainable The onus of proof of negligence lay on the plaintiffs and if the neglect in the execution of their statutory powers and duties was not brought home to the Municipality a suit against them must fail as being unsustainable in law howsoever great the damage the plaintiffs might have suffered from the extra ordinary flooding uncontrolled by the old tank dam *Per* RAO J —The damage was mainly, if not wholly attributable to the extraordinary fall of rain It was an occurrence in the nature of *vis major* for which the defendants were not res ponsible MUNICIPALITY OF HUBLI *v* LUCUS IUSTRATIO RALLI (1911) **I L R 35 Bom 492**

——— s 56—*Irrigation Act (Bom Act VII of 1879)—Drainage cut—Drainage channel—Neglect of proper repairs by local bodies—Flow of water across the road into plaintiffs field—Damage—Liability of local bodies—Non feasance—Neglect of highways* Where drainage water passing along a certain drainage cut owing to some default instead of flowing along the assigned channel flowed across the road into the plaintiffs field and caused damage to the plaintiffs and the damage was found to be due not to the authorized drainage work but to the neglect of the drainage channel which the Municipality was bound to repair *Held* that the Municipality was liable to the plaintiffs in damages *Per Curiam* The exemption from liability of local bodies on the ground of non feasance is confined to neglect of highways and does not apply to drainage works carried out by the local bodies for their conve nience which they are bound to maintain in a proper state of repairs so that they shall not be a nuisance to the neighbouring owners *Borough of Bathurst* v *Macpherson 4 App Cas 256 Muni cipality of Pictou* v *Geldert [1893] A C 524* referred to DHOLKA TOWN MUNICIPALITY *v* PATEL DESAIBHAI (1913) **I L R 38 Bom 116**

——— s 59—*Special sanitary cess—Owner of private latrines connecting them with Municipal sewer—Authority of Municipality to levy cess* The plaintiffs built on their premises private latrines which were cleansed by manual labour After some time the plaintiffs were allowed by the Municipality to connect the latrines with the Municipal sewer and this was done at the plaintiffs own expense The plaintiffs were thereafter called upon to pay a special sanitary cess which the defendant Municipality claimed to be entitled to levy under section 59 (*b*) (vi) of the Bombay District Municipal Act 1901 The plaintiffs paid the tax under protest and brought a suit for the recovery of the amount paid The lower Courts allowed the plaintiffs claim on the ground that the plaintiffs at their own expense connected the privies with the Municipal sewer and the Munici pality did not make arrangements for receiving and conducting sewage into Municipal sewer On appeal to the High Court *Held* dismissing the plaintiffs suit that it was clearly the intention of the Act that if the Municipality provided a sewer for receiving the sewage and the owner of private latrines connected them with the sewer and then the Municipality provided the water although it might be at an additional cost to the owner for carrying the sewage from the latrines to the sewer the latrines were being cleansed by the

BOMBAY DISTRICT MUNICIPALITIES ACT (BOM III OF 1901)—*contd*

——— s 59—*contd*

Municipal Agency and the Municipality were entitled to levy a special sanitary cess AHMEDABAD MUNICIPALITY v THE GUJARAT GINNING AND MANUFACTURING COMPANY LTD
I L R 44 Bom 527

——— s 65—

See s 2 I L R 45 Bom 611

——— ss 70 113 and 122—*Public street—Projection—Projecting a shop board into a public street without permission or without paying fees—Surat City Municipality's By laws 3 and 10—By law not ultra vires* The accused rented a shop on a public street and projected therefrom a shop board into the street without having obtained permission of the Municipality and without paying the fees prescribed in that behalf by the Municipality in its by law 10 On prosecution for offences under ss 113 and 122 of the Bombay District Municipalities Act 1901 the accused contended that by law 10 was *ultra vires* *Held* that the by law 10 was not *ultra vires* of the Municipality and that the accused had contravened the by law EMPEROR v NAGINDAS (1918)
I L R 42 Bom 454

——— ss 92, 96—*Erection of a new building—Application to Municipality for permission—Condition requiring the owner to keep certain space vacant for widening street—Condition not valid* The plaintiff applied to the Municipality for permission to rebuild her house The Municipality granted the permission on the condition among others that she should in rebuilding the house keep a specified space vacant and unbuilt upon for the improvement of the street by widening it The plaintiff disregarded the condition and built upon the specified space Thereupon the Municipality having threatened the demolition of the house the plaintiff brought the present suit for an injunction restraining the Municipality from doing so *Held* that under s 96 of the Bombay District Municipal Act (Bom Act III of 1901) the Municipality was empowered to prescribe the location of the building in relation to any street existing or projected as they think proper whereas in the present case they had prescribed the location of the building in relation not to the existing street but to a street which might come into existence in the future The object of the Municipality in imposing the condition was not for the purposes of sanitation or ventilation but to get a set back which could not be obtained under s 92 of the Act If the condition of the permit were complied with the plaintiff would have to give up or keep vacant or unproductive a considerable portion of her land and the Municipality would have the opportunity of paying compensation for it at any time they might feel disposed to do so which would be contrary to the provisions of s 92 which contemplates that when a set back is determined upon compensation should be paid to the owner and that the plaintiff was entitled to an injunction as prayed. *Queen Empress* v *Veerammal* *I L R 16 Mad 230* referred to BAI FATMA v RANDER MUNICIPALITY (1914) I L R 38 Bom. 597

——— s 96—

See s 3 I L R 35 Bom 412

See s 92 I L R 38 Bom. 597

——— *Application to Municipality to reconstruct a house building balconies—Permission note to rebuild the house—Permission to build balconies indefinitely delayed—Building of balconies—Indefinite delay inconsistent with the District Municipal Act (Bom Act III of 1901)* On the 3rd July 1903 the plaintiff applied to the Ahmedabad Municipality for permission to reconstruct his house building balconies on its two sides On the 25th July 1903 the Municipality issued a permission note giving the plaintiff permission to rebuild his house and informing him that as regards the building of the balconies his application was placed before the Managing Committee and that until the permission was granted he must not do any work in that respect The plaintiff not having heard from the Municipality he built the balconies On the 4th August 1904 the Municipality called upon the plaintiff to remove the balconies and his application to the Municipality to reconsider their decision having failed he brought a suit against the Municipality for an injunction restraining them from removing his balconies *Held* that the plaintiff was entitled to succeed There being no subsisting provisional order referred to in s 96 sub s (4) (a) (ii) of the District Municipal Act (Bom Act III of 1901) the plaintiff was entitled to the liberty of proceeding allowed by sub s 4 After the expiry of one month the order as to the balconies was spent and the plaintiff became entitled to proceed with the proposed work *Per Curiam* Under the District Municipal Act (Bom Act III of 1901) an applicant is not to be restrained from proceeding with his work merely because a provisional order which is expressly limited to one month may have been issued months or even years earlier An order directing indefinite delay is inconsistent with the District Municipal Act (Bom Act III of 1901) AHMEDABAD MUNICIPALITY v PAS JI KUBER (1911) I L R 36 Bom 61

——— *Municipality—Permission of the Municipality—Building a wall which had fallen down—Absence of permission—Erecting a building* The accused applied to the Municipality on the 19th April 1910 for leave to reconstruct a wall of his house which had fallen down Under sub s 4 of s 96 of the Bombay Municipal Act (Bombay Act III of 1901) the Municipality had one month within which to make known their decision and on the 13th May they issued an order to the accused prohibiting him from making the reconstruction In the meanwhile on the 11th May the accused reconstructed the wall He was therefore prosecuted under s 96 of the Act for having reconstructed the wall without the permission of the Municipality but the Magistrate relying on the case of *Queen Empress* v *Tippan Pitamlal's Un Cri Cas 402* acquitted him On appeal —*Held* reversing the order of acquittal that the accused had erected a building within the meaning of s 96 of the Bombay District Municipal Act 1901 since the rebuilding of the whole wall which had fallen down was a material reconstruction or an erection of a building as defined in the explanation to the section *Queen Empress* v *Ti[illegible] Patan Pa Un Cri Cas 402* is not an a[illegible] under the new Act EMPEROR v [illegible] (1910) [illegible] Bom 238

BOMBAY DISTRICT MUNICIPALITIES ACT (BOM III OF 1901)—*contd*

——— s 96—*contd*

——— *Permission to build a privy granted under sub s (2)—Subsequent order by the Municipality revoking the permission—Legality of the order* The plaintiff applied to the Municipality on December 1 1913 for permission to build a privy on his own land The permission was granted by the Municipality on 22nd December under sub s (2) of s 96 of District Municipalities Act 1901 On January 8 1914 the Municipality acting on the resolution of the Managing Committee gave notice and passed an order to the plaintiff not to build the privy until further orders The plaintiff having sued for the cancellation of the order of January 8 1914 as *ultra vires* *Held* that the order was not legal in the absence of any power to cancel the permission once granted under sub s (2) of s 96 of the District Municipalities Act 1901 *Emperor* v *Kareen Ranjan 19 Bom L R 65* followed VITHAL DHONDDEV v THE ALIBAG MUNICIPALITY (1918) I L R 42 Bom 629

——— *Permission to build—Permission once granted cannot subsequently be cancelled—Sale of land by Municipality—Absence of written contract of sale—Effect on the validity of the sale* It is not competent to a District Municipality to revoke a permission to build which has already been granted under the provisions of s 96 of the Bombay District Municipal Act 1901 *Emperor* v *Kareem Panjan Khoji (1916) 19 Bom L P 65* and *Vithal* v *Alibag Municipality (1916) 42 Bom 629* followed *Quære*—Where a District Municipality sells land without a contract in writing as required by s 40 (6) of the Act is the sale valid? *Abaji Sitaram* v *Trimbak Municipality (1903) 28 Bom 66* and *Young and Co* v *The Mayor etc of Royal Leamington Spa (1883) 8 App Cas 517* considered MUNICIPALITY OF SHOLAPUR v ABDUL WAHAB I L R 45 Bom 797

——— *Building an Otla in front of a house—Permission of the Municipality not obtained—Otla an additional structure—Permission necessary* The plaintiff raised an Otla in front of his house without previously obtaining permission of the Municipality as required by clause (1) s 96 of the District Municipalities Act (Bom Act III of 1901) The defendant Municipality served the plaintiff with a notice to remove the Otla The plaintiff having sued for a permanent injunction restraining the Municipality from removing the Otla alleging that the Municipality's notice for its removal was illegal and *ultra vires* *Held* dismissing the suit that in raising the Otla the plaintiff was seeking to add to an existing building which he could not do without asking for permission of the Municipality under clause (1) s 96 of the District Municipalities Act 1901 VIRAMGAM MUNICIPALITY v PHAICHAND DAMODAR (1919) I L R 44 Bom 198

——— *Permission to build privy subsequently revoked* The plaintiff applied to the Municipality for permission to build a privy on his own land and was given same under s 96 (2) of the Act Later permission was withdrawn *Held* that the revocation was illegal *Emperor* v *Kareen Ranjan 19 B L R 65* followed VITHAL DHONDDEV v THE ALIBAG MUNICIPALITY I L R 42 Bom 629

BOMBAY DISTRICT MUNICIPALITIES ACT (BOM III OF 1901)—*contd*

——— ss 113 122—*Suit against Municipality for re instating a stone removed by it—Plaintiff's adverse possession—Municipality creature of the statute—Duties of Municipality—Municipal District—Encroachment—Obstruction to safe and convenient passage—Notice of removal—Justification by reference to statutory powers* In a suit brought against a Municipality to restrain them from obstructing the plaintiff in re instating a stone which was imbedded in his *otla* in its original position the lower Appellate Court found that the stone had been *in situ* for twelve years therefore the Municipality had no right to interfere with it as there had been adverse possession for the statutory period of the portion of the street occupied by the stone On second appeal by the Municipality *held* that the Municipality was the creature of the statute with duties *inter alia* to preserve the passage along public streets It mattered not for the Municipality whether the encroachment had been in existence for 12 years or more Under s 113 of the District Municipal Act (Bom Act III of 1901) the Municipality might on proof that the encroachment objected to was an obstruction to the safe and convenient passage along a street by written notice require the owner to remove it Section 122 of the Act empowered the Municipality to remove the encroachment which might have been put up after the place had become a Municipal District In the present case the Municipality having failed to justify their action by reference to the said statutory powers the decree was confirmed DAKORE TOWN MUNICIPALITY v TRAVEDI ANUPRAM (1913) I L R 38 Bom 15

——— s 142—*Held* that a Municipality had power to order destruction of bad meat exposed for sale EMPEROR v HAJI ABOO I L R 45 Bom 193

——— s 151 (1)—*Use of property for a lime kiln—Nuisance—Municipality to determine whether the use is or is likely to be a nuisance—Power of the Court to interfere with the discretion of the Municipality* The use of property for the purpose of a lime kiln would be a nuisance within the meaning of s 151 (1) of the District Municipal Act (Bom Act III of 1901) and under that section it is the Municipality who is to judge whether the use is or is likely to become a nuisance to the neighbourhood The Courts will not interfere with the exercise of that power unless it can be shown that it is exercised in an improper manner NUR MAHOMED GULAM v THE SURAT CITY MUNICIPALITY (1919) I L R 44 Bom 738

——— s 160—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 115 I L R 40 Bom 509

——— *Municipality—Compulsory—Acquisition of land—Compensation—Arbitration—Decision of District Court—Appeal—High Court—Construction of Statutes* No appeal lies from the decision of a District Court under cl (3) of s 160 of the Bombay District Municipal Act (Bom Act III of 1901) Where a Statute creates a right not existing at common law and prescribes a particular remedy for its enforcement then that remedy alone must be followed *Wolverhampton New Waterworks Co* v *Hawkesford 6 C B N S 336* followed CHUNILAL VIRCHAND v AHMEDABAD MUNICIPALITY (1911) I L R 36 Bom 47

BOMBAY DISTRICT MUNICIPALITIES ACT (BOM III OF 1901)—*concld*

——— ss 161 (2)—

See Criminal Procedure Code 435
I L R 43 Bom 864

BOMBAY DISTRICT POLICE ACT (BOM IV OF 1890)

——— s 42—*District Magistrate—Order for prevention of disorder—Promulgation of the order—Presence of the Magistrate at the place when the order is promulgated—Ultra vires order* A District Magistrate issued a notification under the provisions of s 42 of the Bombay District Police Act 1890 prohibiting circulation of certain pictures throughout the whole District The notification was promulgated in all the Taluka head quarters The Taluka head quarters of the village where the accused lived was nearly twelve miles distant At the time when he issued the notification the District Magistrate was at a considerable distance from the village The accused was convicted of having disobeyed the notification in that he sold the prohibited pictures at his village *Held* reversing the conviction and sentence that the notification in question could not be upheld under s 42 because (i) it was not promulgated at the village where the accused lived and (ii) the District Magistrate was not present at or near the village at the time of the promulgation *Per* Chandavarkar J—The preliminary conditions essential under the provisions of s 42 of the District Police Act for the exercise of the jurisdiction conferred by it are these (i) the jurisdiction is conferred on the Magistrate of the District or in his absence and subject to his own order the Magistrate of the First Class (ii) he must have jurisdiction in the town or village where the jurisdiction is intended to operate (iii) they must be present in such town or village or in the neighbourhood thereof at the time the jurisdiction under the section is set in motion Emperor v Dattatraya Laxman (1912) I L R 36 Bom 504

——— s 61 cl (b)—*Disregarding rule of the road—Driving a bicycle on a wrong side of the road—Vehicle—Bicycle* A bicycle is a vehicle within the meaning of the word as used in cl (*b*) of s 61 of the District Police Act (Bombay Act IV of 1890) Emperor v Kikabhai (1917)
I L R 41 Bom 464

——— s 62—Where the provisions of the Prevention of Cruelty to Animals Act 1890 are extended by the Bombay Government to a certain district under s 1 (*2*) of the Act the extension does not by itself operate to repeal s 62 of the Bombay District Police Act within that district Emperor v Bhagwan Krishna Thorat
I L R 45 Bom 203

——— ss 63 (b) 80 (3)—*Complaint against police officer for vexatiously seizing property—Limitation for the application* On the 2nd March 1916 certain property was seized from the applicant by a police officer The applicant was tried by a Magistrate and acquitted and the property was returned to him on the 30th October 1916 The applicant applied under s 63 (*b*) of the Bombay District Police Act (Bombay Act IV of 1890) charging the police officer with vexatiously seizing the property It was objected that the application not having been made within six months from the date of the seizure was time

BOMBAY DISTRICT POLICE ACT (BOM IV OF 1890)—*contd*

——— ss 63(b) 80(3)—*contd*

barred under s 80 (*3*) of the Act *Held* that the application was not barred by s 80 (*3*) for the act complained of was the whole act of seizure by the police which must be taken to have been a continuous act so long as the seizure by the police was maintained Madhav Ganpatprasad v Majidkhan (1917) I L R 41 Bom 737

BOMBAY GENERAL CLAUSES ACT (Bom I OF 1904)

——— s 3—

See Mamlatdars court act s 23
I L R 39 Bom 552

BOMBAY HEREDITARY OFFICES ACT (BOM III OF 1874)

See Hereditary Offices Act

——— s 11—

See Limitation Act (IX of 1908) s 14 I L R 43 Bom 201

——— s 15—*Mutalik Desai Vatan—Presumption in grants—In Vatans grant is usually of the soil—In Inams and Saranjams grant is usually of the royal share of the revenue —Construction of grants* The village of Rajgoli Khurd was granted to the plaintiff s ancestor in 1734 A D by a Maratha Ruler for maintenance in return of service The grant was expressed to be Koolbab and Koolkanoo (i e all taxes and assessments) but exclusive of the (Haks of) Hakdars and Inamdars In 1858 the Inam Commissioner continued the Inam to the grantee s descendants on the same terms The Inamdar accepted a settlement in 1884 in respect of village lands agreeing to pay to Government a fixed amount in lieu of service A question having arisen whether the grant was of the royal share of the revenue or of the soil also *Held* that the grant in question was a grant of the soil *Vasudev Pandit* v *The Collector of Puna* (1873) 10 Bom H C R 471 followed In the case of Vatan property the distinction between grants of the royal share of the revenue and grants of the soil which is admissible in the case of Inams and Saranjams cannot be conveniently made without detriment to the statutory restriction on the Vatandar s power of alienation and should not be made unless it is clearly justified by the terms of the settlement In the Presidency of Bombay in the case of Inams and Saranjams the ordinary presumption in the absence of any indication to the contrary is in favour of the grant being limited to the royal share of the revenue and clear words are necessary to indicate grant of the soil The words ordinarily used to indicate a grant of the soil are water grass wood (trees) stones mines and hidden treasures but the absence of these words cannot be treated as necessarily establishing that the grant is of the royal share of the revenue only Where a whole village is mentioned in a Sanad evidencing a settlement under s 15 of the Bombay Hereditary Offices Act (Bombay Act III of 1874) it is for the party alleging that a particular survey number of that village is outside the scope of that settlement to prove it Amrit Vaman v Hari Govind (1919) I. L. R. 44 Bom. 237

BOMBAY HEREDITARY OFFICES ACT (BOM III OF 1874)—*contd*

——— s 18—

See BOMBAY REVENUE JURISDICTION ACT (X OF 1876) s 4 (a)
I L R 43 Bom 277

——— ss 25 36—*Death of registered Vatandar—Representation—Eldest son or other nearest heir of the deceased—Suit for declaration—Jurisdiction* S 25 of the Hereditary Offices Act (Bom Act III of 1874) imposes the duty upon the Collector of determining the custom of a Vatan and what person shall be recognized as representative Vatandar A suit for a declaration that the plaintiff is the nearest heir of a deceased representative Vatandar is maintainable under s 36 of the Act notwithstanding that it is manifest that the declaration is sought for the purpose of establishing fact which would enable the plaintiff to have his name entered in the Vatan Register RAHIMKHAN v DADAMIYA (1909) I L R 34 Bom 101

——— *Suit for a declaration—Declaration that plaintiff is the nearest heir of a deceased representative Vatandar—Watan—Civil Court—Jurisdiction* A suit for a declaration that the plaintiff is the nearest heir of a deceased representative Vatandar is within the jurisdiction of a Civil Court although a declaration that the plaintiff is entitled to have his name entered in Vatan Register is a matter beyond the jurisdiction of the Court *Rahimkhan* v *Dadamiya I L R 34 Bom 101* followed SHANKAR BABAJI v DATTATRAYA BHIWAJI (1915) I L R 40 Bom 55

BOMBAY HIGH COURT

See HIGH COURT RULES AND ORDERS

——— Appellate Side Rule 65—

See BOMBAY REGULATION II OF 1827 s 52 I L R 37 Bom 393

——— Civil circulars—

See HIGH COURT RULES AND ORDERS

——— cl (17)—In every proclamation for sale carried out under the Rules it should be notified that any person wishing to set aside the sale under O XXI of the Civil Procedure Code should make his application to the Court and not to the Collector to whom the decree has been sent for execution within thirty days from the date of the sale SHANTMURTI DERAPPA v NARAYAN RAMCHANDRA I L R 45 Bom 1132

BOMBAY HIGH COURT (CIVIL CIRCULARS)

——— ch II cl 91—

See CIVIL PROCEDURE CODE 1908 s 70 O XXI r 7—
I L R 42 Bom 621

——— cl 159—

See CIVIL PROCEDURE CODE 1908 s 97
I L R 38 Bom 33

——— ch VI p 2—

See CIVIL PROCEDURE CODE 1908 ss 115 AND 151 I L R 38 Bom 638

BOMBAY IRRIGATION ACT (VII of 1879)

See IRRIGATION ACT
I L R 38 Bom 116

BOMBAY LAND REVENUE CODE (V OF 1879)

See GUJERATH TALUKDARS ACT (BOM ACT VI OF 1888) s 31
I L R 35 Bom 97

See LAND REVENUE CODE BOMBAY

See BOMBAY REVENUE JURISDICTION ACT (X OF 1876) ss 4 (c) 5 AND 6
I L R 37 Bom 542

——— s 3 cl (19)—*Village of Ghatkooper—Kowl (lease) for 99 years— Alienated village—Agricultural lease—Buildings erected by occupiers on their respective lands—Extra assessment levied by Government—Right to levy extra assessment not parted with under the Kowl* The *kowl* (lease) of the village of Ghatkooper in the Thana District granted by Government on the 31st December 1845 for 99 years provided *inter alia* that the grantee should pay to Government annually a fixed sum with respect to the land which had already been under cultivation and that as to waste lands the grantee should bring them all into cultivation within 40 years, and on the expiration of that period the full assessment according to the prevailing usage of the country should be collected annually from the grantee on such quantity as might remain waste out of the present waste entered in the public accounts The *kowl* further provided that In respect of the abovenamed village you (grantee) are to consider yourself as a farmer thereof You are therefore to exercise the authority vested in farmers by Chap VI of Reg XVII of 1827 or such as may hereafter be vested in them by any new enactment shall also be exercised by you and in the event of your acting contrary to the abovesaid enactments you will be subject to such penalties as are now or may hereafter be provided for by Regulations Subsequently some of the occupants of the village having built upon their respective lands Government levied extra assessment from them under the provisions of the Bombay Land Revenue Code (Bom Act V of 1879) The grantee under the *kowl* himself claimed the right to levy extra assessment on the ground that the village was an alienated village within the meaning of cl (19) of s 3 of that Code and was therefore not liable to the provisions of the Code He therefore applied to Government for a refund either wholly or in part of the extra assessment collected by them and the Government having refused to grant his request he brought a suit against the Secretary of State for India in Council praying (i) for a declaration that (a) the extra assessment imposed by the defendant upon lands appropriated for building sites in the village was illegal (b) the Bombay Land Revenue Code (Bom Act V of 1879) was not applicable to the village and (c) the resolution of Government to the effect that the *kowl* was agricultural was erroneous (ii) that the defendant be restrained by a permanent injunction from levying the extra assessment (iii) that in the event of its being found that the Government were entitled to levy the assessment it be declared that the plaintiff was entitled to receive the same and (iv) that the amount if any received by the defendant on account of such assessment be awarded to him The Court dismissed the suit *Held* on appeal that having regard to the terms of the *kowl* it was a lease of the revenues of the village on certain

BOMBAY LAND REVENUE CODE (V OF 1879)—*contd*

———— ss 3 cl(19)—*contd*

conditions The object of the lease was agricul tural and Government never parted with their rights so far as the right to build was concerned The *Lowl* was no more than a lea e The Govern ment parted with their rights as lessors in favour of the grantee as lessee and imposed upon him certain conditions none of which brought the contract within the definition of the term alienа ted village in cl (19) of s 3 of the Bombay Land Revenue Code (Bom Act V of 1879) The clause in the *Lowl* that the grantee was to con ider him elf a farmer of the village and was to exercise the authority vested in farmers by Chap VI of Reg XVII of 1827 or such as may be hereafter vested in them by any new enactment shall be exercised by you and you will be subject to such penalties as are now or may hereafter be provided for by Regulation brought the village within the operation of the provi ions of the Bombay Land Revenue Code (Bom Act V of 1879) HAJI ABDULLA v SECRETARY OF STATE FOR INDIA (1911) I L R 35 Bom 462

———— ss 3 74 76 and 88—*Rajinama—Unsurveyed alienated village—Inamdar—Rajinama executed in favour of the Inamdar—Rajinama in admissible in evidence unless registered —Rajinama would not have the effect of extinguishing title—Inamdars power to rec ive notices of relinquish ment—Indian Registration Act (XVI of 1908 section 90— Holder of alienated land interpretation of* The land in suit was situated in an unsurveyed alienated village The defendant was an Inamdar of the village The land was entered in the Inamdar s Khata book in the name of the plaintiff s father who had mortgaged it with pos ession to one Joti In 1900 plaintiff s eldest b other passed a Rajinama to the defendant Inamdar relinquishing the land in suit In 1908 the Inamdar entered into possession after redeem ing the mortgage The plaintiff having sued to recover posse sion of the land the defendant contended that the Rajinama extinguished the interest of the plaintiff in the land and therefore the action in ejectment could not be sustained A question having arisen whether the Rajinama was admissible in evidence for want of regi tration and whether it extinguished the rights of the plaintiff s family in suit land *Held* that the Rajinama did not come within the exemption of s 90 of the Registration Act and was inadmis sible for want of registration and therefore the rights of the plaintiff s family had not been extin guished was only when a survey settlemen had been in roduced o when powe s con emplated in e tion 88 of the Land Revenue Code had been introduced or when powers contemplated in s 88 of the Land Revenue Code had been given to the Inamdar that he was entitled to receive notices of relinquishment under s 74 of the Land R v nue Co le and only such no ices were exempt from registration under s 90 of the Registration Act SHIDHARAJ BHOJRAJ v DASI (1920) I L R 45 Bom 898

———— ss 3(11) 109 197 and 217—*Holder—A person in whom a right to hold land is ve te —O cupants—Entry in the revenue register—Mis understanding of an order— Oversight —Recti fication of the register—Natural ju tice* The term holder as defined by s 3 (*11*) of the Land Reve

BOMBAY LAND REVENUE CODE (V OF 1879)—*contd*

———— ss 3(11) 109 197 and 217—*contd*

nue Code (Bom Act V of 1879) signifies the per son in whom a right to hold land is vested Where persons are not holders their claim as occu pants cannot be supported by s 217 of the Land Revenue Code (Bom Act V of 1879) Where an entry in the revenue register was due to a mis understanding of a certain order *Held* that the cause of the error being of the same nature as oversight falling within the de cription of errors in s 109 of the Land Revenue Code (Bom Act V of 1879) the rectification of the register so as to bring it in accord with the order after hearing both partie was not contrary to natural justice It was a ca e in which the revenue officer concerned was authorized under s 197 of the said Code to dispense with any judicial or *quasi* judicial inquiry WASUDEV LAKSHMAN v GOVIND MAHADEV (1911) I L R 36 Bom 315

————s 3 cl (20) and s 217— *Alienated interpretation of the term—Inamdar—Grant of soil —Survey Settlement—Effect of introduction of Survey Settlement in Inam lands* The plaintiff was an Inamdar of a village In 1880 the Survey Settlement was introduced into the village and in the settlement register the defendants appellants were entered as Khatedar Since 1880 they had been cultivating the lands in their occupation paying only a sum equivalent to annual as e s ment to the Inamdar In 1910 the plaintiff sued to eject the defendants alleging that they were annual tenants The defendants contended that by virtue of the provi ions of s 217 of the Land Revenue Code 1879 the effect of the introduction of the Survey Settlement in 1880 was that there after the defendants had the ame rights in re pect of the lands in their occupation as holders of land in unalienated villages have under the provi ions of the Land Revenue Code 1879 For the plaintiff it was urged that s 217 of the Land Revenue Code 1879 was not applicable becau e the village in question was not an alienated village within the meaning of that term as it was defined in cl (20) of s 3 of the Land Revenue Code 1879 by reason of the entire property in the soil and n t merely the rights to receive the land revenue being transferred to the Inamdar *Held* that the village was an alienated village within the meaning of the Land Revenue Code 1879 not withstanding that the whole property in the soil was granted by Government to the Inamdar S 217 of the Land Revenue Code 1879 wa therefore applicable to the ca e *Pandu v Ram chandra Ganesh I L R 4 Bom 11* approved The words transferred in so far as the rights of Government to payment of the rent or land revenue are concerned in cl (20) of s 3 of the Land Reve nue Code 1879 prescribe a certain minimum requirement and where that minimum require ment is satisfied the definition al o is sati fied notwithstanding that the tran fer may cover certain other interests over and above tho e con tained in the minimum requirement DADOO BIN BHATOO v DINKAR VISHNU (1918) I L R 42 Bom 77

———— ss. 3 217—*Survey se t ment introduced into I —Inamdar s name entered as Khat t tenant of the Inamdar before t Inamdar s right to enhance rent* ombay Land

BOMBAY LAND REVENUE CODE (V OF 1879)—*contd*

——— ss 216 and 217—*contd*

claim following the decision in *Gangadhar Hari Karlare* v *Morbhat Purohit (1893) 18 Bom 525* In 1917 the plaintiff again sued one of the defendants to recover the Mamul dues for the years 1915 and 1916 The defendant contended that all that the plaintiff was entitled to recover was one half of the survey assessment under ss 216 and 217 of the Bombay Land Revenue Code but the plaintiff contended that the defendant was barred by *res judicata* from re agitating the question *Held* that the principle of *stare decisis* should be applied SITARAM SAKHARAM v LAXMAN VINAYAK **I L R 45 Bom 1260**

——— s 217—

See KADIM INAMDAR **I L R 42 Bom 112**

——— *Inamdar grantee of the soil as well as of the royal share of the revenue—Mirasdar—Right to enhance rent—Introduction of survey settlement into a village with the consent of Inamdar—Inamdar cannot enhance rent beyond the amount of assessment* The plaintiff was a Kadim Inamdar of certain lands in a village He was a grantee of the soil and not merely of the royal share of the revenue Survey Settlement was introduced into the village with his consent or acquiescence The defendant was a Mirasdar (permanent tenant) of the lands and he used to pay as rent the amount of assessment which was fixed for the land. The plaintiff having claimed to recover enhanced rent from the defendant *Held* that the defendant was by virtue of s 217 of the Bombay Land Revenue Code 1879 entitled to hold the lands on payment only of the amount of assessment as rent and that the plaintiff could not enhance the rent *Dadoo bin Bhatoo* v *Dinkar Vishnu (1918) 43 Bom 77* followed Pershad J Assuming that the consent of the plaintiff would be necessary for a valid introduction of the survey settlement into the village it seems to me that having regard to his statements in this suit he must be taken to have accepted the introduction of the survey settlement The Judgment under appeal proceeds on the assumption that the survey settlement has been validly introduced into this village and the suggestion to the contrary made in the argument must be disallowed PANDU v RAMCHANDRA (1920) **I L R 45 Bom 61**

——— *Alienated village—Sanad granted to Inamdar under Bombay Act II of 1863—Introduction of Survey Settlement under Bom Act I of 1865—Right of Inamdar to enhance assessment at the end of the period of settlement* In 18[illegible]0 survey settlement was introduced into an Inam village under Bombay Act I of 1865 on the application of the Inamdar who held the village under a Sanad granted under the Survey Settlement Act (Bom Act II of 1863) The period of the settlement expired in 1888 From 1895 to 1910 the plaintiff recovered with the concurrence of the Collector higher assessment than that allowed under the survey settlement The Commissioner having objected to the Inamdar doing so in 1910 the Inamdar sued to establish his right to charge higher assessment —*Held* that the Inamdar had not the right to enhance the assessment because

BOMBAY LAND REVENUE CODE (V OF 1879)—*concld*

——— s 217—*contd*

s 217 of the Bombay Land Revenue Code 1879 applied when a survey settlement had been introduced into an alienated village with the consent of the alienee under Bombay Act I of 1865 and when the period of the settlement had expired after the Land Revenue Code of 1879 came into force DHONDO VASUDEV v THE SECRETARY OF STATE FOR INDIA **I L R 44 Bom 110**

BOMBAY MAMLATDAR COURT ACT (BOM II OF 1916)

See MAMLATDAR COURT ACT

BOMBAY PREVENTION OF GAMBLING ACT (BOM IV OF 1887)

——— s 3—*Instruments of gaming—Book used for recording bets already made is an instrument of gaming* A book which is used for recording entries of the bets made by persons frequenting a place is an instrument of gaming within the definition of that term in s 3 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) *Emperor* v *Lakhamsi I L R 29 Bom 264* followed EMPEROR v MANILAL MANGALJI (1915) **I L R 40 Bom 233**

——— s 4 cls (a) (c)—*Place—Interpretation—A chok having houses on all sides and approached by a narrow lane* The accused were convicted under s 4 cl (a) and (c) of the Bombay Prevention of Gambling Act (Bom Act IV of 1887) for having the use of a place and keeping or using the same for the purpose of a common gaming house The spot in question was a small open space surrounded by houses on all sides and accessible only by a narrow lane on which was a sign board pointing to the spot The accused No 1 was the lessee in occupation of the spot The question for determination was whether the spot in question was a place within the meaning of s 4 of the Act *Held* that the spot in question was a place within the meaning of s 4 inasmuch as it was a small area limited by metes and bounds surrounded on all sides by buildings and appropriated for the business of betting by the accused No 1 becoming the lessee in occupation of it EMPEROR v FATTOO MAHOMED **I L R 37 Bom 651**

——— ss 5 6 and 7—*Gaming in a common gaming house—Search of the house without warrant issued under s 6—Presumption under s 7 cannot arise in search conducted without warrant under s 6* The Deputy Commissioner of Police in Bombay who was invested by the Commissioner of Police with power to issue warrants under s 6 of the Bombay Prevention of Gambling Act (Bom Act IV of 1887) on receipt of certain information on oath personally raided a house and searched it without issuing a warrant under the provisions of s 6 The accused seventeen in number were not seen gaming but there were found three packs of playing cards and small coin lying near them The accused were tried for the offence of gaming in a common gaming house and the trying Magistrate applying to them the presumption raised by s 7 of the Act convicted them of an

BOMBAY PREVENTION OF GAMBLING ACT (BOM IV OF 1887)—*contd*

——— ss 5 6 and 7—*contd*

offence under s 6 The accused applied to the High Court *Held* that the presumption under s 7 that the mere finding of cards and dice was to be taken as evidence that the house in which they were found was used as a common gaming house could only arise when the house is entered under warrant issued under s 6 of the Act *Held* accordingly that the accused should be acquitted and discharged *Emperor* v *Fernad I L P 31 Bom 435* considered EMPEROR r JAFFUR MAHOMED (1912) I L R 37 Bom 402

——— s 8—*Order of forfeiture—Cash and ornaments found on the person of the gamblers* Cash ornaments and currency notes found on the person of the accused convicted of gambling cannot be ordered to be forfeited under s 8 of the Bombay Prevention of Gambling Act 1887 *Emperor* v *Walli Mussuji* (1907) 31 Bom 641 referred to EMPEROR v SADASHIV BAB HABBU I L R 44 Bom 686

——— s 12—*Gambling in the courtyard of a mosque—Sentence* The accused who were peons and mill hands betook themselves on a hot afternoon to the cool shades of a musjid where they amused themselves by playing cards for very insignificant stakes They were convicted for an offence under s 12 of the Bombay Prevention of Gambling Act 1887 and sentenced to undergo simple imprisonment for fifteen days *Held* that the sentence passed was under the circumstances out of proportion to the criminality of the acts charged and that a sentence of small fine would have been adequate EMPEROR v MAHOMED NATHU (1916) I L R 41 Bom 149

BOMBAY PUBLIC CONVEYANCES ACT (BOM ACT VI OF 1863)

——— s 1—*Public conveyance—Hand drawn lorry is a public conveyance* A hand drawn lorry plied for the conveyance of goods is a public conveyance within the meaning of the expression as defined in the Public Conveyances Act (Bom Act VI of 1863) EMPEROR v BANUBHAI HADUBHAI (1912) I L R 37 Bom 374

——— s 28—Proceeding to recover legal fare not complaint for an offence—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 250

I L R 44 Bom 463

BOMBAY REGULATION (II OF 1827)

See HINDU LAW—CASTE QUESTION I L R 36 Bom 94

——— s 5—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 115 I L R 40 Bom. 86

——— s 52—*Pleaders Act (I of 1846) ss 6 and 7—Bombay High Court Appellate Side Rules Rule 65—Pleaders fees—Taxation—Appeal from a preliminary decree deciding status of agriculturist—Practice* The pleaders fees in

BOMBAY REGULATION (II OF 1827)—*contd*

——— s 52—*contd*

the High Court in an appeal from a preliminary decree determining the status of an agriculturist must be assessed at Rs 30 under Rule 65 of the Bombay High Court Appellate Side Rules and not on the subject matter in dispute under s 52 of the Bombay Regulation II of 1827 or under s 6 of Act I of 1846 MANOHAR RAMCHANDRA v THE COLLECTOR OF THE NASIK DISTRICT (1912) I L R 37 Bom 303

——— s 56—*Pleader—Pleader in the mofussil—Duty towards client—Winding up proceedings—Pleader must not represent parties whose interests are conflicting* By the custom of the mofussil a pleader employed by a party to a proceeding before a Court is bound faithfully and exclusively to serve that party throughout the whole proceeding The pleader in the mofussil is not merely an advocate—he is the confidential legal adviser of his client and does for him those things which in the Presidency towns are often done by solicitors For legal advice for the prosecution of legal proceedings in all their stages the client depends on the pleader This dependence makes the position of the pleader peculiarly onerous and binds him to give exclusive attention to the interests of the client throughout any proceedings in which he is engaged In winding up proceedings a single pleader must not represent two different creditors whose interests are known to conflict A pleader must not accept a vakalatnama when he knows that he cannot act for his client throughout the proceedings A pleader in defending himself against charges of professional misconduct made certain statements He was dealt with under the disciplinary jurisdiction for making them It was contended in his behalf that the statements made by him in defence must be regarded as having been made by an accused and were therefore protected *Held* overruling the contention that the pleader was writing to the Court as a pleader and was responsible as such for the statements made by him GOVERNMENT PLEADER v BHAGUBHAI DAYABHAI (1912) I L R 36 Bom 606

———*Pleader—Misbehaviour—Not limited to professional misconduct—High Court—Disciplinary jurisdiction* The term misbehaviour in s 56 of the Bombay Regulation II of 1827 is not restricted to misbehaviour in the strict course of a pleader's professional duties but includes general misbehaviour There is no reason to suppose that the Legislature intended in this matter to enact a laxer rule of practice in India than the rule which prevails in England GOVERNMENT PLEADER BOMBAY v ANNAJI NARAYAN DESHPANDE (1912) I L R 37 Bom 354

——— 1827—IV

——— s 26—

See CUSTOM I L R 45 Calc 450

See PRE EMPTION I L R 40 Bom 358

———1827—V

——— s 1—

See LIMITATION

BOMBAY REGULATION (II OF 1827)—*concld*

———— s 15 cl 3—*Usufructuary mortgage of 1869—Agreement to pay the debt after fixed period—Suit by mortgagee after the expiration of the period for the recovery of the debt by sale of mortgaged property* A usufructuary mortgage executed in the year 1869 contained the following agreement — The amount of Rs 1 750 is borrowed on the said premises We three of us shall after paying off the said amount of debt after fifteen years from this day redeem our premise Perhaps any one of us three might within the period pay off at one time the amount of rupees according to his share you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the monies received In the year 1906 the mortgagee having brought a suit for the recovery of the mortgage debt by sale of mortgaged property the first Court allowed the claim but the Appellate Court reversed the decree and dismissed the suit on the ground that where in the case of a usufructuary mortgage the mortgagor agrees to redeem by payment of the principal after a stated period the mortgagee has no higher or better right than he has under a simple usufructuary mortgage *Held* on second appeal by the plaintiffs that the mortgage in suit was governed by clause 3 s XV of Regulation V of 1827 and there being nothing in the terms of the agreement between the parties which either expressly or by implication indicated that the property should not by means of a suit be applied in liquidation of the debt the suit would lie The decree of the Appellate Court reversed and that of the first Court restored *Mahadaji v Joti I L R 17 Bom 425* and *Ramchandra v Tripurabai P J 425* followed *Shaik Idrus v Abdul Rahiman I L R 16 Bom 303* *Sadashiv v Vyankatrao I L R 20 Bom 296* and *Krishna v Hari 10 Bom L R 615* explained PARASHARAM v PUTLAJIRAO (1909)

I L R 34 Bom 128

———— 1827—XVI

See LIMITATION ACT 1908 SCH I ART 152 I L R 43 Bom 376

See VATAN I L R 34 Bom 175

BOMBAY RENT (WAR RESTRICTIONS) ACT (BOM II OF 1918)

———— s 2—*Tenant and sub tenant—The Increase of Rent and Mortgage Interest Act 1915, 5 and 6 Geo 5 ch 97* A godown which was in a dilapidated condition was being reconstructed by its owner at considerable expense During the reconstruction of the godown, the plaintiffs leased the same from the owner at a monthly rent of Rs 305 for a period of twenty three months commencing from 25th December 1916 The godown became ready for occupation in February 1917 and the plaintiffs commenced paying rent from 22nd February 1917 The plaintiffs sub let the godown to the defendants for Rs 275 per month from 22nd February 1917 and the defendants entered into possession on that date The defendants paid rent to the plaintiffs at the rate of Rs 275 per month up to 13th March 1918 but thereafter they refused to pay the stipulated rent contending that Rs 110 was the standard rent which they were liable to pay under the Bombay Rent (War Restrictions) Act II of 1918 The

BOMBAY RENT (WAR RESTRICTION) ACT (BOM II OF 1918)—*contd*

———— s 2—*contd*

defendants paid rent at the rate of Rs 110 upto 27th July 1919 which the plaintiffs took under protest On 29th April 1920 the plaintiffs sued the defendants claiming rent at the rate of Rs 275 per month from 13th March 1918 to 20th March 1920 after giving credit for the amount paid by the defendants and further rent at Rs 305 per month as being the standard rent of the premises the plaintiffs having given notice to the defendants that they would claim Rs 305 as standard rent from 21st March 1920 *Held* on the facts of the case that the godown in question was for all practical purposes a new godown and the standard rent for the same was the rent at which it was first let after the 1st of January 1916 *Held* further that the standard rent must be taken to be Rs 305 per month at which the godown was first let to the plaintiffs by its owner and not Rs 275 at which it was sub let by the plaintiffs to the defendants The only object of including in the definition of landlord a tenant and in the definition of tenant a sub tenant is to extend the benefits of the Rent Act to sub tenants but it was not intended that the standard rent was to be determined by different standards between the original landlord and the tenant and between the tenant and the sub tenant Otherwise the tenant while himself getting the advantage of the Rent Act would be able to profiteer as between himself and the sub tenant GHATSEY UMEPSEY v KESHAVJI v KESHAVJI DAMJI

I L R 45 Bom 744

———— ss 2 (c) 9—*Suit in ejectment—Landlord definition of in the Rent Act—Landlord includes his lessee if entitled to recover rent—Rent Act not retrospective where tenancy determined before the Act came into force* On the 6th of February 1918 the plaintiffs took a lease of a four storied house from its owner By the lease the plaintiffs became entitled to the premises for twenty years at a rent of Rs 6 500 per annum for the first ten years and Rs 7 000 for the second ten years with an option of renewal for another seven years at the same rent the plaintiffs acquiring the benefit of all subsisting tenancies The plaintiffs object in taking the lease was to utilise the fourth floor as an office for their firm At the date of the lease the said floor was held by the defendants on a monthly tenancy On the 18th of February the owner of the house at the instance of the plaintiffs gave the defendants notice to quit on the 31st of March as the plaintiffs tenure was to commence on the 1st of April The defendants failing to quit on the due date the plaintiffs filed the suit for possession of the fourth floor on the 10th of April 1918 the day on which the Bombay Rent Act (II of 1918) came into force The plaintiffs submitted that they were entitled to the relief claimed inasmuch as the premises were *bonâ fide* required by them for their own occupation and that the defendants were trespassers sometime before the Bombay Rent Act came into force The defendants contended that under the general scheme of the Rent Act and the policy of the Legislature they could not be ejected The Court of first instance dismissed the plaintiffs suit as being repugnant not only to the policy of the Rent Act but to the express intention of s 9 of that Act The

BOMBAY RENT (WAR RESTRICTION) ACT (BOM II OF 1918)—*contd*

———— s 2—*contd*

plaintiffs appealed *Held* reversing the decree of the lower Court (i) That the plaintiffs fell within the terms of the definition of landlord in the Rent Act s 2 (c) for they were the persons entitled to recover rent for the premises (ii) that the plaintiff having established that they did *bona fide* require the fourth floor for their own occupation within the meaning of s 9 of the Rent Act were entitled to the possession of the same (iii) that the original landlord having parted with his rights for twenty years and the defendants tenancy having determined before the Act came into force it was impossible to hold that the Act had any retrospective force in limiting the operation of the prior transfers MORARJI GOKULDAS & Co *v* THE ASIAN COMMERCIAL ASSURANCE Co LD (1919)

I L R 43 Bom 795

———— ss 3 9 and 12—*Held* that non payment of rent is a continuing breach and if plaintiff waived his right to forfeit one month he was not precluded from asserting his right in a subsequent month but the right was an auxiliary right and the Rent Act prevented its exercise if the standard rent was tendered. KASTURBHAI MANIBHAI *v* DAKAR I L R 45 Bom 535

———— s 7—*Standard rent—Additional charge for supplying light—Recovery of rent in excess of standard rent* Before the year 1916 the accused charged his tenant at Rs 12 a month as rent *He next put in electric lights in the passages and* recovered Rs ‿ extra every month for the light from the tenant The Controller of Rents fixed the standard rent at Rs 12 and allowed the statutory increase of Rs 1 3 2 Thereafter the accused charged Rs 13 3 2 as rent and levied Re 0 4 0 extra for the light He was on these facts convicted of an offence punishable under s 7 (1) of the Bombay Rent (War Restrictions No 2) Act 1918 *Held* setting aside the conviction that by recovering four annas extra for *the light the accused did not recover anything* more than the standard rent for the supplying of the electric light on the passages of the building was a matter of arrangement or contract between the tenant and his landlord and did not necessarily form a part of the rent EMPEROR *v* RAM GOPAL (19 0) I L R 45 Bom 188

———— s 9—

See LAND ACQUISITION

I L R 45 Bom "25

———— The Court is bound to consider an owners allegation that he requires premises for his own use BHAGWANDAS *v* KAI KHUSHROO I L R 45 Bom 9‿8

———— *Order for possession—Small Cause Court has no power to alter the order—Presidency Small Cause Courts Act (XV of 188) Chap VII s 13—No jurisdiction to enter the terms of the decree passed under Chapter VII* On the 21st January 19 0 a decree for possession was made in favour of the petitioner by the Presidency Small Cause Court on the ground that the premises were reasonably and *bona fide* required and the opponent was ordered to vacate by the 21st June 19 0 On the 15th June 19 0 the opponent applied for further time and was granted time till the 9th July Thereafter on a further application by the opponent the Court stayed execution till the 20th October 1920 The petitioner having applied to the High Court under its revisional jurisdiction *Held* setting aside the order that the Small Cause Court had no jurisdiction to alter or amend the terms of a decree or order for possession once passed under s 43 of the Presidency Small Cause Courts Act 1882 nor was there anything in the Rent Act which gave the Small Cause Court *any power to alter its orders for possession* made in due course JAMSHEDJI HORMASJI *v* GORDHANDAS GOKULDAS (19"0)

I L R 45 Bom 1048

———— *Ejectment—Premises reasonably and* bona fide *required—Landlord requiring premises for residence and business—Costs where ejectment proceedings could have been taken in the Small Cause Court—Practice* Ordinarily an owner of premises if he wishes to use them for his own purpose is entitled to do so What the Rent Act endeavours to provide for is the case of a landlord who evicts the existing tenants in order that he may let to another tenant at a higher rent or exact a higher rent from the tenant on a threat of eviction A landlord is not bound to continue residing in rented premises with all the uncertainties of that tenure If he chooses to live in any portion of his own house he is entitled to do so provided he does not seek to occupy more space than is reasonably required for himself and his family Cost should not be allowed where ejectment proceedings could have been taken in the Small Cause Court RUSTOMJI DINSHAW *v* DOSIBAI RUSTOMJI

I L R 45 Bom 1°26

———— *Landlord and tenant—Ejectment suit—Landlord reasonably requiring a portion of demised premises for his own use—Tenant willing to occupy remainder—Suit can be decreed for portion only* Where in an ejectment suit it appears that the landlord reasonably requires only a portion of the premises *within the meaning of* the proviso to s 9 of the Bombay Rent Act 1918 and that the portion so required is capable of severance it is open to the Court if the tenant is willing to occupy the remainder of the premises to pass a decree for possession for the portion only KUNDANMAL DOWLATRAM *v* LAKHMICHAND (1921)

I L R 45 Bom 1294

BOMBAY REVENUE JURISDICTION ACT (BOM X OF 1876)

See REVENUE JURISDICTION ACT

———— s 4—

See BOMBAY HEREDITARY OFFICES ACT

I L R 3" Bom 37

See REVENUE JURISDICTION ACT

I L R 34 Bom 2°2

See SARANJAM I L R 41 Bom 408

———— *Bombay Hereditary Offices Act (Bombay Act III of 18 4) s 18—J a'ar Wetar—[illegible] of the [illegible] ge [illegible] by the Civil C[illegible]r—J[illegible] of Civil Court—Suit by [illegible] to declare that the [illegible] of the r d ad an mals belonged to them* The plaintiffs residing in a v[illegible] e sued for an injunction to prevent the skin[illegible] dead animals being

BOMBAY REVENUE JURISDICTION ACT (BOM X OF 1876)—*contd*

——— s 4—*contd*

taken away by the defendants who claimed the right to retain the sums as Mahar Watandars of the village The lower Courts dismissed the suit as barred by s 18 of the Bombay Hereditary Offices Act 1874 and s 4 (*a*) of the Bombay Revenue Jurisdiction Act 1876 The plaintiffs having appealed *Held* that the question whether there was a Mahar Watan was within the jurisdiction of the Civil Courts *Held* also that the plaintiffs would be entitled to their injunction unless the defendants succeeded in showing that there was an hereditary office of Mahars SAVLA BIN TUKARAM *v* SANTYA VALAD PARSHA (1918)

I L R 43 Bom 277

——— *Kulkarni Vatan—Commutation—Suit for a declaration of right a Vatandar—Civil Court—Jurisdiction—Indian Limitation Act (IX of 1908) Schedule I Articles 14 and 91* The plaintiffs were the hereditary Kulkarni Vatandars of certain villages By an agreement dated the 7th July 1914 arrived at between the plaintiffs and the Government the plaintiffs consented to the commutation of their Vatans On the 30th September 1917 the plaintiffs filed suits for a declaration that they were the Vatandars and were entitled to the vahivat of the Kulkarni Vatan hereditarily as before *Held* that the suits were barred under s 4 (*a*) of the Bombay Revenue Jurisdiction Act 1876 *Held* also that even if the suits be treated as having been brought to set aside the agreement they were barred under Article 14 or under Article 91 of the Limitation Act 1908 DAMODAR KRISHNA *v* THE SECRETARY OF STATE FOR INDIA **I L R 44 Bom 261**

——— *Collector s order—Civil Courts—Jurisdiction—If right of action against East India Company jurisdiction of Civil Court cannot be ousted by Legislature* The plaintiffs claimed to be the occupants of land in suit In 1914 the Collector at the instance of the second defendant made an order that the lands should be resumed and restored to him as the holder of a sanad granted to his predecessors in 1841 The plaintiffs thereupon sued for a declaration that the order made by the Collector was not binding on them and that they had an absolute right over the lands in suit The lower Court dismissed the suit as barred under s 4 (*a*) of the Bombay Revenue Jurisdiction Act 1876 On appeal to the High Court *Held* remanding the case that if the plaintiffs could show that their predecessors in title cultivating the suit lands in 1841 had such rights of occupancy that if dispossessed by the East India Company they would have had a right to sue the Company on account of such dispossession the jurisdiction of the Civil Court would not be ousted *Secretary of State for India v Moment (1912) 40 Calc 391* considered DAMODAR TUKARAM *v* SECRETARY OF STATE FOR INDIA

I L R 45 Bom 1161

——— **s 4 (a) Prov (k) and ss 5 (a) and (b)**—*Khatib Inam land—Alienation of land by Inamdar s widow—Adjudication passed by Inam Commissioner exempting the land from payment of assessment—Collector s order directing the economic rent to be paid to the officiator appointed—Suit by alienee to set aside the order—Jurisdiction—Civil Court* The land in suit were originally granted in Inam to one Fakarudin for Khatibgiri services In 1856 by an adjudication passed by the Inam Commissioner under Bombay Act XI of 1852 it was declared that the lands were to be held by the Inamdar free from payment of land revenue In 1861 Fakarudin s widow Pachhabi alienated the lands and transferred the Khatibgiri right to plaintiff s father Thereafter the plaintiff enjoyed the lands free from assessment and performed the services as Khatib until 1911 when an order was passed by the Commissioner directing that the full economic rent be recovered from the plaintiff and be paid to defendant No 3 as long as he officiated as Khatib on behalf of the Inamdar The plaintiff sued for a declaration that the Commissioner s order was invalid and not binding upon him and also claimed the right to officiate as Khatib The defendants contended that the jurisdiction of the Civil Court was ousted under s 4 (*a*) of the Bombay Revenue Jurisdiction Act 1876 and the suit was not saved by clause (*k*) of the proviso to that section nor by s 5 (*a*) and (*b*) of the Act *Held* that the plaintiff s claim being a claim to hold land wholly or partially free from payment of land revenue under an adjudication duly passed by a competent officer under Bombay Act XI of 1852 was cognizable by the Civil Court under clause (*k*) of the proviso to s 4 of the Bombay Revenue Jurisdiction Act The fact that the plaintiff claimed as alienee did not take the case out of the proviso *Held* further that the claim to perform the services as Khatib apart from the claim to hold the lands exempt from the payment of land revenue was although in form a claim covered by the first part of the second paragraph of s 4 (*a*) of the Revenue Jurisdiction Act 1876 in substance a matter between private parties and might be treated as falling under s 5 (*b*) of the Act notwithstanding the suit was against Government and was thus cognizable by Civil Courts FAKARUDINSAB *v* THE SECRETARY OF STATE FOR INDIA

I L R 44 Bom 130

——— Where a Vatandar applies to the Collector to declare that a particular alienation of Vatan property is void but the Collector refuses to make the order the party aggrieved can file a suit in a Civil Court against the alienee in respect of the alienation DATTATRAYA KESHAV *v* TUKARAM RAGHU

I L R 45 Bom 1141

——— **s 4 (a) Prov (k)**—*Kazi Inam lands—Alienation of lands by Inamdar—Adjudication passed by Inam Commissioner declaring the land to be held wholly free of assessment—Order passed by the Collector directing alienee to pay rent to Kazi or else directing resumption—Suit by alienee to set aside the order—Civil Court—Jurisdiction* The lands in suit were granted in Inam for Kazi services In 18 by the decision of the Inam Commissioner it was declared that the lands will be continued to be held wholly free of assessment In 1911 the Collector passed an order directing that the plaintiff who was an alienee from the Inamdar should pay a certain rent on the lands in suit for Kazi services or else the lands would be resumed from his possession The plaintiff sued for a declaration that the order of the Collector was illegal and *ultra vires* The defendant Kazi contended that the plaintiff s

BOMBAY REVENUE JURISDICTION ACT (BOM X OF 1876)—*contd*

——— s 4—*contd*

claim being against Government relating to the property appertaining to his office as village officer the jurisdiction of the Civil Court was ousted under s 4 (a) paragraph 1 of the Bombay Revenue Jurisdiction Act 1876 *Held* that the plaintiff's claim being a claim to hold land wholly exempt from assessment under the decision of the Inam Commission r w s clearly within the scope of proviso (*l*) of s 4 of the Bombay Revenue Jurisdiction Act 1876 and therefore cognizable by Civil Court *Held* also that the proviso to s 4 of the Bombay Revenue Jurisdiction Act 1876 in terms applied to any person claiming exemption from land revenue under an adjudication duly passed by a competent officer und Bombay Act XI of 1852 and an alienee from the Inamdar could not be treated as being outside the scope of the proviso MAHAMADSAHEB *v* THE SECRETARY OF STATE FOR INDIA I L R 44 Bom 120

——— s 4 5 6—*Held* that 4 is not a bar to a suit in which there is a claim arising out of the alleged illegality of the proceedings taken for the realisation of land revenue Where the legality of proceedings initiated by a Revenue Officer is in question the Court has to enquire under s 6 whether the act complained of was done *bonâ fide* The Mamlatdar can only exercise delegated powers in the Taluka which the delegation occurred GANGARAM HATIRAM *v* DINKAR GANESH I L R 37 Bom 542

——— s3 *See* PROVINCIAL SMALL CAUSE COURT ACT 1887 SCH II. I L R 39 Bom 131

——— s 11—*Collector's order Forfeiture of land—Appeal—Suit to set aside order of forfeiture—Limitation*

See LIMITATION ACT (IX OF 1908) SCH I ART 14 I L R 44 Bom 451

——— s 12—

See BOMBAY REVENUE JURISDICTION ACT (X OF 1876) I L R 45 Bom 1177

——— s 12 gives the High Court jurisdiction not only to say which party should bear the costs but also on what scale they should be taxed. JAGANNATH WASUDEV PANDIT *In re* I L R 45 Bom 1177

——— *Reference by Government to High Court—Bombay Summary Settlement Act (Bom Act II of 1863) s 1—Summary Settlement—Inam Dharmadaya—Sanad—Jaghir—Treaty between the Government and the Native State—Lands whether held under a treaty or on political tenure* Under s 12 of the Revenue Jurisdiction Act 1876 Government can refer a question for the decision of the High Court when investigating any claim or objection which before 1876 may have been excluded from the cognizance of a Civil Court In 1818 the British Government granted by a Sanad some villages in Chikodi and Manowlee as Inam Dharmadaya to be enjoyed from son to grandson etc from generation to generation Shortly afterwards the talukas of Chikodi and Manowlee were ceded by the British Government to the Maharaja of Kolhapur In 1821 the Raja of Kolhapur granted some more villages in the said talukas to the same grantee In 18[illegible] a treaty was concluded between the British Government and the Maharaja of Kolhapur One of the articles of the treaty provided that the Raja of Kolhapur promised to continue to the grantee his lands and rights and the British Government guaranteed enjoyment of those villages to the grantee for life provision being made that the rights of the grantee's descendants as founded on Sanad or custom should not be prejudiced by the cessation of the said guarantee As the Raja did not keep his promise not to molest the grantee the British Government made in 1827 a further treaty with the Raja of Kolhapur by which it was provided that the latter should give back to the former the said talukas in the same state in which he received them and that as the Raja had never ceased to annoy and harass the grantee by seizing his villages and other property it had been deemed necessary to extend the guarantee of the British Government to his descendants and the Raja accordingly engaged never to molest them Thereafter in 18[illegible]8 a question having arisen with regard to the villages granted by the Raja in the said talukas it was declared by the Government that the same should be allowed to remain in possession of the grantee as if the grant was made with the concurrence of the British Government In 1863 on the introduction of the Summary Settlement the Government was of opinion that no *primâ facie* case had been made out for excluding the grantee's lands from the benefit of the Summary Settlement on the ground of their being held on political tenure and the Summary Settlement was accordingly applied to the grantee's lands with his consent It was contended nearly sixty years afterwards that the lands in question being either lands held under a treaty or under political tenure were excepted from the provisions of the Bombay Summary Settlement Act 1863 *Held* (1) that at the time of Summary Settlement the lands in question were not held under a treaty for neither was it shown that the original title was under a term of treaty which remained in force nor that the treaty of cession guaranteed title (2) that the title of the grantee to the lands in question originated in the Sanads of 1818 and 1821 and that when the two talukas were given back by the Raja to the British Government in 1827 the existing rights of the grantee under the Sanads remained undisturbed *pleno vigore* and were so recognised by the British Government (3) that the grant was specifically described in the Sanad as Dharmadaya Inam and there was nothing to show that it was a Jaghir or held under political tenure (4) that therefore the Bombay Summary Settlement Act 1863 was properly applied to the lands in question *Cook v Sprigg (1899) A C 5* and *Sheikh Sultan Sani v Sheikh Ajmodin (1891) 17 Bom 431* distinguished *In re* VASUDEV HARIHAR PANDIT (1920) I L R 45 Bom 463

BOMBAY SURVEY AND SETTLEMENT ACT (BOM I OF 1865)

——— s 25 28, 37 38—*Land Revenue Code (Bom Act V of 1879) s 10 106—Khoti village in Kolaba District—Survey and Settlement—Introduction of sanctioned settlement— Fixed or guaranteed —Expiration of the period of some*

BOMBAY SURVEY AND SETTLEMENT ACT (BOM I OF 1865)—*contd*

——— s 25—*contd*

tioned settlement—Continuance of the terms of the sanctioned settlement after the expiration of the period as still being sanctioned A question having arisen as to whether under the settlement of the khoti village in suit which was sanctioned in 1863 and introduced in 1865 subject to all the provisions of the Survey and Settlement Act (Bom Act I of 1865) and thereafter for a fixed period of twenty seven years the Government was entitled on the expiration of the said period of twenty seven years to insist upon the terms imposed upon the Khot as between him and his tenants under the settlement as still being sanctioned *Held* that in 1892 when the fixed period of the settlement sanctioned in 1863 and introduced in 1865 came to an end the terms which had been imposed upon the Khot under s 38 of the Survey and Settlement Act (Bom Act I of 1865) when that settlement was introduced remained in force since the settlement itself must be deemed to have been then and still to have been sanctioned and that Government was within its rights in insisting upon the Khot accepting certain clauses in the *kabuliyat* of that year SECRETARY OF STATE FOR INDIA v SADASHIV ABAJI (1911)

I L R 36 Bom 290

BOMBAY TITLES TO RENT FREE ESTATES ACT (BOM XI OF 1852)

——— Shetsanadi lands— *Rules framed under Act XI of 1852 (Bombay)—Government continuing the shetsanadi lands to the family of the shetsanadi who is discharged by Government without any fault on his part—Continuance on condition of paying full survey assessment on the lands—Subsequent resumption of the lands by Government* On the death in 1865 of the then *shetsanadi* one *B* Government appointed one *Y* as the new *shetsanadi* but under the rules framed under Bombay Act XI of 1852 Government continued the *shetsanadi* lands to the family of *B* on condition of their paying full survey assessment on the lands The remuneration of Y was made payable out of the extra assessment recovered in 1904 Government resumed the lands and handed them over to Y for his services *Held* that both the order passed in 1865 and the action taken under the rule framed under Bombay Act XI of 1852 had in law the effect of converting the land from a *shetsanadi vatan* into a *rayatwari* holding and investing the holder of the land with the rights of an ordinary occupant entitled to it so long as he paid the survey assessment *Held* also that the proceedings of 1905 were on the supposition that what was done in 1865 on *B's* death had the effect of continuing the lands in dispute as one reserved for *shetsanadi* service but that was not its effect and the proceedings in question were *ultra vires* YELLAPPA v MARLINGAPPA (1910) I L R 34 Bom 500

BOMBAY VILLAGE POLICE ACT (BOM VIII OF 1867)

——— s 9—*Held* that a District Magistrate had power to appoint [illegible] (inferior village police) in a Talukdari village [illegible]

I L R 4[illegible] Bom 3[illegible]

——— s 14—

See OATHS ACT 1873 ss 9 TO 11

I L R 45 Bom 96

BONÂ FIDE ACT

——— by Collector—

See BOMBAY ABKARI ACT (BOM ACT V OF 1878) ss 32 67

I L R 37 Bom 101

BONÂ FIDE CLAIM.

See CRIMINAL TRESPASS

I L R 43 Calc 1143

See THEFT I L R 44 Calc 66

BONÂ FIDE PURCHASER

See HINDU LAW—ENDOWMENT

I L R 38 Calc 526

See MAHOMEDAN LAW—MINOR

I L R 35 Bom 217

See RATES AND TAXES (ARREARS OF)

I L R 42 Calc 625

BONÂ FIDES

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909) s 57

I L R 39 Mad 250

——— want of—

See DEPOSIT IN COURT

I L R 43 Calc 269

BOND

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 209

I L R 37 Mad 17

See CONSTRUCTION OF DOCUMENT

16 C W N 957

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 125

I L R 37 Mad 125

See JOINT BOND I L R 39 Mad. 409

See HINDU LAW—BOND

I L R 40 All. 17

See LIMITATION ACT (IX OF 1908) SCH I ART 75 I L R 35 All 455

I L R 41 All 104

ART 116 166 I L R 38 Bom 177

See MORTGAGE I L R 37 All 426

See PROBATE AND ADMINISTRATIVE ACT s 50

I L R 47 Calc 115

See SUCCESSION CERTIFICATE

I L R 38 Calc 182

——— for appearance—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) ss 90 501 AND 537

I L R 38 Mad 1088

s 514 I L R 42 Mad 400

——— Interest in advance and progressive

See INTEREST I L R 44 Bom 775

——— liability upon—

See PROCEDURE L R 46 I A 223

———whether surety liable where principal is not—

See CRIMINAL PROCEDURE CODE 1898 s. 514 I L R 2 Lah 204

——— *Slavery bond—Public policy—Overwhelming interest* Where in a bond the executant bound himself down to daily

BOND—contd

attendance and manual labour until a certain sum was repaid in a certain month and it penalised default with overwhelming interest *Held* that such a bond was not enforceable at law being opposed to public policy RAM SARUP BHAGAT v BANSI MANDAR (1915) I L R 42 Calc 742

——— *Alteration in good faith consonant to original intention of the parties—Instrument whether vitiated thereby* Where a mortgage was in terms one rupee per mensem on a loan of Rs 200 and the mortgagee inserted the words per cent in the bond while in his possession thus altering the interest from eight annas per cent per mensem to one rupee per cent per mensem and it was found that there had been no fraud and that it was the common intention of the parties that interest was to be paid at the rate of one rupee per cent *Held* that an alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument ANANDA MOHAN SHAHA v ANANDA CHANDRA NAHA (1916)
I L R 44 Calc 154

——— *Held* on a construction of the bond in question in the case that it imposed personal liability upon the executants The Courts in India having allowed interest at the rate of 8½ per cent per annum during the period of the pendency of the suit *Held* that the Civil Procedure Code gives the Court discretion in the matter and the Judicial Committee was not prepared to dissent from the view taken by the Courts in India PANNA LAL v NIHAL CHAND (P C) 26 C W N 737

——— *Bond payable by instalments with condition that interest may be charged if instalments are not paid on due date—Irregular payments made and accepted not as instalments but in reduction of the debt generally* Where a bond is payable by instalments without interest but with a condition that if the instalments are not paid on due date then the obligor will be entitled to charge interest acceptance of an instalment though paid after due date may be evidence of a waiver of the rights to charge interest but the payment must be in discharge of a specific instalment in arrear and not merely a payment in reduction of the debt generally WIZARAT HUSAIN v MOHAN LAL I L R 43 All 38

BONUS

——— stipulation for—
See PUTNI LEASE
I L R 42 Calc 1029

BOOKS

——— of a Firm—
See SUMMONS TO PRODUCE DOCUMENTS
I L R 47 Calc 647

——— preventing production of—
See INSOLVENT I L R 47 Calc 254

——— translations of—

——— *Bool tendency of if can be judged from translations of isolated passages* A Court cannot be invited to form an opinion as to the true tendency of books from translations of isolated passages books must be judged as a whole IULIN BEHARY DAS v KING EMPEROR (1911) 16 C W N 1105

BOOKS OF REFERENCE

——— *Reliance by Court on Books of Reference—Parties should know of it at the trial—Practice* Whenever a Court relies on a book of reference such as a work on medical jurisprudence it should be made known at the trial to the parties so that they may have an opportunity of adducing evidence or argument on the point *Durga Prasad Singh v Ram Dayal Chaudhuri I L R 38 Calc 153* referred to WESTON AND OTHERS v PEARY MOHAN DASS (1912) I L R 40 Calc 898

BOUGHT AND SOLD NOTES

See ARBITRATION I L R 40 Calc 219
See SALE OF GOODS
I L R 42 Calc 1050
See STAMP DUTY
I L R 39 Calc 669

BOUNDARY

See BOMBAY LAND REVENUE CODE 1879 s 121 I L R 45 Bom 67

——— *Dispute between two lessees—Agent of lessor settling a boundary line before dispute without reference to the boundaries given in the registered leases—Boundary so fixed if binds lessees—Agreement necessary to alter boundary so fixed if binds lessees—Agreement necessary to alter boundary* Plaintiffs and defendants claimed respectively two plots of land in mouzah P 175 bighas and 212 bighas in area on either side of a common boundary under two registered leases granted in 1895 by the Pandeys to their predecessors The correct boundary line between the two plots was determined by a Commissioner appointed in the suit but defendants set up another fixed in 1900 by one *T P* at the instance of the Pandeys *Held* that the rights conferred by the leases could not be affected unless it could be shown that the then lessees agreed to the new partition DEBENDRANATH GHOSH v NEW TETTURYA COAL COMPANY (19 0)
24 C W N 740

BOUNDARIES ACT (XXVIII OF 1860)

——— ss 24 25—
See CIVIL PROCEDURE CODE (ACT V OF 1908) s 11 I L R 39 Mad 1202

BOUNDARY SETTLEMENT OFFICER

——— decision of a—
See CIVIL PROCEDURE CODE (ACT V OF 1908) 11 I L R 39 Mad 1202

BREACH OF CONTRACT

See CONTRACT I L R 38 Mad 791
I L R 45 Bom 129
See DAMAGES I L R 43 Calc 493
See PROCEDURE
I L R 48 Calc 8 2
See SALE OF GOODS
I L R 45 Calc 28

——— by vendor—
See VENDOR AND PURCHASER
I L R ... 458

BREACH OF CONTRACT—*contd*

——— *by workman*—

See WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859) s 2
I L R 40 All 282

——— *procuring of*—

See MARRIAGE CONTRACT OF
I L R 39 Bom 682

——— to deliver goods at a particular time —

See CONTRACT ACT (IX OF 1872) ss 39 55 63 73 I L R 37 Mad 412

BREACH OF CONTRACT ACT (XIII OF 1859)

See WORKMAN'S BREACH OF CONTRACT ACT

BREACH OF CONTRACT OF MARRIAGE

See DAMAGES I L R 41 Bom 137

See HINDU LAW—WILL
I L R 37 Bom 18

BREACH OF THE PEACE

See PROHIBITORY ORDER
I L R 38 Calc 876

See SECURITY FOR GOOD BEHAVIOUR
I L R 38 Calc 156

——— likelihood of—

See DISPUTE CONCERNING LAND
I L R 39 Calc 150

BREACH OF TRUST

See TRUSTEE I L R 38 Mad 71
I L R 39 Mad. 115

BRIBE

See PRINCIPAL AND AGENT
I L R 37 Calc 81

BRIBERY

——— imputation of—

See SEDITION I L R 38 Calc 214

BRITISH BALUCHISTAN REGULATION (IX OF 1896)

——— s 10—

See ESTOPPEL L R 44 I A. 213

See RES JUDICATA
I L R 45 Calc 442

BRITISH COURT

See FOREIGN DECREE
I L R 40 Bom 551

BRITISH INDIA

See WADHWAN CIVIL STATION
I L R 37 Bom 152

BROACH AND KAIRA INCUMBERED ESTATES ACT (BOM XXI OF 1881)

——— *s 26—Indian Contract Act (IX of 1872) s 65—Talukdar mortgage by—Validity of mortgage during Talukdar's lifetime—Mortgage void after Talukdar's death—Mortgagee not entitled to compensation after declaration of mortgage* A mortgage effected by a talukdar being void beyond the natural life of the mortgagor talukdar under s 28 of the Broach and Kaira Incumbered Estates Act (XXI of 1881) the mortgagee is not in that event entitled to recover back the money advanced by him on the mortgage under s 65 of the Indian Contract Act (IX of 1872) *Javerbhai Jorabhai v Gordhan Narsi I L R 39 Bom* 358 distinguished PARSHOTTAM VERIBHAI v CHHATRASANGJI (1917) I L R 41 Bom 546

BROKER

See CONTRACT I L R 46 Calc 831

See LIMITATION ACT (IX OF 1908) SCH I ART 115 I L R 39 All 81

See PAKKA ADATIA
I L R 45 Bom 386

——— appointment of—

See DAMAGES I L R 46 I A 314

——— offer of—

See ABETMENT I L R 46 Calc 607

——— *personal liability of*—

See SALE OF GOODS
I L R 42 Calc 1050

BROTHEL

——— *order for discontinuance of*—

See HIGH COURT JURISDICTION OF
I L R 37 Calc 287

——— *Order of Magistrate directing discontinuance of use of house as such—Jurisdiction of District Magistrate to stay order—Eastern Bengal and Assam Disorderly Houses Act (II of 1907) ss 2 3* The District Magistrate has no jurisdiction under the law to interfere with the order of a Criminal Court under s 3 of the Eastern Bengal and Assam Disorderly Houses Act (II of 1907) and stay its operation *Payani Khemtawali v King Emperor 11 C W N 404* referred to LALIT MOHAN CHAKRAVARTI v HEMENDRA KUMAR DE (1917) I L R 45 Calc 301

BROKERAGE CONTRACT

——— *terminable by parties by three months notice before the end of the term—Under broker who had notice of brokerage contract if may claim damages for whole term when brokerage contract legally terminated before expiry of term—Under broker wrongfully dismissed before brokerage contract terminated—Damages measure of—Broker age contract if terminable by fresh agreement—Under broker if may insist on termination by notice—Hindu joint family carrying on business in partnership—Contract by family if terminates with death of coparcener—Contract Act (IX of 1872) s 253 cl 10—Rule of Hindu law if to be considered* By an agreement between A and B dated 31st May 1911 the former appointed the latter to act as broker for him for 7 years or for such further period as might be mutually agreed upon between the parties It was provided in the agreement that it might be determined by either party by giving three months notice to the other party In pursuance of another term of the said agreement B (the broker) appointed C to act as under broker for him during the subsistence of the said agreement and C (the under broker) had notice of the said agreement On

BROKERAGE CONTRACT—*contd*

12th August 1912 the broker *B* wrongfully dismissed the under broker *C* and subsequently on 2nd December 1912 in good faith entered into a second agreement with *A* inconsistent with the first *Held* in a suit by *C* against *B* for wrongful termination of the under brokerage contract that as the under brokerage contract depended upon the subsistence of the brokerage contract and the latter contract was validly terminated on the 2nd December 1912 the under brokerage contract also came to an end on the same day and the plaintiff was entitled to recover damages as for the period from his dismissal on the 12th August to the termination of the contract on 2nd December 1912 *Per* MOOKERJEE *J* That the three months notice required by the contract between *A* and *B* was for the benefit and protection of the contracting parties themselves and *C* was not entitled to make a grievance that either party has allowed the other to determine that agreement without insisting on the prescribed notice Where X and Y members of a joint family (of which Y was the *karta*) carrying on a joint family business entered into a contract of under brokerage and *X* subsequently died but Y and the other party to the contract went on dealing with each other as if the contract subsisted *Held per* CURIAM that X's death did not terminate the contract *Per* MOOKERJEE *J* Where there are two joint agents and one of them dies upon his death the contract of agency terminates only so far he is concerned but not as regards the surviving agent The rights and liabilities of coparceners in a joint Hindu family cannot be determined by exclusive reference to the Indian Contract Act but must be considered also with regard to the general rules of Hindu Law according to these rules the death of one of the coparceners does not dissolve a family partnership PAGHUMULL *v* LUCHMONDAS (1916) **20 C W N 708**

BUILDING

See BOMBAY DISTRICT MUNICIPALITIES ACT (BOM ACT III OF 1901) s 3

See CANTONMENT LAND **15 C W N 969**

——— **addition of bath rooms in**—
See BOMBAY CITY MUNICIPAL ACT (BOM III OF 1888) s 349P
I L R 41 Bom 741

——— **by co-owner**—
See TEMPORARY INJUNCTION
I L R 41 Calc 436

——— **compensation for a ejectment**—
See LANDLORD AND TENANT
I L R 44 Bom 950

——— **concession of**—
See LANDLORD AND TENANT
I L R 41 Bom. 609

——— **constructed by lessees**—
See BOMBAY CITY MUNICIPAL ACT (BOM ACT III OF 1888) s 305
I L R 34 Bom 593

——— **erection of without sanction**—
See UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916) s 185 186
I L R 39 All 482

BUILDING—*contd*

——— *Re erection* —*Renewing or repairing a roof replaced on its former site—Reconstruction not exceeding one half its cubical extent— Building whether a shed with posts and tin roof is a—Building line of a road encroachment on—Calcutta Municipal Act (Ben III of 1899) ss 3 (3) (39) (a) 351 449* The removal of an old roof of a shed consisting of posts and the replacing on the same site either of a new roof or the former one after repairs without an alteration exceeding one half its cubical extent is not a re erection within s 3 (39) (a) of the Calcutta Municipal Act The offence of infringing on a building line within the meaning of s 351 is having regard to the definition in s 3 (3) the erection or re erection of the wall of a building within that line and not the removal of an old roof and replacing it on the same site TRIPENDESWAR MITTER *v* CORPORATION OF CALCUTTA (1911)
I L R 39 Calc 84

BUILDING FINE

——— **Collector's power to levy**—
See BOMBAY LAND REVENUE CODE (BOM ACT V OF 1879) s 48
I L R 42 Bom 129

BUILDING LEASE

——— **Transferability**—*Building and Residential Lease—Heritability—Transfer of Property Act (IV of 1882) s 108 (j)* Where there is a lease for building and residential purposes in the absence of any intention to the contrary indicated either in the terms of the grant or in the nature of the tenancy the leasehold interest is heritable and the tenancy does not determine by the death of the lessee but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit Such a tenancy *in the absence of any custom or contract* to the contrary is governed by the provision of the Transfer of Property Act and is consequently *prima facie* transferable under s 108 (j) of that Act KISHORILAL ROY CHOWDHURY *v* KRISHNA KAMINI CHOWDHRANI (1910)
I L R 37 Calc 37

BUILDING PLANS

——— **sanction of**—
See MUNICIPAL CORPORATION
I L R 40 Calc 836

BUNDELKHAND ALIENATION ACT (U P II OF 1903)

——— **s 3**—

——— *Agricultural tribe —Suit for pre emption—Sanction* The sanction contemplated in s 3 of the Bundelkhand Alienation of Land Act 1903 applies to a voluntary transfer and there is no provision in the Act which entitles an intending pre-emptor to get the sanction of the Collector to bring a suit for pre emption Therefore a Court is not entitled to grant a decree for pre emption to a person who is not entitled to purchase the property in question not being a member of the agricultural tribe within the meaning of s 3 of the Bundelkhand Alienation of Land Act [illegible] (1915) **I L R 37 All. 662**

——— *Equity of redemption sold or pre-empted— sale of mortgagee* [illegible]

BUNDELKHAND ALIENATION ACT (U P II OF 1903)—*contd*

——— s 3—*contd*

rights—Rights of purchaser The policy of the Bundelkhand Land Alienation Act is to prevent persons who are not members of an agricultural tribe from acquiring property and the provisions of s 3 apply to all permanent alienations even though they are brought about by the exercise of the right of pre emption Property in Bundelkhand was mortgaged and subsequently the equity of redemption was sold by the owners to *a certain person from whom it was pre empted* The Collector however did not sanction the sale but ordered the name of the purchaser to be recorded as a usufructuary mortgagee Later the mortgagors sold this very property to the plaintiff He brought this suit to redeem it from the defendant who was in possession as a prior mortgagee *Held* that the plaintiff had a right to redeem the property from the defendant inasmuch as the ultimate right of redemption remained in the representatives of the original mortgagor This right they were entitled to transfer to the plaintiff RAM NATH v HARANI (191)

I L R 37 All 467

——— ss 3 4 6 9—*Court bound to prevent an alienation which is not permitted by the Act from taking effect—Mortgage executed by a member of an agricultural tribe— Ghos* Where at any stage of a suit it is brought to the notice of a Court that an alienation forming the subject of the suit is an alienation made in contravention of the provisions of the Bundelkhand Alienation of Land Act 1903 the Court is bound to take notice of the fact and to pass such orders as may lead to an ultimate compliance with the requirements of the Act So where a mortgage had been executed by a member of an agricultural tribe in a form not permitted by the Act and a preliminary decree for sale has been passed thereon without opposition on the part of the mortgagor based on his status as a member of an agricultural tribe it was *held* that the Court to which application for a final decree was made was not merely justified in taking but was bound to take action under s 9 of the Act *Held* also that the Hindu *ghos* of the Jalaun district are a sub division of the Ahir caste and therefore members of an agricultural tribe within the meaning of the above mentioned Act KALKA PRASAD v RAJ RANI (1918)

I L R 41 All 294

——— s 9—*Mortgage—Suit for foreclosure—Plea of defendants that they were members of an agricultural tribe—Reference to Collector—Effect of Collector s finding in the negative* In a suit for foreclosure of a mortgage against two sets of defendants both sets pleaded that they were members of an agricultural tribe to whom the provisions of the Bundelkhand Alienation of Land Act 1903 applied and a reference was accordingly made to the Collector under *s 9 (3) of that Act The Collector took* action under the Act with regard to one set of defendants but as to the other set decided that they were not members of an agricultural tribe *Held that this finding left the Civil Court no* option but to continue the proceedings before it independently of the provisions of the Bundelkhand Alienation of Land Act 1903 GOVIND RAO v KAMTA PRASAD (1914)

I L R 36 All 376

BUNDELKHAND ALIENATION ACT (U P II OF 1903)—*concld*

——— s 16—*Member of an agricultural tribe—Restrictions on dealing with property—Mortgage—Decree for sale—Sale in execution of decree—Insolvency—Property of member of agricultural tribe not vesting in receiver* Where a mortgage has been executed by a member of an agricultural tribe to whom the provisions of the Bundelkhand Alienation of Land Act 1903 apply in contravention of that Act even a decree passed in a suit for sale and a sale in execution following thereon cannot pass a good title in the mortgaged property to the auction purchaser Nor does it make any difference that after the passing of the decree the judgment debtor has become *insolvent because under the terms of the Act the* mortgaged property does not vest in the Receiver in insolvency and cannot therefore be sold by him HANUMAN PRASAD NARAIN SINGH v HARAKH NARAIN

I L R 42 All 142

——— s 17—*Mortgage executed by Collector—Stamp—Stamp Act (II of 1899) s 3 Held that a mortgage executed by a Collector under the* provisions of s 17 of the Bundelkhand Alienation of Land Act 1903 is not exempt from stamp duty SOMWARPURI v MATA BADAL (1916)

I L R 38 All 351

BUNDELKHAND ENCUMBERED ESTATES ACT (I OF 1903)

——— s 13—*Sub mortgage by usufructuary mortgagee—Covenant to indemnify sub mortgagee if dispossessed—Effect on such covenant of mortgagors taking advantage of the provisions of the Bundelkhand Encumbered Estates Act 1903* The mortgagee in possession under a usufructuary mortgage executed a sub mortgage of his mortgagee rights and covenanted with the sub mortgagee that if during the period of the mortgage the property mortgaged in any year by any reason should pass out of the possession of the *sub mortgagee or the mortgage deed for any* reason should be declared to be invalid he the executant would be liable to pay the loss sustained by the mortgagee The mortgagors took advantage of the provisions of the Bundelkhand Encumbered Estates Act The mortgagee took no steps under the Act to realize the amount due to him on his mortgage The sub mortgagee did prefer a claim but it was rejected and he did not appeal against the special Judge s order rejecting it The sub mortgagee was ejected from the mortgaged property and thereafter his sons sued the mortgagee on his covenant claiming damages on account of his ejectment *Held* that the suit was not barred by reason of anything contained in the Bundelkhand Encumbered Estates Act 1903 GAYA PRASAD v GANGA BISHAN (1910)

I L R 33 All 138

BURDEN OF PROOF

See ADVERSE POSSESSION

I L R 33 Mad 362

See AGRA TENANCY ACT (II OF 1901) s 164

I L R 37 All 595

See AGREEMENT TO SELL

I L R 36 Bom 446

See ATTACHMENT

I L R 45 Bom 1020

BURDEN OF PROOF—*contd*

See BOMBAY DISTRICT MUNICIPAL ACT (BOM III OF 1901) ss 60 64
I L R 35 Bom 492

See BOMBAY LAND REVENUE CODE s 83 I L R 45 Bom 350 353

See CARRIERS I L R 47 Calc 1027

See CIVIL PROCEDURE CODE (1908) s 60 (c) I L R 35 All 307

O XXI R 23 I L R 34 All 612

See CONTRACT I L R 39 All 418

See EVIDENCE I L R 33 All 483

See EVIDENCE ACT (I OF 1872)

s 106 1 Pat L J 108

Ss 103 114 I L R 34 All 36 511

See FORFEITURE I L R 47 Calc 190

See GRANT OF LAND
I L R 43 Bom 37

See HINDU LAW—ALIENATION
I L R 40 Calc 288
I L R 36 All 187

See HINDU LAW—JOINT FAMILY
I L R 32 All 415
I L R 33 All 677
I L R 34 All 126 135
I L R 39 All 437
I L R 41 All 235 523 609
5 Pat L J 622

See HINDU LAW—LEGAL NECESSITY
I L R 38 Calc 721

See HINDU LAW—MORTGAGE
I L R 41 All 571

See HINDU LAW—WIDOW
I L R 33 All 342

See JURISDICTION
I L R 35 Bom 264

See LIMITATION ACT (IX OF 1908) SCH I ARTS 140, 141
I L R 40 Bom 239

See MAHOMEDAN LAW—DIVORCE
I L R 36 All 458

See MAHOMEDAN LAW—PRE EMPTION
I L R 38 Bom 183

See MORTGAGE I L R 33 All 478
I L R 33 All 540
I L R 41 All 250
I L R 42 All 575

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881) ss 64 76
I L R 33 All 364
I L R 41 All 40

s 98 I L R 33 All 4

See ONUS OF PROOF

See OUDH ESTATES ACT (I OF 1869) ss 8 10 I L R 38 All 552

See PARDANASHIN LADY
I L R 31 All 455

See PENAL CODE ACT (XLV OF 1860) s 4 I L R 3? All 395

See PRE-EMPTION I L R 36 All 464

See SUCCESSION ACT (X OF 1) ss ? 9 10 I L R 41 Bom 637

BURDEN OF PROOF—*contd*

See SUIT TO RECOVER POSSESSION OF LAND FROM AN ALLEGED LICENSEE
I L R 41 All 669

See TRANSFER OF HOLDING
15 C W N 953

See WILL 15 C W N 177

——— **Title against Government**—*Evidence of possession necessary to prove title against Government—Nattam poramboke classification as effect of* Where in a suit for declaration of title against Government the plaintiff proves possession for a period of more than 12 years the Government must prove that it has a subsisting title When the Government fails to prove such title or possession within 60 years the plaintiff is entitled to a declaration of title and not merely to a declaration that he is lawfully in possession of such land The classification of land as *nattam poramboke* is no legal evidence of title in the Government At the most it is evidence only of an assertion of title *Kattas Mahomed Meera Mahideen* v *Secretary of State for India* 13 *Mad L J* 269 explained *Ganga Ram China Patel* v *Secretary of State for India I L R* 20 *Bom* 798 distinguished *Hanmantarav* v *Secretary of State for India I L R* 25 *Bom* 287 distinguished KRISHNA AIYAR v SECRETARY OF STATE FOR INDIA (1909) I L R 33 Mad 173

——— *Reversioner declaratory suit by to set aside alleged adoption—Onus on adopted son whether reversioner entitled to immediate possession or only to declaration* Where a reversioner during the lifetime of the widow on whose death he will be entitled to possession sues for a declaration that an adoption alleged to be made by her is invalid and his right as reversioner is not impeached the burden will be on the party relying on the adoption to prove its validity as it would be in the case where the reversioner sues for immediate possession *Isharfi Kunwar* v *Rup Chand I L R 30 All 197* dissented from RAJAGOPALA REDDY v NATTU GOVINDA REDDI (1910) I L R 34 Mad 329

——— *Agreement to sell land—Recital of receipt of consideration—Denial of receipt by vendor—Title deeds in vendee's possession—Presumption* Mere denial by the vendor of the receipt of the consideration acknowledged in the recitals of a deed of sale is not in all cases sufficient to cast upon the vendee the burden of proving payment of the consideration Where the plaintiff wishes to set aside a contract of which there has been performance and under which the defendant has been in possession and enjoyment of the subject matter he must establish at least a good *primâ facie* title to the relief which he seeks RAMPAL RAM v SUBA SINGH
4 Pat L J 517

BURGADAR

See LANDLORD AND TENANT (MIS)
14 C W N 620

See SPECIFIC RELIEF ACT s 9
15 C W N 956

BURMA TOWN AND VILLAGE LANDS ACT (BURMA IV OF 1898)

——— s 41 (b)—

See JURISDICTION ... Cal 331

CALCUTTA POLICE ACT (BENG IV OF 1866)—contd

——— ss 45—*contd*

petition was filed before the Chief Presidency Magistrate of Calcutta by one S alleging that at the premises mentioned therein cotton figure gambling had been carried on the *modus operandi* of which was described and that the accused had taken part in it The Magistrate examined S issued warrant [illegible] and directed the Assistant Commissioner of Police Southern Division to [illegible] He next made an order [illegible] the Assistant Commissioner Northern Division [illegible] evidence sufficient [illegible] The police thereafter submitted [illegible] charging the accused with gambling [illegible] fied therein [illegible] The accused moved the High Court for quashing the proceeding pending before the Magistrate *Held* that the Magistrate took cognizance on the petition [illegible] submitted [illegible] s 46 of the [illegible] proceedings were not irregular [illegible] the petition disclosed an offence under [illegible] of which the Magistrate could take cognizance thereon *Semble*—It [illegible] cognizance [illegible] the police which does not give a sufficient description of the offence in question BHAIRANCA LAL KHETRI *v* THE KING EMPEROR

25 C W N 428

——— s 51A—

See AUTREFOIS ACQUIT

I L R 45 Calc 727

——— *Possession of property suspected to be stolen*—The preliminary condition which must be fulfilled before effect can be given to s 51 (1) is that there must be reason to believe that the property found in the accused's possession was stolen property In the present case the High Court acquitted the accused on the ground that the reasons given by the Magistrate were not sufficient SUSIL KALWAR *v* KING EMPEROR (1918) **22 C W N 876**

——— *Possession of article suspected to be stolen*—*Requisite for conviction* To justify a conviction under s 51 of the Calcutta Police Act there must be reason to believe that the article has been stolen or fraudulently obtained and no conviction can be had in the absence of a reasonable ground for suspicion BAT DAS *v* ALIM BUX KHAN (1919) **23 C W N 1053**

——— s 62A (4) 1924—

See PROCESSION **I L R 40 Calc 470**

——— s 66 sub s (a) (2)—*Calcutta Municipal bye law (2) framed under sub s 18 s 559 of the Calcutta Municipal Act (Beng III of 1899)—Obstruction of footpath* The petitioner was granted a licence under Bye law (2) framed under sub s 18 s 559 of the Calcutta Municipal Act authorising him to make an enclosure in a portion of a particular street for depositing mortar bricks etc during the building of certain premises on that street The licence was granted on condition that the portion of the street to be occupied must be fenced off with a temporary fence but the petitioner without putting up any such fence deposited some bricks on the footpath and was convicted under s 66 of the Calcutta Police Act *Held* that the petitioner committed a breach of the bye law under which his licence was granted but his offence also fell under sub s 3(a) s 66 of the Police Act and his conviction under that section was proper *Quære* Whether sub s 4 (a) introduced into s 66 of the Police Act by the amending Act of 1910 (Bengal Act III) repealed the provisions regarding the regulation of obstructions in the Calcutta Municipal Act BROCKER *v* KING EMPEROR (1917)

22 C W N 455

CALCUTTA POLICE CIRCULAR

——— No 1159

See POLICE OFFICER

I L R 46 Calc 581

CALCUTTA PORT ACT (BENG IX OF 1890)

——— s 91—

See CARRIERS **I L R 41 Calc 703**

——— ss 112 113 114—

See LOSS OF GOODS

I L R 40 Calc 56

——— s 139—*Criminal Procedure Code (Act V of 1898) s 20—Presidency Magistrate if has jurisdiction in respect of offence committed outside Calcutta but within the limits of the Port* By the operation of s 20 of the Code of Criminal Procedure a Presidency Magistrate is an officer authorised to exercise the powers of a Magistrate within the limits of the Port of Calcutta within the meaning of s 139 of the Calcutta Port Act and so has jurisdiction in respect of an offence under the said Act committed outside Calcutta but within the limits of the Port thereof GUNPAT LAL KHEMKA *v* W J WOOD **24 C W N 79**

CALCUTTA RENT ACT (III OF 1920)

——— s 2— *Tenant meaning of—Suit filed before the Rent Act came into force applicability of the Act—Effect of non payment of rent—Relief against forfeiture for non payment if available* The term tenant is used in a special sense in the Calcutta Rent Act 1920 and includes a person whose tenancy has expired even before the Act came into operation Such a tenant is entitled to the benefit of the Act even if a suit for ejectment was instituted before the Act came into operation A tenant is not entitled to the benefit of s 11 of the Act if he does not pay rent as provided in s 11 sub s 5 of the Act LIRHAL DAS CHANDAK *v* LALBEHARI DUTT

25 C W N 867

——— *Held* that a workshop did not come within premises under this section INDIAN ENGINEERING MOTOR CO LTD *v* GLADSTONE WYLLIE & CO **26 C W N 102**

——— s 4—*Held* that the fact that there was option for renewal for a further period of three years after the expiration of the first three years did not make the lease one for five years and upwards within the meaning of s 4 sub s 3 That the Rent Controller refused to exercise jurisdiction vested in him by law and the High Court could properly interfere in revision BASANTA CHARAN SINHA *v* RAJANI MOHUN CHATTERJEE

26 C W N 711

CALCUTTA RENT ACT (III OF 1920)—*contd*

——— s 11—

See s 2 25 C W N 967

——— *Held* that to allow a landlord who has sufficient premises for his requirement to eject a tenant for his own better convenience or profit would be to defeat the object of the Act PEKHAD CHAND DOOGER v J R D CRUZ 26 C W N 499

——— Where there is an agreement to extend the time for payment before the rent actually becomes due under the lease then it might well be that the time within which under s 11 (5) rent has to be paid to the landlord is such extended date but where the default has already taken place the subsequent acceptance of rent by the landlord does not take the matter out of the provisions of s 11 sub s (5) JETHA BHALCHAND v F C GRACE 26 C W N 679

——— Grounds on which a landlord can claim to enter into possession discussed KUMAR NATH MITTER v WALTER LOCKE & Co 25 C W N 1012

——— 15—

——— *Held* that under this section the Controller must grant a certificate certifying the standard rent ALLEN BROS & Co v BANDO & Co 26 C W N 845

——— *Held* that an application in revision against an order of the Controller lies to the Appellate Side of the High Court KALI DASI v KANAI LAL DE 26 C W N 52

——— s 20—

——— *Held* that this section is not but that r 4 framed under s 2 is *ultra vires* GOBARDHAN DAS DEORA v DOOLIE CHAND SHETHIA 25 C W N 661

——— ss 20 and 23—

See ULTRA VIRES I L R 48 Calc 955

CALCUTTA SUBURBAN POLICE ACT (BENG II OF 1866)

——— ss 39A (4) 49A—

See PROCESSION I L R 40 Calc 470

CALLS

See COMPANY I L R 42 Bom 159 & 264

CAMBAY

See PENAL CODE ss 34 109 467 I L R 36 *Bom* 524

CANAL

See NORTHERN INDIA CANAL AND DRAINAGE ACT (VIII OF 1873)

——— damage to—

See PENAL CODE (ACT XLV OF 1860) s 430 I L R 41 All 599

CANCELLATION

See GIFT I L R 39 Calc 933

See LIMITATION ACT (XV OF 1877) SCH II ARTS 91 AND 141 I L R 32 All 392

See PARDANASHIN LADY I L R 36 All 81

——— of order—

See PROBATE AND ADMINISTRATION ACT (V OF 1881) s 50 I L R 37 All 330

——— of Registration under Patents and Designs Act—

See DESIGN I L R 45 Calc 606

——— of sale deed—

See LIMITATION ACT (IX OF 1908) SCH I ART 91 I L R 42 Bom 638

CANDIDATE

——— for pleadership—

See PLEADERSHIP EXAMINATION I L R 40 Calc 588

——— for Municipal Election—

See MUNICIPAL ELECTION I L R *46 Calc 119 & 132*

CANTONMENT PROPERTY

See ADVERSE POSSESSION I L R 33 All 229

——— *Resumption by Government of land in—Cantonment Code of 1836 and 1850—Ownership of land in Poona Cantonment—Suit by Government for ejectment of tenant from premises within Cantonment limits—Private ownership in Cantonment claim to—Presumption of ownership—Possession effect of—Right of Government to resume land* In a suit for ejectment of the appellants from premises within the limits of the Poona Cantonment the Government as plaintiffs claimed that the land belonged to them and was merely held by the defendants on military or cantonment tenure which entitled them to resume it at their pleasure subject to compensation for buildings which the tenants might have erected thereon The defendants claimed the land as their private property on the ground that their predecessors in title were owners of the land at the time the cantonment was established and that nothing had happened since to vest the title in the Government and while admitting that they were subject to military jurisdiction and to the Government right of appropriation contended that they were entitled to compensation on a basis of private ownership and not as mere licensees. They also contended that being in actual possession of the land the onus was on the plaintiffs to rebut the presumption of ownership in fee attaching to the possession of land whether in a cantonment or elsewhere The title *of the defendants was based on a document dated* 27th August 1864 by which one Bevts a Purser in the Indian Navy certificated that for the consideration therein mentioned he handed over to Dorabjee Pestonjee all claim he had to the house out houses and premises generally marked 23 Staff Lines, *Poona Cantonment This document was* endorsed as sanctioned by the Brigadier General Commanding *Held* on a consideration of the mode of delimitation of the Poona Cantonment

CANTONMENT PROPERTY—*contd*

the regulations affecting it the arrangements made with the owners of the lands taken to indemnify them for the loss they sustained by being deprived of their rights of occupancy and the other circumstances of the case (i) that even if the defendants established that their house was built at or before the time the cantonment was made there was still a strong probability that they were duly compensated for the change in their position as owners to that of licensees (ii) that from the regulations as summarised in Aitchison s Cantonment Code of 1836 and Jameson s Cantonment Code of 1850 it was clear that, though permission to occupy ground was frequently given especially for the building of officers houses or bungalows such permission carried with it no sort of proprietary right and the buildings were liable to expropriation at a price to be fixed by the authorities and the permission of the Commanding Officer was necessary even for the letting or sale of the house so built It was therefore impossible to say that mere possession or occupation of the bungalow on this site afforded any presumption whatever that the defendants or their predecessors in title were owners in fee The presumption was all the other way and was strengthened by an examination of the history of the site itself which showed that the defendants predecessors in title did not regard the property as differing in its tenure and terms from other property in the cantonment The defendants were therefore mere licensees and the land had been lawfully resumed by Government KAIKHUSRU ADERJI GHASWALA v SECRETARY OF STATE FOR INDIA (1911) I L R 36 Bom 1
15 C W N 919

CANTONMENT CODE OF 1833 AND 1850

See CANTONMENT I

I L R 33 Bom 1

CANTONMENT CODE 1912

——— r 97—*Notice of removal—Cantonment authority—Building in a ruinous condition* A notice issued under r 97 of the Cantonment Code of 1912 can require the owner to do one of the two things *viz* to remove the building or to cause repairs to be made It is not necessary that the notice should always be in the alternative either to remove or to repair the choice to be with the owner EMPEROR v BYRAMJI PUDUMJI (No 2) (1919) I L R 43 Bom 838

——— rr 107A 97—*Order to repair a building in a bad condition—Disobedience of the Order—Power to inflict daily fine for disobedience—Fine can be levied for disobedience in the past only* The owner of a bungalow within Cantonment limits having failed to carry out repairs to the bungalow was on the 27th October 1918 ordered by a Magistrate under r 107A of the Cantonment Code of 1912 to pay a daily fine of Rs 5 from the 1st November 1918 until such time as the repairs were carried out *Held* that r 107A did not authorise the Magistrate to convict the owner of a failure in regard to the future though he was competent to impose a fine for the past failure EMPEROR v BYRAMJI PUDUMJI (No 1) (1919) I L R 43 Bom 836

CANTONMENTS ACT (III OF 1880)

——— s 22—*Limitation Act (IX of 1908) Art 62—Taxes levied by cantonment authorities—*

CANTONMENTS ACT (III OF 1880)—*contd*

——— s 22—*contd*

Payment under protest—Jurisdiction of Civil Courts to entertain suit for recovery of payment—Assessment on the annual letting value—Payment by cheque—Limitation runs from the date of the receipt of the money by the payee Civil Courts have jurisdiction to entertain a suit to recover the amount of taxes levied by the cantonment authorities and paid under protest on the ground that the assessment was illegal This may be the case both when a serious demand requiring very attentive consideration had been made on the plaintiffs and reasonable time has not been given to the latter to take advice on the subject and when the cantonment authorities have wholly disregarded the basis on which the rate should have been assessed by assessing the rate upon the gross income of the plaintiffs *Kasandas v Ankleshwar I L R 26 Bom 294* followed In assessing a tax based on the annual letting value of premises it is illegal to take the annual income derived from the premises as the basis of calculation. In case of payment by a cheque limitation runs not from the date of the delivery of the cheque but from the date of the receipt of the money by the payee SECRETARY OF STATE FOR INDIA v MAJOR HUGHES (1913) I L R 38 Bom 293

CANTONMENTS ACT (XIII OF 1889)

——— s 80—*Civil Procedure Code (Act V of 1908) ss 2 (17) 80—Public officer—Suit against public officer—Notice of claim necessary—Cantonment Committee is public officer—Cantonments Act (XIII of 1889) s 80 applies to actions ex delicto and not to actions ex contractu* A Cantonment Committee constituted under the Indian Cantonments Act (XIII of 1889) is a public officer within the meaning of s 2 cl. (17) of the Code of Civil Procedure (Act V of 1908) Before the Committee can be sued the notice prescribed by s 80 of the Code must be given. The notice contemplated by s 80 has to be given for actions sounding substantially in tort and it makes no difference that those actions are by operation of law treated for certain purposes as actions *ex contractu* *Raymond v Hanmant I L R 29 Bom 697* considered CECIL GRAY v THE CANTONMENT COMMITTEE OF POONA (1910)
I L R 34 Bom 583

CAPACITY OF PARTIES TO SUE

——— *Res judicata—Capacity of parties—Matter substantially in issue—Civil Procedure Code (Act XIV of 1882) s 13* If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit his claim has no proper connection with that former suit and the Civil Procedure Code (Act XIV of 1882) s 13 does not apply HARGOVAN PAMJI v MULJI HARJIVAN (1909)
I L R 34 Bom 416

CAPITAL CASES

See PUBLIC PROSECUTOR DUTY OF
I L R 42 Calc 422

CAPTURE OF VESSEL

See SALE OF GOODS
I L R 45 Calc. 28

CARE AND PRUDENCE

———— degree of—

See TRUSTEE I L R 38 Mad 71

CARGO

See CONFISCATION I L R 42 Calc 334

———— release of—

See SALE OF GOODS I L R 45 Calc 28

CARRIAGE OF GOODS

See CONTRACT I L R 41 Calc 670

CARRIERS

See CARRIERS ACT

See CARRIERS BY SEA

See COMMON CARRIER

———— On Railway Risk Note—

See CONTRACT I L R 39 All 418

———— mis-delivery by Railway—

See RAILWAYS ACT 1890 s 80

I L R 2 Lah 133

———— Partly by Rail and partly by River—

See RAILWAY COMPANY

I L R 47 Calc 6

———— suit against—

See SPECIFIC MOVEABLE PROPERTY

I L R 39 Mad. 1

1 ———— "During Transit"—*Construction of contract—Consignor bound by ordinary train arrangements made by Company* A consigned certain cotton by railway from *E* station to *K* station. Under the terms of the risk note signed by the consignor the company was exempted from liability for any loss before during or after transit over the Railway Under the train arrangements made by the Railway Company goods consigned from *E* to *K* were carried beyond *K* to *C* and then back from *C* to *K* The goods were damaged while at *C* In a suit to recover compensation for the loss so caused *Held* that the loss occurred during transit from *E* to *K* and that the company was protected by the terms of the risk note. Every customer dealing with a company is bound not only by the ordinary route but also by the ordinary train arrangements according to which it professes to carry *Tobin* v *London & North Western Railway Company* [illegible] *Ir R p 2*[illegible] *3*[illegible] referred to ARUNACHELLAM CHETTIAR *v* THE MADRAS RAILWAY COMPANY (1909) I L R 33 Mad 120

2 ———— "Clear receipt"—*By consignee—Loss of goods—Liability of Company for the loss* Certain bales of cloth tendered to the East Indian Railway Company for transit were in due course delivered to the consignee who granted clear receipt for them Subsequently the consignee discovered that some pieces of cloth out of the bales were missing, the same having been lost while in the custody of the Railway Company In a suit brought by the consignee for compensation *Held* that the grant of clear receipt and acceptance of delivery do not affect the right to compensation for loss or damage proved to have been caused to the goods while in the custody of the carriers. *Per* MOOKERJEE J A receipt acknowledging a delivery of the goods in good condition is only *primâ facie* evidence of the fact and raises a presumption in favour of the carriers which may be rebutted by the consignee EAST INDIAN RAILWAY COMPANY *v* SISPAL LAL (1911)

I L R 39 Calc 311

2. (a) ———— In deciding a suit against a common carrier for the loss damage and non delivery of goods entrusted to him for carriage the Court has to decide whether the negligence can legitimately be inferred from the facts of the particular case and whether the negligence so inferred was the effective cause of the loss damage and non delivery Under s 9 of the Carriers Act the burden of proof of absence of negligence is thrown on the common carrier on the theory that the loss or damage to the goods is *primâ facie* proof of negligence INDIA GENERAL NAVIGATION AND RAILWAY CO *v* THE EASTERN ASSAM CO LTD

I L R 47 Calc 1027

3 ———— Liability of Steamer Company —*Carriers Act (III of 1865) ss 6 7 8 9—Onus of proof—Negligence or criminal act of company its servant or agent presumed* Where a steamer company forwarded a consignment of four tins of oil on terms contained in what is known as an owner s risk note after receiving the tins in good condition and the consignee refused to take delivery as one tin was cut open and partly empty and another was quite empty and brought a suit for the value of the oil *Held* that the steamer company being a common carrier was in a different position from railway companies who are only bailees coming under ss 151 152 and 161 of the Contract Act Its liability is therefore that of an insurer subject to certain exceptions under s 6 of the Carriers Act *Held* also that the onus was as a matter of course on the steamer company as common carriers even in a case covered by special contract to disprove negligence as the loss of the goods is *primâ facie* evidence of negligence or criminal act of the carrier his servants or agents *Choutmul Doogur* v *The Rivers Steam Navigation Co I L R 24 Calc 786* followed *Irrawaddy Flotilla Co* v *Bhugwandas I L R 18 Calc 620 Lalchand Sew Karan* v *E I Ry Co 17 C W N 635n* referred to *Sheobarut Ram* v *B and N W Ry Co 16 C W N 766* not followed INDIA GENERAL STEAM NAVIGATION COMPANY *v* BHAGWAN CHANDRA PAL (1913) I L R 40 Calc 716

4 ———— Undeclared luggage—*Carriers Act (III of 1865) s 3 4 8 9—Negligence of carrier or his agent—Liability* Where loss of or damage to goods was caused by negligence or criminal act of the carrier or any of his agents or servants the carrier is liable for the loss although the value and description of the goods were not declared nor was a higher charge paid for them. *Cahill* v *The London North Western Railway 13 C B N S 818 Great Northern Railway Company* v *Shephard 8 Exch* [illegible]*0 David Keays* v *Belfast Railway Company 8 H L Cas 556 Sheikh Rohim ulla* v *Palmer Oorytons Rep 133* referred to *Velayat Hossein* v *Bengal and North Western Railway Co I L R 36 Calc 819* distinguished S 9 of the Carriers Act clearly shows that the onus of proving negligence is not upon the plaintiff. *Sheobarut Ram* v *Bengal and North-Western Railway Company 16 C W N 766* distinguished.

CARRIERS—*contd*

INDIA GENERAL NAVIGATION AND RAILWAY CO, LD *v* GOPAL CHANDRA GUIN (1913)
I L R 41 Calc 80

5 ———— Conversion—*Misdelivery of goods—Notice of arrival—Delivery order—Unauthorised act—Reasonable conduct—Consignee duty of regarding delivery—Calcutta Port Act (Beng III of 1890) s 91* The plaintiff Noel William Freeman shipped goods from London to Calcutta under a bill of lading which provided that the goods were to be delivered at the Port of Calcutta unto Mr N W Freeman or his assigns and in which the consignee s name and address were stated as N W Freeman Calcutta The consignee took no steps regarding delivery of the goods on arrival and the defendant company after landing the goods handed them over in the usual course to the Port Commissioners The defendant company thereafter posted a notice of arrival addressed to N W Freeman Esq Calcutta which was delivered by the post office to one Nigel W Freeman The latter through his agent gave a letter of indemnity to the defendant company and the agent without production of the bill of lading obtained from the defendant company a delivery order on the Port Commissioners for the goods and wrongfully took delivery of the same When communicated with Nigel W Freeman returned most of the goods in a damaged and deteriorated condition to the plaintiff In a suit by the owner consignee against the shipping company for damages for misdelivery *Held* that the defendant company had not done an unauthorised act in issuing the notice of arrival or the delivery order and that they have acted in a reasonable and proper manner *Hiort v Bott L R 9 Ex 86* and *Heugh v Stott 14 P D 112* distinguished *Heugh v London and North Western Ry Co L R 5 Ex 51* referred to It is the duty of the consignee to ascertain which goods will arrive and to be ready to take delivery FREEMAN *v* P & O S N CO LD (1913)
I L R 41 Calc 703

6 ———— reweighing goods A Railway Company is not bound to reweigh goods and give a certificate of shortage on demand of consignee JAGANNATH MARWARI *v* EAST INDIAN RAILWAY
22 C W N 902

CARRIERS ACT (III OF 1865)

See CONTRACT ACT (IX OF 1872) ss 56 65
I L R 40 Bom 529

———— not applicable to carriers by sea—
See BILL OF LADING
I L R 38 Mad 941

———— ss 3 4 8 9—
See CARRIERS I L R 41 Calc 80

———— ss 5 8 9—
See COMMON CARRIERS
23 C W N 998

———— ss 6 7 8 9—
See CARRIERS I L R 40 Calc 716

———— ss 6 8 9—
See COMMON CARRIER LIABILITIES OF
I L R 38 Calc 28
See CARRIERS I L R 40 Calc 716

CARRIERS ACT (III OF 1865)—*contd*

———— s 9—
See CARRIERS
I L R 47 Calc 1027
See RAILWAY COMPANY
I L R 37 Bom 1

———— s 10—
See COMMON CARRIERS
I L R 38 Calc 50

CARRIERS BY SEA.

See CONTRACT ACT (IX OF 1872) ss 56 65 I L R 40 Bom 529

———— Carriers Act not applicable to—
See BILL OF LADING
I L R 38 Mad 941

CASE STATED

See PRESIDENCY BANK ACT 1876 s 23
I L R 45 Bom 138

CASH ALLOWANCE

See LIMITATION ACT 1908 SCH II ART 131 I L R 38 Mad 916

———— *Tasdik— arrears of cash allowance suit to recover—Limitation Act (XV of 1877) Sch II Arts 131 62* The plaintiff the manager of the temple of Shri Laxmi Narayan Dev at Hukkal sued to recover from the defendants the managers of the temple of Shree Madhukeshwar at Banawasi a sum of Rs 90 as arrears of a cash allowance (tastik) which the former was entitled to receive from the property of the latter The defendants admitted the title of the plaintiff to the allowance but pleaded limitation as to the arrears for two out of the six years The lower Courts applied Art 131 of the Limitation Act 1877 and allowed the whole of the claim On appeal *Held* that the claim was properly allowed A cash allowance of the nature as in the present case is according to Hindu law *nibandha* or immoveable property where it is annually payable the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and which have become actually due But where there are more than one person entitled to the payment as co sharer and the payment is made to one of them by the person liable to pay the co sharer receiving the amount holds it *minus* his share on behalf of the rest as money had and received for their use though as to him with reference to the aggregate of rights it is *nibandha* or immoveable property in the nature of a periodically recurring right The important question is who is the person sued and what is it that is sued for ? If what is sued for is the establishment of a title to the right itself then Art 131 applies whether the defendant is the person originally liable to pay or is a co sharer who has received payment from that person If on the other hand what is sued for is the amount of arrears which has become actually payable to the plaintiff then there is a distinction between the person originally liable to pay and a co sharer of the plaintiff who has actually received payment from that person Art 131 applies in that case

CASH ALLOWANCE—*contd*

to the per on originally liable to pay and Art 62 applie to the co shar r who has received the pay ment SAKHARAM HARI v LAXMIPRIYA TIRTHA SWAMI (1909) I L R 34 Bom 349

CASTE

See CHURCH I L R 39 Mad 1056

See CIVIL PROCEDURE CODE (1908) O I R. S J I L R 39 Bom 339
I L R 40 Bom 158

See HINDU LAW —CONVERSION
I L R 33 All 356

See HINDU LAW—MARRIAGE
I L R 39 Bom 538
I L R 43 Calc 926

See LIBEL I L R 39 All. 561

———— property of—

See CONTRACT ACT (IX OF 18) 0
I L R 42 Bom 556

———— Usage of—

See DEFAMATION I L R 33 Mad. 67

———— *Ownership of property by* Own rship of property by a fluctuating body of persons is recognised in Hindu Law and though ther is no cas in which the right of a particular *caste or community to hold property has been* de del th re are observations tending to show that su h a body is capable of own ng property PROBHAT CHANDRA SEN v HARI MOHAN DHUPI
24 C W N 206

———— *Regulation II of 1827 s 21—Caste question—Civil Court jurisdiction —Suit to be declared Ayya of Hiremath and to restrain defendant from so styling himself* The plaintiff sued to obtain a declaration that he was entitled to the fees and privileges appertaining to the Hiremath at Kamalapur by reason of hi title to be called the Ayya of that Hiremath and to obtain a perpetual injunction to restrain the defendant from u ing the name of Ayya of Hire math. The plaintiff s complaint was that the defendant had assumed a name to which the plaint iff had the exclusive right and that that assump tion would enable as it had enabled the defendant to attract to him elf a large number of the plaint iff s follower and thereby appropriate to himself fees which would otherwise have be n paid to the plaintiff *Held* that it was a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy certain privileges and honors at the hands of the members of the caste in virtue of that office It was a caste question not cognizable by a Civil Court *Held* al o that the fact that there had been no allegation of any speci fic damage by reason of the assumption by the de fendant of the name of Ayya of Hiremath and also the admission that after all the result of the assump tion of that name would be merely to enable some of the followers of the plaintiff to go over to the defendant showed that what the parties had been fighting for was merely a question of dignity under the cover of a religious office If the Court were to interfere in such cases it would be merely assisting one party at the expen e of the other and compelling the ca te or the sect to follow one spiritual leader in preference to another GADIGEYA v BASAYA (1910) I L R 34 Bom 455

———— *Caste—Trustee of caste funds—Jurisdiction of Civil Courts in caste*

CASTE—*contd*

questions— Application of Indian Trusts Act (II of 1882) ss 5 and 6 to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908) s 151 As a result of dis ensions in a Hindu caste a suit was filed by the plaintiff a tru tee of ertain caste funds and member of the Managing Committee against the defendant a co trustee and the Presi dent of that Committee The plaintiff prayed for a declaration that he had the right to inspect all books and documents of the Mahajan Managing Committee Sub Committee and Trustees and for an injunction restraining the defendant from interfering with him in the exercise of such right The only two documents about which there was any real controversy were the minutes of the Sub Committee and the correspondence file of the Mahajan *Held* that as trustee of the Dorasai and Sadharan funds the plaintiff had no right either in law or by virtue of any caste rules to the roving inspection claimed *Bank of Bombay v Suleman I L R 32 Bom 466 4 4* referred to *Held* further that the Mahajan fund of this caste being a purely secular fund the Indian Trust Act applied and the plaintiff could not claim to have been made a trustee of that fund merely by virtue of a caste resolution and his own letter of acceptance *Held* further on the evidence that there had been no express demand addressed by the plaintiff to the proper quarter and no refusal by the defendant such as would be necessary to enable a suit of this character to succeed *Held* further that where rights to property are not involved all matters of external management must be left to the decision of the caste The question in dispute was in reality a question between the caste and a section ap parently a small section of the caste led by the plaintiff and as such it was outside the Court s jurisdiction in accordance with the decision in *Nemchand v Savaichand I L R 5 Bom 85 Lalji Shamji v Walji Wardhman I L R 19 Bom 507* referred to and di tinguished *Held* lastly that when according to well established principles certain que tions have been removed from the jurisdiction of the Court they cannot be brought within the jurisdiction under s 151 of the Civil Procedure Code (Act V of 1908) JET HABHAI NARSEY v CHAPSEY COOVERJI (1909)
I L R 34 Bom 467

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850)

See HINDU LAW—CONVERSION
15 C W N 545

———— *Descendant of Hindu convert to Christianity whether relieved by the Act* The Caste Disabilities Removal Act do s not apply to descendants of persons relieved by the Act The de cendants of a Hindu convert to Christianity have therefore no interests in the property of their unconverted relatives *Bhagwant Singh v Kallu I L R 11 All 100* di sented from VAI THILINGA v AYYATHORAI (1917)
I L R 40 Mad. 1118

———— *Succession by a Chris tian to the so s of a convert to Islam—Muhammadan Law—Pre emption—Punjab Pre emption Act I of 1913 s 15* In 1914 defendants 1 to 3 the 3 Muhammadan sons of Mr Stuart Skinner alias Nawab Mirza who was a convert to Islam sold 6 villages to Mr P H Skinner defendant 4 a first cou in of the removed The plaintiffs

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850)—*contd*

as occupancy tenants in one of the villages sold brought the present suit for pre emption in respect of that village and the only question before the High Court was whether the vendee would but for the sale be entitled on the death of the vendors to inherit the land sold he being a Christian as in that case he would have a right of pre emption superior to that of the plaintiffs under the Punjab Pre emption Act I of 1913 s 15 *Held* following *Bhagwant Singh v Kalu (I L R 11 All 100)* that Act XXI of 1850 has the effect of abrogating the rule of Muhammadan Law by which a non Muslim is excluded from succession to a Muslim and that the vendee had consequently a right of succession to the vendors and therefore a right of pre emption superior to that of the plaintiffs *Gulab v Isher Kaur (53 P R 1893) per Stogdon J Mahna v Chand (101 P R 1902)* and *Jiwan v Harnam Das (77 P R 1907)* referred to *Kanshi Ram v Jiwan (82 P R 1890) Desu v Jowala (13 P R 1885) Inder Lal v Musammat Sahib Jan (75 P R 1912) Khunni Lal v Gobind Krishna (I L R 33 All 356 P C)* and *Mukerji v Alfred (36 P R 1909)* distinguished RUPA *v* SARDAR MIRZA I L R 1 Lah 578

CATTLE TRESPASS

See RAILWAYS ACT (IX OF 1890) s 1[?]
I L R 34 All 91

CATTLE TRESPASS ACT (III OF 1857)

See ACT OF STATE I L R 39 Calc 615

CATTLE TRESPASS ACT (I OF 1871)

——— ss 1 and 18—

See ACT OF STATE I L R 39 Calc 615

——— s 10—*Person authorised to seize cattle—S 24 rescue of cattle lawfully seized* No conviction can be had under s 24 of the Cattle Trespass Act unless it is proved that the cattle rescued was lawfully seized within the meaning of the provisions of the Act Where it appeared that the complainant had let out the land in question in *burga* *Held* that the question whether the complainant could be said to be the occupier of the land within the meaning of s 10 depended entirely on the terms of the *burga* lease If it was a lease properly so called then the lessee would be the occupier and not the complainant That the onus was on the complainant to satisfy the Court that he was a person entitled to seize the cattle or cause it to be seized MANIK CHANDRA RAY *v* ISMAIL (1918) 23 C W N 387

——— s 20—

——— Magistrate's cognizance of offence—

See CRIMINAL PROCEDURE CODE s 190
I L R 44 Bom 42

——— s 24—*Offence not compoundable—Compromise—Intention of compromise effected by complainant refraining from producing evidence* The offence provided for by s 24 of the Cattle Trespass Act 1871 is not compoundable Inasmuch as however it is a summons case the accused would be entitled to an acquittal if the complainant failed to produce his evidence Where therefore a Magistrate purported to accept a compromise entered into between the complainant and persons accused of committing offences under s 24 of the Cattle Trespass Act and s 323 of the Indian Penal Code in pursuance of which the complainant had refrained from producing evidence against the accused it was *held* that though the procedure of the Magistrate was incorrect the result of his order was substantially right EMPEROR *v* JULUA
I L R 42 All 202

CAUSE OF ACTION

See AGRA TENANCY ACT (II OF 1901) s 31 I L R 35 All 512

See ARREST OF SHIP
I L R 42 Calc 85

See CIVIL PROCEDURE CODE 1882 s 43
I L R 34 All 172

See CIVIL PROCEDURE CODE 1908—

s 9 I L R 32 All 527

s 11 EXPL IV O II R 2
I L R 39 Bom 138

s 20 I L R 36 All 563
I L R 45 Bom 1228
I L R 37 All 189
I L R 39 All 697
I L R 42 All 4[?]0

O II R 2 I L R 36 All 560
I L R 39 All 217
I L R 41 All 286 & 53
I L R 45 Bom 65

O XXXIII RR 1 2 AND [?]
I L R 34 Bom 638

See CONTRACT I L R 31 All 429

See CONTRACT ACT ss 30 73 1[?]0
I L R 24 Bom 192

See DECREE FOR POSSESSION
I L R 38 All 509

See EVIDENCE ACT (I OF 1872) s 91
I L R 31 All 158

See FRAUD 14 C W N 695

See HINDU LAW—SUCCESSION
I L R 32 All 594

See HINDU LAW—WILL
I L R [?]2 Calc 561
I L R 37 All 422

See HUNDI SUIT ON
I L R 40 Bom 473

See INDEMNITY BOND
I L R 41 All 395

See LETTERS PATENT CLS 12 AND 14
I L R 34 Bom 564

See LIMITATION ACT (IX OF 1908) SCH I ARTS 97 AND 116 I L R 45 Bom 955

ARTS 91 AND 120
I L R 37 All 640

ART 120 I L R 36 All 492
I L R 41 All 509

See MADRAS ESTATES LAND ACT (I OF 1908) s 102 I L R 38 Mad 655

See MADRAS LAND ENCROACHMENT ACT 1905—

ss 3 5 14 I L R 38 Mad 674

ss 5 6 7 14 I L R 39 Mad 72[?]

See MAHABRAHMANS I L R 43 All 15[?]

CAUSE OF ACTION—contd

See MALICIOUS PROSECUTION I L R 37 Calc 358
I L R 42 All 305
I L R 38 Calc 880

See MISJOINDER OF PARTIES I L R 45 Calc 111

See ORISSA TENANCY ACT 1913 s 3 4 Pat L J 387

See PRACTICE L R 41 I A 142

See RES JUDICATA I L R 34 Mad. 97

See SECRETARY OF STATE FOR INDIA I L R 38 Calc 378

See SPECIFIC RELIEF ACT (I OF 1877) s 42 I L R 32 All 316
I L R 33 All 430

See TORT I L R 43 All 688

See TRADE MARK I L R 37 All 446

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 111 CL. (g) I L R 42 Bom. 195

———— abatement of—

See PARTIES—RELIGIOUS ENDOWMENT I L R 40 Calc 323

———— Dissolution of Partnership—

See CIVIL PROCEDURE CODE 1908 s 20 I L R 45 Bom 1228

———— for mesne profit —

See CIVIL PROCEDURE CODE (ACT V OF 1908) O II RR. 2 AND 4 I L R 38 Mad 829

———— for possession of land—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O II RR 2 AND 4 I L R 38 Mad 829

———— for redemption—

See MORTGAGE I L R 36 All 26

———— for return of purchase money on dispossession—

See LIMITATION ACT (IX OF 1908) SCH I ARTS 62 AND 97 I L R 38 Mad 887

———— fresh suit on same cause—

See CIVIL PROCEDURE CODE 1908 O XVII R 2 O IX R 3 J O XXXII R 3 I L R 44 Bom 767

———— Hundi money advanced on—

See EVIDENCE ACT 1872 s 91 I L R 2 Lah 330

———— misjoinder of—

See CIVIL PROCEDURE CODE (1908) O II R 6 I L R 38 Bom 120

———— on promissory note unstamped—

See VARTHA MANANU I L R 38 Mad 660

———— on mortgage—

See CIVIL PROCEDURE CODE 1908 O II ACT 2 I L R 45 Bom 55

———— splitting up of—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O II R 2 I L R 40 Bom 351

———— splitting up of suits to recover different parts of property— I L R 44 Bom 352

———— survival against insolvent defendant—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXII R 10 I L R 39 Bom 568

———— survival of—

See PARTIES I L R 45 Calc 862

———— suits by several mortgagees—

See CIVIL PROCEDURE CODE 1908 O II R 2 I L R 45 Bom 55

———— suspension of—

See LIMITATION I L R 43 Calc 660

1 ———— Amendment of plaint —*Secretary of State for India in Council—Action in tort—Notice of suit—Civil Procedure Code (Act V of 1908) s 80—Amendment of plaint when not permissible—Leave to withdraw* Where notice of an action against the Secretary of State for India in Council required under s 80 of the Civil Procedure Code pointed to a suit based on negligence and the original plaint proceeded on that basis and it was subsequently sought to amend the plaint by setting up a cause of action based on nuisance *Held* that such amendment of the plaint could not be permitted Leave to withdraw suit granted. MCINERNY *v* THE SECRETARY OF STATE FOR INDIA (1911) I L R 38 Calc 797

2 ———— Vendor and purchaser—*Right of vendor to sue purchaser for default in paying creditors as agreed in the sale* A vendor has a cause of action against the purchaser when the latter commits default in paying the creditors of vendor as directed in the sale deed It is not necessary to maintain such a suit that the vendor should show that he has sustained damage at the date of suit *Dorasinga Thevar* v *Arunachallam Chetty I L R 23 Mad 441* followed *Dorasamy Thevan* v *Lakshmana Chetty 14 Mad L J 285* not approved ANSUR SUBBA NAYUDU *v* BATHULA BEE BEE SAHIBA (1910) I L R 34 Mad 479

3 ———— Separate causes—*Contract—Intention—Civil Procedure Code (Act V 1908) O II r 2 scope of—Presidency Small Cause Courts Act (XV of 1882) s 69—Damage suit for* A contract by indent provided for the supply of goods by two monthly shipment clauses 13 of the contract being as follows This indent it to be deemed and construed as a separate contract in respect of each item and instalment of goods and your rights and liabilities and ours respectively shall be the same as though a separate indent has been made out and signed in respect of each instalment The purchaser having failed to take delivery or pay for the goods in respect the the two shipments, the vendor brought two separate suits in the Calcutta Small Cause Court for re sale damages one in respect of each shipment *Held* that in v[illegible] intention expressed in clause 13 the[illegible] s entitled to

CAUSE OF ACTION—*concld*

bring a separate suit for damages in respect of each shipment *Vollart* v *Sabju Sahib I L R 19 Mad 304* followed *Setha Ayyar* v *Krishna Ayyangar I L R 24 Mad 96 Jashvant* v *Vithal I L R 21 Bom 267 Umed Dholchand* v *Pir Saheb Jira Miya I L R 7 Bom 134 Pramada Dasi* v *Lakhinarain Miller I L R 12 Calc 60* referred to *Anderson Wright & Co* v *Kalagarla Surjinarain I L R 12 Calc 339* and *Duncan Brothers & Co* v *Jeetmull Greedharee Lall I L R 19 Calc 372* distinguished MANDAL & Co v FAZUL LLLAHIE (1914) **I L R 41 Calc 825**

4 ———— Omission to sue for portion of claim—*Civil Procedure Code (Act V of 1908) O II r 2*—In 1908 the plaintiff sued the defendant Company for damages for Rs 1 900 for having dismantled a building situate on certain land which was stated to belong to the plaintiff in certain undivided shares. In that suit the plaintiff alleged that the defendant Company had not only dispossessed the plaintiff from his share the property by denying the plaintiff's title thereto but had wrongfully appropriated the material of the same on such demolition as aforesaid to the prejudice of the plaintiff's right—the work of dismantling having been commenced and completed in October 1908 The plaintiff in his plaint in that suit assessed the damages as for the value of the plaintiff's share in the building but asked for no relief in respect of the recover of possession of the said property The Munsi gave the plaintiff a decree for Rs 1_ 8 and the decision was ultimately affirmed on appeal In a suit brought by the plaintiff in 1914 against the same defendants for the recovery of separate possession of the said property after declaration of title thereto and after partition of the same by metes and bounds *Held* that the cause of action in the present suit is the same as that in the former suit and that the plaintiff is by O II r 2 precluded from suing for the relief which he now claims KHARDAH COMPANY LTD v DURGA CHARAN CHANDRA (1919) **I L R 46 Calc 640**

5 ———— Suit for recovery of money lent—*First suit based on promissory note—Subsequent suit for same relief based on plaintiff's account books* Defendants borrowed money from plaintiff and executed a promissory note therefor in his favour Plaintiff sued upon the promissory note but the suit was dismissed not on account of any defect in the promissory note but owing to the plaintiff's personal default and this order of dismissal became final *Held* that the plaintiff could not thereafter sue the defendant on the basis of entries in the plaintiff's books of account to recover the same money *Baij Nath Das* v *Salig Ram 16 Indian Cases 33* referred to MUNDAR BIBI v BAIJ NATH PRASAD **I L R 42 All 193**

CAUSING DEATH BY RASH OR NEGLIGENT ACT

See PENAL CODE s 304 (A)

———— *Administering of a love potion without knowledge of or inquiry into its actual contents—Penal Code (Act XLV of 1860) s 304A—Statement by accused when the only evidence in the case, and relied on by the prosecution—Evidentiary value of such statement* If a person intentionally commits an offence and consequences

CAUSING DEATH BY RASH OR NEGLIGENT ACT—*contd*

beyond his immediate purposes result the result is not to be attributed to mere rashness If knowledge cannot be imputed still the wilful offence does not take the character of rashness because its consequences have been unfortunate but acts probably or possibly involving danger to others which in themselves are not offences may be offences within s 304A and kindred sections if done without due care to guard against dangerous consequences *Reg* v *Nidamarti Nagabhushanam 7 Mad H C 119 Empress* v *Ketabdi Mundul I L R 4 Calc 764* followed Where the only evidence of an offence is a statement by the accused and it is relied on by the prosecution as evidence thereof it must be taken as a whole and nothing can be read into it which is not contained therein PIRA BEWA v EMPEROR (1912)

I L R 39 Calc 855

CAVEAT EMPTOR

See VENDOR **3 Pat L J 358**

———— doctrine of—

See SALE IN EXECUTION OF DECREE
I L R 37 Calc 67

———— not applicable to a Court sale—

See COURT SALE
I L R 36 Mad 194

CAVEAT

See PROBATE AND ADMINISTRATION ACT s 81 **I L R 34 Bom 459**

CENTRAL BUREAU REGISTER OF THUMB IMPRESSION

See SECURITY FOR GOOD BEHAVIOUR
I L R 43 Calc 1128

CENTRAL PROVINCES CIVIL COURT ACTS 1885 AND 1904

See CENTRAL PROVINCES LAND REVENUE ACT 1881 s 136 **1 Pat L J**

CENTRAL PROVINCES GOVERNMENT WARDS ACT (XVII OF 1885)

———— s 18— *Application of Act—Hindu joint family estates—Application by managing members of joint family for superintendence of estate by Court of Wards—Mitakshara law family governed by—Sanction by Chief Commissioner to mortgage of estate under charge of Court of Wards—Suit on mortgage after relinquishment by Court of Wards* The Central Provinces Government Wards Act (XVII of 1885) applies to the superintendence by the Court of Wards of the estates of Hindu joint families as well as to the separate estates of Hindus and others situate within the territories administered by the Chief Commissioner of the Central Provinces The two managing members of a Hindu joint family governed by the Mitakshara law and zamindars of the family estate of Bahera khedi in Hosangabad which had become over burdened with debt applied under the above Act to the Deputy Commissioner as the Court of Wards

CENTRAL PROVINCES GOVERNMENT WARDS ACT (XVII OF 1885)—*contd*

——— s 18—*contd*

for the district to assume superintendence of the joint family estate with a view to liquidate the debts *Held* that in making the application they acted within their power and authority as managing members and in the interest of all the members of the joint family and that inasmuch as no member had in the property any definite undivided share [*Gajadhar v Khalak Singh I L R 23 All 40 I L R 29 I A 103 and Appovier v Rama Subba Aiyan 11 Moo I A 75*] what was taken over by the Court of Wards on assuming superintendence of the estate was the property of all the members of the joint family The Chief Commissioner had power to sanction the assumption by the Court of Wards of the whole of the joint family property whether the application was made by the managing members only or by all the members of the family and the acts of the Court of Wards in dealing with the property after charge of it was assumed bound the interest of all the members The sanction of the Chief Commissioner to a mortgage of such property as required by s 18 of Act XVII of 1885 may be an implied sanction By the terms of a mortgage made in 1891 by the Court of Wards in favour of the respondents (plaintiffs) on the security of the joint family estate the mortgage money (Rs 1 0 000 way repayable with interest by annual instalments of Rs. 10 000 extending over more than 10 years and in the event of Rs 30 000 becoming overdue the Court of Wards covenanted to recover such sum by sale or otherwise of sufficient of the mortgaged property If it was found impossible to continue to manage the estate the Court of Wards was either to sell up the entire property and devote the proceeds to the liquidation of the debt, or make over the estate to the mortgagees in satisfaction of their claim In the event of the management being relinquished before the debt was liquidated in the ordinary course the Court of Wards was to liquidate the debt remaining due by the sale of such portion of the property as might be necessary The sum borrowed was applied to pay off the debts on the property *Only Rs. 10 000 was repaid up to 1893 and since* then no instalment had been paid, the Court of Wards owing to unforeseen circumstance finding its impossible to pay more, either of principal or interest and in March 1902 the Court of Wards after giving the mortgagees notice that the relinquishment by it of the management had been sanctioned, offered to make over to them the mortgaged property in satisfaction of their claim excepting the cultivating rights of *sir* land which are to be reserved for the maintenance of the ward which the mortgagees declined as not being a compliance with the terms of the mortgage deed. In June 1902 the Court of Wards relinquished the management of the estate without selling it or transferring it to the mortgagees In a suit brought in 1904 on the mortgage for sale and recovery of the amount due *Held* (affirming the decisions of the Courts in India) that on the terms of the mortgage and under the circumstances of the case the whole sum payable on the mortgage had become due on the relinquishment of the management by the Court of Wards and the usual decree for sale was made GULAB SINGH v GOKULDAS (1913) I L R 40 Calc 784

CENTRAL PROVINCES LAND REVENUE ACT XVIII OF 1881 (AMENDED BY ACT IV OF 1906)

See ACT OF STATE I L R 39 Calc 615

——— s 65A—*Gaontia, permanent rights conferred by validity of— protected Gaontia power of to surrender tenure—Adverse possession* *Held* that there is nothing in the incidents of the tenure of a protected *gaontia* as set out in s 65A of the Central Provinces Land Revenue Act 1881 which in any way suggests that a *gaontia* is not entitled to relinquish his rights *Held* further that the suit was not barred by limitation because possession could not be adverse to a person who was not himself entitled to claim present possession and so long as the *gaontia* tenure subsisted the *zamindar* was not entitled to actual possession of any part of the village Therefore the possession of the defendants did not become adverse to the plaintiff until the tenure was relinquished in 1907 A *gaontia* cannot confer on others rights of a permanent character which would be binding upon the *zamindar* after the *gaontia's* tenure ceases to exist LAL NAPAPRAJA SINGH v BHABANI TELI 1 Pat L J 293

——— ss 65A 132 and 152—

See GAONTIA TENURE 3 Pat L J 229

——— s 78—*Central Provinces Land Revenue Act (XVIII of 1881) ss 78 82 83 1 0 (b) 152 s b s (b) cl (12)—S 69 sub s (4) contrasted—Record of rights entry in—Suit to correct as provided in s 83 not instituted—Entry if becomes final and conclusive—Title suit by party affected if maintainable — Presumption of correctness until the contrary is shown* When an entry has been made in the record of rights as to any matter referred to in s 78 of the Central Provinces Land Revenue Act (XVIII of 1881) such entry is presumed under s 82 to be correct until the contrary is shown and under s 83 a person aggrieved by the entry may institute a suit in the Civil Court to have such entry cancelled or amended but it does not follow that the contrary referred to in s 82 can be proved in such a suit only and not otherwise Cl (12) of sub s (b) of s 152 of the Act means only that the entry cannot be corrected except by the Revenue Authorities but it does not preclude a suit by the person affected by the entry to establish his title in the Civil Court The remedy provided by s 83 of the Act is cumulative and not exclusive *Held* that the present suit by the plaintiff in which he sought relief *inter alia* on the basis of his alleged title as occupancy tenant was maintainable although the defendant's name had been entered as the occupancy tenant in the record of right and the plaintiff had not instituted a suit under s 83 for the cancellation or amendment of the entry DIBAKAR BISI v CHATTO BAG (1908) 14 C W N 686

——— s 83 72 68—*Suit to correct an entry in record of rights if a suit under s 83—Limitation—Limitation Act (IX of 1908) Art 120* In a record of rights prepared under Chap VI of the Central Provinces Land Revenue Act the appellants were described as *shikmi gaontias* or permanent tenants under plaintiffs The plaintiffs sued to have the entry amended so that the appellants might be described as mortgagees and not as permanent tenants *Held*, that the suit was within s. 83 of the Act and a suit under that section is not governed by Art 14 but by

CAUSE OF ACTION—*concld*

bring a separate suit for damages in respect of each shipment *Volkart v Sahju Saheb, I L R 19 Mad 301* followed *Sesha Ayyar v Krishna Ayyangar I L R 24 Mad 96, Jashvant v Vithal I L R 21 Bom 267, Umed Dholchand v Pir Saheb Jira Miya I L R 7 Bom 134 Pramada Das v Lakhinarain Mitter I L R 12 Calc 60* referred to *Anderson Wright & Co v Kalagarla Surynarain I L R 12 Calc 339* and *Duncan Brothers & Co v Jeetmull Greedharee Lall I L R 19 Calc 372* distinguished MANDAL & Co v FAZUL ELLAHIE (1914) **I L R 41 Calc 825**

4 ———— **Omission to sue for portion of claim**—*Civil Procedure Code (Act V of 1908) O II r 2*—In 1908 the plaintiff sued the defendant Company for damages for Rs 1 900 for having dismantled a building situate on certain land which was stated to belong to the plaintiff in certain undivided shares In that suit the plaintiff alleged that the defendant Company had not only dispossessed the plaintiff from his share the property by denying the plaintiff's title thereto but had wrongfully appropriated the material of the same on such demolition as aforesaid to the prejudice of the plaintiff's right—the work of dismantling having been commenced and completed in October 1908 The plaintiff in his plaint in that suit assessed the damages as for the value of the plaintiff's share in the building but asked for no relief in respect of the recovery of possession of the said property The Munsif gave the plaintiff a decree for Rs 1,58 and the decision was ultimately affirmed on appeal In a suit brought by the plaintiff in 1914 against the same defendants for the recovery of separate possession of the said property after declaration of title thereto and after partition of the same by metes and bounds *Held* that the cause of action in the present suit is the same as that in the former suit and that the plaintiff is by O II r 2 precluded from suing for the relief which he now claims KHARDAH COMPANY LTD v DURGA CHARAN CHANDRA (1919) **I L R 46 Calc 640**

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CAVEAT

See PROBATE AND ADMINISTRATION ACT s. 81 **I L R 34 Bom 459**

CENTRAL BUREAU REGISTER OF THUMB IMPRESSION

See SECURITY FOR GOOD BEHAVIOUR **I L R 43 Calc 1128**

CENTRAL PROVINCES CIVIL COURT ACTS 1885 AND 1904

See CENTRAL PROVINCES LAND REVENUE ACT 1881 s 136 **1 Pat L J**

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CENTRAL PROVINCES GOVERNMENT WARDS ACT (XVII OF 1885)—*contd*

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CENTRAL PROVINCES LAND REVENUE ACT XVIII OF 1881 (AMENDED BY ACT IV OF 1906)

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——— ss 65A 132 and 152—

See GAONTIA TENURE **3 Pat L J 229**

——— s 78—*Central Provinces Land Revenue Act (XVIII of 1881) ss 78 83 83 1 0 (b) 15 sub s (b) cl (12)—S 69 sub s (4) contrasted—Record of rights entry in—Suit to correct as provided in s not instituted—Entry if becomes final and conclusive—Civil suits by party affected if maintainable— Presumption of correctness until the contrary is shown* When an entry has been made in the record of rights as to any matter referred to in s 78 of the Central Provinces Land Revenue Act (XVIII of 1881) such entry is presumed under s 82 to be correct until the contrary is shown and under s 83 a person aggrieved by the entry may institute a suit in the Civil Court to have such entry cancelled or amended but it does not follow that the contrary referred to in s 8 can be proved in such a suit only and not otherwise Cl (12) of sub s (b) of s 152 of the Act means only that the entry cannot be corrected except by the Revenue Authorities but it does not preclude a suit by the person affected by the entry to establish his title in the Civil Court The remedy provided by s 83 of the Act is cumulative and not exclusive *Held* that the present suit by the plaintiff in which he sought relief *inter alia* on the basis of his alleged title as occupancy tenant was maintainable although the defendant's name had been entered as the occupancy tenant in the record of right and the plaintiff had not instituted a suit under s 83 for the cancellation or amendment of the entry DIBAKAR BISI *v* CHATTO BAG (1908) **14 C W N 686**

——— ss 83 72 68—*Suit to correct an entry in record-of rights if a suit under s 8 —Limitation—Limitation Act (IX of 1908) Art 1 0* In a record of rights prepared under Chap VI of the Central Provinces Land Revenue Act the appellants were described as *shikmi gaontias* or permanent tenants under plaintiffs. The plaintiffs sued to have the entry amended so that the appellants might be described as mortgagees and not as permanent tenants *Held* that the suit was within s 83 of the Act and a suit under that section is not governed by Art 14 but by

CENTRAL PROVINCES LAND REVENUE ACT XVIII OF 1881 (AMENDED BY ACT IV OF 1906)—contd

——— s 83—contd

Art 120 of the Limitation Act Where the defendants having been recorded as *shikmi gaontias* the plaintiffs *gaontias* sued for a declaration that they were in possession as mortgagees only *Held* that the Settlement Officer acted either under s 68 or under s 72 of the Act so that the Court had jurisdiction to entertain the suit under s 83 NALACHAN BADHAI v PACHUNATH BABU (1915) 19 C W N 1363

——— s 112 1?8—

See LAMBARDAR I L R ?? Calc 664

——— 136 (g & h — *Appeal if lies to High Court against decision of Commissioner on appeal—Deputy Commissioner of a District Court* There is no appeal to the Commissioner against the decision of a Deputy Commissioner passed under s 136C of the C P Land Revenue Act and no appeal lies to the High Court against an order of a Commissioner passed on appeal against such decision of a Deputy Commissioner GAJRAJ DAS v KRITTA ?? DAS (191?) 17 C W N 155

——— ss 136 (I & h) 22—*Partition application for—applicants title admitted—duty of court to grant partition—Appeal— right of the parties* If the title of an applicant for partition is admitted the court is bound to partition the land unless an objection has been made by a co sharer in possession under s 136I and the objection has been upheld by the court If no such objection has been made and the court declines to partition the land the decision is appealable to the High Court ANANDA CHANDRA PATI v SADANAND PATI 5 Pat L J 140

——— s 136 (g)—*Order passed by Deputy Commissioner appeal from* In the Sambalpur District the District Judge has taken the place of the Deputy Commissioner as the principal Civil Court of original jurisdiction under the Central Provinces Civil Courts Act 1885 and therefore an order passed by a Deputy Commissioner under s 136 G of the Central Provinces Land Revenue Act 1881 must be deemed to be a decision of a District Judge and is appealable to the High Court not to the District Court PADMAN LOCHAN MISSIR v KRISHNA CHAURA MISRA 1 Pat L J ?60

——— ss 136 H and 22 cl. (b) (as amended)

See APPEAL I L R ?8 Calc 91

CENTRAL PROVINCES TENANCY ACT XI OF 1898 (AMENDED BY ACT I OF 1920)

——— *Trespass suit for whether Act applies to* The provisions of the Central Provinces Tenancy Act 1898 do not apply to a suit based on trespass which is cognizable by the Civil Courts *Qu —* Whether the provisions of ss 46 and 47 of the Act would apply in a case where a mortgagee forecloses and takes possession of a tenancy under a decree in a foreclosure mortgage suit CHAMRU SATPASTI v DIRKA BABU 1 Pat L J 525

——— ss 4 (a) and 69—Bhogra *land—lease by landlord—suit for ejectment* Where a suit is brought to eject a tenant of *bhogra* land there is

CENTRAL PROVINCES TENANCY ACT XI OF 1898 (AMENDED BY ACT I OF 1920) —contd

——— s 4 (a)—contd

nothing in s 69 of the Central Provinces Tenancy Act 1898 to debar the defendant from setting up a lease granted by the proprietor himself. ADITYA PRASAD v PARMANANDA PATEL 4 Pat L J 505

——— ss 35 36 46 47 and 95— *Otherwise transfer —Surrender of tenancy by occupancy raiyat to some of the co-sharer landlords—remaining co-sharer put in possession of holding by Revenue Officer—Suit for recovery of possession by the other co-sharers and their lessee —Ejectment suit for whether maintainable by lambardar* A surrender is not a transfer within the meaning of s 46 of the Central Provinces Tenancy Act 1898 The words otherwise transfer in s 46 (3) are limited to transactions of a similar nature to those enumerated in the first part of the sub-section namely transfers by way of sale gift mortgage or sub lease The Act does not make any provision for recovery of possession by a co sharer landlord of land which has been surrendered to the other co sharers by a tenant A suit for ejectment can be brought only by the entire body of landlord. If a *lambardar* co sharer landlord seeks to maintain such a suit he can do so only as the agent of the whole body . *The institution of a suit for* ejectment against a purchaser is not one of the duties which a *lambardar* has to perform as the *representative of the landlords A lambardar has* no power to eject trespassers or tenants TRILOCHAN PANDA v DINABANDHU PANDA 3 Pat L J 88

——— s 45 sub ss (1) (6)—*Construction of Act—Mortgages made before Act came into force —Effect of Conciliation Award made after coming into force of Act—Foundation of origin of rights of parties was Award—Proceedings in suit not in pursuance of mortgages—Transfer of rights to occupy sir land by proprietor (mortgagor)* On the construction of s 45 of the Central Provinces Tenancy Act (XI of 1898) sub s *(1)* and *(6)* — *Held* in this case that a Conciliation Award dated 28th February 1905 was a fresh contract or origin of rights between the parties which although it came into existence in consequence of registered mortgages of 1881 and 1884 and transactions under them was both for the purposes of enforcement and for the purpose of the application of s 45 sub s *(6)* the transaction between the parties which was the foundation of their rights The transfer made or decreed by the proceedings in suit could not therefore be said to be in pursuance of the mortgage As documents expressly providing for the transfer of the right to occupy *sir* land as a proprietor within sub s *(6)* the mortgages would have been saved from the *operation* of sub s *(1)* But that sub section was applicable in this case and therefore notwithstanding the terms of the award which by virtue of the agreement of reference became the agreement of the parties the mortgagor could not so transfer his rights to occupy *sir* land as to divest himself of his right as an occupancy tenant under the Act XI of 1898 as amended by Act XXI of 1899 NARAYAN GANESH CHATATE v BALIRAM (1918) I L R 46 Calc 76
L R 45 I A 179

CENTRAL PROVINCES TENANCY ACT XI OF 1898 (AMENDED BY ACT I OF 1920) —*concld*

———— s 46—

See HINDU LAW (JOINT FAMILY)
4 Pat L J 354

———— ss 46 47 95—*Transfer* *by an occupancy tenant—S 47 the only provision for avoiding such transfer—Jurisdiction of Civil Court—Effect of* s 95 Where an occupancy tenant governed by the Central Provinces Tenancy Act sold half of the share of his holding to the defendant and subsequently mortgaged the other half to another person with possession and the plaintiff landlord applied to the Revenue Officer under s. 47 of the Act for possession of the land and was given a decree in respect of the mortgaged moiety but as to the moiety which had been sold it was held that the plaintiff's application was out of time having been made more than two years after the date and the plaintiff subsequently brought a suit in the Civil Court for precisely the same relief as to the moiety which was sold *Held* that having lost his case under s 47 the plaintiff could not again bring a suit in a Civil Court for the same relief S 47 enacts the only method by which a transfer made by an occupancy tenant in contravention of s. 46 of the Act may be avoided *Iklaram Sing* v *Mahrony Falida 7 C L J 499* followed. Under s 95 the jurisdiction of the Civil Court is excepted in the case of ss 46 and 47 BAIKANTHA NATH MISRA v LABOO NAG (1912) 17 C W N 621

CEREMONIES

See BURMESE LAW—MARRIAGE
I L R 39 Calc 492

See MAHOMEDAN LAW—PRE EMPTION
I L R 39 Calc 915

CERTIFICATE

See GUJRAT TALUKDARS ACT (BOM ACT VI OF 1888) s 29 E
I L R 43 Bom 44

See LIMITATION ACT (IX OF 1908) SCH ART 182 CL. (5) I L R 37 Bom 559

CERTIFICATE OFFICER

See CRIMINAL PROCEDURE CODE 1908 s 475 4 Pat L J 475

CERTIFICATE OF COLLECTOR

See PENSIONS (XXIII OF 1871)—

s 4 I L R 37 Bom 91

ss 6 8 11 I L R 31 Bom 154

CERTIFICATE OF INCORPORATION

See COMPANIES ACT (VI OF 1882) ss 6 40 41 I L R 40 Calc 1

CERTIFICATE OF MARRIAGE

See PARSI MARRIAGE AND DIVORCE ACT 1865 I L R 45 Bom 146

CERTIFICATE OF PAYMENT

See EXECUTION OF DECREE
I L R 43 Calc 207

CERTIFICATE OF PURCHASE

See FORGERY I L R 43 Calc 421

CERTIFICATE OF REGISTRY

See COASTING VESSELS ACT ss 4 7 AND 13 I L R 38 Bom 111

CERTIFICATE OF SALE

———— *Revenue Court jurisdiction of—Public Demands Recovery Act (Beng I of 1895) ss 10 15 17 21 26—Sale by Collector while deposit in treasury—Sale by Revenue Authorities without jurisdiction—Validity of sale against bona fide purchaser without notice—Whether civil suit lies to set aside sale—Speculative Purchaser —Hardship* A certificate which has been properly made for arrears actually due can be cancelled or modified only on the ground that the amount stated was either never due or if due had been paid before the certificate was made and ss 12 and 15 of the Public Demands Recovery Act do not apply when the sale is held without jurisdiction the amount due under the certificate having been paid before the sale When the sale was held by the Revenue Authorities without jurisdiction it cannot be treated as one made under the provisions of the Public Demands Recovery Act and may consequently be challenged by a civil suit without recourse to procedure provided by the Act *Bal Kishen Das* v *Simpson I L R 25 Calc 833 Baijnath Sahu* v *Lala Sital Prasad 2 B L R F B 1 10 W R F B 66* and *Harkhoo Singh* v *Bunsidhur Singh I L R 25 Calc 876* followed Where a sale has taken place on the basis of a satisfied judgment the satisfaction of which has been certified to the Court the sale is void and ineffectual to pass any title even to a *bona fide* purchaser for value without notice A Certificate Officer has authority to sell only so long as the certificate remains unpaid and a duty is cast upon him by law to enter satisfaction as soon as payment has been made *Reua Mahton* v *Ram Kishen Singh I L R 14 Calc 18 L R 13 I A 106 Mothura Mohun* v *Akhoy Kumar I L R 15 Calc 557* and *Yellappa* v *Ramchandra I L R 21 Bom 463* distinguished No case of hardship arises where a person with eyes open makes a speculative purchase of a valuable estate for a nominal price *Baijnath* v *Ramgut 5 C L J 667* affirmed by the Judicial Committee *I L R 23 Calc 775* followed. JANAKDHARI LAL v GOSAIN LAL BHAYA GAYWAL (1909) I L R 37 Calc 107

CERTIFICATE OF SUCCESSION

See CIVIL PROCEDURE CODE (1908) s 109 I L R 38 All 188

See SUCCESSION CERTIFICATE

See SUCCESSION CERTIFICATE ACT 1889—

s 4 I L R 36 All 21 381
I L R 43 All 341

ss 7 AND 9 I L R 40 All 81

ss 16 AND 18 I L R 36 All 423

ss 18 19 I L R 42 All 347

CERTIFICATE TO COLLECT DEBTS

See SUCCESSION CERTIFICATE ACT (VII OF 1889) ss 4 AND 7
I L R 32 All 335

CHARGE—*contd*

S 250 I L R 37 Bom 376

See DACOITY I L R 41 Calc 350

See DEBT I L R 42 Calc 849

See INTEREST I L R 40 Calc 514

See LIMITATION ACT (IX OF 1908) SCH I ART 132 I L R 35 All 185

See MORTGAGE

See PENAL CODE—

Ss 361 AND 366 4 Pat L J 74

S 409 I L R 33 All 56

See RAILWAY RECEIPT I L R 38 Mad. 664

See RIOTING I L R 39 Calc 781

See SUMMARY TRIAL 16 C W N 696

See TRANSFER OF PROPERTY ACT (IV OF 1882)—

S 59 I L R 38 All 461

Ss 58 AND 100 I L R 36 All 201

Ss 59 AND 100 I L R 35 All 164

S 82 I L R 37 All 101

Ss 118 TO 120 54 AND 55 CL. 6 (*b*) I L R 38 Mad 519

——— absence of—

See CRIMINAL TRESPASS I L R 41 Calc 662

——— cancellation of—

See JURISDICTION OF MAGISTRATE I L R 39 Calc 885

——— extinguishment of—

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 101 I L R 38 Bom 369

——— misjoinder of—

See CRIMINAL PROCEDURE CODE—

Ss 233 236 239 I L R 32 All 219

Ss 234 235 537 I L R 32 All 67

S 235 15 C W N 732

——— of money on immovable property—

See LIMITATION ACT 1908 SCH I ART 132 25 C W N 57

——— Mortgage subrogation—

See LIMITATION ACT 1908 SCH I ART 120 I L R 45 Bom 597

——— necessity of—

See SUMMARY TRIAL I L R 41 Calc 743

I CRIMINAL

II ON PROPERTY

I CRIMINAL.

1 ——— Of conspiracy—*Persons known and unknown* Where the accused were charged with conspiracy with persons known and unknown —*Held* that if the persons were known they should be named in the charge EMPEROR *v* LALIT MOHAN CHUCKERBUTTY AND OTHERS (1911) I L R 38 Calc 559

CHARGE—*contd*

I CRIMINAL—*contd*

2 ——— Omission to frame—*Rioting—Causing hurt—Conviction for an offence other than the one charged with—Error of law— Error omission or irregularity —Criminal Procedure Code (V of 1898) ss 535 537 (a)—Practice* Ss 535 and 537 (*a*) of the Criminal Procedure do not apply to a case where the accused is charged with one offence and convicted of another—totally different to the one he was charged with S 233 is mandatory for every distinct offence of which any person is accused there shall be a separate charge, and every charge shall be tried separately except in the cases mentioned in ss 234 235 236 and 239 of the Code S 236 refers to a series of acts which are of such a nature that it is doubtful which of the several offences the facts constitute To convict an accused of murder on a charge of rioting or to commit him to the Sessions without framing a charge would be not merely an irregularity but an error of law vitiating the trial SITA AHIR *v* EMPEROR (1912) I. L R 40 Calc 168

3 ——— Misjoinder of—*Joint trial of charges of criminal breach of trust and falsification of accounts committed in separate transactions—Criminal Procedure Code (Act V of 1898) ss 235 234 and 235—Penal Code (Act XLV of 1860) ss 408 and 477A* A charge of criminal breach of trust of a sum of money can be tried under s 235 (*1*) of the Criminal Procedure Code at the same time with one of falsification of accounts made to conceal the act of misappropriation as part of the same transaction and two unconnected charges of falsification may be tried at one trial under s 234 but a charge of criminal breach of trust cannot be legally tried together with one of falsification relating to a distinct act of misappropriation committed in a separate transaction *Kasi Viswanathan* v *Emperor I L R 30 Mad 328* and *Subrahmania Ayyar* v *King Emperor I L R 25 Mad 61 L R 28 I A 257* followed EMPEROR *v* JIBAN KRISTO BAGCHI (1912) I L R 40 Calc 318

4 ——— *Misjoinder—Illegality of trial—Criminal Procedure Code (Act V of 1898) s 233* A single charge relating to several distinct offences is illegal Under s 233 of the Criminal Procedure Code there should be a separate head of charge for each such offence A charge under s 409 of the Penal Code of criminal breach of trust in respect of a total sum of 10 annas 6 pies to wit a sum of 4 annas 6 pies collected from *A* between certain dates in one year and a sum of 6 annas collected from *B* between other dates in the same year is bad for misjoinder and a trial held on such a charge is illegal *Subrahmania Ayyar* v *King Emperor I L R 25 Mad 61* followed ASGAR ALI BISWAS *v* EMPEROR (1913) I L R 40 Calc 846

5 ——— *Prejudice—Criminal Procedure Code (Act V of 1898) ss 233 234 and 537* A single head of charge relating to three offences of the same kind is defective for duplicity and not misjoinder but a trial under such a charge is not bad unless the accused has been prejudiced thereby *Subrahmania Ayyar* v *King Emperor I L R 25 Mad 61* referred to MUSAI SINGH *v* EMPEROR (1913) I L R 41 Calc 66

6 ——— *Misjoinder—Joinder of three charges under s 409 with three under s 477A of the Penal Code—Legality of trial—*

CHARGE—*contd*

I CRIMINAL—*contd*

Criminal Procedure Code (Act V of 1898) ss ... ( ) 233 234 S 2... ( ) of the Criminal Procedure Code refers to cases of criminal breach of trust or dishonest misappropriation of money and cannot be applied to a case under s. 477A of the Penal Code. *Queen Empress v Mati Lal Lahiri I L R 25 Calc 559* referred to. S 233 of the Code must be strictly followed save where the law itself provides an exception. A joinder of three charges under s. 409 with three under s 477A of the Penal Code relating to different transactions is not warranted by any of the exceptions provided in the Code and is illegal. Such a misjoinder is absolutely fatal to the trial. *Subrahmania Ayyar v Emperor I L R 30 Mad 328* and *Subrahmania Ayyar v King Emperor I L R 25 Mad 61* followed. A series of falsifications of accounts made to cover a single act of defalcation may be laid in one charge under s 477A of the Penal Code and does not constitute distinct offences merely by reason of a plurality of false entries intended to cover the same defalcation. PARAN BEHARI DAS v EMPEROR (1913) I L R 41 Calc 722

7 ———————— *Misjoinder—Inherent power of Criminal Courts* Per Mookerjee J Criminal Courts have equally with Civil Courts, inherent power to mould their procedure, subject to statutory provisions to enable them to discharge their functions as Courts of justice. A Criminal Court has power to permit the prosecution to withdraw charges the joinder of which is objected to as illegal. PULIN BEHARI DAS v KING EMPEROR (1911) 16 C W N 1105

8 ———————— *Misjoinder of persons and offences—Charging several persons individually by similar false representations at the same time and place and in pursuance of the same conspiracy—False representation by the accused to each person and obtaining payments of separate sums of money from each—One head of charge relating to several offences—Joint trial of the accused—Criminal Procedure Code (Act V of 1898)* ss 233 235 239 Where the accused at a time in concert made separate representations to each of two sets of persons present at the same time and place and induced each to pay individually a larger sum of money than was actually due from him and were thereby tried together on charges of cheating each relating to one of these under s 420 of the Penal Code *Held* that there should have been as many charges as there were persons cheated, but that the defect had occasioned no failure of justice. *Chand Mahomed Sirkar v Chitru Mandal 10 C W N 53*, *Johan Subramaniam v King Emperor 10 C W N 520*, *Sheikh Chandra Mullick v Emperor 13 C W N 195*, *Tulsi Bhai Das v Emperor 6 C L J 751*, *Ajgar Ali Biswas v Emperor I L R 40 Calc 846*, *Ram Sarup Singh v King Emperor 19 C W N 97* referred to. *Held* also that as the misrepresentation was in each case the same and the offences were all committed at the same time and place and in pursuance of the same conspiracy the transaction was the same and the joint trial legal under ss. 235 and 239 of the Code. *Subrahmania Ayyar v King Emperor I L R 25 Mad 61* distinguished. KAILASH CHANDRA PAL v EMPEROR (1918) I L R 46 Calc 712

CHARGE—*contd*

I CRIMINAL—*contd*

8 (a) ———————— *Held* that s 234 of the Criminal Procedure Code does not apply to a single charge under s 401 of the Penal Code of belonging to a gang for habitually committing theft. The charge relates to one offence only though based on evidence of several offences of theft. *Quære* whether a previous conviction may be used to prove association. KADAM ALI v EMPEROR I L R 47 Calc 154

9 ———————— Form and Proof of—An accused is entitled to know with certainty and accuracy the exact nature of the charge brought against him. But where the accused fully understood the nature of the offence with which they were charged they had clearly not been prejudiced by the omission of the words "unlawfully and maliciously" and "in British India" occurring in s 4 (b) of Act VI of 1908. Such an omission can be cured by the verdict. *The Queen v Mansfield [1895] 1 Q B 758* referred to. Where the illegal act charged under s 120 B is the unlawful and malicious possession of explosive substances within the meaning of s 4 of the Explosive Substances Act 1908 it is not essential to specify in the charge the explosive substance which the accused have conspired to have in their possession or under their control. A person may be guilty of criminal conspiracy even though the illegal act which he has agreed to do has not been done for the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means. *Reg v Hibbert 13 Cox 82*, *Quinn v Leathem [1901] A C 495*, *The Queen v Most 7 Q B D 244 14 Cox 583* and *O Connell v The Queen 11 Cl & F 155 1 Cox 413 5 St Tr N S 1* referred to. The indictment in all cases of conspiracy must in the first place charge the conspiracy but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed. *The King v Gill 2 B & Ald 204*, *The Queen v Kenrick 5 Q B 49*, *The Queen v Blake 6 Q B 126*, *Sydserff v The Queen 11 Q B 245*, *The Queen v Gompertz 9 Q B 824 2 Cox 145*, *Aspinall v The Queen 2 Q B D 48*, *Taylor v The Queen [1895] 1 Q B 25*, *R v Parker 3 Q B 292* referred to. It is a wise precaution that the Court should adhere to the language of the statute as far as practicable when a charge is drawn up as nothing is gained by a paraphrase while opportunity is afforded to the accused to take exception to the form of the charge. The accused cannot be convicted on a conspiracy charge under s. 120 B Indian Penal Code unless the prosecution establishes that the accused were members of the conspiracy after the 26th March 1913 when Act VIII of 1913 became law. A comprehensive formula of universal application cannot be framed regarding the question whether two or more acts constitute the *same transaction* the circumstances which must bear on its determination in each individual case are proximity of time, unity or proximity of place continuity of action and community of purpose or design. If *A B* and *C* conspire to make, or have in their possession or under their control, an explosive substance within the meaning of the Explosive Substances Act and in pursuance of

CHARGE—*contd*

I CRIMINAL—*contd*

such conspiracy *A* makes or has in his possession or under his control an explosive substance they may if the Court thinks fit be charged and tried together under s 120 B Indian Penal Code and s 4 (*b*) of Act VI of 1908 If all the *known* co conspirators named in the charge are not placed on their trial the trial of some (separately) without the others is not vitiated *Emperor* v *Lalit Mohan Chuckerbutty I L R 38 Calc 559 15 C W N 593* explained If the accused have committed an offence under s 4 (*b*) of the Explosive Substances Act 1908 in pursuance of a criminal conspiracy it is open to the Crown to prosecute them for such offences irrespective of the question of the ultimate design of the alleged conspiracy coming under s 121A Indian Penal Code (which charge requires previous sanction under s 196 Criminal Procedure Code) In order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt *R* v *Hodge* 2 *Lewin C C* [illegible] referred to The presumption of innocence (in criminal cases) [illegible] be no more than this that if the commission of a crime is directly in issue in any proceeding it must be proved beyond reasonable doubt The whole doctrine when drawn out is *first* that a person who is charged with a crime must be *proved* guilty that according to the ordinary rule of procedure and of legal reasoning *presumitur pro reo* [illegible] so that the accused stands innocent until he is proved guilty and *secondly* that this proof of guilt must displace all reasonable doubt In a charge of conspiracy general evidence of the existence of the conspiracy may first be given before particular facts are proved to show that one or more of the accused took part in it *R* v *Sidney 9 St Tr 817 Queen Caroline's Case 2 B & B 284 1 St Tr N S 1 48 R* v *Hunt 3 B & Ald 566* followed Under the law in England facts *similar but not part of the same transaction as the* main fact are not in general admissible to prove either the occurrence of the main fact or the identity of its author except (after evidence *aliunde* on these points has been given) to show the state of mind of the parties with regard to such fact *i e* knowledge of its nature or his intent In general whenever it is necessary to rebut even by anticipation the defence of accident mistake or other innocent condition of mind evidence that the accused has been concerned in a systematic course of conduct of the same specific kind as and proximate in point of time to that in question may be given *R* v *Holt (1860) Bell 280 8 Cox 411* to the contrary is no longer authority *R* v *Smith 0 Cox 804 92 L T 208* and *Emperor* v *Debendra Prosad I L R 36 Calc 573 9 C L J 610* referred to S 4 of Act VI of 1908 substantially reproduces the provisions of s 3 of 46 and 47 Vict Chap 3 (Explosive Substances Act 1883) consequently the expression *unlawfully and maliciously* may be interpreted in the sense in which it is familiarly used in the criminal law of England *Unlawfully* thus signifies not for a lawful object and *maliciously* signifies intentionally and without justification or excuse or claim of right *The Queen* v *Clemens [1898] 1 Q B 556 19 Cox 18 Miles* v *Hutchins [1903] 2 K B 714 20 Cox 555* referred to *Reg* v *Ward 1 Cox* *123 1 C C R 356 McPherson* v *Daniels 10 B & C 272 Bromage* v *Prosser 4 B & C 247 Clark* v *Molyneux 3 Q B D 237 Allen* v *Flood [1898] A C 1 Johnson* v *Emerson L R 6 Ex Ch 373 R* v *Pembleton 2 C C R 119 12 Cox 607 Mogul Steamship Co* v *McGregor [1892] A C 25 23 Q B D 598* followed The term explosive substance as used in s 4 (*b*) of Act VI of 1908 includes *any part* of an apparatus machine or implement intended to be used or adapted for causing or aiding in causing any explosive substance and by means thereof does not mean by means thereof *alone* *R* v *Charles* [illegible] *499* referred to The inference of fact may legitimately be drawn that the explosive substances made and possessed by Sasanka were intended for *use in British India* It is the duty of the prosecution not *so much to secure a conviction* as to place all the available evidence in the case fairly and fully before the tribunal by which alone the guilt or innocence of the accused is to be determined *Ram Ranjan Roy* v *King Emperor I L R 42 Calc* [illegible] *19 C W N* [illegible] following *Regina* v *Holden 8 C & P 606* referred to The proof of the case against the prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner but upon the positive affirmative evidence of his guilt that is given by the Crown But if there is a certain appearance made out against a party if he is involved by the evidence in a state of considerable suspicion he is called upon for his own sake and his own safety to state and to bring forward the circumstances whatever they may be which might reconcile such suspicious appearances with perfect innocence *Regina* v *Frost 4 St Tr N S 85* followed While it is not necessary to prove manual possession of the explosive substance by the accused it must be proved that it was in his power or control *possession* to be punishable must also be possession with knowledge and assent *The mere fact that the other* accused were in the room does not show they were in possession of all or any of the things contained therein When the evidence at the disposal of the prosecution is insufficient to secure a conviction for the crime committed it is inexpedient even though it may be lawful to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime *Reg* v *Boulton 12 Cox 87* and *Emperor* v *Lalit Mohan I L R 38 Calc 559 15 C W N 593* referred to A man's guilt is to be established by proof of the facts alleged and not by proof of his character such evidence might create a prejudice but not lead a step towards substantiation of guilt In India as in England the accused are entitled in cross examination to elicit facts in support of their defence from the prosecution witnesses wholly unconnected with the examination in chief In the course of cross examination of this character the defence are entitled in view of the generality of s 143 of the Indian Evidence Act to ask leading questions. Under s 154 the Court has the discretion to permit the prosecution to test by way of cross examination the veracity of their own witnesses with regard to the (unconnected) matters elicited by the defence in cross examination The defence is not entitled to elicit from individual prosecution witnesses whether he was a spy or an

CHARGE—*concld*

I —CRIMINAL—*concld*

informer or to discover from police officials the names of persons from whom they had received information but a detective cannot refuse on grounds of public policy to answer a question as to where he was secreted *P v Bolson 32 St Tr 1 P v Richardson 3 Fos & Fin 693 A G v Bryant 15 M & W 169 1 F P 610 Marks v Beyfus 25 Q B D 494 Webb v Catchlove 3 T L R 159* referred to In strictly carrying out the provisions of s 60 (1) of the Criminal Procedure Code by the daily reading over in open Court of the deposition of each witness the Court does not lay itself open to criticism though that procedure should occupy considerable time *Mohendra Nath v Emperor 1 C W N 843 Jyotish Chandra Mukerjee v Emperor I L R 6 Calc 955* and *Kamatchinathan v Emperor I L R 28 Mad 308* referred to Though written statements may be accepted from the accused in accordance with the universal practice in the Courts under the Calcutta High Court they do not take the place of evidence nor of such examination of the accused as is contemplated by s. 342 of the Code of Criminal Procedure *Emperor v Ansuia (1903) All W N 1* dissented from AMRITA LAL HAZRA v EMPEROR (1915) I L R 42 Calc 957

II —ON PROPERTY

———— Court sale of property subject to a charge—

See CIVIL PROCEDURE CODE 1908 O XXI r 60 I L R 44 Bom 860

———— distinction between charged mortgage—

See RATES AND TAXES I L R 42 Calc 625

———— New charge on old security—whether a new mortgage—

See REGISTRATION ACT s — I L R 2 Lah 202

1 ———— **Fixed deposit**—*Competence of depositor to charge money on fixed deposit in a bank as security for a loan* It is competent to a person who has money with a banking company on fixed deposit with the assent of such company if not without it to assign to any person whom he pleases either absolutely or by way of a charge the debt due or about to become due to him from the banking company *Brandt's Sons & Co v Dunlop Rubber Co [1905] A C 454* referred to *Agha Mahomed Jaffar Lindanim v Koolsom Beebee I L R 25 Calc 9* distinguished GUR PRASAD v THE GORAKHPUR BANK LIMITED (1914) I L R 36 All 507

2 ———— **Annuity**—*Charge on movable as well as immovable property—Sale of property charged in separate lot—Notice of charge to purchaser* Movable property at all events movable property which is not perishable or necessarily consumed by use may be effectively charged with the payment of an annuity and may be sold subject to the charge even in execution of a decree for arrears of the annuity *Sahib Mirza v Umda Khanam I L R 19 Calc 444* followed Where however an annuitant in execution of a decree which he had obtained for arrears of an annuity attached and sold part of such movable property without notice of the charge and the nature of the property was such that it was of no particular value apart from other property which was sold separately *Held* that such part must be taken to have been sold free of the charge GANESH v BABU RAM (1914) I L R 37 All 72

3 ———— **Government revenue due on land**—*Common Burden—Payment by one sharer—Right to claim charge on other shares—No right to a personal decree* When several shares in the same land or when several lands are liable under a common burden (such as Government revenue as in the present case) the discharge of the whole burden by the owner of a distinct share or a distinct land would give him a charge on the remaining shares or lands for the proportionate sums they were equitably liable But the common burden being only on the land or lands and not recoverable from the sharers personally there can only be a charge and no personal decree *Raja of Vizianagram v Raja Setrucherla Somasekharara I L R 26 Mad 686* followed *Alayakammal v Subbaraya Gounden I L R 28 Mad 493* and *Parbhu Narain Singh v Babu Beni Singh 14 C W N 361* referred to *Subramania Chetty v Mahalinghasami Sivan I L R 33 Mad 41* distinguished AMMAN PARIYALI v PAKRAN HAJI (1913) I L R 36 Mad 493

4 ———— **What creates**—*Agreement to give a lien or charge on monies for work done operates as a charge* NAVAJEE v THE ADMINISTRATOR GENERAL MADRAS I L R 38 Mad 500

CHARGE ON HUSBAND S PROPERTY

See JEWISH LAW I L R 38 Calc 708

CHARGE TO JURY

See JURY TRIAL BY I L R 40 Calc 367

See PRACTICE I L R 40 Bom 220

See PRIVY COUNCIL PRACTICE OF I L R 41 Calc 1023

———————— *Duty of judge heads of charge meaning of* The object of the heads of charge is to inform the High Court should occasion arise of what direction the Judge gave in law to the jury and the nature of his summing up of the evidence not only for the prosecution but also for the defence The heads of charge are not intended to be an exhaustive detail of every particular which the Judge may have addressed to the jury The Judge is not bound to address himself in every particular and in every detail to every suggestion put forward by the defence It is the duty of the Judge fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and of the defence respectively In doing so he is entitled to take into consideration the speeches made upon both sides If in substance it can be seen from the frame of the heads of charge what were the directions which the Judge gave to the jury and that they were right and proper then there can be no ground of complaint even though the phraseology and form adopted might be open to question. Mere informality of expression or form is not sufficient to invalidate [illegible] tion EKNATH SAHAY v KING EMP 1 Pat L J 317

CHARGES OF MISCONDUCT

———— by Counsel—

See INSTRUCTIONS TO COUNSEL.
I L R 40 Calc 898

CHARGING ORDER

———————— *Practice—Dissolution of partnership—Assets in hands of receiver—Judgment creditor—Solicitor s lien for costs* The rule at common law that a solicitor is entitled to a lien for his costs on property recovered or preserved by his exertions has always been followed by this Court and where there are assets of a partner ship in the hands of a receiver appointed in a part nership suit the solicitors engaged in that suit are entitled to ask for a charge on those ass ts in priority to the creditors of the partnership *Ridd* v *Thorne* [1902] 2 *Ch* 344 followed Where a plaintiff has obtained a decree against a partner ship firm the available assets of which are in the hands of a receiver appointed in a previous part nership suit his proper course is not to issue exe u tion against those assets but to ask the Court for a charging order and to undertake to deal with the charge according to the order of the Court *Kew ney* v *Attrill* 34 *Ch D* 345 followed A. HAJI ISMAIL AND CO v RABIABAI (1909)
I L R 34 Bom. 484

CHARITABLE BEQUEST

See WILL I L R 40 Calc 192

CHARITABLE INAMS

1———————— *Resumption of by Government—Patta granted to one of the previous trustees—Suit by representative of another trustee for share—Effect of resumption—Distinction between resumption and enfranchisement of personal or service inams* Where the Government resumed certain lands which were held previously as charitable inam and after imposing an assessment granted a patta to one of the persons who were the trustees thereof prior to the resumption *Held* that the represent ative of another trustee had no right to claim a share in the land, as against the trustee to whom the patta was given. The principles regulating the ownership of enfranchised lands in cases of en franchisement of personal or service inams afford no guidance in cases of resumption of charitable inams In cases of enfranchisem nt there is a change not of ownership of the land but of the tenure on which it is held in cases of resumption the land previously the property of the trust is at the absolute disposal of the Government who can grant it to anyone who be omes the owner subject to the obligations ordinarily attached to ryotwari tenure. *Gunnaiyan* v *Kamakchi Ayyar I L R* 26 *Mad* 339 and *Pingala Lakshmipathi* v *Bommireddipalli Chalamayya I L R* 30 *Mad* 434 distinguished PUNNIAH v KOTAMMA (1916)
I L R 40 Mad 939

CHARITABLE OR RELIGIOUS TRUST

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 92 I L R 40 Bom 439

See WILL I L R 46 Calc 485

———— liability of a trustee of—

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881) ss 26 27 28
I L R 41 Mad 815

CHARITABLE OR RELIGIOUS TRUST—*contd.*

1 ———— Trustees, acts of—*When act of majority will be binding—Estoppel—Suit by some of several trustees when sustainable—Misjoinder—Form of decree* The rule that in the case of charitable trusts the act of the majority will be binding on the minority only applies wh n such act is done after full opportunity given for mutual discussion by all the members. When the act is done after mutual discussion when the minority had an opportunity to record their dissent it will be the act of the whole body oth rwise it will be the act of the majo ity alon and will not bind the minority *Teramath* v *Lakshmi I L R* 6 *Mad* 270 referred to *Wilkinson* v *Malin* 2 *Tyrwhit* 544 referred to A company or body of p rsons will be estopp d from questioning the validity of an act done by some only of such body or company only wh n such p rsons are h ld out as clothed with authority to do the act Where su h p rsons have not unlimited power to act for the body but only the right to act within certain limits the stranger enterin into the transa tion has to find within such limits the power to transa t Where the remedial right do s not accrue until the majority have after consultation signified th ir will an a tion by some or the majority of the trustees without consulting the others will not be maintainable When the right to the relief claimed has accrued to the joint trustees the institution of a sui by some only w thout having consulted the remaining trustees even where they have not perversely refused to join cannot be a ground for dismissing the suit Although the interests of the co trustees is joint and indivisible it is fully represented when they are all on the re ord on one side or the other *Peria Karuppan* v *Velayutham Chetti I L R* 29 *Mad* 302 referred to One trustee can sue for redemption without consulting the other trustees or making them co plaintiffs Su h misjoinder is not fatal to the suit *Karattole Elamana* v *Unni Kannan I L R* 26 *Mad* 649 referred to The prop r decree in su h a case would be to order the trust prop rty to be restored to all for the benefit of the *cestui qui trust* KUNHAN v MOORTHI (1910)
I L R 34 Mad 406

2 ———— Madras Endowments and Escheats Regulation VII of 1817—*Charitabl Trust—The Madras Religious Endowm nts Act XX of 1863—The Madras Local Boards Act V of 1884 s 51—Religious Endowm nts Act—Powers of Board of R v nue and Taluq Board to appoint new trustee—Non dismissal of old trustee* Regulation VII of 1817 and Act XX of 1863 are applicable to endow m nts made after the Regulation as well as to prior endowments The Board of R venue has no power to ignore the rights of a p rson lawfully in offi e as trustee and to appoint another person in his place without dismissing him In this respect there is no diff rence b tween a hereditary and a non h reditary trustee who is equally entitled to a freehold office The Board of Revenue is entitled under s. 51 of Act V of 1884 to make over to a lo al body not only its power of sup rintendence but also the managem nt of any endowm nt. *The Chairman Municipal Council Rajahmundry* v *Susurla Venkateswarlu I L R* 31 *Mad* 111 followed. *Nilayathakshi Ammal* v *Taluk Board of Mayavaram* 20 *Mad L J* 8 followed VENKATACHALA PILLAI v THE TALUQ BOARD SAIDAPET (1911) I L R 34 Mad 375

Cf. RELIGIOUS ENDOWMENTS ACT s 3
I L R 38 Mad 1176

CHARITABLE OR RELIGIOUS TRUST—*contd*

3 ———— Acts of minority of Trustees——*binding on minority—Indian Trusts Act (II of 1882), s 42 Any trustees or trustee meaning of—Payment to some only of the trustee not a valid payment* An act of the majority of a body of charitable trustees binds the whole body A mortgage purporting to be on behalf of all but executed only by a majority of the trustees when the others have declined to join in its execution is binding on all the trustees. *Teramath* v *Lakshmi I L I 6 Mad 2 0* followed. A payment to some only of several trustees is not a valid payment unless he has or is held out by his co-trustees as having authority to receive the same The words any trustees or trustee in s. 42 of the Indian Trusts Act mean the trustee where there is only one the trustees where there are more *Pamkalu* v *Committee of Rameshwar 1 Bom. L I 66* not followed *Semble* If a document is drawn up in the names of several persons and it is the intention of the parties that all should execute it it will be incomplete and inoperative till all have done so *Sivaswami Chetty* v *Sevagan Chetty I L P 25 Mad 359* and *Latch* v *Wedlake II A & E 959* followed It is a question of fact in each case as to what was the intention of the parties NETHIRI MENON *v* GOPALAN NAIR (1915) I L R 39 Mad. 597

4 ———— Construction of and necessary parties to an appeal, etc —*Failure of a condition precedent—What is essential in a valid charitable trust—Cypres doctrine if applicable to wills—Rule of perpetuities if applicable to the vesting of a charitable trust—Costs of the Advocate General* Where in a deed a settler created a trust in the following words to expend after the liquidation of all the debts the sum of Rs .00 per month for such medical and educational charities within the zemindaris of the settlor as shall, with the approval of the settlor appear just to the trustees and the settler died without approving any trust and the zemindari was sold before any charitable trust was selected by the trustees *Held* that the conditions precedent to the constitution of the trust were not satisfied and it failed. It failed further as there was no general charitable intent overlying the particular charitable bequest *In re Emson 74 L J Ch 65 21 T L R 623 A G* v *Earl of Craven 21 Beav 392 Cherry* v *Mott (1836) Myl & Cr 123 Chamberlayne Bro Lett L R 8 Ch 206 A G* v *Earl of Powis (1853) Kay 186 N E Bly* v *Lord Hastings [1900] A C 260* referred to and also to Lord Eldon's principles in *Mills* v *Farmer 1 Mer 55* that where a testator has expressed an intention to give to charitable purposes that intention must be *declared absolutely* and nothing must be left uncertain but the mode in which it is to be carried into effect The question whether a charitable trust if otherwise valid, is vitiated by the rule against perpetuities is left open, but the preponderance of authority is for the proposition that the doctrine of *cypres* is applicable only in wills and not in deeds *Brudenell* v *Elwes 1 East 442 Pitt* v *Jackson 2 Bro C C 51 Adams* v *Adeams 2 Cowp 651* referred to Between the applicability of the *cypres* doctrine and the failure of a charitable trust for the non satisfaction of a condition precedent the distinction is that in the former there is the breakdown of the machinery required to carry out validly created charitable trust and in the latter there is the initial failure of the conditions essential to bring the trust into existence *Yates* v *University College I R 7 H L 438 In re White's Trust 33 Ch D 449 Briscoe* v *Jackson 35 Ch D 460* referred to If something is required to be supplemented before the bequest takes effect and that is not done then the bequest is inoperative *Grimond* v *Grimond [1905] A C 124 Houston* v *Burns [1918] A C 337* referred to Where A. G is made a party in a public capacity as guardian of a charitable fund and the bequest is upheld in the lower Court it is his duty to maintain its validity in the Court of Appeal and his costs if he loses should come out of the estate SANTANA RAY *v* THE ADVOCATE GENERAL OF BENGAL (1920) I L R 48 Calc 124

CHARITIES

See CIVIL PROCEDURE CODE 1882 s 539 I L R 35 Bom 470

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 92 I L R 37 Bom 95

See CUTCHI MEMONS I L R 41 Bom 181

See EXCESS PROFITS DUTY I L R 48 Calc 844

See MAHOMEDAN LAW—WAKF I L R 33 All 400 I L R 40 Mad 116

See TRUSTEES AND MORTGAGEES POWERS ACT I L R 35 Bom 380

CHAR LANDS

———— Occupancy rights in—

See BENGAL TENANCY ACT 1885 s 180 2 Pat L J 48

CHARTER ACT (24 & 25 VICT C 104)

See HIGH COURT ACTS 1861

———— cls 13 14—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) ss 491 .33 AND 537 I L R 39 Mad. 527

———— cl 15—

See CIVIL PROCEDURE CODE 188 s 310A. 15 C W N 863

See CIVIL PROCEDURE CODE 1908—

S 109 15 C W N 879

S 115 15 C W N 682

See INTERLOCUTORY ORDER 14 C W N 147

See JURISDICTION I L R 42 Calc 928

See LAND ACQUISITION I L R 39 Calc. 230

See LETTERS PATENT HIGH COURTS

See MADRAS CITY MUNICIPAL ACT (III OF 1904) I L R 38 Mad 581

See PRACTICE I L R 41 Calc 632

See PRESIDENCY MAGISTRATES I L R 35 Mad. 730

See SONTHAL PARGANAS I L R 41 Calc.

See TEMPORARY INJUNCTION I L R.

CHARTER ACT (24 & 25 VICT C 104)—concld

———————— To constitute appellate jurisdiction there must exist the relation of superior and inferior courts and the power on the part of the former to revise the latter Meaning of Final order discussed SECRETARY OF STATE FOR INDIA v BRITISH STEAM NAVIGATION COMPANY 15 C W N 848

CHARTER OF THE SUPREME COURT 1774

———— cl 26—

See ARREST OF SHIP I L R 42 Calc 85

CHARTER-PARTY

See BILL OF LADING

See CONTRACT

See CONTRACT ACT (IX OF 1872)—

S 56 I L R 40 Bom 301

Ss 56 65 I L R 40 Bom 529

———————— *Bills of lading—Where charter party and bills of lading conflict the prevailing contract is the charter party—Stevedores though named by the charterers are the agents of shipowners and not of the charterers—Dunnage improper and insufficient—Shipowners ordinary liability for bad stowage and insufficient dunnage—Shipowners specific liability for shortage and sweepings under the charter party* The plaintiffs chartered the defendant company s teamer Abydos for the carriage of cargo of rice in bags from Akyab a seaport in Burma to Bombay The plaintiffs under the charter party were empowered to sub let the whole or part of the cargo and they sub let about one fourth of the cargo space to other shippers. The charter party expressly provided *inter alia* that 'nothing herein contained shall exempt the ship owners from liability to pay for damage to cargo occasioned by bad stowage by improper or insufficient dunnage that the charterers stevedores at loading port to be employed at market rate but not exceeding owner s contract rate that all mats and requisite dunnage to be provided by the steamer that all sweepings to be delivered to the charterers at port of discharge and that the steamer to be responsible for any proved shortage The bill of lading contained a special exception that the ship was not responsible for loss or damage caused by insufficient packing torn mended or chafed weak or fragile bags and bagging wrappers not for usual and reasonable wear and tear of packages During the voyage the ship experienced heavy weather for at least two days and throughout encountered average monsoon weather with south westerly squall On the cargo being unloaded at Bombay it was found that 710 bags of the plaintiffs were damaged that there was a shortage to the extent of 400 cwts and that the sweeping collected amounted on the whole to about 576 cwts On the evidence adduced in the case it was found that the damage was to a certain extent caused by improper laying of the dunnage at the port of loading The plaintiffs sued in respect of (i) damage (ii) shortage and (iii) sweepings The defendants contended that the loading and stowage of the cargo as well as the laying of the dunnage was within the discretion and control of the stevedore as the plaintiffs agent

CHARTER-PARTY—concld

and not as the defendants agent and that in respect of shortage their liability was excluded by the bills of lading *Held* (i) that the shipowners would be *primâ facie* liable for the damage caused by bad stowage or improper or insufficient dunnage and that their liability would not be modified by a clause in the charters party empowering the charterers to name the stevedores as the stevedores were the agents and paid servants of the ship owners for the purpose of discharging the duty of the shipowners in loading the cargo *Harris v Best Ryley & Co 68 L T 76* followed (ii) that the defendants were liable in respect of the short age as the prevailing contract between the ship owner and the charterer was the charter party and not the bill of lading (iii) the plaintiffs were entitled to claim the value of the sweepings as specific provision was made in that behalf in the charter party BOMBAY AND AFRICA STEAM NAVIGATION CO v HAJI AZUM (1916) I L R 41 Bom 119

CHATTELS

See PALAS OR TURNS OF WORSHIP I L R 42 Calc 455

CHAUKIDARI ACT

See VILLAGE CHAUKIDARI ACT

CHAUKIDARI CHAKARAN LANDS

See LANDLORD AND TENANT—CHAUKIDARI CHAKARAN LANDS

See PUTNI 15 C W N 5

See SIMANADARS I L R 43 Calc 227

———— onus of proving—

See REMAND I L R 43 Calc 1104

1 ———— Resumption and transfer to zamindar—*Putnidar s right to claim settlement for zemindar—Suit virtually for specific performance—Conditions which zemindar may impose—Equitable defence—Liability of putnidar to pay amount of assessment by Collector and part of the profits* A suit by a putnidar against his zamindar for recovery of resumed *chaukidari chakaran* lands brought on the ground that under the terms of the putni the putnidar became entitled to the chaukidari chakran lands as soon as they were transferred by the Government to the zemindar is virtually a suit for specific performance of contract The zamindar would be equitably entitled to refuse settlement asked by the putnidar unless the putnidar agreed to the conditions as to payment of the assessment made by the Collector and a proportionate share in the profits such as the zemindar would in the circumstances be entitled to impose on him *Semble* It is not correct to hold that the putnidar is not bound to pay to the zemindar more than the assessment made by the Collector *Kai Kaus Khoda v Surendra Nath De 5 C L J 33 s c 11 C W N 201 Hari Narain Mazumdar v Mukund Lal Mundal 4 C W N 814* referred to RAJENDRA NATH MUKERJEE v HIRA LAL MUKERJEE (1910) 14 C W N 995

2 ———— Rent claimable on resumed land—*Village Chaukidari Act (Bengal VI of 1870) s 49—Assessment of rent by Collector—Right of landlord to claim fair and equitable rent* The right of a landlord to claim rent when making a settlement of resumed *chaukidari chakaran* lands with a putni-

CHAUKIDARI CHAKARAN LANDS—*contd*

dar is not restricted to the amount of a s ssment made by the Collector under 49 of the Village Chaukidari Act (Beng Act VI of 1870) he is entitled to claim a fair and equitable rent *Hari Narain Ma umlar v Mukund Lal Mundal 4 C W N 811* and *Ka i Neem Khoda v Ram Jadu Dey I L R 31 Calc 169 a C L J 33* referred to GOPENDRA CHANDRA MITTER v TARAPPASSANNA MUKERJEE (1910)

I L R 37 Calc 598

3 ———— **Resumption**—*Bengal Act VI of 18 0 s 50—Re umption and transfer by Government —Rights of zemindars and dar patnidars—Suit for recovery of khas pos ession—Frame of suit—Specific performance of contract—Landlord and tenant* Where *chaukidari chakaran* lands had been re umed by the Government and settled under s 50 of Bengal Act VI of 1870 with a zamindar who had created a patni under which there was a dar patni and who ma le a raiyati settlement and the dar patnidars brought a suit against the zemindar for khas po ses ion of the lan ls and for the execution of a deed of tran fer on the allegation that the zemindar ha l tran ferred his rights in the aid lands to the patnidars and the patnidars had similarly tran ferred all their right subject of course to the payment of the respective head rent *Held* that the joining of the two prayers for execution of a deed of transfer and for recovery of po ses ion was in no way repugnant to any rule of law *Nathu Paulu v Budhu Bhika I L R 18 Bom 53* and *Narayana Kaviraján v Kanda sami Goundan I L R 22 M l 4* referred to RANJIT SINGH v KALIDASI DEBI (1900)

I L R 37 Calc 57

4 ——————— *Village Chauki dari Act (Beng VI of 1870) ss 1 48 49 50 51 52 55—Power of resumption and assessment of chauki dari chakran lands—Zamindar estates in Orissa—Regulation XII of 1805 s 33—Regulation VIII of 1800 s 41—Regulation I of 1793 s 8 cl (4)— Onus of proof* In these appeals the Judicial Committee (affirming the decision of the High Court) *held* on a con ideration of the hi tory of Ori sa and of the legislation applicable to its settlement and the nature of its zamindari estate that the Government were under the circumstance not entitled to resume and as e s with revenue as being *chaukidari chakaran* land within the meaning of the Village Chaukidari Act (Bengal Act VI of 1870) certain lands forming part of the e tates of the re pondents (the zamindars of Sul nda and Madhupur) in Ori sa with who e ancestors ettlements had been made in 1803 and sanads granted by which statutory confirmation was given by s 33 of Bengal Regulation XII of 1805 and in respect of which e tates the revenue was settled in perpetuity The hi tory of chaukidari grants as set out in the judgment of Lord King lown in the case of *Joykishen Mookerjee v Collector of East Burdwan 10 Moo I A 16* referred to The re pondents in discharge of the duties impose l on them by their sanads to maintain peace and order within their estates (the manner in which they were to carry out such duties being impliedly left by the Government to the zamindars as there was no machinery provided for the purpose in the legislation previous to 1870) retained in their service a large number of chaukidars whom according to the custom of the country they remunerated by grants of land in lieu of wage A register of these chaukidars was kept in the zamindari office and in the appointment of the chaukidars in more than one instance the Government Police Officer had a voice But the records showed that the zamindars often changed the lands held by these men and re umed what they considered to be in excess of their requirement Bengal Act VI of 1870 was extended to Orissa in 1879 In suits by the respondents against the Secretary of State for a declaration that the Act did not apply to the lands in question *Held* that the onus was on the appellants to show that when the zamindaries were confirmed to the respondents ancestors such confirmation was subject to reservations in respect of any land which gave the Government the power of resuming and a e sing it and that onus had not been di harged The power of re umption was re erved by Government in the old Regulations in re pect of lands which had been set apart by the zamindar with their permi ion or under their authority In Regulation I of 1793 the word u ed is appropriated in Regulation XIII of 1805 the expression a signed is employed but in both statutes the characteristics of the grants under which the lands were held depended on the implied authorisation of the Government which excluded them from con ideration in the adjustment of the jama of the mahal In the present cases the appellant had failed to how that any parcel of land was not taken into account in fixing the rent respectively payable by the respondent nor that there was any obligation on the part of the respondents to make such grants The only obligation on them was to m intain peace and order within their zamindarie They entertained the services of chaukidars for whose maintenance they allotted from time to time certain lands of their own free will The mere fact that some appointments were made with the approval of a Government official could not alter the nature of the grants The word a signed in the definition section of Bengal Act VI of 1870 means land assigned by Government or appropriated under their authority or with their permission Not only did the form of the transferring order in Schedule C of the Act clearly show that the expres ion a signed is applied to lands assigned by Government for the maintenance of the chaukidars and in respect of which they re erved the ri ht to resume and transfer to the zamindar subject to an additional assessment but the resolution by which the Act was xtended to O i a lea es no possibility of doubt what the Government understoo l the Act to mean In the orders passe l a distinction is made with regard to chaukidari holdings in the temporarily settled tracts and tho e situated in permanently settled estates With regard to the e it is declared that on resumption the holdings should be included in the estates within which they lie and form part of its as ets in the future Nothing can be clearer that the Act was designed to deal with lands which althou h lying within a mahal did not form part of its assets which was not the ca e with the respondents zamindaries SECRETARY OF STATE FOR INDIA v KIRTIBAS BHUPATI HARI CHANDAN MAHAPATRA (1914)

I L R 42 Calc. 710

5 ———— *Suit for khas posse sion—Chaukidari chakaran lands—Resumption by Government and settlement with private individual—Holding over by tenant without settlement f m such private i d r dual* The plaintiffs sued to khas po on of three plots of land a na es and in the

CHAUKIDARI CHAKARAN LANDS—*contd*

alternative for a decree declaring that the defendants were bound to pay rent and for assessment of adequate rent The lands in suit were formerly chakaran lands which were resumed by Government and settled with plaintiff s vendor on 7th September 1898 The plaintiff obtained his title to the lands by purchase of his vendor s interest at an auction sale in execution of a decree in 1907 or 1908 The defendants who held the lands as chaukidari chakran lands at the time of the resumption continued to hold them ever since without taking any settlement either from the plaintiff's vendor or the plaintiff In 1902 the plaintiff's vendor sued the defendants in the Small Cause Court for compensation for use and occupation and obtained decrees against them The plaintiff brought his suit on the 10th September 1909 *Held* that once the chakran lands were resumed and settled with the plaintiff's predecessor the latter had the right to take *khas* possess on of the lands and the mere omission of the plaintiff s predecessor and of the plaintiff after him to assert that right would not amount to acquiescence on the part of the plaintiff which would alter the status of the defendants from that of trespassers to that of tenants and the plaintiff was entitled to bring his suit within 12 years from the date of resumption by Government and settlement with the plaintiff s vendor RAJ KRISHNA PUDRA v PHAKIR DOME (1913) 19 C W N 478

6 ———— Mortgage of zamindari before resumption and transfer—*Accession to mortgaged property upon transfer—Chakaran lands if become new estate.* Whether upon resumption by Government *chaukidari chakran* lands are for all purposes severed from the zamindari or not they form part of the zamindari before resumption and a mortgage of the zamindari executed before the resumption would cover such lands upon transfer of the resumed *chakaran* lands to the zamindar There is an accession to the mortgaged property within the meaning of s 70 Transfer of Property Act *Semble. Chaukidari-chakaran* lands upon resumption form a separate estate for one purpose only viz as being hypothecated for the *chaukidari* assessment Otherwise it remains a part of the estate *Kashim Sheikh v Prasanna Kumar I L R 33 Calc 596 s c 10 C W N 598* disapproved *Kali Newaj v Ram Jadu I L R 34 Calc 109 s c 11 C W N 201* referred to Tenants found holding under a *chaukidar* for 50 years or so before resumption acquired occupancy rights and were not liable to be ejected by the zamindar on resumption and transfer to him of the *chakaran* lands *Ram Kumar Bhattacharjee v Ram Newaj I L R 31 Calc 1021* followed *Shaikh Jonab Ali v Pakibuddin 9 C W N 571 Krishna Kinkar Dutt v Mahanto Bhagaban Das 12 C W N 161* distinguished *Padha Pershad v Budhu Dashad I L R 32 Calc 938* referred to PAKHAL DAS MUKHERJEE v MADHAB CHANDRA SINGHA (1910) 15 C W N 61

7 ———— Resumption—*Possession taken by putnidar—Ryots settled by putnidar if may be ousted by person taking settlement from zamindar—Recital in sale deed when estops vendee—Estoppel—Collateral statements in deed—Tenancy if may be created by verbal settlement* Where a conveyance of a putni taluk expressly recited that certain resumed *chaukidari chakaran* lands appertaining to the putni taluk were retained by the vendor *Held* that the vendee was not estopped from claiming the *chakaran* lands under a subsequent settlement thereof from the zamindar By accepting a deed of conveyance in fee and going into possession a grantee is not estopped to deny the title or seizing of the grantor unless he claims under the deed *Rup Chand Ghose v Sarbeswar Chandra 10 C W N 747 s c I L R 33 Calc 915 3 C L J 609,* referred to The doctrine of estoppel does not extend to mere descriptive matters or statements or recitals which are immaterial and not contractual or essential to the purposes of the instrument To give a recital to that effect it must be shown that the object of the parties was to make the matter recited a fixed fact as the basis of their action The statement in question in the present instrument did not create an estoppel as it was essentially a collateral statement not concerning the direct purpose of the deed When in pursuance of an agreement for a lease the intended lessee has taken possession though the requisite documents had not been executed the position is the same as if the document has been executed provided specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined Where a putnidar took possession of resumed *chakaran* lands on the footing that they were included within the putni and he was entitled to hold them upon payment of such rent as might be assessed and there were negotiations between him and the zemindar regarding the *chakaran* lands, and the putnidar settled the lands with the defendants who *bona fide* accepted a raiyati lease from him *Held* that the plaintiff who purchased the putni and then took settlement of the *chakaran* lands from the zamindar with full knowledge that the defendants were in occupation as cultivating tenants was not entitled to rent and treat the defendants as trespassers. *Binad Lal Pakrashi v Kalu Pramanik I L R 20 Calc 708 Upendra Narain v Protap Chandra 8 C W N 320 Jonab Ali v Rakibuddin 9 C W N 571 s c 1 C L J 303* referred to BEPIN BEHARI MITRA v TINCOURI PATHAK (1911) 15 C W N 976

8 ———————— *Zamindar s title under s 50* The suits which gave rise to this appeal were brought to recover *khas* possession from the appellant the registered proprietor of extensive zamindaris in the Birbhum District of Bengal of *chaukidari chakaran* lands resumed by Government and transferred to him under the provisions of the Village Chaukidari Act (Beng Act VI of 1870) The plaintiff in each suit (respondents) was the putnidar or dar putnidar of the village within the boundaries of which the land in each suit was situated It was objected that the appellant had no such interest in the *chaukidari chakaran* lands as could be conveyed in a putni lease *Held* (on a consideration of the nature of *chaukidari chakaran* land the provisions of the Bengal Permanent Settlement of 1793 the Regulations of that time so far as they deal with *chakaran* lands and the true meaning and effect of Bengal Act VI of 1870) that the zamindar obtained or retained in the *chaukidari chakaran* lands situate within the territorial boundaries of a village comprised in his zamindari an interest capable of being made the subject of a putni lease The settlement of 1793 recognizes and proceeds on the footing that the zamindars are the actual proprietors of the land for which they undertake to pay the Government

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revenue and it is clear that since the settlement they have had a *primâ facie* title to all lands for which they pay revenue such lands being commonly referred to as malguzari lands see *Herlad Sein v Doorga Persaud Tewaree 12 Moo I A 259* On the Regulations of the Permanent Settlement the leading authority is *Joykissen Mookerjee v Collector of East Burdwan 10 Moo I A 16* in which Lord King down said that the effect of the settlement was to divide *chakaran* lands into two classes viz *thanadari chakaran* lands that is land held on service tenure by police officials and all other *chakaran* lands The former class were by Bengal Regulation I of 1793 s 8 cl 4 made resumable by Government the Government relieving the zamindars from the duty of maintaining a police establishment These lands were in fact shortly afterwards resumed and became Government land the title of the zamindars being extinguished by such resumption As to all other *chakaran* land whether held by public officers or private servants in lieu of wages they are dealt with by Regulation VIII of 1793 s 41 From ss 37 to 41 inclusive it appears that whatever may be the case with regard to the private lands of the zamindars or with regard to *chakaran* lands the services for which were purely personal to the zamindar it was clear that *thanadari* and *chaukidari chakaran* lands the services for which involved the performance of duties in which the public was interested had not as a rule been taken into account for the purpose of increasing the revenue The effect of a resumption by the Government of *chaukidari chakaran* lands under the provisions of Bengal Act VI of 1870 is that after the assessment is complete the Collector is under s 50 by order in the scheduled form to transfer to the zamindar subject to such assessment and by s 51 such order operates to transfer the land to the zamindar subject to all contracts thereby made in respect of under and by virtue of which any person other than the zamindar may have any right to any land portion of his estate or tenure in the place in which such land may be situate Those words are wide enough to include and in their Lordships opinion do include the rights of a putnidar under a putni grant by virtue of which the putnidar is lessee of the zamindars interest in the lands resumed and also the rights of a dar putnidar under a dar putni grant Not only therefore does the Act recognize the existing title of the zamindar to the lands resumed but the estate taken by the zamindar under the order of transfer is in confirmation and by way of continuance of his existing estate and when the zamindar or those through whom he claims has or have entered into contracts affecting his existing estate the rights of third parties under those contracts are preserved RANJIT SINGH BAHADUR v KALI DASI DEBI (1917)

I L R 44 Calc. 841

9 ——————— *Included in revenue paying estate—Resumption of and transfer to landlord—Village Chaukidari Act (Beng VI of 1870)—Sale of parent estate for default of payment of Government revenue—Revenue Sale Law (Act XI of 1859)—Title of purchaser* Where *chaukidari chakaran* lands resumed by Government under the provisions of the Village Chaukidari Act 1870 were transferred in 1900 to *A* in consequence of whose default in paying Government revenue the parent estate was sold in 1910 and purchased by *B* and where *B* sued to recover possession of the same *Held* that the purchaser at the revenue sale acquired no title to the *chaukidari chakaran* lands which were never put up to sale for realization of the arrears due from the remainder of the estate *Ranjit Singh v Kali Dasi Debi I L R 44 Calc 841 21 C W N 609* followed *Kazi Newaz Kheda v Ram Jadu Dey I L R 34 Calc 109 11 C W N 201 Harreck Chand Babu v Charu Chandra Sinha 13 C L J 102 15 C W N 5 Pallal Das Mukerji v Madhab Chandra Sinha 13 C L J 109* referred to *Kasim Sheikh v Prasanna Kumar Mukerjee I L R 33 Calc 596 10 C W N 598* dissented from BROJENDRA LALL DAS v DEB NARAIN TEWARI (1917)

I L R 45 Calc 765

10 ——————— *Resumption—Patni lease—Transfer to landlord—Suit for recovery of possession with mesne profits—Village Chaukidari Act (Beng VI of 1870) s 51* Where *A* obtained a putni of two villages from *Z* paid a bonus and the annual rent was fixed in perpetuity and where within the lands comprised in the putni were some *chaukidari chakaran* lands which were subsequently resumed by Government and transferred to *Z* who settled the same with tenants and where *A* the putnidar instituted a suit for declaration of title and recovery of possession with mesne profits *Held* that on equitable grounds the putnidar and the zamindar must be placed in the position they would have occupied if the *chaukidari chakaran* lands had been resumed before the putni was created the assets of these lands would then have been taken into account in settling the amount of putni rent which would have represented the assessment due to the State as also a fair share of the profits *Held* also that mesne profits were to be calculated on the basis of the rent payable by the tenants to the zamindar and not on that of the actual value of the land produce *Ranjit Singh v Kali Dasi Debi 21 C W N 609 Kazi Newaz Kheda v Ram Jadu Dey I L R 34 Calc 109 Rajendra Nath Mukherjee v Hira Lal Mukherjee 14 C W N 995 Gopendra Chandra Mitter v Tara Prasanna Mukherjee 14 C W N 1049 Harak Chand Babu v Charu Chandra Singha 15 C W N 5* referred to MEHDI HOSSEIN v UMESH CHANDRA MOOKERJEE (1917)

I L R 45 Calc 685

11 ——————— *Effect of transfer—Village Chaukidari Act (Beng VI of 1870) s 51* Where certain *chaukidari chakaran* lands forming part of a revenue paying estate being abandoned by the chaukidars were appropriated by the zamindar who settled the same with the defendants as tenants and thereafter the lands were resumed under the provisions of the Village Chaukidari Act 1870 and subsequently transferred to the zamindar who granted an under tenure to the plaintiff *Held* that the plaintiff could not contend that the defendants who were brought on the land by his grantor were trespassers and the plaintiff s suit in ejectment must fail *Ranjit Singh Bahadur v Kali Dasi Debi 21 C W N 609* referred to SHIB CHANDRA BANERJEE v SURENDRA CHANDRA MANDAL (1917) **I L R 45 Calc 515**

12 ——————— **Putni lease**—*Clause reserving power of zamindar to appoint and dismiss chaukidars effect of* A clause in a putni lease which reserves to or confers on the zamindar the right to appoint and dismiss chaukidars has not the effect of reserving to the zamindar and excluding

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6 ———— Mortgage of zamindari before resumption and transfer—*Accession to mortgaged property upon transfer—Chakaran lands if become new estate* Whether upon resumption by Government *chaukidari chakran* lands are for all purposes severed from the zamindari or not they form part of the zamindari before resumption and a mortgage of the zamindari executed before the resumption would cover such lands upon transfer of the resumed *chakaran* lands to the zamindar There is an accession to the mortgaged property within the meaning of s 70 Transfer of Property Act *Semble Chaukidari chakaran* lands upon resumption form a separate estate for one purpose only viz as being hypothecated for the *chaukidari* assessment Otherwise it remains a part of the estate *Kashim Sheikh* v *Prasanna Kumar I L R 33 Calc 596 s c 10 C W N 598* disapproved *Kazi Newaz* v *Ram Jadu I L R 34 Calc 109 s c 11 C W N 201* referred to Tenants found holding under a *chaukidar* for 50 years or so before resumption acquired occupancy rights and were not liable to be ejected by the zamindar on resumption and transfer to him of the *chakaran* lands *Ram Kumar Bhattacharjee* v *Ram Newaj I L R 31 Calc 1021* followed *Shaikh Jonab Ali* v *Rakibuddin 9 C W N 571 Krishna Kinkar Dutt* v *Mahanto Bhagaban Das 12 C W N 161* distinguished *Radha Pershad* v *Budhu Dashad I L R 22 Calc 938* referred to PARBAL DAS MUKHERJEE v MADHAB CHANDRA SINGHA (1910) 15 C W N 61

7 ———— Resumption—*Possession taken by putnidar—Ryots settled by putnidar if may be ousted by person taking settlement from zamindar—Recital in sale deed when estops vendee—Estoppel—Collateral statements in deed—Tenancy if may be created by verbal settlement* Where a conveyance of a putni taluk expressly recited that certain resumed *chaukidari chakaran* lands appertaining to the putni taluk were retained by the vendor *Held* that the vendee was not estopped from claiming the *chakaran* lands under a subsequent settlement thereof from the zamindar By accepting a deed of conveyance in fee and going into possession a grantee is not estopped to deny the title or seizing of the grantor unless he claims under the deed *Rup Chand Ghose* v *Sarbeswar Chandra 10 C W N 747 s c I L R 33 Calc 915 3 C L J 629* referred to The doctrine of estoppel does not extend to mere descriptive matters or statements or recitals which are immaterial and not contractual or essential to the purposes of the instrument To give a recital to that effect it must be shown that the object of the parties was to make the matter recited a fixed fact as the basis of their action The statement in question in the present instrument did not create an estoppel as it was essentially a collateral statement not concerning the direct purpose of the deed When in pursuance of an agreement for a lease the intended lessee has taken possession though the requisite documents had not been executed the position is the same as if the document has been executed provided specific performance can be obtained between the same parties in the same Court and at the same time as *the subsequent legal question falls to be determined* Where a putnidar took possession of resumed *chakaran* lands on the footing that they were included within the putni and he was entitled to hold them upon payment of such rent as might be assessed and there were negotiations between him and the zemindar regarding the *chakaran* lands and the putnidar settled the lands with the defendants who *bonâ fide* accepted a raiyati lease from him *Held* that the plaintiff who purchased the putni and then took settlement of the *chakaran* lands from the zamindar with full knowledge that the defendants were in occupation as cultivating tenants was not entitled to rent and treat the defendants as trespassers *Binad Lal Pakrashi* v *Kalu Pramanik I L R 20 Calc 708 Upendra Narain* v *Protap Chandra 8 C W N 320 Jonab Ali* v *Rakibuddin 9 C W N 571 s c I C L J 303* referred to BEPIN BEHARI MITRA v TINCOURI PATHAK (1911) 15 C W N 976

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I L R 44 Calc 841

9 ———————— *Included in revenue paying estate—Resumption of and transfer to landlord—Village Chaukidari Act (Beng VI of 1870)—Sale of parent estate for default of payment of Government revenue—Revenue Sale Law (Act XI of 1859)—Title of purchaser* Where *chaukidari chakaran* lands resumed by Government under the provisions of the Village Chaukidari Act 1870 were transferred in 1900 to *A* in consequence of whose default in paying Government revenue the parent estate was sold in 1907 and purchased by *B* and where *B* sued to recover possession of the same *Held* that the purchaser at the revenue sale acquired no title to the *chaukidari chakaran* lands which were never put up to sale for realization of the arrears due from the remainder of the estate *Ranjit Singh v Kali Dasi Debi* I L R 44 Calc 841 21 C W N 609 followed *Kasi Kewa Kheda v Ram Jadu Dey* I L R 34 Calc 109 11 C W N 201 *Harreck Chand Babu v Charu Chandra Singha* 13 C L J 102 15 C W N 5 *Pallal Das Mukerji v Madhab Chandra Sinha* 13 C L J 109 referred to *Kasim Sheikh v Prasanna Kumar Mukerjee* I L R 33 Calc 596 10 C W N 598 dissented from BROJENDRA LALL DAS *v* DEB NARAIN TEWARI (1917)

I L R 45 Calc 765

10 ———————— *Resumption —Putni lease—Transfer to landlord—Suit for recovery of possession with mesne profits—Village Chaukidari Act (Beng VI of 1870) s 51* Where *A* obtained a putni of two villages from *Z* paid a bonus and the annual rent was fixed in perpetuity and where within the lands comprised in the putni were some *chaukidari chakaran* lands which were subsequently resumed by Government and transferred to *Z* who settled the same with tenants and where *A* the putnidar instituted a suit for declaration of title and recovery of possession with mesne profit *Held* that on equitable ground the putnidar and the zamindar must be placed in the position they would have occupied if the *chaukidari chakaran* lands had been resumed before the putni was created the assets of those lands would then have been taken into account in settling the amount of putni rent which would have represented the assessment due to the State as also a fair share of the profits *Held* also that mesne profits were to be calculated on the basis of the rent payable by the tenants to the zamindar and not on that of the actual value of the land produce *Ranjit Singh v Kali Dasi Debi* 21 C W N 609 *Kasi Kewa Kheda v Ram Jadu Dey* I L R 34 Calc 109 *Rajendra Nath Mukherjee v Hira Lal Mukherjee* 14 C W N 995 *Gopendra Chandra Mitter v Tara Prasanna Mukherjee* 14 C W N 1049 *Harak Chand Babu v Charu Chandra Singha* 15 C W N 5 referred to MEHDI HOSSEIN *v* UMESH CHANDRA MOOKERJEE (1917)

I L R 45 Calc 685

11 ———————— *Effect of transfer —Village Chaukidari Act (Beng VI of 1870) s 51* Where certain *chaukidari chakaran* land forming part of a revenue paying estate being abandoned by the chaukidar were appropriated by the zamindar who settled the same with the descendants as tenants and thereafter the lands were resumed under the provisions of the Village Chaukidari Act 1870 and subsequently transferred to the zamindar who granted an under tenure to the plaintiff *Held* that the plaintiff could not contend that the defendants who were brought on the land by his grantor were trespassers and the plaintiffs suit in ejectment must fail *Ranjit Singh Bahadur v Kali Dasi Debi* 21 C W N 609 referred to SHIB CHANDRA BANERJEE *v* SURENDRA CHANDRA MANDAL (1917)

I L R 45 Calc 515

12 ———————— Putni lease—*Clause reserving power of zamindar to appoint and dismiss chaukidars effect of* A clause in a putni lease which reserves to or confers on the zamindar the right to appoint and dismiss chaukidars has not the effect of reserving to the zamindar and excluding

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from the *putni* the *chowkidari chakaran* land NAFAR CHANDRA CHANDRA *v* BEJOY CHAND MAHTAP (1917) 22 C W N 487

13 ———— Limitation—*Act 1877 Sch II Arts 113 and 144—Suit by putnidar to recover rights in and to obtain a settlement of chaukidari chakaran lands on resumption by Government and transfer of them to zamindar—Suit for possession or for specific performance—Whether rights were contractual—Transactions creating real right—Village Chaukidari Act (Beng VI of 1870) s 51* In suits brought by the respondent claiming to recover and obtain as settlement of certain *chaukidari chakaran* lands in villages of which the appellant was the zamindar it was contended that the suits were barred by limitation and that question depended on whether they were suits *for specific performance and governed by Art 113* (three years) or for possession and governed by Art 144 (twelve years) of the limitation Act There was no doubt that under the ruling of the Board in *Ranjit Singh v Kali Dasi Debi I L R 44 Calc 841 L R 44 I A 117* the putnidar had on resumption of the lands by the Government and transfer of them to the appellant such rights in the land as he claimed *Held* that it did not follow that because such rights originally arose by virtue of a grant declared to be a contract within the meaning of s 51 of Bengal Act VI of 1870 they are therefore rights contractual in the sense that the contract by its terms creates or regulates the personal obligations and duties of the grantor in the circumstances that had arisen which were not contemplated and necessarily not referred to at the time the grants were made On the resumption of the lands by the Government the rights of the patnidar were those conferred on him by the estate and interest created by the putni leases and it was these rights which were kept alive by s 51 of Bengal Act VI of 1870 The suits were not suits for specific performance of a contract nor was the application of Art 113 of the Limitation Act in any way suitable to them no date having been fixed for performance nor any notice given of refusal to perform a contract for there was no unexecuted contract to be performed A suit for specific performance is essentially a suit for enforcing a stipulation relating to property The word contract itself primarily means a transaction which creates personal obligations but it may though less exactly refer to transactions which create real rights It is in this latter sense that the word was used in s 51 and the rights thereby reserved to the putnidars comprehensively in the word contracts are real rights the enforcement of which is secured not by a suit for specific performance but by a suit for possession and this is the character of the present suits The period of limitation applicable therefore is twelve years prescribed by Art 144 of the Limitation Act and the suits were not barred RANJIT SINGH BAHADUR *v* MAHARAJ BAHADUR SINGH (1918) I L R 46 Calc 173

———————— *Chowkidari Chakaran lands within the ambit of a putni resumed by Government—Respective rights of putnidar and Zamindar in such lands* The interest of the *putnidar* in resumed *Chowkidari Chakaran* lands comprised in his putni is derived from the putni itself and nothing else and the Zamindar cannot claim a share in the profits derived from the settlement of such lands and thus in effect to vary the *putni* The law to the contrary laid down in *Moharaja Bijoy Chand v Krishna 34 C L J 375*, and the decisions followed therein is not correct in view of the decisions of the Privy Council in *Ranjit Singh Bahadur v Kali Dasi Debi 21 C W N 609* and *Ranjit Singh Bahadur v Maharaja Bahadur Singh I L R 46 Calc 173* NARPAT SINGH *v* RAJA BHUPENDRA 26 C W N 943

CHEATING

See EVIDENCE ACT 1872—

Ss 11 14 15 I L R 39 All 273

Ss 14 AND 65 I L R 34 All 95

See EXTRADITION ACT (XV OF 1903) ss 7 8 AND 8A

I L R 43 Bom 310

See PENAL CODE (ACT XLV OF 1860) s 415 I L R 43 Bom 842

———— abatement of—

See MISJOINDER I L R 38 Calc 453

———— at examination—

See UNIVERSITIES ACT 1904 s 25

I L R 2 Lah 197

CHELAS

See CUSTOM I L R 1 Lah 511 & 540

See HINDU LAW—SUCCESSION

14 C W N 191

———— mortgage by—

See MORTGAGE 15 C W N 838

CHEQUE

See BANKER AND CUSTOMER

I L R 36 Bom. 455

See LIMITATION ACT (IX OF 1908)

S 20 19 C W N 724

SCH I ART 62 I L R 38 Bom 293

———— *Effect of payment by—Part payment—Limitation—Limitation Act (IX of 1908) s 20—Continuous account* If a cheque is delivered to a payee by way of payment and is received as such it operates as a payment subject to a condition subsequent that if upon due presentation the cheque is not paid the original debt revives Where such a cheque is signed by the debtor and paid in part payment of the principal of a debt the cheque being subsequently honoured the proviso to s 20 of the Limitation Act has been complied with *Mackenzie v Tiruvengadathan I L R 9 Mad 271* distinguished Where the dealings between two parties give rise to a continuous account the whole forms one cause of action *Bonsey v Wordsworth 18 C B 325* followed KEDAR NATH MITRA *v* DINABANDHU SAHA (1915)

I L R 42 Calc 1043

CHETTY MONEY LENDING FIRM

See PRINCIPAL AND AGENT

I L R 43 Calc 527

CHEIF JUDGE SMALL CAUSE COURT

———— jurisdiction and discretion of—

See SPECIFIC RELIEF ACT (I OF 1877) s 45 I L R 34 Bom 659

CHIEF PRESIDENCY MAGISTRATE

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 514
I L R 42 Bom 400

CHILD

———— abandonment of—

See PENAL CODE (ACT XLV OF 1860) s 317 I L R 41 Bom 152

———— meaning and maintenance of—

See CRIMINAL PROCEDURE CODE 1898 s 488 I L R 37 Mad 565

CHILD WITNESS

———— competency of—

See APPEAL I L R 41 Calc 406

———— examination of without affirmation—

See APPEAL I L R 41 Calc 406

CHILDLESS WIDOW

See REMARRIAGE CUSTOM OF
I L R 48 Calc 300

———— property of—

See HINDU LAW—AYAUTUKA STRIDHAN
I L R 37 Calc 863

CHITTAS

———— *Chittas* prepared for the purpose of distributing the public revenue on a partition of an estate is a public document and is evidence of the state of affairs then existing and *admissible in evidence* NOBENDRA KISHORE ROY v DURGA CHARAN CHOWDHURY (1910)
15 C W N 515

CHOTA NAGPUR

———— grant by Maharajah of whether impartible—

See CUSTOM
1 Pat L J 109

———— under Raiyat in—

See BENGAL RENT ACT s 82
20 C W N 392

CHOTA NAGPUR ENCUMBERED ESTATES ACT (BENG VI OF 1876)

———— application of——*Mortgage—Immoveable property not within Chota Nagpur—Bengal Regulation VIII of 1819 (Patni Taluqs)—Proceedings under ss 8 and 14 of the Regulation—Suit to recover from the zamindar money paid to him as being arrears of rent wrongly alleged to be due—Threatened sale of patni* The Chota Nagpur Encumbered Estates Act (Beng VI of 1876) is not applicable to immovable property outside the limits of Chota Nagpur *Bhicha Ram Sahi* v *Bishambhar Nath Sahi 16 C L J 297* approved The main purpose of the Act is the protection of zemindars within that district and any provisions which affect rights to enforce in jurisdictions outside it personal debts or liabilities are merely ancillary to the main purpose of the Act which is directed to improving the persons owning land within it *The procedure provided for by s 14* of the putni Regulation (VIII of 1819) is not such as to put those submitting to pay money under it in the position of persons paying a claim

CHOTA NAGPUR ENCUMBERED ESTATES ACT (BENG VI OF 1876)—*contd*

brought against them in an ordinary suit in which they could have set up a full defence but had *failed to do so In the latter case those who* pay lose their right to assist however good be can e having had the full opportunity of doing so which the law allows them once for all they have not availed themselves of the opportunity so given But s 14 of the Regulation expressly recognises the right to bring a separate suit in an ordinary Court in which the question of title can be raised notwithstanding the proceedings before the Collector taken by the zemindar under s 8 which are of an administrative rather than a properly judicial character The rule therefore which prevents a person from recovering back money which he has paid on a claim in legal proceedings to which he might have set up a defence but has failed to do so was held to have no application *in the present case in which the patnidar* sued the zemindar to recover back money paid to the latter as arrears of rent wrongly alleged to be due without setting up any defence as he might have done RAJA OF PACHETE v KUMUD NATH CHATTERJI (1918) I L R 46 Calc 1

———— s 2—*Act if applies to land outside Chota Nagpur—Vesting order—Statute interpretation of—Statute conferring special privilege in derogation of rights of others strict construction The Chota Nagpur Encumbered Estates Act has* no application to land outside Chotanagpur and a vesting order under Chap II of the Act can only be made in respect of land lying within that area The privilege enjoyed by a mortgagee from the proprietor in respect of land outside Chota Nagpur to enforce his rights in a Court of ordinary civil jurisdiction has not been abrogated or struck at by any of the provisions of the statute *Ajodhya Nath Choudhury* v *Keshub Chunder Mukherjee 11 C W N 1127* followed and explained BHICHA RAM SAHI v BISHAMBHAR NATH SAHI (1912)
17 C W N 754

———— ss 2 A 3 and 21 B *Held* that s 21 B refers to suits other than proceedings in regard to debts and liabilities mentioned in s 2 A and *does not restrict the provisions of s 3* BANSIDHAR DHAR v TIKAIT HAR NARAYAN SINGH
6 Pat L J 685

———— s 3—

———— *holder of property whether trespasser is included—debt and liability whether contractual debt or liability is included* The liability in respect of which protection is accorded by this Act is that to which a holder of the property or his heirs are liable and does not include a trespasser *Query* Whether the words debt and liability in the same section include a contractual liability LAL MRITUNJAY NATH SAHI DEO v THAKUR PANCH KAURI NATH SAHI DEO 3 Pat L J 156

———— *Deed of release executed by disqualified proprietor* A deed of release executed by a proprietor at a time when his estate was managed under the Chota Nagpur Encumbered Estates Act Beng VI of 1876 cannot be operative as the proprietor was wholly incompetent to *make any such disposition of his property* It was not a case of a merely voidable agreement An admission to that effect in a [illegible] (which did not operate as an alienation) [illegible] the [illegible]

CHOTA NAGPUR TENANCY ACT VI OF 1908 —contd

———— s 208—concld

cuted as a decree for rent under s 208 of the Act It is open to the decree holder to treat the de ree as a d. ree for money and to execute it in the ordinary Civil Court *Udan Mohan Nath Sahi v Protap Uday Nath Sahi 16 C W N 1024* distinguished Where a decree for rent was obtained against p rsons who did not represent the entire tenure the registered holder of a fourth share in it having b n left out of the suit and on the application of the latter his share of the tenure was exempted from sale under s 211 cl (*1*) of the *Chota Nagpur Tenancy Act* *Held* that the decree could not be executed as a rent de ree under s 208 of the Act as against the remaining three fourths share of the tenure The Bengal Rent Recovery Act of 1865 contemplates the sale of an entire tenure A decree obtained against some only of the registered tenants cannot be executed as a decree for rent CHANDRA NATH TEWARI *v* PROTAP UDAI NATH SAHI (1913)
18 C W N 170

———— ss 211 and 270—*Rent d cree—appli cation for—Ex ution of* No appeal lies to the D puty Commissioner from a de ision of a Deputy Colle tor under s 211 o the Cho a Nagpur Tenancy A t 1908 If a Deputy Collector whilst exercising the pow r of the Deputy Commissioner delegated to him fails to exercise a jurisdi tion which he might have exerci ed or usurps a jurisdiction which it is not within his comp ence to exercise th n the D puty Commissioner has power to order him either to exercise that jurisdiction or to refrain from exercising it as the case may be The same rule applies in the case of the Commissioner and the Board of Revenue dealing with acts performed by the Deputy Commissioner Where on an application to the D puty Collector by the landlord for execution of a rent decree which he had obtained against the tenant other persons ob ected to the execution under s 211 on the ground that they were transferees from the tenant and produced (i) evidence to show that they been sued for rent by the landlord and (ii) a money order re ipt for payment of *registration fees* *held* (*1*) that the Deputy Commissioner had power to revise the de ision of the Deputy Colle tor upholding the objection (2) that the de ision of the Deputy Collector upholding the objection amounted to a finding that the circumstances of the case shewed that as there had been recognition by the landlord of the tenancy of the obje tors there was sufficient rea on for not having it registered within the meaning of the proviso to s 211 and (3) that as there was no failure on the part of the Deputy Collector to exercise jurisdi tion nor any attempt to usurp jurisdiction the Deputy Commissioner was right in refusing to interfere in revi ion TIKAIT GANESH NARAYAN SAHI DEO *v* CHANDU MISTRI
5 Pat L J 468

———— ss 212 and 215—*Order rejecting application under s 212 appeal from— claims an interest meaning of* The app llants purchased a tenure in execution of a decree for rent Thereupon the respondents stating that they held a *dar mo' urarri* interest in the tenure under a person for whom they alleged the judgment debtors were *benamidars* claimed to deposit the sums indicated in s 212 of the Chota Nagpur Tenancy Act 1908 The first court rejected their application *Held* that as the order passed by the first court was an order passed after a de ree and relating to the exe ution thereof within the meaning of s 215 of the Tenancy Act an app al lay to the Judicial Commissioner The court to which an application is made under s 212 of the Tenancy Act is bound to inquire into the truth of the allegations made in the application A person cannot have a sale set aside under s 212 merely upon his putting before the court a s ries of statements which may be totally untrue A p rson who in an application under s 212 to set aside a sale of property held in exe ution of a decre claims an interest therein under a title lawfully acquired before the sale must prove his allegation PANCHANAN MAHTA *v* KANAI MAITRA
2 Pat L J 153

CHOTA NAGPUR TENANCY ACT VI OF 1908 —concld

———— s 212—contd

———— ss 215 (3) 224 229 234, 235—*Appeal to High Court—Stay of ex cution po ver to grant—Code of Civil Procedure (Act V of 1908) O XLI r 5* In an appeal to the High Court under s 215 (*3*) and 224 of the Chota Nagpur Tenancy Act 1908 the High Court has no power under that A t to order stay of execution in the absence of any *rules* made by the Lo al *Government* under s 265 providing for stay of execution But wherever an appeal lies to the High Court the Court has inherent jurisdiction to stay proceeding in the Lower Court The right of staying execution in cases under app al should be exercised sparingly and only in cases where it is manifest that justice demands such an exercise LAL NILMANI SAHI *v* PAT BAHADUR BALDEO DAS BISTA
4 Pat L J 371

———— s 224—

See s 74 5 Pat L J 697

———— s 231—

———————— *Mortgage decree—Exe ution sale—Purchase by decree holder—Application by judgm nt debtor to set aside sale—Limitation Act (IX of 1908) Sch I Art 166 or s 231 Chota Nagpur Tenancy Act (Beng VI of 1908) applicable* In execution of a mortgage decree the mortgaged property was sold on 21st December 1912 and was purchased by the decree holder and the sale was confirmed on the 15th February 1913 On 28th August 1914 the judgment debtor applied to set aside the sale on the ground that under s 47 of Chota Nagpur Tenancy Act the sale was null and void *Held* that the application was barred by limitation if not under Art 166 of the Limitation Act at any rate under s 231 of the Chota Nagpur T nancy Act NILMONI GOSWAMI *v* ROBIN MAJHI (1916) 20 C W N 1243

———————— *Sale of raiyati holding in exe ution of mortgage decree appli ation to set aside—Limitation Act (IX of 1908) Sch I Art 166* An application to set aside the sale of a *raiyati* holding held in execution of a mortgage decree must under s 231 of the Chota Nagpur Tenancy Act 1908 be made within one year from the date of the sale NILMANI GOSWAMI *v* ROBAN MAJHI
1 Pat L J 483

———— s 264—

See UNDER s 74 5 Pat L J 697

———— s 270—

See UNDER s 211 5 Pat L J 468

CHOWKIDARI ACT (BENG VI OF 1870)

See VILLAGE CHOWKIDARI ACT

——— s 1—*Chowkidari jagir created since the date of settlement if liable to resumption—Suit to question validity of resumption—Limitation—Limitation Act (XV of 1877) Sch II Art 14—Killadari estate in Orissa—Chowkidari Act if may be extended to such estate—Grant by sanad if equivalent to settlement—Reg XII of 1805 s 33—Reg I of 1793 s 8 cl (4) and Reg VIII of 1793 s 41 if apply* The Chowkidari Act (Beng VI of 1870) was recently applied to the plaintiff s zemindari of Killah Sukinda in Orissa which the plaintiff was entitled to hold at a fixed jama in perpetuity under a *sanad* granted by Government in 1803 which was confirmed by s 33 of Reg XII of 1805 The tenures resumed as chowkidari chakran were found to have been mostly recent creations so that they could not have been assigned by Government for the maintenance of village watchmen at the date of the *sanad* or in 1805 *Held* that the Chowkidari Act did not apply to such lands and the resumption and transfer thereof under the Act were without jurisdiction That Art 14 of Sch II of the Limitation Act did not apply to the plaintiff s suit questioning the validity of such resumption and transfer The words otherwise than under a temporary settlement in the definition of chowkidari chakran lands s 1 of the Chowkidari Act refer to a settlement by Government and the party who in that section is pointed to a assigning the land is also Government such assignment taking place at the date of the settlement *Per* WOODROFFE J Assuming that the grant of the *sanad* in 1803 was equivalent to a settlement by Government as such settlement did not assign and did not exclude from assessment the chowkidari chakran land then existing in the plaintiff's zemindari such lands if any would not come under the operation of Beng Act VI of 1870 HARI CHANDAN MAHAPATRA *v* THE SECRETARY OF STATE FOR INDIA (1910)

15 C W N 300

CHOWKIDARI CHAKRAN LAND

See CHAUKIDARI CHAKRAN LAND

CHOWKIDARI CUSTODY

See ARREST BY PRIVATE PERSON

I L R 41 Calc 17

CHRISTIAN

——— Living like Hindu—

See PARDANASHIN LADY

26 C W N 490

CHRISTIAN MARRIAGE ACT (XV OF 1872)

——— ss 3 68— *Persons professing the Christian religion —Marriage between two bhangi celebrated according to caste rites by two ' Christians '* One Maha Ram whose father was a Christian but who himself was found not to be a Christian within the meaning of s 3 of the Indian Christian Marriage Act 1872 although he had been baptized when an infant and used to attend a Christian school was married to a *bhangi* girl according to the rites of the *bhangi* caste This marriage was conducted by two persons Bechhan and Mangli who although they were apparently Christians within the meaning of the Act officiated as *mans* or priests of the *bhangi* caste All these persons were convicted Bechhan and Mangli of the substantive offence defined in s. 68 of the Indian

CHRISTIAN MARRIAGE ACT (XV OF 1872) —*concld*

——— s 3—*concld*.

Christian Marriage Act 1872 and Maha Ram of abetment of that offence *Held* that the conviction could not stand both because Maha Ram on the facts appearing in evidence could not be held to be a Christian within the meaning of s 3 of the Indian Christian Marriage Act 1872 and also as *held* by WALSH J because the Act in question deals with Christian marriages and Christian marriages only *Queen Empress* v *Paul I L R 20 Mad 12 In re Kolandaivelu I L R 40 Mad 1030* and *Muthusami Mudaliar* v *Masilamani I L R 33 Mad 342* discussed by WALSH J EMPEROR *v* MAHA RAM (1918) I L R 40 All 393

——— ss 41 and 46—*Marriage between a Christian and a Jewess divorced according to Jewish Law—Registrar refusing to take any steps—Direction from Court to solemnize marriage* Where a Jewess was divorced according to Jewish law a Christian desiring to marry her gave notice to the Registrar under the provisions of Act XV of 1872 The Registrar having refused to solemnize the marriage the Court on application ordered the Registrar to receive and publish the notice and upon compliance with the provisions of s 41 of the Act take all such steps as are necessary for the solemnization of the marriage *In re* HAROLD TUCKER (1912)

16 C W N 417

——— s 68—*Hindu performing marriage in Hindu mode between persons one of whom is a Christian whether guilty under* A Hindu by religion performing a marriage according to the Hindu mode between two persons one of whom is a Christian commits an offence under s 68 of the Christian Marriage Act (XV of 1872) *Madras High Court Appellate Side Proceedings 21st March 1871 6 Mad H C R Appx* XX and *Queen Empress* v *Yohan I L R 17 Mad 391* approved Meaning of solemnize in s 4 explained KOLANDAIVELU *In re* (1917)

I L R 40 Mad 103

CHUDASAMA GIRASIAS

See HINDU LAW—ADOPTION

I L R 43 Bom 778

CHUKANI RIGHT

——— *Contract of sale of a chukani tenure—Misrepresentation by non disclosure of facts—Suit for rescission by purchaser—Transfer of Property Act (IV of 1882) s 55—Duty of seller* A *chukani* tenure in the District of Rungpur is not a temporary tenure under the Transfer of Property Act terminable at six months notice but a *raiyati* leasehold which may develop into occupancy right When the vendor is informed by the purchaser of his object in buying certain property and the lease contains covenants which will defeat that object mere silence will, in equity be equivalent to misrepresentation *Flight* v *Barton* 3 My & K 282 followed JOGENDRA NATH GOSWAMI *v* CHANDRA KUMAR MOZUMDAR (1914)

I L R 42 Calc. 28

CHUR LANDS

See ADVERSE POSSESSION

23 C W N 380

See LANDLORD AND TENANT

I L R 37 Calc. 449

CHUR LANDS—*contd*

———— resumption of—

See NAVIGABLE RIVER
I L R 46 Calc 390

———— *Thak and Survey maps —Consent decree in previous suit—Decree not inter parties—Constructive possession of owner of sub merged lands during diluvion—Adverse possession—Limitation* The plaintiffs sued for declaration of their title to certain Chur lands which they alleged were partly reformations on the site of and partly accretions to three mauzas The Churs were measured in the course of Thak proceedings in the year 1859 and were subsequently measured by way of survey during the following year The plaintiffs based their title to the disputed land on the Thak map of 1859 the Survey map of 1860 and a con sent decree passed in 1879 in a suit instituted by the predecessors in interest of the plaintiffs against persons represented by the defendants in conse quence of a dispute about the possession of some of the lands of these Churs *Held* on the evidence that the consent decree was as binding on the parties as a decree after a contentious trial but it cannot have greater validity than the compromise itself *Held* on the evidence that the proceedings in the suit of 1879 were not *bona fide* that the compromise was entered into without authority from the defendants and that it was not estab lished that the defendants even though apprised of the compromise had acquiesced in it That the rights of property as between two parties cannot be affected by a map drawn for a different purpose—a purpose not relevant to the subject of the dispute between them That the location of the boundary in the map prepared in the suit of 1879 could *not be treated as conclusive between* the parties for the purposes of the present contro versy inasmuch as it was not necessary for the disposal of that suit and was outside its scope *Kerr v Nur Mahomed 2 W P P C 28 Kanto Prashad v Jagat Chandra I L R 23 Calc 335 Ranjit Sinha v Basanta Kumar 9 C L J 597 Preo Nath v Durga Tarini 14 C L J 578* and *Shib Churn v Nil Kantha 17 C L J 642* relied on No hard and fast rule can be laid down that a Survey map is more reliable than a Thak map The true principle is that the map which more clearly agrees with the local land marks is the one that should be followed That as the Thak map was made in the presence of the parties or their agent it was *primâ facie* binding on them and in the circumstances of the present case the decree should be based not on the Survey map but on the Thak map after it has been relaid with as much accuracy as practicable That as the rightful owners must be deemed in law to have been in possession of the submerged lands during the period of diluvion for the purpose of deciding the question of limitation the only point for investigation was the period of time when the lands reappeared and became fit for occupation and as the possession of the defendants after reformation of the disputed lands did not extend over the statutory period the claim of the plaintiffs was not barred by limita tion in respect of lands which lay within the Thak boundaries of their Chur That as regards the plaintiff's claim by adverse possession to land lying beyond the Thak boundaries of their Churs the plaintiffs were bound to establish in respect of specific parcels of land that they have been in occu pation thereof to the exclusion of the rightful owner

CHUR LANDS—*concld*

continuously for a period of twelve years for the theory of constructive possession is applied only in favour of a rightful owner and is not extended in favour of a wrong doer whose possession is treated as confined to land of which he is actually in possession AMRITA SUNDARI DEBI *v* SERAJ UDDIN AHMED (1914) **19 C W N 565**

———— *Chur land thrown up in river within the boundaries of a permanently settled estate if liable to assessment with revenue—Act IX of 1847 s 6—Reg II of 1819 Arts 3 31 —Reg I of 1793 Arts 3 6—Reg XIX of 1793 s 1—Reg XI of 1825 s 1 (1) (4)* The intention and effect of Act IX of 1847 was merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time when the Act was passed The question whether *chur* lands formed since the Permanent Settlement in beds of rivers belonging to a permanently settled zemin dari are assessable as land added to the estate within the meaning of s 6 of the Act IX of 1847, has to be determined by reference to the pre existing law and particularly to Reg II of 1819 The effect of Reg II of 1819 is to declare that *churs* formed since the Decennial Settlement upon land which at the time of the Settlement had been river bed are to be treated as unsettled and this express provision cannot be excluded by showing that the river bed from which the *churs* have been thrown up was at the date of settlement the pro perty of the zemindar and that the settlement was imposed upon the zemindari as a whole In view of Art 3 of Reg II of 1819 a river bed was not intended to be treated as waste land coming within the protection of Art 31 of the Regula tion SECRETARY OF STATE *v* SIR BIJOY CHAND MAHTAB BAHADUR **26 C W N 620**

CHURCH

———— *Prevailing form of wor ship for sixty years primâ facie the original form —Right to manage—Usage alone not the test—Canon law may be invoked—One trustee cannot eject another —Repudiation by one trustee good ground for his removal—Removal amendment of plaint for allowed, to avoid further litigation—Civil Procedure Code (Act XIV of 1882) s 30—Defendants on record objecting to represent others—Jurisdiction of Court to allow—Limitation Act (IX of 1908) s 10—No Limitation against one holding properties as trustee—Whole income used evidence of dedication of lands—Evid ence Act (I of 1872) s 57—Only proof of notorious facts of public history dispensed with* When it is found that for a period of more than sixty years before the defendants (parishioners) secession, the Roman Catholic form of worship prevailed in their parish church the onus is undoubtedly on the defendants to establish by satisfactory evidence that the church was Syro Chaldean at the incep tion As to the right of management of a parti cular Roman Catholic Church and its properties besides usuage other things such as the rights of ecclesiastical authorities according to the canon law can be looked to though in some churches on the West Coast parishioners have more or less control over the management of the properties A single trustee is not entitled to recover possession of the

CHURCH—*contd*

properties appertaining to the tru t from another tru tee by evicting him though he may be entitled to maintain a suit in ejectment against a stranger on behalf of the trust Even if the defendants or some of them were once entitled to be trustees along with the Vicar *Held* that they by their secession from the Catholic Church and by their repudiation of the trusts of the institution which in law works a forfeiture of their office disentitled themselves to hold the office of trustee and that they had in law no answer to a suit for their moval *Marian Pillai* v *Bishop of Mylapore I L R 17 Mad 447* followed Even if they offered to return to their allegiance to the Roman Church it would not be possible to accept their recantation to the extent of holding them to be fit to hold the responsible office of trustee Even if the plaintiff had not asked for the removal of the defendant an amendment to that effect can be allowed in order to avoid future litigation and in the interests of the trust A plaintiff may be allowed to sue certain defendants under s 30 Civil Procedure Code (Act XIV of 1882) as representing certain others in spite of the objection or refusal of the defendants on record to represent the others the consent of the defendants on record not being necessary *In re Andrews* v *Salmon (1888) W N 102* followed Where a defendant claims to hold certain properties as a trustee and not as his own there is no period of limitation within which a suit must be brought to recover them on behalf of the trust Limitation Act (IX of 1908) s 10 The right to the properties of the trust must go with the right to the office of trustee *Gnanasambanda Pandara Sannadhi* v *Velu Pandaram I L R 23 Mad 271* and *Gossami Sri Gridharji* v *Romanlalji Gossami I L R 17 Calc 3* followed The fact that the entire income of certain properties has always been utilised for a church is very good evidence that the properties belong to it No deed of endowment is necessary to prove a dedication of certain properties in favour of a trust Under s 57 of Evidence Act the Court could dispense with evidence only of what may be regarded as notorious facts of public history and cannot treat letters though 70 years old without any sort of legal proof as proof of where certain missionaries were living or when they died *Taylor on Evidence tenth edition volume II paragraph 1785* and *Wigmore on Evidence volume III* s 1699 referred to AMBALAM PAKKIYA UDAYAN v BAPTLE (1913) I L R 36 Mad 418

———————— *Roman Catholic Church —Convert to Roman Catholic religion—Claim for certain exclusive rights in the church by one set of converts over another on the ground of superiority of caste unsustainability of—Internal management of church absolute right of church authorities over* According to Canon Law a Roman Catholic church becomes as soon as it is consecrated the property of the church authorities irrespective of the fact that any particular worshipper or worshippers contributed to its construction The Bishop and other church authorities have the exclusive right to the internal management of the church whether relating to secular or religious matters such as accommodating the congregation inside the church and prescribing the part to be taken by the congregation in the services and the ceremonies The Canon Law knows no distinction of castes amongst the Roman Catholics and no convert to Roman Catholicism can claim any special or exclusive rights or privileges in the church on account of any supposed superiority of his caste over that of others Where a certain section of Roman Catholic converts of a place claimed as against the local church authorities and as against another set of converts whom they considered to be of inferior caste an exclusive right to sit in and worship from a particular portion of the church during time of the service and to take part in certain duties connected with the church service *Held* that such a claim was legally unsustainable however long such privileges might have been enjoyed whether by reason of any such custom or by reason of any agreement to that effect with any former Bishop of the locality *Long* v *The Bishop of Cape Town 1 Moo P C C (N S) 411* and *Merriman* v *Williams L R 7 A C 484* distinguished MICHAEL PILLAI v RT REV BARTLE (1916) I L R 39 Mad 1056

CHURCH AUTHORITIES

See CHURCH I L R 39 Mad 1056

CIRCULARS ISSUED BY GOVERNMENT

See CRIMINAL REVISION I L R 40 Calc 41

CIRCUMSTANTIAL EVIDENCE

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS I L R 41 Calc 601

See JURY TRIAL BY I L R 46 Calc 035

See PENAL CODE s 380 18 C W N 1144

C I F

See CONTRACT C I F

CITY OF BOMBAY MUNICIPAL ACT

See BOMBAY CITY MUNICIPAL ACT (III OF 1888)

CITY POLICE ACT

See BOMBAY CITY POLICE ACT

See MADRAS CITY POLICE ACT

CIVIL AND CRIMINAL CONTEMPT

See CONTEMPT OF COURT I L R 45 Calc 169

CIVIL AND CRIMINAL TRIALS

See STANDARD OF PROOF I L R 40 Calc 898

CIVIL AND REVENUE COURTS

See AGRA TENANCY ACT (II OF 1901)—

See CIVIL PROCEDURE CODE 1908 s 63 I L R 43 All 612

See JURISDICTION

See UNITED PROVINCES LAND REVENUE ACT 1901—

S 4 I L R 43 All 45

S 56 I L R 43 All 422

S 106 I L R 43 All 454

CHUR LANDS—*contd*

——— resumption of—

See NAVIGABLE RIVER
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——— *Thak and Survey maps —Consent decree in previous suit—Decree not inter parties—Constructive possession of owner of sub merged lands during diluvion—Adverse possession—Limitation* The plaintiffs sued for declaration of their title to certain *Chur* lands which they alleged were partly reformations on the site of and partly accretions to three mauzas The Churs were measured in the course of Thak proceedings in the year 1859 and were subsequently measured by way of survey during the following year The plaintiffs based their title to the disputed land on the Thak map of 1859 the Survey map of 1860 and a consent decree passed in 1879 in a suit instituted by the predecessors in interest of the plaintiffs against persons represented by the defendants in consequence of a dispute about the possession of some of the lands of these Churs *Held* on the evidence that the consent decree was as binding on the parties as a decree after a contentious trial but it *cannot have greater validity than the compromise* itself *Held* on the evidence that the proceedings in the suit of 1879 were not *bona fide* that the compromise was entered into without authority from the defendants and that it was not established that the defendants even though apprised of the compromise had acquiesced in it That the rights of property as between two parties cannot be affected by a map drawn for a different purpose—a purpose not relevant to the subject of the dispute between them That the location of the boundary in the map prepared in the suit of 1879 could not be treated as conclusive between the parties for the purposes of the present controversy inasmuch as it was not necessary for the disposal of that suit and was outside its scope *Kerr* v *Nu* *er Mahamed 2 W R P C* 28 *Kanto Prashad* v *Jagat Chandra I L R 23 Calc* 335 *Ranjit Sinha* v *Basanta Kumar 9 C L J 597 Preo Nath* v *Durga Tarini 14 C L J 578* and *Shib Churn* v *Nil Kantha 17 C L J 647* relied on No hard and fast rule can be laid down that a Survey map is more reliable than a Thak map The true principle is that the map which more clearly agrees with the local land marks is the one that should be followed That as the Thak map was made in the presence of the parties or their agent it was *prima facie* binding on them and in the circumstances of the present case the decree should be based not on the Survey map but on the Thak map after it has been relaid with as much accuracy as practicable That as the rightful owners must be deemed in law to have been in possession of the submerged lands during the period of diluvion for the purpose of deciding the question of limitation the only point for investigation was the period of time when the lands reappeared and became fit for occupation and as the possession of the defendants after reformation of the disputed lands did not extend over the statutory period the claim of the plaintiffs was not barred by limitation in respect of lands which lay within the Thak boundaries of their Chur That as regards the plaintiff's claim by adverse possession to land lying beyond the Thak boundaries of their Churs the plaintiffs were bound to establish in respect of specific parcels of land that they have been in occupation thereof to the exclusion of the rightful owner

CHUR LANDS—*contd*

continuously for a period of twelve years for the theory of constructive possession is applied only in favour of a rightful owner and is not extended in favour of a wrong doer whose possession is treated as confined to land of which he is actually in possession AMRITA SUNDARI DEBI v SERAJUDDIN AHMED (1914) 19 C W N 585

——— *Chur land thrown up in river within the boundaries of a permanently settled estate if liable to assessment with revenue—Act IX of 1847 s 6—Reg II of 1819 Arts 3 31—Reg I of 1793 Arts 3 6—Reg XIX of 1793 s 1—Reg XI of 1825 s 1 (1) (4)* The intention and effect of Act IX of 1847 *was merely to alter* the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time when the Act was passed The question whether *chur* lands formed since the Permanent Settlement in beds of rivers belonging to a permanently settled zemindari are assessable as land added to the estate within the meaning of s 6 of the Act IX of 1847 has to be determined by reference to the pre existing law and particularly to Reg II of 1819 The effect of Reg II of 1819 is to declare that *churs* formed since the Decennial Settlement upon land which at the time of the Settlement had been river bed are to be treated as unsettled and this express provision cannot be excluded by showing that the river bed from which the *churs have* been thrown up was at the date of settlement the property of the zemindar and that the settlement was imposed upon the zemindari as a whole In view of Art 3 of Reg II of 1819 a river bed was not intended to be treated as waste land coming within the protection of Art 31 of the Regulation SECRETARY OF STATE v SIR BIJOY CHAND MAHTAB BAHADUR 26 C W N 620

CHURCH

——— *Prevailing form of worship for sixty years primâ facie the original form —Right to manage—Usage alone not the test—Canon law may be invoked—One trustee cannot eject another —Repudiation by one trustee good ground for his removal—Removal amendment of plaint for allowed to avoid further litigation—Civil Procedure Code (Act XIV of 1882) s 30—Defendants on record objecting to represent others—Jurisdiction of Court to allow—Limitation Act (IX of 1908) s 10—No Limitation against one holding properties as trustee—Whole income used evidence of dedication of lands—Evidence Act (I of 1872) s 57—Only proof of notorious facts of public history dispensed with* When it is found that for a period of more than sixty years before the defendants (parishioners) secession the Roman Catholic form of worship prevailed in their parish church the onus is undoubtedly on the defendants to establish by satisfactory evidence that the church was Syro Chaldean at the inception As to the right of management of a particular Roman Catholic Church and its properties besides usage other things such as the rights of ecclesiastical authorities according to the canon law can be looked to though in some churches on the West Coast parishioners have more or less control over the management of the properties A single trustee is not entitled to recover possession of the

CHURCH—*contd*

properties appertaining to the trust from another trustee by evicting him though he may be entitled to maintain a suit in ejectment against a stranger on behalf of the trust Even if the defendants or some of them were once entitled to be trustees along with the Vicar *Held* that they by their secession from the Catholic Church and by their repudiation of the trusts of the institution which in law works a forfeiture of their office disentitled themselves to hold the office of trustee and that they had in law no answer to a suit for their moval *Marian Pillai* v *Bishop of Mylapore I L R 17 Mad 44* followed Even if they offered to return to their allegiance to the Roman Church it would not be possible to accept their recantation to the extent of holding them to be fit to hold the responsible office of trustee Even if the plaintiff had not asked for the removal of the defendant an amendment to that effect can be allowed in order to avoid future litigation and in the interests of the trust A plaintiff may be allowed to sue certain defendants under s 30 Civil Procedure Code (Act XIV of 1882) as representing certain others in spite of the objection or refusal of the defendants on record to represent the others the consent of the defendants on record not being necessary *In re Andrews* v *Salmon (1888) W N 102* followed Where a defendant claims to hold certain properties as a trustee and not as his own there is no period of limitation within which a suit must be brought to recover them on behalf of the trust Limitation Act (IX of 1908) s 10 The right to the properties of the trust must go with the right to the office of trustee *Gnanasambanda Pandara Sannadhi* v *Velu Pandaram I L R 23 Mad 271* and *Gossami Sri Giridharji* v *Romanlalji Gossami I L R 17 Cal 3* followed The fact that the entire income of certain properties has always been utilised for a church is very good evidence that the properties belong to it No deed of endowment is necessary to prove a dedication of certain properties in favour of a trust Under s 57 of Evidence Act the Court could dispense with evidence only of what may be regarded as notorious facts of public history and cannot treat letters though 75 years old without any sort of legal proof as proof of where certain missionaries were living or when they died *Taylor on Evidence tenth edition volume II paragraph 1585 and Wigmore on Evidence volume III s 1699* referred to AMBALAM PAKKIYA UDAYAN v BARTLE (1913) I L R 36 Mad 418

———— *Roman Catholic Church —Convert to Roman Catholic religion—Claim for certain exclusive rights in the church by one set of converts over another on the ground of superiority of caste unsustainability of—Internal management of church absolute right of church authorities over* According to Canon Law a Roman Catholic church becomes as soon as it is consecrated the property of the church authorities irrespective of the fact that any particular worshipper or worshippers contributed to its construction The Bishop and other church authorities have the exclusive right to the internal management of the church whether relating to secular or religious matters such as accommodating the congregation inside the church and prescribing the part to be taken by the congregation in the services and the ceremonies The Canon Law knows no distinction of castes amongst the Roman Catholics and no convert to Roman Catholicism can claim any special or exclusive

CHURCH—*concld*

rights or privileges in the church on account of any supposed superiority of his caste over that of others Where a certain section of Roman Catholic converts of a place claimed as against the local church authorities and as against another set of converts whom they considered to be of inferior caste an exclusive right to sit in and worship from a particular portion of the church during time of the service and to take part in certain duties connected with the church service *Held* that such a claim was legally unsustainable however long such privileges might have been enjoyed whether by reason of any such custom or by reason of any agreement to that effect with any former Bishop of the locality *Long* v *The Bishop of Cape Town 1 Moo P C C (N S) 411* and *Merriman* v *Williams L R 7 A C 484* distinguished MICHAEL PILLAI v RT REV BARTLE (1916) I L R 39 Mad 1056

CHURCH AUTHORITIES

See CHURCH I L R 39 Mad 1056

CIRCULARS ISSUED BY GOVERNMENT

See CRIMINAL REVISION I L R 40 Calc 41

CIRCUMSTANTIAL EVIDENCE

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS I L R 41 Calc 601

See JURY TRIAL BY I L R 46 Calc 635

See PENAL CODE S 380 18 C W N 1144

C I F

See CONTRACT C I F

CITY OF BOMBAY MUNICIPAL ACT

See BOMBAY CITY MUNICIPAL ACT (III OF 1888)

CITY POLICE ACT

See BOMBAY CITY POLICE ACT

See MADRAS CITY POLICE ACT

CIVIL AND CRIMINAL CONTEMPT

See CONTEMPT OF COURT I L R 45 Calc 169

CIVIL AND CRIMINAL TRIALS

See STANDARD OF PROOF I L R 40 Calc 898

CIVIL AND REVENUE COURTS

See AGRA TENANCY ACT (II OF 1901)—

See CIVIL PROCEDURE CODE 1908 S 63 I L R 43 All 612

See JURISDICTION

See UNITED PROVINCES LAND REVENUE ACT 1901—

S 4 I L R 43 All 45

S 56 I L R 43 All 422

S 106 I L R 43 All 454

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CIVIL AND REVENUE COURTS—*contd*

Ss 203 to 207 I L R 39 All 711
I L R 28 All 243

S 233 I L R 41 All 626

1 ——————— *Jurisdiction—Suit to set aside decree of Revenue Court—Matters within exclusive jurisdiction of Revenue Court* Held that no suit can be entertained by a Civil Court for the purpose of setting aside a decree of a Court of Revenue in a matter as to which the latter Court has exclusive jurisdiction *Keshab Deo v Bahori S A No 883 of 1905* decided on the 30th of November 1906 and *Kishen Sahai v Bakhtawar Singh I L R 30 All 237* referred to CHIRANJI LAL v KEHRI SINGH (1910) I L R 33 All 1

2 ——————— *Jurisdiction—Occupancy holding—Usufructuary mortgage—Ejectment of mortgagee—Suit by mortgagee for declaration that surrender was not binding on him* An occupancy tenant who had made usufructuary mortgage of his holding then proceeded to surrender the holding to the zamindar who had the mortgagee ejected by the Revenue court *Held* on suit by the mortgagee for a declaration that the surrender of his holding by the mortgagor was not binding on him that no such suit would lie in the face of the ejectment proceedings in the Revenue Court which were binding on the parties *Ram Dei Kuari v Bindesri Upadhya 8 All L J 940* followed SHIVA PRAKASH v KARNA (1913)
I L R 35 All 464

3 ——————— *Jurisdiction—Tenant taking a partner in cultivation on agreement to pay half the tenant s rent to him—Suit on such agreement by tenant against partner—Small Cause Court* Plaintiff being the tenant of certain plots of agricultural land on a rental of Rs 60 a year took the defendant into partnership on the terms that they were to cultivate jointly and divide the produce equally and that defendant was to pay half the rent annually to the plaintiff *Held* that a suit by plaintiff to recover from defendant the share of the rent payable by him was a suit for damages for breach of contract cognizable by a Court of Small Causes and not a suit for rent within the meaning of the Agra Tenancy Act 1901 RAM NATH v SEKHDAR SINGH (1917)
I L R 40 All 51

4 ——————— *Jurisdiction—Suit by zamindar for damages in respect of the felling of trees on agricultural land by tenants—Agra Tenancy Act (II of 1901) ss 57 65 167* *Held* that a suit for damages for the alleged wrongful felling by the tenant of trees on an agricultural holding is not a suit which is excluded from the jurisdiction of a Civil Court *Lachman Das v Mohan Singh 9 A L J 672* referred to MAN SUKH RAM v BIRJRAJ SARAN SINGH (1918)
I L R 40 All 646

5 ——————— *Jurisdiction—Suit for ejectment of defendants as trespassers—Defence set up that defendants were tenants of the plaintiff—Act (Local) No II of 1901 (Agra Tenancy Act) s 202* In a suit filed in a Civil Court for ejectment of the defendants as trespassers the defendants pleaded in effect that they were tenants of the plaintiff With reference to this plea the civil court held that the suit was not cognizable by it but instead of returning the plaint for presentation in the proper court passed a decree dismissing the suit On the plaintiff's appeal the lower appellate court agreed with the first court that the suit was not cognizable by a civil court and made an order returning the plaint *Held* that an appeal lay to the High Court against this order *Held* also that the suit being on the face of the plaint a suit cognizable by a civil court the court of first instance should have entertained it but in view of the defence set up should have taken action under s 202 of the Agra Tenancy Act 1901 RAGHUNATH v GANESH
I L R 42 All 222

CIVIL CIRCULARS

See UNDER THE VARIOUS HIGH COURTS

CIVIL COURT

See ARMY ACT (44 & 45 VICT c 58) ss 145 190 I L R 43 Bom 368

See BOMBAY LAND REVENUE ACT s 121 I L R 45 *Bom* 67

See BOMBAY REVENUE JURISDICTION ACT 1876 s 4 I L R 45 Bom 1141

See CIVIL AND REVENUE COURTS

See CIVIL PROCEDURE CODE 1908—

S 9 I L R 45 Bom 590 & 683

S 54 I L R 42 Bom 689

S 68 O XXI r 100
I L R 37 Bom 488

S 92 I L R 42 Bom 742

O XXI r 69 I L R 44 *Bom* 50

See CO OPERATIVE SOCIETIES ACT 1912 s 42 I L R 44 Bom 582

See DISTRICT MUNICIPAL ACT (BOM III OF 1901) I L R 44 Bom 738

See HEREDITARY OFFICES ACT (BOM III OF 1874 AS AMENDED BY BOM III OF 1910)—

Ss 25 36 63 64
I L R 41 Bom 23

S 67 I L R 36 Bom 420

See JURISDICTION OF CIVIL COURTS

See LAND REVENUE CODE (BOM ACT V OF 1879) s 85 I L R 43 *Bom* 49

See MUNICIPAL ELECTION
I L R 48 Calc 378

S 4 I L R 42 Bom 689
I L R 45 Bom 197

See PENSIONS ACT (XXIII OF 1871) ss 4 5 6 I L R 37 All 338
I L R 45 Bom 195

See RAILWAY ACT 1890 ss 41 42
I L R 45 Bom 1324

See RIGHT OF SUIT
I L R 40 Bom 200

See SEA CUSTOMS ACT (VIII OF 1878) ss 167 (3) 182 188 191
I L R 43 Bom. 2218

See VRITTI I L R 45 Bom 234

——————— *Collector's order—*

See BOMBAY REVENUE JURISDICTION ACT 1876 s 4
I L R 45 *Bom* 1161

CIVIL COURT—*concld*

——— general rules of practice for—

See CIVIL PROCEDURE CODE (1908) O XXI r 66 **I L R 38 All 481**

——— jurisdiction of—

See ADEN SETTLEMENT REGULATION (VII OF 1900) 13 **I L R 40 Bom 446**

See ASSESSMENT **I L R 37 Calc 374**

See BOMBAY HEREDITARY OFFICES ACT (BOM III OF 1874) ss 25 36 **I L R 40 Bom 55**

See BOMBAY REVENUE JURISDICTION ACT (X OF 1876) s 4 (a) **I L R 43 Bom 277** **I L R 44 Bom 120 130 & 261**

See MADRAS ESTATES LAND ACT (I OF 1908) s 6 SUB S (6) s 8 **I L R 39 Mad 944**

See MUNICIPAL ELECTION **I L R 48 Cal 378**

See PARTITION **I L R 46 Calc 23**

——— question of title—

See BOMBAY LAND REVENUE CODE 1879 s 126 **I L R 45 Bom 67**

——— right to be carried in Procession—

See CIVIL PROCEDURE CODE 1908 s 9 **I L R 45 Bom 683**

——— question of commutation of rent—

See BENGAL TENANCY ACT s 40 **25 C W N 714**

——— *Jurisdiction ouster of—Onus—Inam grant of—Kudivaram—Right ownership of* A party seeking to oust the jurisdiction of ordinary Civil Courts must establish his right to do so *Indetj China Nagadu* v *Potu Konchi Venkatasubbayya (1910) Mad W N 639* and *Virabhadrayya* v *Sonti Venkanna 24 Mad L J 659* followed There is no presumption that an inamdar to whom an inam was granted was not owner of the kudivaram right at the date of the grants *Venkata Sastrulu* v *D Sitaramudu 26 Mad L J 585* and *Ponnusamy Padayachi* v *Karuppudayan 26 Mad L J 285* referred to SRIMATH JAGANNATHA CHARYULU *v* KUTAMBARAYUDU (1914) **I L R 39 Mad 21**

CIVIL COURTS ACT (XII OF 1887)

See BENGAL NORTH WESTERN PROVINCES AND ASSAM CIVIL COURTS ACT 1887

See BOMBAY CIVIL COURTS ACT 1869

——— ss 7 cl (1) 18—

See JURISDICTION **I L R 43 Calc 650**

——— s 8—

See TRANSFER **I L R 48 Calc 53**

——— ss 8 sub s (2) 22 sub s (2)—

See TRANSFER **I L R 42 Calc 842**

——— ss 18 19 21—

See MESNE PROFITS **15 C W N 506**

——— s 19—

See MORTGAGE **I L R 33 All 97**

CIVIL COURTS ACT (XII OF 1887)—*concld*

——— s 21—

1 ——— *Civil Procedure Code (1908) O XXXIV r 6—Decree over in a mortgage suit—Appeal—Forum of appeal to be decided by valuation of suit* *Held* that an appeal lay to the District Judge and not to the High Court from a decree under O XXXIV r 6 of the Code of Civil Procedure notwithstanding that the decree was for a sum exceeding Rs 5 000 if the value of the original mortgage suit was less than Rs 5 000 BADR UN NISSA BIBI *v* SHANKAR LAL (1919) **I L R 41 All 384**

2 ——— *Jurisdiction of Court to entertain suit—Valuation of plaintiff found incorrect on trial—Appeal venue of whether depends on valuation as found or plaintiff's valuation—Plaint amended and presented to another Court under protest if bars appeal* Where the Subordinate Judge in whose Court the plaintiff instituted his suit valuing the same at Rs 5 100 held on the defendant s objection that the proper value was Rs 1 385 and returned the plaint for presentation in the Court of a Munsif who was empowered to try suits up to Rs 2 000 in value and the plaintiff thereupon under protest amended the plaint and presented it also under protest in the Court of the Munsif *Held* that the plaintiff was not precluded from appealing from the order of the Subordinate Judge That (SHAMSUL HUDA J *dubitante*) an appeal against the order lay to the High Court and not to the District Judge s Court The forum of appeal depends not upon the value as adjudged but upon the value as accepted by plaintiff after adjudication The suggestion in *Nilmoney Singh* v *Jagabandhu Roy I L R 23 Cal 536* that the plaintiff s valuation must further be a *bond fide* one commented on The High Court finding the value on evidence to be Rs 2 077 8 ordered the plaint to be returned to the Court of the Subordinate Judge TARA KANTA DAS CHOWDHURY *v* KALI PROSAD DAS GHOSAI (1919) **23 C W N 942**

——— s 21 cl (1)—

See JURISDICTION **I L R 45 Calc 926**

——— ss 21 22—

See SANCTION FOR PROSECUTION **I L R 39 Calc 774** **I L R 40 Calc 37**

——— s 22 (2)—*Criminal Procedure Code (Act V of 1898) s 195 sub ss (6) and (7)—Application to District Judge to revoke sanction to prosecute granted by Munsif—Transfer to Subordinate Judge if valid* An application under sub s (6) of s 195 Criminal Procedure Code is not an appeal within the meaning of sub s (2) of s 22 of the Bengal Civil Courts Act An application made to a District Judge for the revocation of a sanction to prosecute granted by a Munsif cannot therefore be transferred by him for disposal to a Subordinate Judge HARI MANDAL *v* KESHAB CHANDRA MANNA (1912) **16 C W N 903**

——— s 32—*Jurisdiction of Court to execute its own decree* The Court which passed the decree has jurisdiction to proceed with the execution notwithstanding that after the decree the Court of Wards has become a party to the execution proceeding BANDOO KRISHNA *v* NARSINGRAO **I L 662**

CIVIL DISPUTE.

See COMPLAINT I. L. R 46 Calc 854

CIVIL PROCEDURE CODE (ACT VIII OF 1859)

——— when applicable—

See JURISDICTION 18 C W N 994

——— s 15—*15 and 16 Vict c 86 s 50—Specific Relief Act (I of 1877) s 42—Suit by plaintiff for mere declaration that the minor defendant was not his son—Investigation of claim without delay* A talukdar plaintiff brought a suit for a declaration that defendant No 2 a minor was not his son and that he was born to the plaintiff s wife defendant No 1 and for an injunction restraining defendant No 1 from proclaiming to the world that defendant No 2 was plaintiff's son and from claiming maintenance for him as such on The defendants contended that the suit was not maintainable under the provisions of the Specific Relief Act (I of 1877) and that it was premature *Held* that the suit was maintainable it being within the provisions of s 42 of the Specific Relief Act (I of 1877) *Held* further that in the interests of justice it was of the highest importance that such claims should be investigated and decided without unnecessary delay and when the controversy had once been brought to trial the decision should ordinarily follow the usual course *Pool v Ewing Ir Rep 1 Ch 434* distinguished BAI SHRI VAKTUBA v THAKORE AGARSINGHJI RAISINGHJI (1910) I. L. R 34 Bom. 676

——— s. 69—

See SPECIAL APPEAL.

I. L. R 37 Mad. 443

——— s. 246—*Judgment-debtor not served with notice not necessarily a party to an investigation under—Scope of s 246—Ss 278 to 282 of Act X of 1877 and Act XIV of 1882 (Civil Procedure Code) discussed* A judgment debtor upon whom notice has not been served cannot be regarded as necessarily a party to an investigation under s 246 of the Code of Civil Procedure (Act VIII of 1859) A comparison of s 246 of Act VIII of 1859 with ss 278 to 282 of Acts X of 1877 and XIV of 1882 clearly lead to the conclusion that under s. 246 of Act VIII of 1859 the Court could only make an order releasing the property from attachment or disallow the claim which must be one objecting to the sale of the property in execution. KUNHIL KANARAN v VARANAKOT GANAPATHI (1911)

I. L. R 35 Mad. 168

CIVIL PROCEDURE CODE (ACT X OF 1877)

——— s 583—

——— [*Decree for redemption reversed on appeal restitution—Jurisdiction of Court to which application for restitution is made to award mesne profits which are not given by Appellate Court decree—Suit to redeem* A Mortgagor sued for redemption of a usufructuary mortgage and obtained a decree from the Subordinate Judge under which, on payment of the sum decreed to the mortgagee he was put in possession of the mortgaged property but the mortgagee appealed to the High Court which increased the amount payable on redemption by a sum which the mortgagor failed to pay and the mortgagee thereupon applied to the Subordinate Judge for possession and for mesne profits for the period during which

CIVIL PROCEDURE CODE (ACT X OF 1877) —*concld*

——— s 583—*concld*

he had been out of possession *Held* (upholding the decisions of the Courts in India) that the Subordinate Judge had power under s 583 of the Code of Civil Procedure 1877 to award mesne profits although they had not been expressly given by the decree of the High Court If the decree was wrong the parties aggrieved had their remedy either by appeal to the High Court or by an application for revision The proceedings taken under the decree of the Subordinate Judge culminating in the sale at which the mortgagee purported to purchase the equity of redemption, were valid and the appellant an assignee of the rights of the mortgagor was held not entitled to redeem PARBHU DAYAL v MAKBUL AHMAD

I. L. R 38 All 163

CIVIL PROCEDURE CODE (ACT XIV OF 1882)

See JURISDICTION 18 C W N 994

——— *Attachment under—*

See LIMITATION Act (XV OF 1877) ARTS 178 179

I. L. R. 36 Mad 503

——— Execution of decree—*Attachment withdrawal of—Striking off of execution case—Alienation* In execution of a decree passed against H his property was attached under Act XIV of 1882 The application for execution was struck off on default by the decree holder in the payment of process fees. He then made a gift of the said property in favour of his mother who sold it to the defendants *Held* that the attachment must be presumed to have subsisted and the gift was void DAUD ALI v RAM PRASAD (1915)

I. L. R 37 All. 542

——— Amendment of Plaint At the hearing of a suit brought by the plaintiff for recovery of a sum due at the foot of an account the defendant raised a plea of limitation The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation and his application was allowed. GUNNAJI BHAWANJI v MAKANJI KHOOSALCHAND

I. L. R 34 Bom. 250

——— Sale of property of person who had died pending attachment *without making the legal representatives of deceased parties if valid—Objection not taken in application to set aside sale if may be taken by suit* Under the old Civil Procedure Code of 1882 an attachment once made did not necessarily fall with the dismissal of the application for execution Also if a judgment debtor died before the sale but after attachment the sale was not necessarily invalid merely because the legal representative of the judgment-debtor had not been brought on the record The omission was regarded at most as an irregularity which might lay the sale open to attack under the provisions of s 311 of the Code. Where in a proceeding to set aside an execution sale the applicants set up the case that the person whose property purported to have been sold and whose legal representatives they were had died before the decree and did not put forward the case upon which they later on sued to set aside the sale viz.

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd*

that the judgment debtor died after the decree but before attachment *Held per* PICHARDSON J that the suit was barred by the rule of *res judicata* JAGADISH BHATTACHARJEE v BAMA SUNDARI DASYA (1910) 23 C W N 608

——— s 2—

See APPEAL 15 C W N 862

——— s 2 102—

See AGRA TENANCY ACT (II OF 1901) 176 AND 177
I L R 32 All. 373

——— ss 2 244 (c) 294 (16) 540 588 617

See APPEAL I L R 38 Calc 717
15 C W N 862

——— ss 2 474—Interpleader suit—*Order dismissing interpleader suit as not maintainable appealable as a decree within the meaning of s 2—Under what circumstances a tenant can bring an interpleader suit against his landlord* An order dismissing an interpleader suit is a decree within the meaning of s 2 of the Code of Civil Procedure (Act XIV of 1882) and is as such appealable The prohibition in s 474 of the Code of Civil Procedure against a tenant bringing a suit against his landlord and compelling him to interplead with another person not claiming through him does not apply where the title of the landlord to grant the lease is not disputed but it is alleged by such other person that the landlord only acted as trustee in granting such lease ORR v CHIDAMBARAM CHETTIAR (1909) I L R 33 Mad 220

——— ss 10 102 and 103—*Suit dismissed for default of appearance—Date fixed not for hearing of case but for appointment of a guardian to a minor defendant only—Order of dismissal ultra vires* Consequent on the death of one of the defendants to a suit the plaintiff applied to bring the heirs of the deceased defendant on to the record and as one of them was a minor nominated as his guardian his elder brother The brother declined to act as guardian and the Court fixed a date upon which the plaintiff was to appear and nominate another person as guardian Upon the date so fixed the plaintiff failed to appear and the Court dismissed the entire suit subsequently also rejecting an application for its restoration *Held* that the Court had no jurisdiction to dismiss the whole suit as the only matter then before it was the appointment of a guardian to the minor defendant DEBI SAHAI v SARASWATI (1911)
I L R 33 All 560

——— ss 12 13—

See ACCOUNT SUIT FOR
15 C W N 930

——— s 13—

See ACCOUNT 15 C W N 930

See CAPACITY OF PARTIES TO SUE
I L R 34 Bom. 416

See COMPANIES ACT 1882 ss 6 40 41
I L R 40 Calc 1

See ENHANCEMENT OF RENT
I L R 40 Calc 29

See HINDU LAW—PARTITION
L R 41 I A 247

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd*

——— s 13—*contd*

See MORTGAGE I L R 39 Calc 527

See RES JUDICATA
I L R 34 Bom 416
I L R 45 Calc 442

1 ——— Mortgage decree for redemption—*Not providing for extinction of mortgagor's rights upon non payment —Second suit for redemption* Where a mortgagor brings a suit for redemption and obtains a conditional decree but omits to fulfil the condition imposed upon him he is not debarred from bringing a second suit for redemption unless the decree lays down that if he fails to fulfil these conditions the property will be sold or he will be debarred of all his rights to redeem *Rugad Singh v Sat Narain Singh I L R 27 All 178* distinguished NAKTA RAM v CHIRANJI LAL (1910) I L R 32 All 215

2 ——— Decision of Probate Court—*on the existence of a relationship if is—Jurisdiction nature of of Probate Court—Probate Court proceedings before if suit* The plaintiffs having applied for letters of administration to the estate of a deceased person on the allegation that they were nephews of the deceased it was found by the Probate Court on a caveat being entered by the defendant that their relationship was not proved and the application was accordingly refused In a subsequent suit for the declaration of title and recovery of khas possession of a specific property left by the deceased on the allegation that the plaintiffs as his nephews were entitled to the same *Held* that the decision of the Probate Court on the relationship of the plaintiffs with the deceased was not *res judicata* as between the parties to the proceedings in the Probate Court LALIT MOHAN DAS v RADHARAMAN SAHA (1911)
15 C W N 1021

3 ——— Mulgeni tenure—Estoppel—*Person claiming under who is—Tests to determine interest represented—Landlord does not represent interest of mulgeni tenant—Estoppel—No estoppel where party not misled* The mulgeni tenure is a permanent heritable tenure and mulgeni interest is not an interest subordinate to that of the lessor In order to estop a party in a subsequent suit by the decision in a former suit against another party on the ground that the former claims under the latter within the meaning of s 13 of the Civil Procedure Code it must be shown that the party in the former suit represented the interest claimed in the latter suit A party represents all interests owned by him at the time of the action as also interests belonging to others which are subordinate to his A decision against him will bind interests acquired from him subsequently and all subordinate interests whensoever acquired A mulgeni tenant will not be bound by a decision against his lessor as his interest is not subordinate to that of the lessor To estop a party it must be shown that his acts or representations misled the party setting up the estoppel SESHAPPAYA v VENKATRAMANA UPADYA (1910) I L R 33 Mad. 459

4 ——— Capacity of parties—*Res judicata—Matter substantially in issue* The plaintiff in conjunction with another had in 1902 filed a suit against the defendant for possession of certain property basing his claim on the allegation that he was owner He succeeded in the first Court but the Court of Appeal held that the property

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd*

——— s 13—*concld*

had been dedicated to charity and refused to uphold his claim as owner The plaintiff declined to adopt the Court s suggestion to modify his claim and be content to ask for a decree for possession as manager and his suit was therefore dismissed Five years later he filed the present suit claiming possession as manager *Held* that his title as manager was one which might and ought to have been put forward in the previou suit and that his present claim was therefore *res judicata* If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit his claim has no proper connection with that former suit and the Civil Procedure Code (Act XIV of 1882) s 13 does not apply HARGOVAN RAMJI v MULJI MARJIVAN (1909)

I L R 34 Bom 416

5 ——— Maintenance successive suit for—*Brittipatra held not binding in previous suit —Claim based on same document in later suit if maintainable* Where a previous suit of the plaintiff for recovery of maintenance alleged to have been charged on property in the hands of the defendants by a *brittipatra* was dismissed upon the finding that the document had as between the parties no effectual binding power over the estate and did not affect it in any way a second suit by the plaintiff for a declaration of his right to receive maintenance under the *brittipatra* and of the same being a charge on the property and for recovery of arrears of maintenance was barred by the rule of *res judicata* DURGA PRASAD LAHIRI CHOWDHURI v SASHIBALA DEBI (1911) **16 C W N 603**

6 ——— Where in a previous suit the Court held that he rent was liable to enhancement but dismissed the suit on the ground that the rent paid by the defendants was not lower than the rate at which rent wa paid by tenants of adjoining lands *Held* that the decision that the suit was not maintainable was not *res judicata* PARBATTY DEBYA v MATHURA NATH BANERJEE (1912) **16 C W N 877**

7 ——— *Decree if may be set aside as fraudulent on proof that if it was based on perjured evidence—Res judicata bar of—Review of judgment upon newly discovered evidence showing previous evidence perjured* A decree obtained in a suit cannot be set aside in a subsequent action brought for that purpose on mere proof that the previous decree was obtained by perjured evidence If evidence not originally available comes to the knowledge of a litigant and he can show thereby that evidence on which a decree against him was obtained was perjured his remedy lies in seeking a review of judgment But the rule of *res judicata* prevents him from re agitating the matter on the same materials or on materials which might have been laid before the Court in the first instance *Abdul Huq* v *Abdul Hafe 14 C W N 695* followed *Lakhmi Charan Saha* v *Nur Ali I L R 38 Calc 936 s c 15 C W N 1010 Venkatappa Naick* v *Subba Naick I L R 29 Mad 179* dissented from *Flower* v *Lloyd I R 10 Ch D 327 Patch* v *Ward 3 Ch App 203 Baker* v *Wordsworth 67 L J R Q B D 301* relied on *Abouloff* v *Openheimer L R 10 Q B D 295 Vadala* v *Lawes I R 25 Q B D 310 Priestman* v *Thomas 9 P D 210 Cole* v *Langford [1898] 2 Q B 36* referred to MOSUFFI HUQ v SURENDRA NATH RAY (1912) **16 C W N 1002**

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd*

——— ss 13 30—*Decree in suits under s 30—Order in execution not binding on persons not actually brought on record—Res judicata—When judgments obtained in one capacity binding on the same persons in another capacity* Where a party to a suit is allowed to represent others under s 30 of the Civil Procedure Code the decree will be binding on those whom he is allowed to represent But an injunction i personal in its nature and where such a party disobeys an injunction and is proceeded against in execution for such disobedience an order in uch proceedings will not be binding on those whom he was allowed to represent in the suit Where a trustee is a member of a sect and his rights as trustee are linked with and subordinate to the rights of the ect a decision on the rights of his sect fairly obtained in a suit between his sect and a rival sect will be binding on him in his special capacity as trustee in a subsequent suit between him in such capacity and the rival sect Judgments *in personam* in general bind only parties and their privie But the relation established between them by a judgment i in the absence of fraud or collusion conclusive against third partie SRINIVASA AIYANGAR v APAYAR SRINIVASA AIYANGAR (1910)

I L R 33 Mad 483

——— ss 13 43—

——— *Mortgage—Prior and subsequent mortgagees—Mortgaged property brought to sale and purchased by each mortgagee separately the other not being made a party—Suit by prior mortgagee to bring to sale part of the mortgaged property in the hands of the subsequent mortgagee to recover unsatisfied balance of the mortgage a bt* The prior mortgagee of mortgaged property brought the whole of it to sale without impleading the subsequent mortgagee of a portion and purchased the mortgaged property himself The subsequent mortgagee in turn brought a portion of the mortgaged property to sale without impleading the prior mortgagee and also himself became the purchaser The prior mortgagee after an unsucces ful attempt to recover from the subsequent mortgagee possession of the mortgaged property so purchased sued to bring that property to sale for the realization of the unrecovered balance of the original mortgage money *Held* that the suit was maintainable and was not barred by either s 13 or s 43 of the Code of Civil Procedure (1882) SHAM DEI v BALJIT SINGH (1909)

I L R 32 All 119

——— *Res judicata—Dismissal of suit for redemption of a mortgage—Second suit for redemption of another mortgage of the same properties—Civil Procedure Code 1908 s 11 O II r 2* *Held* that the dismissal of a previous suit for redemption of an alleged oral mortgage was no bar to the institution of another suit for redemption of a written mortgage in respect of the same properties of a different date *Thri Kaikat Madathil Raman* v *Thiruthiyil Krishen Nair I L R 29 Mad 553* followed RAM SAHAI v AHMADI BEGAM (1910) **I L R 33 All 302**

——— ss 13 and 44—

——— *Suit by a Mahomedan to recover a portion of the house—Prior suits with respect to other portions—Res judicata—Gift—No estoppel by judgment in suit commenced after the gift*

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —contd.

——— ss. 13 and 44—contd.

—Privity in estate—[illegible] cause of action. A [illegible] of property cannot be estopped as being privy in estate by a judgment obtained in an action against the donor commenced after the gift. A Mahomedan plaintiff having first claimed the property in suit as the heir of his father on the ground that his mother had no title to the property which she purported to dispose of by way of gift to the plaintiff's daughter cannot in the same suit contend that his daughter had obtained a good title to the property from his mother and he was entitled to the property as the daughter's father. *Mercantile Investment and General Trust Company* v. *River Plate Trust Loan and Agency Company* [illegible] *The [illegible] Land etc. Company* v. [illegible] and *Ullah Khan* v. [illegible] *I. L. R.* [illegible] *All.* [illegible] followed. ABDUL ALLI v. [illegible] ABDUL H[illegible] (1911) I. L. R. 35 Bom. 297

——— ss. 13, 206—

See DECREE, AMENDMENT OF I. L. R. 29 Calc. 265

——— ss. 13, 244—

See RES JUDICATA. I. L. R. 3[illegible] All. 425

——— ss. 13, 462—*Res judicata—Consent decree—[illegible] partition [illegible] paying land revenue jointly to Government—Lands do not thereby become impartible—Compromise—Minor—Sanction of Court.* A suit for the partition of a village was resisted on the plea that the village was impartible, first because the arrangement with Government had all along been that the tenants-in-common should be jointly responsible to Government for the land revenue and, secondly because in a previous suit between the parties it was held that the lands in the village were not divisible and only the profits thereof were. The previous suit was decided in terms of a compromise. A minor was a party to it. The guardian of the minor had applied to the Court stating that he had no objection to keep all the lands joint provided the minor got his share of the profits and the Court had made the endorsement that the application had been allowed and filed in the suit. *Held* overruling the plea that the arrangement settling the relations between Government and the tenants-in-common could not be regarded as determination of the relations between the tenants *inter se*. *Held* further that the decision in the previous suit was passed in the terms of a compromise but there was no issue raised and no adjudication on the issue whether the village was impartible. *Held* also that the Court's sanction had not been obtained under s. 462 of the Civil Procedure Code (Act XIV of 1882) to the compromise to which a minor was a party. The mere fact that the parties settled among themselves by compromise that the lands should not be divided, but that they should enjoy the profits could not in law impart the character of impartibility to the estate. Impartibility must arise out of some special tenure or by some general, family or local custom. Parties cannot make an estate impartible which is partible. It is opposed to public policy. *[illegible] Joel [illegible]* v. *Gopal Hari Joshi* [illegible] *L. R.* [illegible] *I. A.* [illegible] followed. PIROJSHAH [illegible] v. [illegible] (1911) I. L. R. 36 Bom. 53

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —contd.

——— ss. 13, 525, 526—*Res judicata—Order refusing to file an award on the ground of misconduct of arbitrators—Subsequent suit to enforce the award.* *Held* that the refusal of a Court to file a private award on the ground of misconduct of the arbitrators will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award. *Lilla* v. *Gobind Dayal I. L. R.* 6 *All.* [illegible] *Fateh [illegible]* v. *Lala Lal All. Weekly Notes* (190[illegible]) 2[illegible] and *Basant Lal* v. *[illegible] Lal I. L. R.* 25 *All.* 21 followed. *Ghulam Khan* v. *Muhammad Hossein I. L. R.* [illegible] *Cal.* [illegible] referred to. [illegible] LAL v. DURGA PRASAD (1910) I. L. R. 22 All. 484

——— ss. 13, 539—*Res judicata—Suit for declaration of trust and of property comprised in it—Party to suit not competent subsequently to deny existence of trust.* *Held* that a person who had been a party to a suit under s. 539 of the Code of Civil Procedure 1882 in which suit the existence of a waqf and the property comprised therein had been declared, was not competent in a subsequent suit for ejectment of the defendant from a part of the waqf property to plead that the property was not waqf. *Ghazaffar Husain [illegible]* v. *Yawar Husain I. L. R.* 28 *All.* 112 referred to. MANOHARI v. MUHAMMAD ISMAIL (1911) I. L. R. 3[illegible] All. 7[illegible]2

——— Civil Procedure Code, 190[illegible], s. [illegible]2—*Waqf—Alienation of waqf property—Suit to set aside such alienation and for declaration that property is waqf—Right to sue.* *Held* that a suit by two Muhammadans for a declaration that a certain property is waqf and to set aside the alienation of such property by the person in charge thereof is not a suit contemplated by s. 539 of the Code of Civil Procedure 1882 or s. 92 of the Code of Civil Procedure, 1908 and is maintainable without permission obtained under s. [illegible] of that Code. *Muhammad Abdullah Khan* v. *Kallu I. L. R.* 21 *All.* 18[illegible] *Jawahir-ud-din* v. *Mujahid Husain I. L. R.* 2[illegible] *All.* [illegible] and *[illegible] Husain* v. *Fazun Lallroelna I. L. R.* 2[illegible] [illegible] followed. DASONDHAY v. [illegible] MUHAMMAD ABU [illegible] (1911) I. L. R. 33 All. 6[illegible]0

——— s. 15—This section refers to procedure only and does not affect the jurisdiction of Courts of higher grade. TARINI MAJHI v. JALADHAR DHALI (19[illegible]) 14 C. W. N. 222

——— s. 19—

See JURISDICTION. L. R. 41 I. A. 197

——— s. 28—*Test for misjoinder—No misjoinder when claims against several defendants in respect of same matter—Limitation Act XV [illegible] Art. [illegible]—Suit to recover purchase-money where [illegible] governed by Art. 62.* A suit to recover the consideration paid for a sale which has [illegible] is governed by Art. 62 of Sch. II of the Limitation Act and must be brought within 3 years from the date when the purchase money was paid. *Hanuman Kamat* v. *Hanuman Mandur I. L. R.* 1[illegible] *Cal.* [illegible] followed. *K[illegible]* v. *[illegible] I. L. R.* 21 *Mad.* [illegible] not followed. A purchased some land from B and paid the purchase money. On proceeding to take possession, he was obstructed by C and he got a sale-deed from C paying consideration for the sale. When the second sale was concluded, D undertook to get back the purchase money from B which was not

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

——— s 13—*concld*

had been dedicated to charity and refused to uphold his claim as owner The plaintiff declined to adopt the Court s suggestion to modify his claim and be content to ask for a decree for possession as manager and his suit was therefore dismissed Five years later he filed the present suit claiming possession as manager *Held* that his title as manager was one which might and ought to have been put forward in the previous suit and that his present claim was therefore *res judicata* If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit his claim has no proper connection with that former suit and the Civil Procedure Code (Act XIV of 1882) s 13 does not apply HARGOVAN PAMJI v MULJI MARJIVAN (1909)

I L R 34 Bom 416

5 ——— Maintenance successive suit for—*Brittipatra held not binding in previous suit—Claim based on same document in later suit if maintainable* Where a previous suit of the plaintiff for recovery of maintenance alleged to have been charged on property in the hands of the defendants by a *brittipatra* was dismissed upon the finding that the document had as between the parties no effectual binding power over the estate and did not affect it in any way a second suit by the plaintiff for a declaration of his right to receive maintenance under the *brittipatra* and of the same being a charge on the property and for recovery of arrears of maintenance was barred by the rule of *res judicata* DURGA PRASAD LAHIRI CHOWDHURI v SASHIBALA DEBI (1911) 16 C W N 603

6 ——— Where in a previous suit the Court held that the rent was liable to enhancement but dismissed the suit on the ground that the rent paid by the defendants was not lower than the rate at which rent was paid by tenants of adjoining lands *Held* that the decision that the suit was not maintainable was not *res judicata* PARBATTY DEBYA v MATHURA NATH BANERJEE (1912) 16 C W N 877

7 ——— *Decree if may be set aside as fraudulent on proof that if it was based on perjured evidence—Res judicata bar of—Review of judgment upon newly discovered evidence showing previous evidence perjured* A decree obtained in a suit cannot be set aside in a subsequent action brought for that purpose on mere proof that the previous decree was obtained by perjured evidence If evidence not originally available comes to the knowledge of a litigant and he can show thereby that evidence on which a decree against him was obtained was perjured his remedy lies in seeking a review of judgment But the rule of *res judicata* prevents him from re agitating the matter on the same materials or on materials which might have been laid before the Court in the first instance *Abdul Haq v Abdul Hafiz 11 C W N 695* followed *Lakhmi Charan Saha v Nur Ali I L R 38 Calc 936 s c 15 C W N 1010 Venkatappa Naick v Subba Naick I L R 29 Mad 179* dissented from *Flower v Lloyd L R 10 Ch D* ... *Patch v Ward 3 Ch App 20 Baker v Wadsworth 67 L J P Q B D 301* relied on *Abouloff v Oppenheimer L R 10 Q B D 295 Vadala v Lawes L R 25 Q B D 310 Priestman v Thomas 9 P D 210 Cole v Langford [1898] 2 Q B 36* referred to MOSUFUL HUQ v SURENDRA NATH RAY (1912) 16 C W N 1002

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

——— ss 13 30—*Decree in suits under s 30—Order in execution not binding on persons not actually brought on record—Res judicata—When judgments obtained in one capacity binding on the same persons in another capacity* Where a party to a suit is allowed to represent others under s 30 of the Civil Procedure Code the decree will be binding on those whom he is allowed to represent But an injunction is personal in its nature and where such a party disobeys an injunction and is proceeded against in execution for such disobedience an order in such proceedings will not be binding on those whom he was allowed to represent in the suit Where a trustee is a member of a sect and his rights as trustee are linked with and subordinate to the rights of the sect a decision on the rights of his sect fairly obtained in a suit between his sect and a rival sect will be binding on him in his special capacity as trustee in a subsequent suit between him in such capacity and the rival sect Judgments *in personam* in general bind only parties and their privies But the relation established between them by a judgment is in the absence of fraud or collusion conclusive against third parties SRINIVASA AIYANGAR v APAYAR SRINIVASA AIYANGAR (1910)

I L R 33 Mad 483

——— ss 13 43—

——— *Mortgage—Prior and subsequent mortgagees—Mortgaged property brought to sale and purchased by each mortgagee separately the other not being made a party—Suit by prior mortgagee to bring to sale part of the mortgaged property in the hands of the subsequent mortgagee to recover unsatisfied balance of the mortgage debt* The prior mortgagee of mortgaged property brought the whole of it to sale without impleading the subsequent mortgagee of a portion and purchased the mortgaged property himself The subsequent mortgagee in turn brought a portion of the mortgaged property to sale without impleading the prior mortgagee and also himself became the purchaser The prior mortgagee after an unsuccessful attempt to recover from the subsequent mortgagee possession of the mortgaged property so purchased sued to bring that property to sale for the realization of the unrecovered balance of the original mortgage money *Held* that the suit was maintainable and was not barred by either s 13 or s 43 of the Code of Civil Procedure (1882) SHAM DEI v BALJIT SINGH (1909)

I L R 32 All 119

——— *Res judicata—Dismissal of suit for redemption of a mortgage—Second suit for redemption of another mortgage of the same properties—Civil Procedure Code 1908 s 11 O II r 2* *Held* that the dismissal of a previous suit for redemption of an alleged oral mortgage was no bar to the institution of another suit for redemption of a written mortgage in respect of the same properties of a different date *Thrikaikat Madathil Raman v Thiruthiyil Krishen Nair I L R 29 Mad 153* followed RAM SAHAI v AHMADI BEGAM (1910) I L R 33 All 302

——— ss 13 and 44—

——— *Suit by a Mahomedan to recover a portion of the house—Prior suits with respect to other portions—Res judicata—Gift—No estoppel by judgment in suit commenced after the gift*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—contd

———— ss. 13 and 44—contd

—Privity in estate—Misjoinder of causes of action
A prior donee of property cannot be estopped as being privy in estate by a judgment obtained in an action against the donor commenced after the gift A Mahomedan plaintiff having first claimed the property in suit as the heir of his father on the ground that his mother had no title to the property which she purported to dispose of by way of gift to the plaintiff's daughter cannot in the same suit contend that his daughter had obtained a good title to the property from his mother and he was entitled to the property as the daughter's father *Mercantile Investment and General Trust Company v River Plate Trust Loan and Agency Company (1894) 1 Ch 578 and The Natal Land etc Company v Good L R 2 P C 121* and *Nawab Ullah Khan v Nawab Ikram I L R 17 All 105* followed ABDUL ALLI v MIAKHAN ABDUL HUSAIN (1911) I. L. R 35 Bom 297

———— ss 13 206—

See DECREE AMENDMENT OF
I. L. R 39 Calc 265

———— ss 13, 244—

See RES JUDICATA
I. L. R 37 All. 485

———— ss 13, 462—*Res judicata—Consent decree—Lands—Tenants in common paying land revenue jointly to Government—Lands do not thereby become impartible—Compromise—Minor—Sanction of Court* A suit for the partition of a village was resisted on the plea that the village was impartible first because the arrangement with Government had all along been that the tenants in common should be jointly responsible to Government for the land revenue and secondly because in a previous suit between the parties it was held that the lands in the village were not divisible only the profits thereof were The previous suit was decided in terms of a compromise A minor was a party to it The guardian of the minor had applied to the Court stating that he had no objection to keep all the lands joint provided the minor got his share of the profits and the Court had made the endorsement that the application had been allowed and filed in the suit *Held* overruling the plea that the arrangement settling the relations between *Government and the tenants in common could not* be regarded as determination of the relations between the tenants *inter se* *Held* further that the decision in the previous suit was passed in the terms of a compromise but there was no issue raised and no adjudication on the issue whether the village was impartible *Held* also that the Court's sanction had not been obtained under s 462 of the Civil Procedure Code (Act XIV of 1882) to the compromise to which a minor was a party The mere fact that the parties settled among themselves by compromise that the lands should not be divided but that they should enjoy the profits could not in law impart the character of impartibility to the estate Impartibility must arise out of some special tenure or by some general family or local custom Parties cannot make an estate impartible which is partible It is opposed to public policy *Tinayak Waman Joshi Rayarikar v Gopal Hari Joshi Payarikar L R 30 I A 77* followed FIROJSHAH BHIKAJI v MANIBHAI NICHHABHAI (1911) I L R 36 Bom. 53

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—contd

———— ss 13 525 526—*Res judicata—Order refusing to file an award on the ground of misconduct of arbitrators—Subsequent suit to enforce the award* *Held* that the refusal of a Court to file a private award on the ground of misconduct of the arbitrators will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award *Pitola v Gobind Dayal I L R 6 All 186 Kalik Ram v Babu Lal All Weekly Notes (1903) 34* and *Lal v Kunji Lal I L R 28 All 21* followed *Ghulam Khan v Muhammad Hossain I L R 9 Calc 167* referred to KUNJI LAL v DURGA PRASAD (1910)
I. L. R 32 All 484

———— ss 13 539—*Res judicata—Suit for declaration of trust and of property comprised in it—Party to such suit not competent subsequently to deny existence of trust* *Held* that a person who had been a party to a suit under s 539 of the Code of Civil Procedure 1882 in which suit the existence of a waqf and the property comprised therein had been declared was not competent in a subsequent suit for ejectment of the defendant from a part of the waqf property to plead that the property was not waqf *Ghazanfar Husain Khan v Jawar Husain I L R 28 All 11* referred to MANOHARI v MUHAMMAD ISMAIL (1911)
I L R 33 All 752

———— *Civil Procedure Code 1908 s 92—Waqf—Alienation of waqf property—Suit to set aside and for declaration that property is waqf—Right to sue* *Held* that a suit by two Muhammadans for a declaration that a certain property is waqf and to set aside the alienation of such property by the persons in charge thereof is not a suit contemplated by s 539 of the Code of Civil Procedure 1882 or s 92 of the Code of Civil Procedure 1908 and is maintainable without permission obtained under s 30 of that Code *Muhammad Abdullah Khan v Kallu I L R 21 All 18 Jamal ud din v Mujtaba Husain I L R 25 All 631* and *Kazi Husain v Sagun Balkrishna I L R 24 Bom 170* followed DASONDHAY v MUHAMMAD ABU NASAR (1911)
I L R 33 All 660

———— s 15—This section refers to procedure only and does not affect the jurisdiction of Courts of higher grade TANJOR MAJHI v JALADHAR DEARI (1909) 14 C W N 392

———— s 19—

See JURISDICTION L R 41 I A 197

———— s 28—*Test for misjoinder—No misjoinder where claims against several defendants in respect of some matter—Limitation Act Sch II Art 62—Suit to recover purchase—Money where sale ab initio void governed by Art 62* A suit to recover the consideration paid for a sale which is *ab initio* void is governed by Art 62 of Sch II of the Limitation Act and must be brought within 3 years from the date when the purchase money was paid *Hanuman Kamat v Hanuman Mandi I L R 19 Calc 123* followed *Krishnan Nair v Kannan I L R 21 Mad 8* not followed. A purchased some land from B and paid the purchase money On proceeding to take possession, he was obstructed by C and he got a paying consideration for the second sale was concl back the purchase money

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—contd

———— s 28—*concld*

done *A* who had paid the purchase money twice brought a suit against *B C* and *D* to recover from *B* the amount paid to him if he should be found not to be the owner or in the alternative if he should be the true owner to recover from *C* and *D* the amount paid for the second sale *Held* that the suit was not bad for misjoinder S 28 of the Civil Procedure Code authorises the joinder in one suit of several defendants where the relief claimed is sought in the same matter although the causes of action against them may be different *Aiyathurai Rowthen* v *Santem Meera Rowthen I L R 31 Mad 252* followed KOVVURI BASIVI REDDI v TALLAPRAGADA NAGAMMA (1910)
I L R 35 Mad 39

———— s 30—

See CHURCH . I L R 36 Mad 418

See s 13 . I L R 33 Mad 483

———— *Right to a village path way—Distinction between a public highway and a village road* There is a distinction between a public highway and a village road and a suit under s 30 Civil Procedure Code 1882 is maintainable when a right to a village pathway is the subject matter of litigation even in the absence of special damage *Chuni Lal* v *Ram Kishen Shahu I L R 15 Calc 460* referred to KALI CHARAN NASKAR v RAM KUMAR SARDAR (1912)
17 C W N 73

———— *Parties—Persons having the same interest in the subject matter of the suit* Where numerous persons are similarly interested in the subject matter of a suit a suit brought by one or more of such persons for the protection of the rights of all is not bad because the plaintiffs may not have obtained the permission of the Court under s 30 of the Code of Civil Procedure 1882 to sue on behalf of all the persons so interested *Zafaryab Ali* v *Bakhtawar Singh I L R 5 All 497* and *Raja Lal Pribhu* v *Balak Lal Pahuk I L R 24 Calc 315* followed GULBA v BASANTA (1910) I L R 32 All 231

———— ss 30 373—*Subsequent suit filed after breach of condition on which permission to withdraw previous suit given—Right of one not a tenant to sue for himself and other tenants under s 30 Civil Procedure Code* Where permission to withdraw from a suit with leave to bring a fresh suit was given to a party on condition of costs being paid within a certain time such party on failing to fulfil the conditions is precluded from bringing a fresh suit *Abdul Ali Molla* v *Ebrahim Molla I L R 31 Calc 955* distinguished A person who is not a tenant cannot maintain a suit on behalf of tenants under s 30 Civil Procedure Code RAMASAMI KAVUNDAN v NAGAPPA MUDALY (1903) I L R 33 Mad 25

———— ss 30 539—*Held* that a suit by 2 Muhomedans for a declaration that a certain property is waqf and to set aside the alienation of such property by persons in charge thereof is not a suit contemplated by s 539 of the Code of 1882 or s 92 of the 1908 Code and is maintainable without permission under s 30 DASONDHAY v MUHAMMAD ABU NASAR

I L R 33 All 660

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—contd

———— s 31—

See LIMITATION ACT 1877 ss 22 28
I L R 34 Bom 91

———— ss 32 53 582—

See PARTIES I L R 37 Calc 229

———— ss 36 37—*Pleader duly appointed —Appointment of authorised agent—Signature to execution petition* Where a party to a suit authorizes an agent by special power of attorney to appoint a pleader to sign execution petitions a pleader so empowered by the agent is a pleader duly appointed to act on his (the party's) behalf within s 36 of the Code of Civil Procedure and the petition signed by the pleader but not signed by the party is a duly presented petition even if neither the agent nor the pleader is a recognized agent within s 37 [*Judgment of the High Court reversed*] TIRUVENKATASAMI IYENGAR v PAVADAI PILLAI (1921)

I L R 44 Mad (P C) 736

———— s 37 (a)—

See ATTORNEY I L R 38 Mad 134

———— ss 42 43—

See HUSBAND AND WIFE
I L R 38 Calc 629

———— s 43—

See s 13 I L R 32 All 119

See MORTGAGE I L R 37 Calc 589

See PARTITION I L R 36 Mad 151

1 ———— *Civil Procedure Code 1908 Sch I O II r 2—Competence to give leave to omit remedies or split claims not limited by pecuniary jurisdiction of Court—Suit for surplus collections made by mortgagee—Limitation—Act No IX of 1871 Sch II Art 105—Act No XV of 1877 Sch II Arts 105 109—Act No IX of 1908 Sch I Arts 105 109* The competence of a Court to give leave to a plaintiff to omit to sue for a relief to which he may be entitled is not affected by the pecuniary value of the relief in respect of which such leave is sought A suit by a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee may be brought within three years from the time when the mortgagor re enters on the mortgaged property under Art 105 of the second Schedule to the Limitation Act of 1877 (Sch. I to the Limitation Act of 1908) and there is no restriction as to the way in which the mortgagor may obtain possession. *Ram Din* v *Bhup Singh I L R 30 All 275* discussed MUHAMMAD FAIYAZ ALI KHAN v KALLU SINGH (1910) I L R 33 All 244

2 ———— *Suit for injunction—Suit dismissed upon the ground that plaintiff had failed to prove his possession—Subsequent suit for possession* *Held* that the dismissal of a suit for an injunction in respect of certain property upon the ground that the plaintiff has not proved his possession of the property in respect of which the injunction is sought is no bar to a subsequent suit for possession of the same property The principle of the decisions in *Darbo* v *Kesho Rai I L R 2 All 356 Saraali* v *Kunj Behari Lall I L R 5 All 345* and *Mohan Lal* v *Bilaso I L R 14 All 519* followed BANDE ALI v GOKUL MISIR (1911) I L R 34 All 172

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —contd.

——— s 43—contd.

3 ——— *Portion of claim—Intentional omission—Civil Procedure Code (1908) O II r 2 (3).* G who was the tenant of a holding died leaving a mother and a daughter both of the same name The plaintiff sued the mother as representing G for arrears of rent for 1313 Fasli and obtained an *ex parte* decree In respect of the year 1314 he sued the daughter and obtained a decree The decree in respect of 1313 was set aside and at the rehearing the daughter was made a party It was found that at the time the plaintiff brought the suit in respect of 1314 he *was not aware that the daughter was the tenant in 1313* *Held* that the plaintiff having no knowledge when he brought his suit in respect of 1314 that the daughter was the tenant in 1313 could not be said to have omitted to sue in respect of that year and the suit for 1314 was not barred by the provisions of s. 43 of the Code of Civil Procedure (1882) *Amanat Bibi v Imdad Husain I L R 15 I A 106 I L R 15 Calc 800* referred to BATUL KUNWAR v MUNNI LAL (1910)

I L R 32 All 625

4 ——— *Contract Act s 43—Omission of part of cause of action in a suit against a joint promisor—Effect of such omission in subsequent suit against other promisors* The omission in a previous suit against one of several joint promisors of a part of the cause of action is no bar under s 43 of the Civil Procedure Code to a subsequent suit against another joint promisor for the portion so omitted The subsequent suit will not be barred by the rule laid down in *King v Hoare 13 M & W 494* as that rule is based on the merger of the cause of action in the judgment There can be no such merger when the cause of action has not been sued upon The effect of s 43 of the Indian Contract Act on the rule laid down in *King v Hoare 13 M & W 494* that a judgment against one of several joint promisors is a bar to a suit against the others considered RAMANJULU NAIDU v ARAVAMUDU AIYANGAR (1909)

I L R 33 Mad 317

——— ss 43 and 50—*Transfer of Property Act (IV of 1882) s 90—Suit to recover mortgage debt by sale of mortgaged and unhypothecated property—Decree against mortgaged property alone—Sale—Amount realised not sufficient—Application for supplemental decree to recover balance by sale of other property—Limitation—Putting forward allegations at a late stage* In a suit upon a mortgage dated the 18th April 1887 the plaintiff claimed on the 18th April 1899 to recover the mortgage debt by sale of the mortgaged property and the balance if any from the non hypothecated property of the mortgagor The decree was passed in plaintiff's favour against the mortgaged property alone The amount realised by the sale of the mortgaged property being insufficient to satisfy the decree the plaintiff applied under s 90 of the Transfer of Property Act (IV of 1882) for a supplemental decree against the other property of the mortgagor The first Court found that the claim for a personal decree against the mortgagor was time barred On appeal by the plaintiff he attempted to prove that the claim was within time owing to an intermediate payment by the defendant but the Appellate Court found that the plaintiff failed in his attempt and confirmed the decree On second appeal by the

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —contd

——— ss 43 and 50—*contd*

plaintiff *Held* confirming the decree that the mortgage in suit being of the year 1887 and the suit of the year 1899 the plaintiff's right to a personal decree against the mortgagor was time barred the plaintiff having failed to show the ground on which exemption from the law of limitation was claimed *Held* further that the plaintiff could not be allowed at a late stage of the suit to bring forward for the first time allegations which it was necessary to prove in order to show that he was entitled to a further decree against the defendant personally GULAM HUSSAIN v MAHAMADALLI IBRAHIMJI (1910)

I L R 34 Bom 540

——— ss 44 45—

See PRE EMPTION I L R 32 All 14

——— s 50—

See s 43 I L R 34 Bom 540

——— ss 50 211 212—

See JURISDICTION I L R 43 Calc 650

——— s 53—

See PARTIES I L R 37 Calc 229

——— s 53— *Amendment of plaint by referring to document not included in list of documents relied on* At the hearing of a suit brought by the plaintiff for the recovery of a sum due at the foot of an account the defendant raised a plea of limitation The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation The lower Court refused the application On appeal *Held* that the amendment should have been allowed GUNNAJI BHAWAJI v MAKANJI KHOOSALCHAND (1909)

I L R 34 Bom 350

——— *Plaint if may be returned for amendment after issues framed* The mere fact that issues have been framed does not stand in the way of the return of the plaint by the Court for amendment under s 53 of the Civil Procedure Code (Act XIV of 1882) *Port Canning and Local Improvement Co v Dharanidhar 9 C W N 608 Baroda Prasad v Girija Nath 2 C L J 11* referred to *Ganga Sahai v Mahamad Ali I L R 30 All 44* followed SASI BHUSAN DAS v RASIK LAL RAY (1910)

17 C W N 989

——— s 54—*Power of Court to extend time allowed—Time if may be extended* ex posto facto—*Court Fees Act (VII of 1870) s 28—Limitation* The Court has the power to extend the time allowed by it to put in deficit court fees *ex poste facto* A plaint was filed one day before the last day of limitation on an insufficiently stamped paper and the Court allowed a week's time to put in the balance of court fee The court fee was put in one day later than the time allowed and later on a petition was put in praying for extension of time and the plaint was registered *Held* that this amounted to an extension of the time which the Court was quite competent to grant *Held* further that in the circumstances the plaintiff would have the benefit of s 28 of the Court Fees Act and the suit was not barred AMIR HOSSAIN KHAN v BABU NANAK CHAND (1910)

14 C W N 882

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

———— ss 232 266—

See MAINTENANCE ALLOWANCE
I L R 38 Calc 13

———— s 234—*Hindu Law—Joint Hindu family—Decree obtained against uncle executed against nephews—Legal representative—Limitation Act (XV of 1877) Sch II Art 170—Application against persons not the legal representatives* A simple money decree was passed against one Raja Suchit Prasad Singh He died leaving a widow and two nephews Application for execution was made against the two nephews but was dismissed upon the ground that the property sought to be taken in execution was ancestral A second application for execution was made against other property alleged to be self acquired and this time against the widow as well as the nephews *Held* that the nephews were not legal representatives of the deceased judgment debtor and this being so an application for execution against them could not be held to keep the decree alive as against the widow with respect to whom it was otherwise barred by limitation *Veerappa Chettiar* v *Ramaswami Aiyar I L R 27 Mad 106* referred to *Ramanuj Sewak Singh* v *Hingu Lal I L R 9 All 517 Gopal* v *Har Prasad All Weekly Notes (1892) 241* and *Hari* v *Narayan I L R 12 Bom 427* distinguished GYANENDRA NATH BASU v PANI NIHALO BIBI (1910)
I L R 32 All 404

———— s 235—

See REVIVOR **I L R 43 Calc 903**
See s 230 **I L R 33 All 517**

———— ss 235 238 245—

See LIMITATION ACT 1877 SCH II ART 179 **14 C W N 481**

———— ss 235 320—*Gujarat Talukdar s Act (Bom Act VI of 1888) ss 28 29 B and 29 E—Decree against Talukdar—Execution—Decree transferred to Talukdari Settlement Officer—Notification of management—Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment debtor—Certificate under s 29E of the Gujarat Talukdar s Act (Bom Act VI of 1888)—Managing Officer—Talukdari Settlement Officer* When execution proceedings are commenced against a judgment debtor they can be continued after his death by substituting the name of the legal representative in place of that of the deceased judgment debtor in the application for execution It is not necessary to file a fresh application under the provisions of s 235 of the Civil Procedure Code (Act XIV of 1882) *Hirachand Harjivandas* v *Kasturchand Kasidas I L R 18 Bom 2?4* explained The effect of s 29F of the Gujarat Talukdar s Act (Bom Act VI of 1888) is that before the execution of a decree can be proceeded with the Court must be satisfied that the decree claim has been duly submitted If the officer certifies that it has been duly submitted there is an end of the matter If he does not so certify the Court must wait for one month from the date of the receipt by the officer of an application for a certificate and upon being satisfied that the claim has been duly submitted in accordance with the provisions of s 29B of the

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

———— ss 235 320—*contd*

Gujarat Talukdar s Act (Bom Act VI of 1888) it may then proceed with the execution The expression managing officer in s 29E of the Act is merely a compendious term for the Talukdari Settlement Officer or any other officer appointed by Government to take charge of the Talukdar s estate and keep the same in his management referred to in s 28 of the Act and where the officer who takes charges of the estate and keeps the same in his management is the Talukdari Settlement Officer the managing officer is merely a synonym for Talukdari Settlement Officer Where an application relating to a claim is presented to the Subordinate Judge and is forwarded by him to the Talukdari Settlement Officer it amounts to a submission of the claim in writing within the meaning of s 29B of the Act if the Talukdari Settlement Officer is also the managing officer PURUSHOTTAM v RAJBAI (1909)
I L R 34 Bom 142

———— s 238—

See LIMITATION ACT (XV OF 1877) SCH II ART 179
I L R 37 Bom. 317
14 C W N 481

———— *Limitation Act (XV of 1877) Arts 142 and 144—Suit to recover possession—Dispossession—Discontinuance of possession—Possession as an agent of minors—Decree by the minors on attaining majority against the agent for possession of the property—Decree not executed and barred by limitation—Agent wrongfully dispossessed by a third person—Money decree against the original owners—Decree holder seeking to attach property—Adverse possession* N died in 1879 leaving behind him two minor sons *R* and *D* and a mistress *A* The latter looked after the minors and managed their property When they arrived at the age of majority they found that *A* claimed the property in her own right In 1891 *R* and *D* sued *A* for the possession of the lands and obtained a decree on the 30th of August 1892 which was confirmed on appeal on the 15th of June 1894 This decree was sought to be executed on the 26th June 1897 but the application was dismissed as barred by limitation *A* was then wrongfully deprived of the possession of the property by V who sold it to *B* in 1908 *B* mortgaged the property to *E* in 1900 In the same year the plaintiff obtained a money decree against *P* and *D* and in execution of it he had an attachment placed on the property but the attachment was removed in 1904 at the instance of *B* and *E* In 1905 the plaintiff brought a suit for a declaration that the property was liable to be attached and sold in execution of his decree against *R* and *D* The defendants *B* and *E* contended that the suit was barred under Art 142 of the Limitation Act 1877 inasmuch as neither the plaintiff nor his predecessors in title *R* and *D* were in possession of the property within twelve years preceding the suit *Held* that the suit having been brought by the plaintiff under s 283 of the Civil Procedure Code of 1882 to establish his right to attach and sell the property in dispute as that of his judgment debtors *R* and *D* in execution of his money decree all that he had to prove was that on the date of attachment the judgment-debtors had a subsisting right to the property and that the suit must

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd*

——— s. 238—*contd*

therefore be tried as if it were a suit for possession by the judgment-debtors. *Held* also that as A's possession must be deemed to have begun in 1871 as that of bailiff or agent for the minors R and D and to have continued as such until after they had arrived at the age of majority and as there had never been any dispossession by A of R and D while they had been in possession in a suit against A her plea of limitation would be decided by the application not of Art 142 but of Art 144 of the Limitation Act 1877. *Morgan* v. *Morgan I All 489* followed. *Taylor* v. *Hord* Sm L C Vol II 10th Edn pp 641 645 followed. *Lalubhai Panachand* v. *Malharrao* I L R 21 Bom 355 at p 413 followed and *Dadoba* v. *Krishna* I L R 7 Bom 34 followed. *Held* further that though the decree for possession obtained by R and D against A had become incapable of execution by reason of their failure to apply to the Court for its execution within the period prescribed by the law of limitation the right established by it remained and though that right could not be enforced as against A by execution through the Court the decree holders could enter by ousting any trespasser A included. *Pandhu* v. *Natu* I L R 15 Bom 238 followed. *Held* therefore that there having been no allegation of possession in R and D lost by dispossession or discontinuance of possession but the case put forward having been a title in them established by their decree against A and a wrongful possession obtained from her after the decree by F under whom B and E claimed the limitation applicable to the suit was that provided by Art 144 not Art 142 of the Indian Limitation Act (XV of 1877). *Fakir Abdulla* v. *Balaji Gunguji* I L R 14 Bom 458 followed and *Gangadaji Nagu Kaval Mhatra* v. *Nago Dhaya Mhatra (1887)* I J 242 followed. *Per* HEATON J —Art 142 of the Indian Limitation Act (XV of 1877) has no application to claims which neither in terms nor in substance are claims to possession made necessary by reason of dispossession or discontinuance of possession. It is a general principle that any one suing in ejectment must prove possession within twelve years the reason for this however is that possession is commonly the effective assertion of title which is relied on but it is not the only one. There is another which in some cases is equally good and that is an assertion of title made in Court and established by a decree. That is good against those who are party defendants to the suit and if the same title is reasserted and made good in a later suit against other opposing parties it is good against them also and entitles to possession whether the title claimant has or has not been in possession within twelve years unless the opponent can defeat the title by adverse possession. VASUDEO ATMARAM JOSHI v. EKNATH BALKRISHNA THITE (1910) I L R 35 Bom 79

——— ss 240 276 295—

See ATTACHMENT I L R 44 Calc 662

——— s 244—

See APPEAL I L R 38 Calc 717

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XI r 5
I L R 39 Mad. 541

See MORTGAGE I L R 41 Mad. 403

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd*

——— s 244—*contd*

See OCCUPANCY HOLDING
I L R 42 Calc 172

See RES JUDICATA
I L R 37 All 485

See TRANSFER OF PROPERTY ACT (IV OF 1882) ss 85 89
I L R 40 Bom 321

See s. 211 I L R 45 Bom 211

1 ——— Execution of decree—*Interpretation*. *Held* that s 244 of the Code of Civil Procedure 1882 does not apply to a dispute between the decree holder and a person against whom though a party to the suit no decree has been passed. *Kalka Prasad* v. *Bansi Ram* I L R 3 All 546. SHEO LAKHA SINGH v. NAWAB SINGH (1910) I L R 32 All 321

2 ——— Compromise—*Sale application to set aside on ground of fraud—Compromise purporting to be made by the applicants—Right of one of the applicants to show that he was no party to compromise.* The judgment debtors under a decree applied under s 244 of the Code of Civil Procedure (Act XIV of 1882) to set aside a sale of their property in execution of the decree. The proceeding terminated in a compromise made on an application which purported to be signed by all the judgment debtors. One of the judgment debtors subsequently applied under s 244 of the Code of Civil Procedure (Act XIV of 1882) to show that she was no party to the petition and was not bound by the compromise. *Held* that there was no bar in law to the hearing of such an application. *Rajib Panda* v. *Lakhan Sendh* I L R 27 Calc 11 referred to. ASABAN BANU v. ANANDA CHARAN DUTTA (1909)
14 C W N 823

3 ——— Decree revivor of—*Civil Procedure Code (Act XIV of 1882) ss 244 258—Limitation Act (XV of 1877) Sch II Art 180—Step in aid of execution—Order in Council if includes provisions of decree affirmed—Limitation—Payments in satisfaction of decree made out of Court if may be proved.* In order that any proceeding in execution may operate as a revivor there must be expressly or by implication a determination that the decree is still capable of execution and the decree holder is entitled to enforce it. Where a decree holder applied for execution and on the judgment debtor's objecting to the execution on the ground of the decree being time barred their objection was overruled but the decree holder did not proceed with the application any further. *Held* that this order operated as a revivor of the decree. SRIMATI KAMINI DEBI v. AGHORE NATH MUKERJI (1909) 14 C W N 357

4 ——— Suit by previous purchaser—*at private sale if barred*. A money decree was obtained against the heirs of one N. Some of the heirs subsequently transferred their interest in the disputed property to K and it was a found that the transfer was *bona fide* and for value. The decree holder then attached the property and purchased it himself in execution of the decree. In a suit by the heirs of K for declaration of title and recovery of possession on the ground that the property attached having been sold to K could not be attached in execution of the decree —*Held* that the suit was not barred by s 244 of the

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

———— s 244—*contd*

Civil Procedure Code 1882 the purchaser not being a representative of the judgment debtor within the meaning of that section. *Gour Sunder Lahiri v Hem Chandra Chowdhury I L R 16 Calc 355 Ishan Chandra Sirkar v Beni Madhab Sirkar I L P 24 Calc 62 Akhoy Kumar Soor v Bejoy Chand I L P 29 Calc 813* distinguished. KALI KUMAR VIDYARATNA *v* MISRIJAN (1911)
15 C W N 711

5 ———— **Under-statement of value in sale proclamation**—*Application to amend proclamation must be considered before sale* Proceedings under s 287 cl. (c) of the Civil Procedure Code of 1882 fall under the provisions of s 244 of the Code and are appealable as such Where the lower Court dismissed as premature an application made before the sale for amendment of sale proclamation on the ground that the property had been under valued *Held* that under statement of value in a sale proclamation being a material irregularity where an application is made by a debtor objecting to the value of the property as stated in the sale proclamation it is the duty of the Court to make an enquiry and to satisfy itself that the value as stated in the sale proclamation is correct As the sale had already taken place and the appeal thus made unfructuous the Court dismissed the appeal with these observations LACHMAN PERSHAD SINGH *v* GANGA PERSHAD SINGH (1910) **15 C W N 713**

6 ———— **Suit by party or representative against auction purchaser**—*To raise question within section not maintainable—Auction purchaser as such not representative of decree holder or of the judgment debtor* A suit by a party to a suit as his representative against an auction purchaser raising questions which as between the parties must be decided in execution under s 244 of the Code is not sustainable The prohibition is not ba ed on the ground that the auction purcha er is the representative of the decree holder The auction purchaser is not such representative *Manickka Odayan v Rajagopala Pillai I L R 30 Mad 507* not approved. *Per* WALLIS J—The prohibition is based on the general intention of the Legislature as gathered from the section. *Per* KRISHNASWAMI AIYAR J—A party to the execution proceedings can impeach a sale only by an application to set it aside and where the sale not being so impeached is confirmed the posse sion [of the] auction purchaser cannot be disturbed by [a suit]. The true ground for the prohibition is not [that s 2]44 bars the suit as the auction purchaser [is the repres]entative of the decree holder but that [there is a] bar to setting aside the sale except [by application] between the parties the suit [by the purcha]ser is not maintainable until it [is set aside. A s]tranger purcha er at an au tion [in execution of] a money decree is not the [representative of the] decree holder or of the [judgment-debtor.] MUNI NARAYANA IYEN[GAR *v*] PILLAI (1910) **I L R 31 Mad. 417**

[Overlapping fragments from a folded page, as legible: ct… ex… of s… I… m n… comme… be conti… name of t… the d cease… for execution… application under… Civil Procedure Co… chand *Haj vand* … *I L R 18 Bom 274* … s 20F of the Gujarat … VI of 1888) is that before … can be proceeded with the … that the decree claim has … If the officer certifies that it … mitted there is an end of the … to set aside decree … not so certify the Court must wa[it] … that s 244 of Act … from the date of the receipt by … to set aside a … application for a certificate and upon … ground that they … find that the claim has been duly … ALI THAKUR *v* … accordance with the provisions of s … W … N …]

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

———— s 244—*contd*

8 ———— **Partition of Joint Family Property**—*Sale of a judgment debtor's share in joint Hindu family property in execution of decree—Decree holder being the purchaser—Subsequent suit by latter for partition—Whether competent* One *G R* obtained a money decree against one *L* He applied for attachment and sale of *L's* share in certain property which belonged to a joint Hindu family of which *L* was a member This share was ascertained to be one sixth of the property and was sold and purchased by *G R* himself The sale was duly confirmed and the sale certificate issued *G R* then applied for possession by partition of the share the other members of the family objected and the executing Court on 22nd November 190? ordered that *G R* should sue for partition in a separate suit as partition could not be effected in execution proceedings In 1913 the son of *G R* brought the present suit for partition. The Lower Courts held that a separate suit was barred by s 47 of the Code of Civil Procedure 1908 *Held* that s 244 of the old Code of Civil Procedure which was applicable did not give the executing Court power to effect a partition and that the present suit was therefore necessary and competent. *Yelmualai Chetti v Srinivasa Chetti I L R 29 Mad 294* and *Bhaguati v Banwari Lal I L R 31 All 82 F B* followed *Bhagga Shah v Bura Shah 58 P R 1888* distinguished *Sheo Narain v Nur Muhammad I L R 30 All ?2* not followed being overruled by *Bhaguati v Banwari Lal I L R 31 All 82 F B* BRIJ LAL *v* DURGA **I L R 1 Lah 134**

———— ss 244 252 647—**Parties**—*Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under s 244—They cannot raise the defence in a separate suit for possession by auction purchaser — Auction purchaser as a stranger* *C* sued *M* on a money bond. *M* having died during the pendency of the suit his widow *P* and his brother *N* were brought by *C* on the record as his representatives A decree was pas ed awarding the claim out of the property of the deceased After the passing of the decree but before it could be executed both *P* and *N* died. *C* then brought on the record the defendants as the legal represen tatives of *M* The latter denied that they were *M's* legal representatives or that they had any property of *M's* which could be liable for the decree The Court overruled the objection and in execution of the decree attached and sold the property in dispute The plaintiff purchased the property at the sale and filed this suit to recover possession thereof from the defendants The lower Court disallowed the plaintiff's claim on the ground that the property having been joint property of *M* and defendants, survived to the latter at *M's* death and that the plaintiff obtained no title at the Court sale which he could legally assert as against the defendants. In the lower appellate Court the plaintiff contended unsuccessfully that the defendants were debarred by the provisions of s. 244 of the Code of Civil Procedure 188? ? asserting their title *Held* … was sold by the … the …

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

——— s 244—*contd*

and the defendants as judgment-debtors under s. 252 of the Civil Procedure Code of 1882. It was, therefore a question in relation to them falling within s. 244 of the Code by reason of the explanation to s. 647 that applications for the execution of the decree were proceedings in suits. The defendants were consequently bound to object to the attachment and sale under that section, so far as the decree holder's action was concerned. It was contended that whatever might have been the result if the decree holder had been a party to the suit the present dispute was between the auction purchaser who was a stranger to the previous suit and the execution proceedings therein, and the defendants, and that s. 244 did not apply *Held* that though an auction purchaser at a Court sale in execution of a decree was not a party to the suit in which the decree was passed and though he was not a representative of either the decree holder or the judgment-debtor for the purposes of s. 244 yet if the question raised by the judgment-debtor as to the legality of the Court sale was virtually one between the parties to the suit that is between the decree holder and the judgment debtor and if in the decision and result of that question the auction purchaser was interested the judgment-debtor ought not to be allowed to attack the sale in a suit The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction purchaser affects the parties to the suit and could have as between them been raised and determined under s. 244 and whether the auction purchaser though not a party to that suit is a party interested in the result GOKULSING BHIKARAM *v* KISAN SINGH (1910) I L R 34 Bom 546

——— ss 244 258—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXI R 2 I L R 40 Bom 333

——— ss 244 278—

See EXECUTION OF DECREE I L R 39 Calc. 298

——— ss 244 283—*Property attached in execution of a decree purchased while under attachment—Decree set aside—Purchaser not the representative of the judgment-debtor* Where a decree is set aside in appeal everything done in pursuance of that decree comes to an end Hence where property which was subject to an attachment was purchased but the decree under which the attachment was levied was set aside it was *held* that the purchaser was not the representative of the judgment debtor within the meaning of s 244 of the Code of Civil Procedure 1882 GHAFUR UD DIN *v* HAMID HUSAIN (1909) I L R 32 All 129

——— ss 244 295 (c)—

See LIMITATION I L R 41 Calc 654

——— s 245—

See LIMITATION ACT 1877 SCH II ART 179 14 C W N 481

——— s 248—

See LIMITATION ACT 1908) SCH I ART 183 1127

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

——— s 248—*contd*

——— *Execution—Res judicata—Notice under s 248 Civil Procedure Code (Act XIV of 1882) issued by Court on application for transfer of decree—Limitation bar of not raised* In sending a decree for execution to another Court the Court which passed the decree is not called upon to consider whether the decree is still capable of execution That is a question for determination by the Court to which the decree is transferred upon a proper application for execution presented to it Notice under s. 248 Civil Procedure Code is to be issued by the Court which has seizin of the application for execution and not upon an application for transfer of a decree A judgment-debtor is therefore not only not bound to appear and urge an objection of limitation upon a notice under s 248 Civil Procedure Code issued by the Court upon an application for transfer of the decree but it is not possible for him to take this step SRIPATI CHARAN CHOUDRY *v* R BELCHAMBERS (1910) 15 C W N 661

——— *Attachment under decree known to judgment-debtor—Application for sale more than a year after previous application—Sale without notice to judgment-debtor validity of* A sale of a judgment debtor's property is not void for want of notice to him of the application for sale made more than a year after a prior application for execution if the sale is held in pursuance of a subsisting attachment known to the judgment debtors. *Raghunatha Das v Sundar Das Khetri (1915) I L R 42 Calc 72 (P C)* and *Shyam Mandal v Satinath Banerjee (1917) I L R 44 Calc 954* distinguished SITARAMAYYA *v* GOPALAKRISHNAMMA (1920) I L R 43 Mad 57

——— ss 248 249—

See REVIVOR I L R 43 Calc 903

——— s 252—

See ss 244 252 647 I L R 34 Bom 546

——— *Decree against assets of deceased in the hands of representative is a decree against representative—Such decree executable only against such representative or his representative* In a suit brought against *A* the widow of a deceased person as his representative a decree was passed directing the recovery of the sum sued for from the estate of the defendant's deceased husband in her hands Another person *B* brought a suit against *A* to establish his title to the property of the deceased and having obtained a decree in his favour took possession of the estate The decree holder sought to execute the decree against *B* under s 252 of the Code of Civil Procedure —*Held* that the decree was not against the estate but against *A* the legal representative and was capable of execution only against *A* and her representatives *Subbanna v Venkatakrishnan I L R 11 Mad 408* followed KALIAPPAN SERVAIKARAN *v* VARADARAJULU (1909) I L R 33 Mad. 75

——— ss 256 488 490—

See ATTACHMENT I L R 38 Calc 448

——— s 257—*Death of decree holder if relieves judgment-debtor of duty of payment—Mode of payment—Delay in payment of instalment—In*

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

——— s 257—*contd*

terest The death of the decree holder does not relieve the judgment debtor of the duty of paying up the decretal debt in one of the several modes specified in s 257 of the Civil Procedure Code (Act XIV of 1882) He should either deposit the amount in Court as directed in cl (*a*) or should take directions from the Court under cl (c) Where the judgment debtor upon the death of the decree holder failed to deposit the balance due under an instalment decree till long after the date fixed for the payment of the instalment *Held* that the judgment debtor was liable to pay interest for the period during which the instalment remained unpaid NARENDRA CHANDRA LAHIRI v CHARU CHANDRA SINGH (1908)

14 C W N 146

——— s 257A—

See STATUTE CONSTRUCTION OF

I L R 35 Bom 307

See s 210 16 C W N 34

——— *Mortgage decree silent as to interest—Petition by judgment debtor for time wherein he agrees to pay interest—Assent by decree holder—Court s order granting time, if it sanctions agreement to pay interest—Judicial order construction of—Decree if can be altered by agreement of parties* Where a mortgage decree contained no provision for interest on the decretal amount from the expiry of the period of grace to the date of realisation and the decree was made absolute the mortgaged properties being ordered to be sold in execution thereof whereupon the judgment debtor presented a petition, assented to by the decree holder asking for time and agreeing to pay interest on the decretal amount at the bond rate till the date of realisation, and the Court passed an order on the petition granting time *Held* that the order of the Court granting time must be taken as passed under s 257A of the Civil Procedure Code of 1882 Judicial orders must be reasonably construed and judicial acts must be presumed to have been regularly performed *Held* therefore that the sanction of the Court covered not merely the prayer for adjournment but also the agreement to pay interest although this matter was not specifically referred to in the order *Saroda Prosad* v *Luchmiput 10 B L R 214 Bourne* v *Gatliff 11 Cl & F 45 80* and *Banwari Das* v *Mahammad Mashiat I L R 9 All 690* referred to A decree must ordinarily be executed as originally made and the parties can not be permitted to make a substantial alteration therein But where the parties have acted upon the decree as altered for a number of years and treated it as valid the judgment debtor who has substantially benefited thereby cannot be permitted to take exception to its validity Parties litigants cannot be allowed to assume inconsistent positions in Court to the detriment of their opponents where they have elected to adopt a certain course of action, they will be confined to the course they have deliberately adopted *Dwarka Nath Sen* v *Guru Charan Pal 14 B L R 217 21 W R 310 Ram Ranjan* v *Jauhuru Juma 23 W R 129 Bhoopendra Nath* v *Kalee Prasanna 24 W R 105 Heera Lal* v *Dhanputh Singh 24 W R 289* referred to. CORHAI LADHAN v BEHARI LAL LAHIRI (1912)

17 C W N 565

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

——— s 257A—*contd*

——— *Decree—Satisfaction—Decree not carrying interest—Mortgage passed in satisfaction of decretal debt made payable in instalments—Interest payable on failure to pay instalments—Covenant for interest can be severed from the covenant as to repayment of principal—Agreement not void so far as concerned principal* The plaintiff obtained a decree against the defendant for Rs. 800 without interest but with costs which amounted to Rs 89 12 0 In satisfaction of the decretal debt and in consideration of a cash advance of Rs 10 4 0 the defendant passed a mortgage deed for Rs 900 in favour of the plaintiff The amount of Rs 900 was repayable in nine annual instalments of Rs 100 each. On failure to pay any one instalment interest was to be charged at the rate of 1¼ per cent per mensem and the whole amount became payable on failure to pay any two instalments. None of the instalments having been paid the plaintiff sued to recover Rs 900 principal and Rs 900 as interest The lower Courts held that the mortgage deed contravened the provisions of s 257A of the Civil Procedure Code (Act XIV of 1882) but they passed a decree for Rs 900 in plaintiff's favour as the covenant to pay interest was quite distinct and severable from the covenant to pay principal The defendant having appealed *Held* confirming the decree that the primary and main agreement was to pay a sum of money which was not in excess of the decretal amount and that it was only on failure to fulfil that agreement that interest was to be charged that is it was only something which came into operation when there was a breach of the agreement and that the primary agreement was therefore not void under s 257A of the Civil Procedure Code 1882 *Bhagchand* v *Padhakisan I L R 28 Bom 62* followed. CHATRU v KONDAJI VITHAL (1913)

I L R 38 Bom 219

——— ss 257A 258—

See LIMITATION ACT (XV OF 1877) SCH II ART 179 (4)

I L R 32 All 257

——— s 258—

See CIVIL PROCEDURE CODE 1908 O XXI R. 2 I. L. R 40 Bom. 333

See EXECUTION OF DECREE

I. L R 35 All 178

1 ——— Payments made out of Court in satisfaction of a decree and not certified to the Court under s. 258 Civil Procedure Code cannot be proved under s. 244 Civil Procedure Code KAMINI DEBI v AGHORE NATH MUKERJI (1909) 14 C W N 357

2. ——— *Adjustment not certified to the Court—Decree holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872) s 115* A decree was adjusted outside the Court No notice was given to the Court of the adjustment and its sanction was not taken under s. 258 of the Civil Procedure Code of 1882 The decree-holder received payments under the adjustment and after some time applied to execute the decree irrespective of the adjustment. The judgment-debtor pleaded the adjustment as a bar to execution. The decree-holder contended that

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd*

———— s. 258—*contd*

the adjustment not having been certified to the Court, it could not recognise it as valid but was bound to execute the decree. The Subordinate Judge overruled the contention holding that as the decree-holder had, after the adjustment, received for several years moneys under it, he was estopped by conduct under s. 115 of the Indian Evidence Act 1872. *Held* that the view of the Subordinate Judge gave the go-by to the plain language of the last paragraph of s. 258 of the Civil Procedure Code 1882. There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of s. 258 enacts a special law for a special purpose whereas s. 115 of the Indian Evidence Act 1872 relates to the general law of estoppel and the principle is that a special law overrides for its purposes the general law. *Per* CHANDAVARKAR, *J*—Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice and decree-holders who enter freely into adjustments outside the Court and do not certify them as required by law but fraudulently apply for execution ignoring the adjustment should be dealt with under the criminal law. *Per* HEATON *J*—The purpose of s. 258 of the Civil Procedure Code 1882 is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree. TRIMBAK RAMKRISHNA *v* HARI LAXMAN (1910)
I L R 34 Bom 575

3 ———— *Civil Procedure Code (Act V of 1908) O XXI r 2—Mortgagee decree-holder left in possession under decree—Liability under decree to account and to credit surplus income annually—Receipt by mortgagee not certified to Court effect of—Receipt of payment under or adjustment of decree—Certificate within ninety days if necessary* Where under the terms of a decree the decree-holders (mortgagees) were to be in possession of the mortgaged property for six years, to render accounts every year and to give credit for any surplus income accruing from the lands, and at the end of eight years the judgment-debtor applied for the taking of accounts and delivery of possession of the lands *Held* that the receipts by the decree-holders of the income from the lands were not payments under or adjustments of the decree under s 258 of the Civil Procedure Code (Act XIV of 1882) corresponding to Order XXI rule 2 of the new Code and did not require to be certified to the Court within ninety days from the dates when the incomes were received by the decree-holders *Vaidhinadasamy Ayyar* v *Samasundram Pillai I L R 28 Mad 473 478* followed. *Ramasami Naik* v *Ramasami Chetti I L R 30 Mad 255 265* and *Nistarini Dasi* v *Kazim Alini 12 C L J 65* distinguished YELLA REDDI *v* SYED MUHAMMADALLI (1915) **I L R 39 Mad 1026**

———— ss 263 264 318 319—*Civil Procedure Code (Act V of 1908) O XXI r 5 (2)—Court sale—Symbolical possession by purchaser—Judgment-debtor remaining in actual possession—Limitation* Merely formal possession of immoveable property by a purchaser at a Court sale cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession and the property is not in the

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd*

———— ss 263 264 318 319—*contd*

occupancy of a tenant or other person entitled to occupy the same Symbolical possession is not real possession nor is it equivalent to real possession under Civil Procedure Code except where the Code expressly or by implication provides that it shall have that effect *Gopal* v *Krishna Rao I L R 25 Bom 275* and *Mahadeo* v *Parashram Bhagirath Chand I L R 25 Bom 358* overruled MAHADEV SAKHARAM *v* JANU NAMJI HATLE **I L R 36 Bom 373**

———— s 266—

See AGRA TENANCY ACT (II OF 1901) s 0 (2) **I L R 33 All 136**

See MAINTENANCE ALLOWANCE **I L R 38 Calc 13**

———— s 268 274—*Usufructuary mortgage—Debt—Immoveable property—Execution of money decree—Attachment* Where a deed of mortgage with possession provided that the mortgagee was to enjoy the profits in lieu of interest for ten years and was to be redeemed on the expiration of the term by payment of the mortgage money *held* that the document created a purely usufructuary mortgage *Held* further that in the case of a usufructuary mortgage there was no debt payable by the mortgagor to the mortgagee which could be attached in execution of a money decree against the assignee of the mortgagee and that s 268 of the Civil Procedure Code (Act XIV of 1882) was not applicable to such a case The procedure should be by attachment under s 274 of the Civil Procedure Code of the interest in immoveable property and its sale according to the provisions of the Code *Taraadi Bholanath* v *Bai Kashi I L R 26 Bom 305* explained MANILAL PANCHOD *v* MOTIBHAI HEMABHAI (1911)
I L R 35 Bom 288

———— ss 268 278 283—*Civil Procedure Code (Act V of 1908) O XXI rules 58 and 63—Transfer of Property Act (IV of 1882) s 132 illustration (i)—Decree—Execution—Garnishee—Attachment of debt—Objections by garnishee unsuccessful—Purchase by judgment creditor—Suit by purchaser against garnishee—Garnishee cannot raise the same defence—Suit by garnishee period of one year from the date of adverse order—Equity of cross debt—Setting up without payment of Court fee—Garnishee's right of set off—Prompt decision—Garnishee trustee for the judgment debtor* A brought a suit against *B* and in execution of the decree attached a debt alleged to be due to *B* by *T* under s 268 of the Civil Procedure Code (Act XIV of 1882) *T's* objection to the attachment having failed *A* applied for the sale of the debt and having purchased it himself at the Court sale brought a suit against *T* the garnishee for the recovery of the debt Garnishee having set up the same facts in defence as he had set up when he unsuccessfully objected to the attachment *Held* that the equity arising from the cross debt could be set up by the defendant without payment of Court fee as on a counter claim that if a cross debt were due to a garnishee there should be a right to setoff in his favour *Held* however that it was not open to the garnishee to plead a defence which had already in an execution inquiry been

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

——— s 268—*contd*

unsuccessful except in a suit instituted within one year from the date of the adverse order that the property attached could be regarded as property in the possession of the garnishee in trust for the judgment-debtor and therefore could be attached *Held* further that a garnishee's claims and objections should be decided as promptly as other objections to the attachment *Chidambara Pattar v Ramasawmy Pattar I L R 27 Mad 67* followed *Rambutty Koer v Kamessur Pershad 23 W R 58* not followed TAYABALLI GULAM HUSEIN v ATMARAM SAKHA RAM (1914)

I L R 38 Bom 631

——— s 269—*Rule framed under—Binding until rules made under new Civil Procedure Code—Bond given under rules deemed to be given by order of Court stamp of— Otherwise provided for by the Court Fees Act —Court Fees Act (VII of 1870) Sch II Art 6—Stamp Act (II of 1899) Sch I Art 15* Until rules are framed by the High Court under the new Civil Procedure Code (Act V of 1908) the rules made by Government under s 269 of the old Civil Procedure Code (Act XIV of 1882) are in force though they may be inconsistent with O XXI r 43 of the first schedule to the new Civil Procedure Code A bond given in pursuance of the rules made under power conferred by a section of the Code must be deemed to be given in pursuance of an order made by a Court under a section of Civil Procedure Code and is consequently otherwise provided for by the Court Fees Act (see Sch II Art 6 Court Fees Act VII of 1870 and Sch I Art 15 of the Indian Stamp Act II of 1899) The stamp is an eight anna stamp under the Court Fees Act *Re* The DISTRICT MUNSIF OF TIRUVALLUR (1914) **I L R 37 Mad 17**

——— s 273—*Civil Rules of Practice Rule 184—Mortgagee of mortgage decree entitled to sell mortgaged property by executing the mortgage decree—Effect of s 273 on sale of mortgage decree—Pledge of mortgage decree validity of* A mortgaged certain properties to *B* who sued on his mortgage and obtained the usual decree directing payment and sale in default *B* mortgaged the decree to *C* who sued *B* in the Court which passed the decree mortgaged and obtained a decree directing the sale of the decree obtained by *B* against *A* *C* became the purchaser of the decree at the auction and applied for execution of the decree as the transferee thereof *Held* that *C*'s application was sustainable and neither s 273 of the Civil Procedure Code nor r 184 of the Civil Rules of Practice debarred him from doing so *Per* CHIEF JUSTICE —The interest mortgaged to *C* included the right which *B* had to sell in default of payment No order for sale of the decree obtained by *B* was necessary to enable *C* to execute his decree and neither s 273 nor r 184 applied *Per* ABDUR RAHIM *J*—For the purpose of s 273 of the Civil Procedure Code a decree on a mortgage is a money decree and the section by implication prohibits the sale of such decree when attached Such prohibition is not however based upon any grounds of public policy so as to render the sale an absolute nullity S 273 merely lays down a rule of procedure and it cannot be so construed as to interfere further than is necessarily called for by its language with the substantive rights conferred upon the creditor by s 266 of the Code or with the right of alienation

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

——— s 273—*contd*

recognised by s 232 of the Code S 273 has no application where attachment of the decree is not asked for S 232 of the Code recognises the validity of pledges of decrees and it must be within the competence of a Court in the exercise of its general power of enforcing contract to order the sale of the decree pledged SUBBARAYA ROWTHER v KUPPUSAWMI AIYANGAR (1909)

I L R 34 Mad 442

——— *Where decree attached the decree holder cannot take any steps to execute the decree* S 273 of the Code of Civil Procedure prohibits the holder of a decree which has been attached in execution from applying for execution of the decree attached and any such application by him will be infructuous as it could not be granted and will not have the effect of saving limitation The only person competent to execute will be the attaching creditor who will be liable in damages if he allows the decree to become barred by limitation *Adhar Charan Dass v Lal Mohan Dass I L R 24 Calc 778* not followed UMMA KOYA v UMMA (1912) **I L R 35 Mad. 622**

——— s 274—

See s 268 **I L R 35 Bom 288**

——— s 276—

See ATTACHMENT **I L R 44 Calc 662**

See MORTGAGE **I L R 33 Mad 429**

——— ss 276 295—*Attachment—Private assignment—Claims enforceable under an attachment—Claim for rateable distribution of assets—Position of creditors attaching property after a prior attachment and a private assignment subsequent to such prior attachment—Validity of private alienations of property under attachment as against subsequent attachments by other creditors in the event of the withdrawal of the prior attachment—Necessity for the existence of assets realised by sale or otherwise in execution of a decree to give a right to claim rateable division under s 295* In 1894 *A* brought a suit against *B* obtained a decree and in execution of the decree attached the right title and interest of *B* in certain properties After the attachment in 1896 *B* assigned the whole of his right title and interest to the first defendant In 1898 the plaintiffs sued B and obtained a decree In 1900 *B* took the benefit of the Insolvency Act and his insolvency with a small break not material in this suit lasted up to the date of the present suit In 1904 the plaintiffs levied an attachment on the right title and interest of *B* in the property already subject to the attachment by *A* In 1907 *A* was paid off and the attachment by him was accordingly withdrawn and thereafter in 1910 on the application of the first defendant to the Judge in Chambers the attachment by the plaintiffs was raised by an order dated the 16th of April 1910 On the plaintiffs suing for a declaration that the interest of *B* in the said property at the date of the several attachments was liable to be attached and sold in execution of the plaintiffs decree that the order of the 16th of April 1910 should be set aside that the said interest of *B* should be sold in execution of the plaintiffs decree and the proceeds thereof applied according to law *Held* that the essential condition of enforcement of claims under

CIVIL PROCEDURE CODE (ACT XIV OF 1882) contd.

——— s 276—contd

295 of the Civil Procedure Code of 1882 was that there should be assets realised by sale or otherwise in execution of a decree but that in the present case there were no such assets realised by sale or otherwise in execution of a decree which could have been divided rateably among the creditors who had applied for execution of their decree *Held* further that the plaintiffs were not the possessors of a claim enforceable under s 295 or as a consequence enforceable under the attachment by A within the meaning of s 276 and therefore that the assignment to the first defendant was not void against the plaintiffs ETHA PREMA & Co v LADY JAMBAI (1912)

I L R 37 Bom 138

——— ss. 276 295 320 325A—*Execution of decree—Attachment of property—Transfer of execution proceedings to Collector—Property re attached under another decree between same parties—Second execution proceedings transferred to Collector—Claim under the first decree satisfied by compromise—Collector asked to return the darkhast as disposed—Judgment-debtor alienating the property—Claim for rateable distribution under another decree—Claims enforceable under the attachment—Bills of Sale Act 1878 s 8—Practice and procedure* In execution of a money decree which the plaintiff obtained against *B* certain property was attached and ordered to be sold The execution proceedings were thereafter transferred to the Collector under s 320 of the Civil Procedure Code of 1882 In the meanwhile the plaintiff obtained another money decree against *B* in execution of which the property was again attached These execution proceedings were also transferred to the Collector While the Collector was taking steps for the execution of the first decree the plaintiff informed the Mamlatdar who was carrying on the execution work on behalf of the Collector that his claim under the first decree was satisfied by *B* and that the *darkhast* should be returned to the Court as disposed of The Collector did so Ten days after this *B* sold the property to the defendant who out of the consideration moneys satisfied the plaintiff's first decree and other debts of *B* The plaintiff obtained a third *money decree against B* in execution of which the property was sold through the Civil Court and purchased by the plaintiff himself at the Court sale He then sued to recover possession of the property from the defendant In support of the plaintiff's claim it was contended (i) that the deed of sale relied on by the defendant was invalid having regard to the provisions of s 325A of the Civil Procedure Code (Act XIV of 1882) (ii) that the Collector was not warranted in acting upon the plaintiff's admission that the decree had been satisfied because the satisfaction was one made out of Court and not having been certified to the Court it could not be recognized as a payment of the decree under s 258 of the Code and (iii) that the sale *to the defendant was illegal and void under s 276* because the property was on the date of the sale under attachment in the plaintiff's *darkhast* ultimately disposed of by the Collector on the strength of the plaintiff's application that it should be returned to the Court as disposed of in consequence of the decree *Held* (i) that the sale to defendant was not void under the provision of s 325A inasmuch as ss 322 to 325 presupposed a decree which had to be satisfied and which was therefore capable of execution That could not be said of a decree which its holder by his declaration to the Collector acknowledged to have been satisfied (ii) That the intimation to the Collector who was in charge of the execution amounted to a due certifying of the adjustment of the decree, which satisfied the conditions of s 258 *Muhammad Said Khan* v *Payag Sahu I L R 16 All. 228* followed (iii) That s 276 did not apply for though the attachment had existed at the date of the sale to the defendant and was never formally raised the *darkhast* claim having been satisfied was no longer enforceable under it *Held* further that the second attachment itself was illegal under the provisions of the last portion of the first paragraph of s 325A and it could not affect the private sale to the defendant by *B* *Held* also that the sale to the defendant was not illegal and void under s 276 of the Code by reason of the second *darkhast* The moment the attachment of the plaintiff came to an end by reason of the satisfaction of his first decree sent to the Collector for execution all claims enforceable under the attachment ceased to be enforceable under it A claim under another decree cognizable under s 295 ceased to be operative for the purposes of ss 276 and 295 the same being dependent upon the continuance of the said attachment *Sorabji E Warden* v *Govind Ramji I L R 16 Bom 91* distinguished. *Umesh Chunder Roy* v *Raj Bullubh Sen I L R 8 Calc 279* *Gobind Singh* v *Zalim Singh I L R 6 All 33* and *Kunhi Moosa* v *Makki I L R 23 Mad 478* followed. When a decree holder intimates to the Collector that his decree has been *satisfied and that the necessity for its execution* by the Collector has ceased to exist the Collector's powers under ss. 322 to 325 also cease because the very foundation of them consisting in the fact of a decree which is alive and capable of execution has disappeared. The provisions of s 276 of the Civil Procedure Code (Act XIV of 1882) make the private alienation void not absolutely but only as against all claims enforceable under the attachment referred to in it Where the execution proceedings, in the course and for the purpose of which the attachment was made have come to an end on account of satisfaction of the decree by the judgment debtor and in consequence the decree is no longer alive the attachment also ceases and there is no longer any claim enforceable under the attachment to make the private alienation effected by the judgment debtor under the attachment void The person for whose protection s 276 was primarily intended has had his claim in that event satisfied otherwise than by the attachment *As to any claim under another* decree cognizable under s 295 that had been dependent on the continuance of the said attachment when that attachment was swept away all other claims cognizable under it ceased to be *operative for the purposes of ss 276* and 295 The only bar in the way of the private alienation was removed as if it never existed in law and the question as to the private alienation made by the judgment-debtor to the defendant during the attachment became reduced to one between that judgment debtor and his alienee KHUSHALCHAND v NANDRAM SAHEBRAM (1911)

I L R 35 Bom 516

CIVIL PROCEDURE CODE (ACT XIV OF 1882) *—contd*

———— *s* 278—

See s 268 I L R 38 Bom 631

See EXECUTION OF DECREE I L R 39 Calc 298

See VOLUNTARY PAYMENT I L R 40 Calc 598

———— When a claim under s 278 Civil Procedure Code is dismissed without adjudication it is not obligatory on the claimant so bring a regular suit *Sardhari Lal* v *Ambika Pershad L R 15 I A 123 c I L R 15 Calc 521 Kunj Behari* v *Kandh Prashad 6 C L J 252* referred to But if such suit is brought the claimant is bound by its result and cannot be heard to say that the suit was unnecessary SANKER NATH PANDIT v MADAN MOHAN DAS (1909) 14 C W N 298

———— s 278 to 283—*Execution of decree—Attachment—Objection to attachment—Objection dismissed—Suit to recover possession—Jurisdiction* *Held* on a construction of ss. 278 279 280 and 281 of the Code of Civil Procedure 1882 that an objector may raise an objection to an attachment not only on the ground that he is in possession of the property attached but also on the ground that he has an interest in it and that when an executing Court disallows the claims of an objector under s. 281 the Court has jurisdiction *to do so notwithstanding the fact that it erroneously does not go into the question of possession* but disallows the objection on some other ground BHAGWAN DAS v RAJ NATH (1912) I L R 34 All 365

———— *Bar under s 283 applies to parties to proceedings though subsequent to the order they become representatives of judgment debtor—Orders under ss 280 281 282 may deal with questions of titles* Parties to proceedings under s. 278 of the Civil Procedure Code of 1882 and persons claiming through them who would be estopped by orders passed under ss 280—282 do not cease to be parties to such proceedings and to be so estopped because subsequent to such order they acquire rights which enable them to stand in the shoes of the judgment debtor Orders under ss 280 281 and 282 may determine questions of title The power of the Courts in passing such orders is not confined to determining which of the parties is in possession RAMU AIYAR v PALANIAPPA CHETTY (1910) I L R 35 Mad 35

———— *ss* 278 282 283 287—*Civil Procedure Code (Act V of 1908) O XXI rr 62 and 63 —Attachment of mortgaged property—Application to sell the property subject to mortgage lien—Property ordered to be sold free of mortgage—Order not referable to s 283—Suit on mortgage a year after the date of the order—Limitation Act (IX of 1908) Art 11* The property in dispute was attached by the defendant's father under a decree passed by him in a suit of 1882 The plaintiff's father in response to a notice from the Court applied to have the property sold subject to his mortgage lien. In 1883 the Court rejected the application and directed that the property should be sold free from the alleged mortgage claim Thereupon in 1910 the plaintiff sued to recover the amount due on the mortgage Both the lower Courts held that the order of 1883 was passed under s. 283 of the Civil Procedure Code 1882 and the same became conclusive under s 283 of the Code and hence the suit was barred under Art 11 of the Limitation Act 1908 *Held* (i) that the suit was not barred as from the terms of the application itself it was clear that it must be referred to s 287 and not to s 278 of the Civil Procedure Code 1882 and (ii) that apart from the character of the application the Court's order of 1883 could not properly be referred to s 283 of the Civil Procedure Code 1882 With such an order as that s 282 of the Code had no concern *Durga Prasad* v *Mansa Ram 1 All L J 531* followed *Nemagauda* v *Paresha I L R 22 Bom 640* distinguished GANESH KRISHNA v DAMOO (1916) I L R 41 Bom 64

———— *ss* 278 283—

See s 268 I L R 38 Bom 631

———— s 282 287—*Decree—Execution—Attachment—Application to raise attachment by a third person—Court declaring lien in his favour—Property sold subject to lien—Third party suing the auction purchaser for amount of lien—Auction purchaser can question the existence of lien* In execution of a money decree obtained by *G* against *H* certain property belonging to the latter was attached *U* intervened in those proceedings and asked to raise the attachment on the ground that the property was his The Court investigated the claim under ss 280 and 281 of the Civil Procedure Code of 1882 and held that the property belonged to *H* and that *U* was entitled to a lien on the property for Rs 687 11 3 The property was then sold at a Court sale subject to the lien and purchased by *N* *U* sued *N* to recover the amount of his lien. *N* contended that the order passed in the miscellaneous proceedings did not bind him and that he was entitled to question the existence of the lien —*Held* that *N* was not bound by the order passed in the miscellaneous proceedings for he could not be regarded as a party to it being not a representative either of the judgment debtor or of the judgment creditor *Lavanji Haribhai* v *Lallu Akhai I L R 9 Bom 255 Vishvanath Chandu Naik* v *Subraya Shivaya Shetti I L R 15 Bom 290* followed. *Held* further that *N* was entitled to question the existence of the lien inasmuch as the order passed by the Court as to the lien could not be regarded as one passed under s 282 but as one passed under s 287 of the Civil Procedure Code of 1882 NARAYAN SALOBA v UMEAR ADAJI MEMON (1911) I L R 35 Bom 275

———— s 283—

See s 244 I L R 32 All 129

See ss 268 AND 278 I L R 38 Bom 631

See s 278 I L R 41 Bom 64

———— *Civil Procedure Code (Act XIV of 1882) ss 278 283—Suit by defeated claimant who had purchased property attached pending creditor's suit—Plea in defence that transfer fraudulent as to creditors—Creditor may act for himself—Transfer of Property Act (IV of 1882) s 53—Property of greater value than debt—Relief form of* Where in a proceeding under s 283 Civil Procedure Code the Court held that the judgment debtor and not the claimant was in

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —contd

——— s. 283—contd.

possession *Held* that a suit by a claimant under s. 283, Civil Procedure Code should be decreed if it is found in that suit that the claimant was in possession after a purchase for valuable consideration—unless there is anything in the pleadings outside the scope of s. 283, Civil Procedure Code, to restrain or restrict such a result. It is competent to the defendant in such a suit to set up the defence that the transfer to the plaintiff was with intent to defraud him so in effect was not binding as against him. *Clough v London and North Western Railway Co L. R. Exch. 26 The Eastern Mortgage and Agency Co v Rebati Kumar Ray 3 C L J 60* referred to. A creditor who has already recovered judgment on his debt is entitled to show that a transfer by the debtor was void as against his own claim he is not bound to act on behalf of all the creditors. *Smith v Hurst 10 Hare 30 ... Spirett v Willows 11 Jour N S 0 Blenkinsopp v Blenkinsopp 1 DeG M & G 495* referred to When the property transferred is larger than what would satisfy the creditor's demand the latter cannot complain if his right to avoid the transfer is confined to that part of the property or if the transferee be made to satisfy his demand. The title of the plaintiff in the property purchased by him was declared subject to a direction that he should pay the amount of the defendant's decree within a period specified failing which the property was to be sold and the surplus left after paying off the defendants paid to the plaintiff ABDUL KADER v ALI MIA (1912) 16 C W N 717

——— ss 285 295— *Claim or objection entertainable under s 285 nature of—Application for rateable distribution of sale proceeds* An application for rateable distribution of proceeds of property realised in execution cannot be deemed to be an application for determination of any claim to the attached property or of any objection to attachment thereof within the meaning of s. 285 of the Civil Procedure Code (Act XIV of 1882) These words refer to claims and objection of the sort which can be summarily inquired into and decided in execution proceedings as provided in the immediately preceding section or elsewhere in the Code as in ss 278 to 281 An application purporting to be made under s. 295 which fails by reason of not satisfying the conditions laid down therein ought not to be dealt with as one under s. 285 *Chelalingam v Muthia Chetty (1895) Lower Burma Judgments 1893 1900 (161)* approved. *Clark v Alexander I L R 21 Calc 200 Har Bhagat v Anandaram 2 C W N 126* considered PARAS RAS AGARWALA v GURU CHARAN SEN (1909) 14 C W N 396

——— s 287—

See s 282 I L R 25 Bom 275

——— *Execution of decree—Mortgage on property sold notified at time of sale—Subsequent suit on mortgage—Auction purchaser not estopped from questioning validity of mortgage.* In proceedings in execution of a decree a person alleging himself to be the mortgagee of property about to be sold asked the executing Court to notify the existence of his prior incumbrance on the property to be sold and the Court without apparently making any inquiry as to the genuineness of the mortgage did so but did not sell the Property subject to the prior incumbrance The Property was sold and purchased by the decree holder *Held* on suit by the mortgagee that the decree holder auction purchaser was not estopped from contesting the validity of the mortgage so notified *Shib Kunwar Singh v Sheo Prasad Singh I L R 28 All 418* followed. JAIRAJ MAL v RADHA KISHAN (1913) I L R 35 All 257

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —contd

——— ss 287 291—

See SALE IN EXECUTION OF DECREE I L R 39 Calc 26

——— ss 287 293—*Execution of decree—Attachment of a house—Proclamation of sale—Auction sale—Default in payment of price by auction purchaser—Proclamation of re-sale—Errors in the proclamation of re-sale—Application by plaintiff's widow to recover from the defaulting purchaser the deficiency of price in the re sale—Liability creature of statute relating to procedure—At the re sale statute not complied with* One Shivlal brought a suit against Bai Samrath The suit was dismissed and a decree for defendant's cost namely Rs. 66 2 10 was passed against the plaintiff The defendant sold the decree to one Nathu who in execution attached Shivlal's house A proclamation of sale was published and at the auction sale one *Gangadas Dayabhai purchased the* house for Rs 1 3.. and deposited one fourth of the purchase money The purchaser however made a default in the payment of the balance in time and the house was again put up to sale. A second proclamation of sale was issued but the description contained in this proclamation were discrepant and did not tally with those in the previous one At the re sale only Rs 200 were realized Subsequently Shivlal's widow Bai Suraj having applied to recover from the defaulting purchaser the loss on the re sale *Held* that the liability of the defaulting purchaser was the creature of a statute relating to procedure and that statute laid down in very clear terms that in the proclamation of sale the proclamation should specify as fairly and accurately as possible the property to be sold. The first proclamation did not state either fairly or accurately the property to be sold and it was sought to fix the liability upon the appellant by reason of the words of the statute he was entitled to appeal to the words of s 287 of the Civil Procedure Code (Act XIV of 1882) to show that the statute had not been complied with and that it could not be said that there was a re sale of the property which was put up in the first instance GANGADAS DAYABHAI v BAI SURAJ (1911) I L R 36 Bom 329

——— ss 287 311 312 588 594 to 596—

See APPEAL TO PRIVY COUNCIL I L R 40 Calc 635

——— s 291—

See MORTGAGE I L R 37 Calc 897

See SALE IN EXECUTION OF DECREE I L R 39 Calc 26

——— s 293—

See ss 287 293 I L R 36 Bom 329

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd*

——— s 294—

See APPEAL I L R 38 Calc 373

——— s 295—

See s 276 I L R 37 Bom 138
I L R 35 Bom 516

See s 285 14 C W N 296

See ATTACHMENT I L R 44 Calc 662

See LIMITATION I L R 41 Calc 654

——— *Rateable distribution under several decrees— Same judgment-debtor — Decree against judgment debtor—Subsequent decree against his legal representatives to be satisfied out of his estate.* A obtained a decree against one Maru thamuthu Pillai subsequently, B obtained a decree against the legal representatives of Maru thamuthu Pillai and his estate in their hands B applied under s 295 Civil Procedure Code to share rateably in the proceeds of property sold in execution of A s decree *Held* that B was not entitled to do so *Govind Abaji Jakhadi v Mahontiraj Vinayak Jakhadi I L R 25 Bom 404* followed. When a decree is obtained against the legal representatives of a deceased person they are the judgment debtors *Kaliappan Ser uvikaran v Varadarajulu 19 Mad L J 651* referred to SRINIVASA AIYANGER *v* KANTHI MATHI AMMAL (1910) I L R 33 Mad 465

——— s 295 and O XXI rr 63 73 of the Code of 1908—*Realisation of assets—Transfer of decree not necessary for rateable distri bution of sale proceeds of attached property—Appli cation for rateable distribution may be made though copy of decree not received* Where the same property is attached in execution of decrees by two Courts of different grades the decree holder in the inferior Court who had attached prior to realisation may apply to the superior Court for rateable distribution of the sale proceeds of the attached property and the transfer of his decree for execution to the superior Court is not necessary to enable him to do so Assets are reali ed not when the deposit is made by the purchaser but only when the balance of the purchase money is paid into Court An application for execution to the superior Court is an essential pre requisite of a general claim to rateable distribution. Where the lower Court has ordered the transfer of the decree for execution to the superior Court an application after such order to the superior Court before it has received a copy of the decree would be sufficient to satisfy the requirements of O XXI r 73 and to entitle the applicant to rateable distribution ARIMUTHU CHETTI *v* VYAPURI PANDARAM (1912) I L R 35 Mad 588

——— s. 306—*Civil Procedure Code (Act XIV of 188) ss 306 244 311—Execution sale—Sal confirmed though balance of purchas money not deposited—Sale void or voidable.* Where a purchaser at an execution sale failed to deposit the balance of the purchase money as required by s. 306 of Act XIV of 1882 and yet the sale was confirmed: *Held* that the balance of the pur chase money not having been paid at all the sale was a nullity and not merely an irregular sale for which remedy might be had by application under s. 244 or 311 of this Code *Ahmad Bakhsh v Lalta Prasad I L R 23 All 233 Bhim Singh v*

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd*

——— s 306—*contd*

Sarwan Singh I L R 16 Calc 33 distinguished. ALI MEAH *v* KIBRIA KHATUN (1911)
15 C W N 350

——— s 308—

See CIVIL PROCEDURE CODE 1908 O XXI r. 89 I L R 32 All 380

——— s 310A—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXI r. 89
I L R 37 Bom 387

See CONTRIBUTION I L R 38 Calc 1

See JURISDICTION OF HIGH COURT
I L R 38 Calc 832

See LIMITATION ACT 1877 s 3 SCH. II ARTS 13 AND 14
I L R 33 All 93

——— ss 310A 312, 588—

See APPEAL I L R 38 Calc 339

——— s 311—

See APPEAL TO PRIVY COUNCIL.
I L R 40 Calc 635

See PARTIES I L R 39 Calc 881

——— *Application to set aside sale—Dismissal for default—Appeal—Adjournment—Illness* An order dismissing an application under s 311 Civil Procedure Code on the ground of the non appearance of the applicant is appeal able Where the parties were ready with their witnesses but the case was adjourned for want of time and on the date fixed for hearing, the appli cant wanted time on the ground of illness sup ported by a medical certificate from a Civil Hospital Assistant but the Court refused the application *Held* that in the circumstances of the case the order was bad and the case was remanded BROJA SUNDAR ROY CHOWDHURY *v* MOTI LAL MOZUMDAR (1910)
14 C W N 573

——— *Understatement of value in sale proclamation if material irregularity* Deli berate understatement of value of property in a sale proclamation is a material irregularity within the meaning of s. 311 Civil Procedure Code, and a sale may be set aside on that ground. *Sadat mand Khan v Phul Kuar I L R 20 All 412 s c 2 C W N 580* followed. SIVADURGA DEBI *v* RAJMOHAN PODDAR (1910)
15 C W N 577

——— ss 311 312—

See APPEAL TO PRIVY COUNCIL.
I L R. 40 Calc. 635

See SECOND APPEAL.
I L R 39 Calc. 687

——— s. 312—

See APPEAL I L R 38 Calc. 339

——— ss. 313 315—

See SALE IN EXECUTION OF DECREE.
I L R. 37 Calc. 67

——— auction sale under—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXI r. 93
I L R. 40 Mad. 1009

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd.*

——— ss. 313, 319—

See EXECUTION OF DECREE.
I L R 43 All 520

——— s 315—

See SALE IN EXECUTION OF DECREE.
I L R 37 Calc. 67

——————*Execution of decree—Sale in execution—Auction purchaser deprived of property purchased owing to failure of judgment debtor's title —Suit to recover purchase money—Limitation—Limitation Act (IX of 1908) Sch. I Arts 62 and 120* Held (i) that an auction purchaser seeking to recover the purchase money paid by him upon the ground that he has been deprived of the property purchased owing to failure of the judgment-debtor's title thereto has no right outside the Code of Civil Procedure and (ii) that the remedy given by the Code of Civil Procedure is not a suit for money had and received, to which Art 62 of the first Schedule of the Indian Limitation Act 1908 would apply but is a suit falling within the purview of Art. 120 *Munna Singh* v *Gajadhar Singh I L R 5 All 577* and *Mohiuddin Ibrahim* v *Mahomed Mura Lewai 23 Mad. L. J 487* followed. *Ram Kumar Shaha* v *Ram Gour Shaha 13 C W N 1050 not followed. Hanuman Kamal* v *Hanuman Mandur I L R 19 Calc 123* distinguished. SIDHESHAR PRASAD NARAIN SINGH v GOSHAIN MAYANAND (1913)
I L R 35 All. 419

——————*Execution of decree—Sale in execution—Auction purchaser deprived of property purchased owing to failure of judgment debtor's title —Suit to recover purchase money* Where property of a judgment debtor had been sold twice over in execution of decrees against him and purchased twice by different purchasers it was *held* that the second purchaser took no title by his purchase inasmuch as at the time of sale the judgment debtor's title was extinct and that he was entitled to recover the purchase money which he had paid and to follow it into the hands of other creditors of the judgment debtor among t whom it had been rateably distributed. GIRDHAR DAS v SIDHESHWARI PRASAD NARAIN SINGH (1918) **I L R 40 All. 411**

——— s 316—

See PRE EMPTION **I L R 33 All 45**

——————*Execution of decree—Purchase at auction sale—Date of accrual of auction purchaser's title* Held that under the Code of Civil Procedure 1882 the title of a purchaser of immoveable property at a sale in execution of a decree to mesne profits arising therefrom does not accrue until the date of the confirmation of such sale *Amir Kasim* v *Darbari Mal I L R 24 All 405* and *Prem Chand Paul* v *Purnima Dasi I L R 15 Calc 546* followed SHIAM LAL v NATHE MAL (1910) **I L R 33 All. 63**

——— s 317—

See ESTOPPEL **I L R 36 Mad. 564**

See HINDU LAW—JOINT FAMILY PROPERTY **I L R 40 All. 159**
L R 44 I A 201

1. ——————*Civil Procedure Code (Act V of 1908) s 66—Court sale in execution—Certified purchaser—Benami—Mortgagee of certified purchaser—Protection—Doctrine of constructive notice—Transfer of Property Act (IV of 1882) ss 3 and 41* The mortgagee of the certified purchaser at a Court sale is entitled to rely upon the title of his mortgagor including such immunity from suit as the law provides in support of the statutory title S 66 of the Civil Procedure Code (Act V of 1908) which may be called in aid for the purpose of assisting in the construction of s. 317 of the Civil Procedure Code (Act XIV of 1882)—supports this conclusion *Hari Govind* v *Ramchandra I L R 31 Bom 61* followed The doctrine of constructive notice applies in two cases, first where the party charged had actual notice that the property in dispute was charged incumbered or in some way affected in which case he is deemed to have notice of the facts and instruments to a knowledge of which he would have been led by an inquiry after the charge or incumbrance of which he actually knew and secondly where the Court had been satisfied from the evidence before it that the party charged had designedly abstained from inquiring for the very purpose of avoiding notice. This does not conflict in any way with the statutory definition of notice in s. 3 of the Transfer of Property Act (IV of 1882) A purchaser of property is under no legal obligation to investigate his vendor's title But in dealing with real property as in other matters of business regard is had to the usual course of business and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way This is what is meant by reasonable care in s 41 of the Transfer of Property Act (IV of 1882) Occupation of property which has not come to the knowledge of the party charged is not constructive notice of any interest in the property MANJI KARIMBHAI v HOORBAI (1910)
I L R 35 Bom 342

2 ——————*Prior and subsequent mortgages—Purchase of part of mortgaged property in execution of decree on prior mortgage—Suit on second mortgage—Auction purchaser alleged to be benamidar of mortgagor—Transfer of Property Act (IV of 1882) s 43* A portion of certain mortgaged property was purchased by a third party at auction sale in execution of a decree on a prior mortgage *Held* on suit for sale by the subsequent mortgagee that it was not open to the subsequent mortgagee to bring this portion again to sale upon the ground that the auction purchaser was merely a *benamidar* for the mortgagor *Ram Narain* v *Mohanian I L R 26 All 82* followed SARJU PRASAD v BINDESHRI BAKHSH LAL SINGH (1911) **I L R 33 All. 382**

3 ——————*Public Demands Recovery Act (Ben Act I of 1895 as amended by Ben. Act I of 1897) s 19 sub s (2)—Suit to declare defendant's purchase of land at certificate sale benami for plaintiff if maintainable—Civil Procedure Code (XIV of 1882 s 317) if applies.* By virtue of sub s 2 of s 19 of the Public Demands Recovery Act 1895 as amended by Act I B C. of 1897 the provisions of s. 317 of the Civil Procedure Code of 1882 (which correspond with those

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —contd

——— s 317—contd

of s. 66 of the Code of 1908) apply to the case of a purchaser at a sale in enforcement and execution of a certificate issued under the Public Demands Recovery Act and a suit by the plaintiff for a declaration that the defendant's purchase of certain lands in execution of such a certificate was *benami* on behalf of the plaintiff was barred by the provisions of s 317 of the Civil Procedure Code of 1882. *Ambika Prasad v Gopal Buksh Das 1 C L J 550* not followed *Hari Charan Singh v Chandra Kumar Dey I L R 34 Calc 187 s c. 11 C W N 745* followed BANGA CHANDRA NANDI v TARA KINKAR PAL (1912)

16 C W N 873

4 ——— *Co-decree holder purchasing at execution sale trustee for other decree holders—Scope and object of s 317* Where one of several joint decree holders applied for execution of the decree subject to the rights of the others and properties put up to sale in pursuance thereof was purchased by him *Held* that the purchase was for the benefit of all the decree holders and the purchaser could not be allowed to retain the property as his exclusively and perpetrate a fraud against his co decree holders under cover of s. 317 of the Civil Procedure Code of 1882 The provisions of s 317 of the Civil Procedure Code of 1882 were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment-debtors and in no way affect the title of persons otherwise beneficially interested in the purchase. *Bodh Singh Doodhooria v Ganesh Chunder Sen 12 B L R 317* referred to GANGA SAHAI v KESRI (1915) 19 C W N 1175

——— ss 317 and 231—

See HINDU LAW—INHERITANCE

I L R 37 All 545

——— ss 318 and 319—

See ss. 263 264 218 219

I L R 36 Bom 373

——— s 320—

See s. 235 I L R 34 Bom 142

See s 276 I L R 35 Bom 516

——— ss 324A 272 295—*Execution of decree—Money lying with Collector—Prohibitory order upon Collector by another Court—The executing Court attaching the money in execution of another decree—Payment to the decree holder—Remedy of the first decree holder at whose instance prohibitory order was issued—Practice and procedure* Ramchandra and others obtained a decree against Sambhu and another in the Court of the Subordinate Judge Second Class at Chalisgaon Those decree holders having applied for execution by attachment and sale of certain lands, the Court transferred the decree for execution to the Collector under s 320 of the Civil Procedure Code (*Act XIV of 1882*) The Collector executed the decree and held the amount for payment to the decree holders In the meantime the plaintiff obtained a decree for money against Ramchandra and others in the Court of the Subordinate Judge First Class at Dhulia and in execution of the decree obtained attachment of the amount with the Collector by means of a prohibitory order under s. 272 of the Code About this time the

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —contd

——— s 324A—contd

defendant obtained a decree against Ramchandra and others in the Court of the Subordinate Judge Second Class at Chalisgaon and in execution of his decree obtained an order of attachment of the said amount In obedience to this second order the amount was remitted to the Chalisgaon Court where it was paid to the defendant The plaintiff sued to recover the money The lower appellate Court applied the provisions of s. 295 and decreed the plaintiff's claim. *Held* dismissing the plaintiff's suit that it was governed not by the provisions of s. 295 but by those of s. 324A of the Civil Procedure Code (*Act XIV of 1882*) *Held* further that the prohibitory order passed by the Dhulia Court under the provisions of s. 272 was *ultra vires* and could not bind the Collector in view of the provisions of s. 324A under which he was acting *Held* also that in virtue of s 324A of the Civil Procedure Code (*Act XIV of 1882*) the Collector held the amount at the disposal of the Court (at Chalisgaon) which had transferred to him the decree for execution and which was bound to dispose of the amount in the manner and for the purposes mentioned in the third paragraph of that section that it was open to the plaintiff to apply to the Court at Chalisgaon through the Court at Dhulia for rateable distribution under s. 295 and that according to the provisions of s. 324A the Collector owed a special duty to the Chalisgaon Court and that Court alone had jurisdiction to deal with all questions as to the disposal of the amount GOVINDJI VIRAJ v SAKHARAM GOBINDA (1911)

I L R 36 Bom 519

——— s 325A—

See s 276 I L R 35 Bom 516

——— *Disability of judgment debtor to mortgage the property attached in execution of decree whilst under management of the Collector —Proper interpretation of section is to give it the exact and plain sense of the words used—No implied limitation can be read into it* The incompetency imposed on a judgment debtor by s 325 of the Civil Procedure Code 1882 to mortgage the property attached in execution of a decree whilst it is in the possession and under the management of the Collector is on the proper interpretation of the section in the exact and plain sense which the words imply absolute and no implied limitation can be read into it Where therefore, a judgment debtor executed a mortgage of such property during the period of the Collector's management the mortgage is void, notwithstanding it might have been intended only to be effective over any residue that might belong to the judgment debtor after the management of the Collector came to an end *Murray v Murat Singh 3 Nagpur L R 171* and *Salu Bai v Fajat Khan 13 Nagpur L R 130* upheld. *Magniram Vithuram Marwadi v Babulal I L R 36 Bom 510* dissented from GAURISHANKAR BALMUKAND v CHINNUMAYA (1918)

I L R 46 Calc 183

——— *Alienation —Mahomedan Law—Gift during marz ul maut—Will Held* that a gift made by a Mahomedan during death illness is (i) under the Mahomedan Law a will and therefore valid as to one third of the property comprised in it and (ii) is not an alienation which

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd.*

——— s. 255A—*contd*

might fall under the prohibition contained in s. 325A of the Code of Civil Procedure 1882. MUHAMMAD SAYEED v MUHAMMAD ISMAIL (1910)
I L R 33 All. 233

——— *Transfer of Property Act (IV of 1882) s 43—Specific Relief Act (I of 1877) s 18—Attachment of lands—Transfer of execution proceedings to Collector—Letting out by Collector—Cesser of Collector's powers—Sale by the owner of his interest—Sale effective in favour of the purchaser* The plaintiff was a creditor of the family of the defendants. The plaintiff's separated brother was also a creditor The plaintiff's brother attached the family lands. The matter went in execution to the Collector who leased the lands to one Piraji Subsequently the plaintiff and the defendants came to an understanding by which the plaintiff agreed to remit his mortgage debt and pay off his brother—the judgment-creditor—and the defendants agreed to sell him one of the lands. The plaintiff then obtained possession of the family lands from which he was ejected by the defendants. Thereupon, the plaintiff having brought a suit to recover possession. *Held* allowing the claim that the interest which the sale-deed purported to transfer to the plaintiff was the interest which the defendants had in the lands at the time of the transfer and the Collector's powers having ceased by reason of the proceedings in attachment being closed the conveyance of the defendant's interest to the plaintiff took effect in his favour *Gangabai v Jaswant I L R 31 Bom. 155* and *Udey Kunwar v Ladu 6 B L R 283* distinguished *Per* SCOTT C J There is no doubt that the effect of s 324 A would be to invalidate such a sale as we now have to consider as against a lessee or transferee from the Collector exercising his powers under the Civil Procedure Code *See Ganga Prasad v Ganga Bakhsh Singh* (1907) *29 All 415* But that does not dispose of the question whether after the Collector's powers have ceased by reason of the proceedings in attachment being closed the conveyance of the defendants interests will not take effect in favour of the purchaser The statutory provisions bearing upon the point are s 43 of the Transfer of Property Act and s 18 of the Specific Relief Act which provide that where a person contracts to sell certain property having only an imperfect title thereto the purchaser has the right if the vendor has subsequently to the sale acquired any interest in the property to compel him to make good the contract out of such interest MAGNIRAM VITHURAM v BAKUBAI (1912)
I L R 36 Bom 510

——— s 332—*Delivery of possession to decree holder—Proceeding under s 332 decision under against decree holder—Limitation—Act (XV of 1877) Sch II Arts 11 13 120 142* Where in execution of a decree for possession the plaintiffs were put in possession of immoveable property and were then dispossessed by reason of a proceeding under s 332 of the Civil Procedure Code being decided against them *Held* that a subsequent suit by the plaintiffs to recover possession was governed by Art 142 of Sch. II of the Limitation Act and not by Arts 11 13 or 120 thereof *Ayyasami v Samiya I L R 8 Mad 82* approved MAINDI SARDAR v GORA CHAND GHOSH (1910)
16 C W N 971

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd*

——— s 332—*contd*

——— s 335— The only order under s 33 Civil Procedure Code (Act XIV of 1882) upon which the character of finality is impressed is an order upon enquiry and by parity of reason ing the same effect can attach to an order under s 332 only when an investigation has been made. *Kunj Behari v Nandh Prashad 6 C L J 36*, relied upon. COURI CHARAN PATNI v SITA PATNI (1909)
14 C W N 346

——— *Decree in terms of compromise—Execution of decree—Person in possession of property a party to the suit but not a party to the decree—Purchaser in execution of decree trying to recover possession—Obstruction by the person in possession—Order for removal of obstruction in execution proceedings—Order not questioned by a suit—Finality of the order* In a suit by a mortgagee against the mortgagor to recover the money due on the mortgage defendant No 2 who had purchased the equity of redemption from the mortgagor was made a party defendant. Ultimately the suit was compromised between the mortgagor and mortgagee and a decree passed in terms of the compromise Neither to the compromise nor to the decree recording the compromise was defendant No 2 a party In execution of the decree the mortgaged property was sold at a Court-sale and purchased by the plaintiff When the plaintiff attempted to recover possession of the property he was obstructed by defendant No 2 who was in possession. On an application to remove the obstruction the Court made an order for the removal of the obstruction in February 1908 The plaintiff recovered possession of the property in March 1908 but was dispossessed in June 1908 The plaintiff filed a suit in 1913 to recover possession of the property from defendant No 2 *Held* that the order for removal of obstruction was referable to s 335 and not s 334 of the Civil Procedure Code of 1882 that it was binding on defendant No 2, and that as defendant No 2 took no steps to have the same set aside within one year of its date it had become final. BHIMAJI RAMCHANDRA v BHIMABAI (1920)
I L R 45 Bom 573

——— ss 341 349—*Execution of decree—Arrest of debtor—Discharge pending an insolvency petition—Re-arrest in execution of the same decree—Indian Limitation Act (XV of 1877) Sch II Art 179* Where a judgment debtor who has been arrested and sent to jail in execution of a decree obtains an *interim* release under s. 349 of the Code of Civil Procedure, 1882 such a release is not a discharge under s 341 of the Code and does not exempt the judgment debtor from liability to be re arrested in execution of the same decree An application therefore for execution in such circumstances of the decree by re arrest of the judgment debtor is one in accordance with law and saves limitation *Shamji Deokaran v Poonja Jairam I L R 26 Bom 65* followed *Secretary of State for India v Judah, I L R 12 Calc 652* dissented from. SURAJ DIN v MAHABIR PRASAD (1910)
I L R 33 All 279

——— ss 344 to 360A—

See PROVINCIAL I. ... s 14
CL. ( ) ... N 213

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

——— s 317—*contd*

of s. 66 of the Code of 1908) apply to the case of a purchaser at a sale in enforcement and execution of a certificate issued under the Public Demands Recovery Act and a suit by the plaintiff for a declaration that the defendant's purchase of certain lands in execution of such a certificate was *benami* on behalf of the plaintiff was barred by the provisions of s. 317 of the Civil Procedure Code of 1882 *Ambika Prasad v Gopal Bulsh Das 1 C L J 550* not followed *Hari Charan Singh v Chandra Kumar Dey I L R 31 Cal 187 s c. 11 C W N 745* followed BANGA CHANDRA NANDI *v* TARA KINKAR PAL (1912)

16 C W N 973

4 ——— *Co-decree holder purchasing at execution sale trustee for other decree holders—Scope and object of s 317* Where one of several joint decree holders applied for execution of the decree subject to the rights of the others and properties put up to sale in pursuance thereof was purchased by him *Held* that the purchase was for the benefit of all the decree holders and the purchaser could not be allowed to retain the property as his exclusively and perpetrate a fraud against his co decree holders under cover of s. 317 of the Civil Procedure Code of 1882 The provisions of s 317 of the Civil Procedure Code of 1882 were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment debtors and in no way affect the title of persons otherwise beneficially interested in the purchase *Bodh Singh Doodhooria v Ganesh Chunder Sen 12 B L R 317* referred to GANGA SAHAI *v* KESRI (1915) 19 C W N 1175

——— ss 317 and 231—

See HINDU LAW—INHERITANCE

I L R 37 All 545

——— ss 318 and 319—

See ss. 263 264 218 219

I L R 26 Bom 373

——— s 320—

See s 235 I L R 34 Bom 142

See s 276 I L R 35 Bom 516

——— ss 324A, 272 285—*Execution of decree—Money lying with Collector—Prohibitory order upon Collector by another Court—The executing Court attaching the money in execution of another decree—Payment to the decree holder—Remedy of the first decree holder at whose instance prohibitory order was issued—Practice and procedure* Ramchandra and others obtained a decree against Sambhu and another in the Court of the Subordinate Judge Second Class at Chalisgaon Those decree holders having applied for execution by attachment and sale of certain lands the Court transferred the decree for execution to the Collector under s 320 of the Civil Procedure Code (Act XIV of 1882) The Collector executed the decree and held the amount for payment to the decree holders In the meantime the plaintiff obtained a decree for money against Ramchandra and others in the Court of the Subordinate Judge First Class at Dhulia and in execution of the decree obtained attachment of the amount with the Collector by means of a prohibitory order under s. 272 of the Code About this time the

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

——— s 324A—*contd*

defendant obtained a decree against Ramchandra and others in the Court of the Subordinate Judge Second Class at Chalisgaon and in execution of his decree obtained an order of attachment of the said amount In obedience to this second order the amount was remitted to the Chalisgaon Court where it was paid to the defendant The plaintiff sued to recover the money The lower appellate Court applied the provisions of s. 285 and decreed the plaintiff's claim. *Held* dismissing the plaintiff's suit that it was governed not by the provisions of s 285 but by those of s. 324A of the Civil Procedure Code (Act XIV of 1882) *Held* further that the prohibitory order passed by the Dhulia Court under the provisions of s. 272 was *ultra vires* and could not bind the Collector in view of the provisions of s. 324A under which he was acting *Held* also that in virtue of s 324A of the Civil Procedure Code (Act XIV of 1882) the Collector held the amount 'at the disposal of the Court' (at Chalisgaon) which had *transferred to him the decree for execution* and which was bound to dispose of the amount in the manner and for the purposes mentioned in the third paragraph of that section that it was open to the plaintiff to apply to the Court at Chalisgaon through the Court at Dhulia for rateable distribution under s. 295 and that according to the provisions of s. 324A the Collector owed a special duty to the Chalisgaon Court and that Court alone had jurisdiction to deal with all questions as to the disposal of the amount GOVINDJI VIRAMJI *v* SAKHARAM GOBINDA (1911)

I L R 36 Bom 519

——— s 325A—

See s 276 I L R 35 Bom 516

——— *Disability of judgment debtor to mortgage the property attached in execution of decree whilst under management of the Collector—Proper interpretation of section is to give it the exact and plain sense of the words used—No implied limitation can be read into it* The incompetency imposed on a judgment debtor by s 325 of the Civil Procedure Code 1882 to mortgage the property attached in execution of a decree whilst it is in the possession and under the management of the Collector is on the proper interpretation of the section in the exact and plain sense which the words imply absolute and no implied limitation can be read into it Where therefore a judgment debtor executed a mortgage of such property during the period of the Collector's management the mortgage is void notwithstanding it might have been intended only to be effective over any residue that might belong to the judgment debtor after the management of the Collector came to an end *Murray v Murat Singh 3 Nagpur L R 171* and *Salu Bai v Rajat Khan 13 Nagpur L R 150* upheld *Magniram Nathuram Marwadi v Pakubai I L R 36 Bom 510* dissented from GAURISHANKAR BALMUKAND *v* CHINNUMIAYA (1918)

I L R 46 Calc 183

——— *Alienation —Mahomedan Law—Gift during marz ul maut—Will. Held* that a gift made by a Mahomedan during death illness is (i) under the Mahomedan Law a will and therefore valid as to one third of the property comprised in it and (ii) is not an alienation which

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —contd

——— s. 325A—contd

might fall under the prohibition contained in s. 325A of the Code of Civil Procedure 188... MUHAMMAD SAYEED v MUHAMMAD ISMAIL (1910)
I. L. R 33 All. 233

——— *Transfer of Property Act (IV of 1882) s 4—Specific Relief Act (I of 18) s 18—Attachment of lands—Transfer of execution proceedings to Collector—Letting out by Collector—Cesser of Collector s powers—Sale by the owner of his interest—Sale effective in favour of the purchaser* The plaintiff was a creditor of the family of the defendants. The plaintiff's separated brother was also a creditor The plaintiff's brother attached the family lands. The matter went in execution to the Collector who leased the lands to one Liraji Subsequently the plaintiff and the defendants came to an understanding by which the plaintiff agreed to remit his mortgage debt and pay off his brothe —the judgment-creditor—and the defendants agreed to sell him one of the lands. The plaintiff then obtained possession of the family lands from which he was ejected by the defendants. Thereupon the plaintiff having brought a suit to recover possession. *Held* allowing the claim that the interest which the sale-deed purported to transfer to the plaintiff was the interest which the defendants had in the lands at the time of the transfer and the Collector s powers having ceased by reason of the proceedings in attachment being closed the conveyance of the defendant s interest to the plaintiff took effect in his favour *Gangabai v Jaswant I L R 24 Bom. 170* and *Udey Kunwar v Ladu 6 B L R 283* distinguished *Per* SCOTT C J There is no doubt that the effect of s 325A would be to invalidate such a sale as we now have to consider as against a lessee or transferee from the Collector exercising his powers under the Civil Procedure Code *See Ganga Prasad v Ganga Bakhsh Singh* (1907) *29 All 415* But that does not dispose of the question whether after the Collector s powers have ceased by reason of the proceedings in attachment being closed the conveyance of the defendants interests will not take effect in favour of the purchaser The statutory provisions bearing upon the point are s 43 of the Transfer of Property Act and s 18 of the Specific Relief Act which provide that where a person contracts to sell certain property having only an imperfect title thereto the purchaser has the right if the vendor has subsequently to the sale acquired any interest in the property to compel him to make good the contract out of such interest MAGANIRAM VITHURAM v BAKUBAI (1912)
I L R 36 Bom 510

——— s 332—*Delivery of possession to decree holder—Proceeding under s 332 decision under against decree holder—Limitation—Act (XV of 1877) Sch II Arts 11 13 120 142* Where in execution of a decree for possession the plaintiffs were put in possession of immoveable property and were then dispossessed by reason of a proceeding under s 332 of the Civil Procedure Code being decided against them *Held* that a subsequent suit by the plaintiffs to recover possession was governed by Art 142 of Sch. II of the Limitation Act and not by Art 11 13 or 120 thereof *Ayyasami v Saraya I L R 8 Mad 82* approved MAINDI SARDAR v GORA CHAND GHOSH (1912)
16 C W N 971

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —contd

——— s 332—contd

——— s. 335— The only order under s 335 Civil Procedure Code (Act XIV of 1882) upon which the character of finality is impressed is an order upon enquiry and by parity of reasoning the same effect can attach to an order under s. 332 only when an investigation has been made. *Kunj Behari v Kandh Prashad 6 C L J 36* relied upon. CORBI CHARAN PATNI v SITA PATNI (1909)
14 C W N 346

——— *Decree in terms of compromise—Execution of decree—Person in possession of property a party to the suit but not a party to the decree—Purchaser in execution of decree trying to recover possession—Obstruction by the person in possession—Order for removal of obstruction in execution proceedings—Order not questioned by a suit—Finality of the order* In a suit by a mortgagee against the mortgagor to recover the money due on the mortgage defendant No 2 who had purchased the equity of redemption from the mortgagor was made a party defendant. Ultimately the suit was compromised between the mortgagor and mortgagee and a decree passed in terms of the compromise Neither to the compromise nor to the decree recording the compromise was defendant No 2 a party In execution of the decree the mortgaged property was sold at a Court sale and purchased by the plaintiff When the plaintiff attempted to recover possession of the property he was obstructed by defendant No 2 who was in possession On an application to remove the obstruction the Court made an order for the removal of the obstruction in February 1908 The plaintiff recovered possession of the property in March 1908 but was dispossessed in June 1908 The plaintiff filed a suit in 1913 to recover possession of the property from defendant No 2 *Held* that the order for removal of obstruction was referable to s 335 and not s 334 of the Civil Procedure Code of 1882 that it was binding on defendant No 2 and that as defendant No 2 took no steps to have the same set aside within one year of its date it had become final. BHIMAJI RAMCHANDRA v BHIMABAI (1920)
I L R 45 Bom 573

——— ss 341 349—*Execution of decree—Arrest of debtor—Discharge pending an insolvency petition—Re arrest in execution of the same decree—Indian Limitation Act (XV of 1877) Sch II Art 179* Where a judgment debtor who has been arrested and sent to jail in execution of a decree obtains an *interim* release under s 349 of the Code of Civil Procedure 1882 such a release is not a discharge under s. 341 of the Code and does not exempt the judgment debtor from liability to be re arrested in execution of the same decree An application therefore for execution in such circumstances of the decree by re arrest of the judgment debtor is one in accordance with law and saves limitation. *Shamji Deokaran v Poonja Jairam I L R 26 Bom 6..* followed *Secretary of State for India v Judah I L R 1.. Calc 6..* dissented from SURAJ DIN v MAHABIR PRASAD (1910)
I L R 33 All 279

——— ss 341 to 360A—

See PROVINCIAL INSOLVENCY ACT s 14 cl. (3)
5 C W N 213

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd*

——— s 349—

See s 341 I L R 33 All 279

——— s 351—*Application to be adjudged insolvent by person against whom certificates issued under the Public Demands Recovery Act (I of 1895)—District Judge if may entertain application—Refusal—Appeal—Revision* The District Judge had jurisdiction to entertain an application under Ch XX of the Civil Procedure Code to be adjudged an insolvent notwithstanding that the debts, in respect of which relief is sought have been certified and in part recovered against him under the provisions of the Public Demands Recovery Act There is no appeal from an order refusing to entertain such an application. But such an order may be set aside by the High Court in exercise of its revisional powers. KEDAR BANS LAL MISSER *v* MAHARANI JANKI KOER (1909)

14 C W N 143

——— *Insolvency—Insolvent discharged without a schedule of debts being framed—Attempt on the part of a creditor to proceed against after-acquired property* Where an insolvent had taken advantage of the provisions of Ch. XX of Code of Civil Procedure 1882 and had been discharged under s 351 but no schedule of debts had been framed, it was *held* that a judgment creditor of the insolvent could not thereafter have recourse against property which had come into the hands of the insolvent subsequently to his discharge AMIN UD DIN HAIDAR *v* SHEORAJ SINGH (1913) I L R 35 All 402

——— ss 351 and 357—

See LIMITATION ACT (XV OF 1877) SCH II ART 179 I L R 39 Bom 20

——— ss 361 582—*Abatement of appeal on death of defendant respondent—Actio personalis moritur cum persona—Application of rule to appeal by plaintiff—Costs* In a personal action for an injunction a decree was given for the defendant with costs. Plaintiffs appealed During the pendency of the appeal the defendant respondent died *Held* that the right to prosecute the appeal against the respondent's legal representative does not survive to the appellants. The rule *actio personalis moritur cum persona* is not interfered with merely because the person injured incurred his life time some expenditure of money in consequence of the personal injury *Pulling v Great Eastern Railway Company 9 Q B D 110* approved. *Krishna Behary Sen v The Corporation of Calcutta I L R 31 Calc 406* approved. This rule applies as against the estate of a deceased respondent *Paraman Chetty v Sundararaja Naick I L R 26 Mad 499* distinguished. If an action fails what is incidental fails also and if an appeal abates as regards an injunction sought for it abates as regards the costs incurred by the appellant as a consequence of the dismissal of his suit An appellant cannot be allowed to show that the decree refusing the injunction was wrong for the more purpose of getting rid of the direction as to costs. JOSIAM TIRUVENGACHARIAR *v* SWAMI IYENGAR (1910)

I L R 34 Mad 7

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd*

——— ss 366 368, 371—

See LIMITATION L R 44 I A 218

I L R 45 Calc 94

——— ss 366 371—*Abatement of suit—Mortgage—Joint Hindu family—Redemption suit by the mortgagor in his personal right—Second suit to redeem by coparceners not barred by abatement* One V a member of an undivided Hindu family instituted in the year 1881 a suit for redemption against the mortgagee but pending the suit he died on the 9th July 1883 On the 15th October 1883 the Court directed that the suit should abate Subsequently in the year 1912 *T V's* son and three grandsons filed a second suit for redemption of the same property alleging that the property being ancestral they had interest in it by birth It was also alleged that an adult brother of V was interested as a coparcener in the same property The trial Court dismissed the suit on the strength of the order of abatement passed on the 15th October 1883 On appeal the District Court reversed the decree and remanded the suit for disposal On appeal to the High Court *Held* that there being no indication that *V's* suit was brought in a representative capacity it would certainly be defective as a redemption suit according to all canons of procedure and if the suit was defective *V's* personal right to sue did not embrace the rights of his coparceners and none of them would be concluded by the application of s. 371 of Civil Procedure Code (Act XIV of 1882) *Held* also that apart from the question raised upon s. 371 there was sufficient authority for the conclusion that since the introduction of the Code of 1877 no legal proceedings by V short of actual redemption would deprive his coparceners of their right to redeem against the mortgagee *Per* CURIAM The right of a mortgagee to enforce his security by sale in a suit against the person who executes with authority express or implied, a mortgage of family property without joining the coparceners interested results from the authorized mortgage which carries with it the all embracing remedy It does not follow that the defect of one co-owner who desires to redeem will bar the exercise of the same right by another hence arises the necessity for joining all parties interested in one suit RAMCHANDRA NARAYAN *v* SHRIPATRAO (1915)

I L R 40 Bom 248

——— ss 366 371 and Act V of 1908 O XXII, rr 2 9—*Judgment passed after death of party not absolute nullity—Such judgment not liable to collateral attack but must be set aside only by proper proceedings and unless so set aside bars a fresh suit* A decree was passed in favour of a deceased plaintiff on the day of his death which occurred before the case was taken up for disposal and heard In a suit brought by the representative of the plaintiff on the same cause of action and for the same relief it was urged that the decree so passed was a nullity and that the subsequent suit was maintainable *Held* that the suit was barred It is only when the representative of a deceased plaintiff fails to apply within the time allowed by law that a suit abates under

CIVIL PROCEDURE CODE (ACT XIV OF 1859) —contd

——— s. 366—contd

O XXII r 2 of Act V of 1908 or that the Court could have passed an order under s. 366 of Act XIV of 1882 that the suit shall abate. A decree passed after death is not therefore an absolute nullity. The intention of the legislature in enacting s. 371 of Act XIV of 1882 and O XXII r 9 of Act V of 1908 is clearly that where a suit has abated, no fresh suit shall be brought on the same cause of action, and that any remedy which the representative of a deceased plaintiff may have is by application to the Court in which the suit was pending. GOONA COOROOSAMIEN v. SOONDARAM MALL (1909) **I. L. R. 33 Mad. 167**

——— ss. 367 368—*Improper representative of deceased defendant on record—Decree against wrong person—Suit against proper party based on judgment thereof—Limitation.* When a defendant dies it is for the plaintiff to choose against whom he purposes to proceed, and if some one else with an adverse claim to the nominee wishes to be made the representative he should be added as a party. The provisions of s. 367 of Act XIV of 1882 applied only in the case of the death of the plaintiff and had no application to the case of the death of a defendant. PARMESHWAR SINGH BAHADUR v. JANESHWARI BAHOOAIN (1912) **18 C W N 129**

——— s 368—

See LIMITATION **I. L. R 45 Calc 94**

——— *Abatement of appeal—Death of a respondent pending appeal—Representative not brought on record—Decree against all—Cause of action not surviving in favour of other respondents—Pre-emption.* One of the defendants respondents in a suit for pre-emption died pending appeal. No application was made within limitation to bring his representatives on to the record but the appeal was decreed as against all the respondents. *Held* that the suit being one in which the cause of action did not survive against the other respondents the decree must be set aside as a whole. *Raj Chunder Sen v Ganga Das Seal I L R 31 Calc 48* referred to *Imdad Ali v Jagan Lal I L R 17 All 478* distinguished. IMAM UD DIN v SADARATH RAI (1910) **I L R 32 All 301**

——— s 371—

See s 366 **I L R 40 Bom 248**

See LIMITATION **I L R 45 Calc 94**

——— s 372—

See EXECUTION PROCEEDINGS **14 C W N 752**

——— s 373—

See JURISDICTION **I. L. R. 44 Calc 367**

——— *Legal representative—Abatement of suit—Withdrawal of suit with permission to bring a fresh one—Its effect on the representative not on record.* When a suit has abated against a defendant by reason of his legal representative not having been brought on the record within the time allowed by law and when the plaintiff thereupon withdraws his suit with per-

CIVIL PROCEDURE CODE (ACT XIV OF 1859) —contd

——— s. 373—contd

mission to bring a fresh one such a permission can only empower him to bring a fresh suit against those defendants who were on the record on the date of the withdrawal and not against the legal representatives of a defendant who was dead at the time of the withdrawal and whose said representatives had either not been brought on the record or had been removed from the record by an appellate order which set aside the order of the first court bringing them on the record. *Lemmal v Kasupra 21 Mad L J 5 l* dissented from. SUBBAMMA v. SURYANARAYANA (1913) **I L R 38 Mad. 643**

——— ss 373 and 373A—*Execution of decree—Leave to withdraw with permission to make a fresh application not permissible with regard to proceedings after decree.* *Held* that the provision of Ch. XXII of the Code of Civil Procedure (1882) which allowed withdrawal of a suit with permission to bring a fresh suit did not apply to any application subsequent to the decree and did not permit the withdrawal of an application for execution with permission to make a fresh application. MATA BADAL v. BENI MADHO (1914) **I L. R 36 All 172**

——— s 375—

See s 30 **I L R 38 Mad 25**

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 81 O XXXIII r 3 **I L. R 40 Bom 380**

See COMPROMISE **I L R 34 Bom 502**
14 C W N 451
I L R 48 Calc 469

See REGISTRATION OF DOCUMENTS **L R 46 I A 210**

1 ——— *Dekkhan Agriculturists Relief Act (XVII of 1879) s 1—Compromise of the case—Court's duty to record the compromise and pass decree in its terms—Pleader's compromising without authority from his client—Client to apply to cancel the compromise.* There is nothing in the provisions of s. 1 or in any other section of the Dekkhan Agriculturists Relief Act 1879 which expressly deprives the parties to a suit of the power of entering into a compromise and having that compromise recorded under s. 375 of the Civil Procedure Code of 1882 which is the same as O XXIII r 3 of the Code of 1908. A compromise means the settlement of a disputed claim. Where a party complains that a compromise effected in his name by his pleader was unauthorised he must move the Court to cancel all that has been done and to revive the suit. *Basangowda v Churchigirigowda I L R 34 Bom 408* followed. PIRAJI v. GANAPATI (1910) **I L R 34 Bom 502**

2 ——— *Relates to the suit construction of—Res judicata—Wrong decision on question of law no bar to subsequent decision—Registration Act ss 3 17—Provisions of Act do not relate to judicial proceedings—Provisos effect of—Transfer of Property Act ss 107 108 (b)—Possession of right to recover rent how given.* The word relates to the suit in s 375 of the Code of Civil Procedure means relates to the matter of the claim in the case and there is nothing in the section to restrict the relief granted in the

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd*

——— s 375—*contd*

m e to what is prayed in the plaint or le s Where the parties to a suit litigate as le sor and les ee for the ownership and pos e ion of land it is open to the parties to provide by compromi e in what manner such land should be owned and enjoyed and such provi ion although different from and even incon i tent with the plaint relate to the suit within the meaning of s. 375 of the Code *enka appa Nayanim v Thimmappa Nayanim I L R 18 Mad 410* not followed *Muthu Vijaya Raghunatha Udayana Thevar v Thandavaraya Tambiran I L R 22 Mad 214* not followed. *Jota Kuruvelappa v Lari Siri appa I L R 30 Mad 478* followed An order or decree based on a mistake of law does not operate as *res judicata* in a subsequent proceeding in which the operation of such decree or order is not called in question *Mangalathammal v Narayanaswami Aiyar I L R 30 Mad 461*, referred to The provisions of the Registration Act do not apply to proper judicial proceedings whether consisting of pleadings fil d by the parties or orders made by the Court A compromise petition is a pleading filed by parties and can be su l on although not registered *Bindesri Naick v Ganga Surani Sahu I L R 20 All 171* followed. Cases which are clearly outside the scope of an enactment cannot b brought within it by any inference drawn from the terms of a proviso Decree and orders generally are outside the scope of sub s. 1 of s. 3 of the Registration Act. Decrees and orders relating to leases which are governed by cl. (*d*) of sub-s. (1) to s. 17 cannot be brought within sub s (1) of s. 3 merely because sub s. 2 of s 17 which is in the nature of a proviso expressly exempts certain orders and decrees relating only to cls. (*b*) and (*c*) of sub-s. (1) to s 17 of the Act. When the subject matter of a lease is the rents and profits of land the possession which a lessor under s. 108 (*b*) of the Transfer of Property Act, is bound to give the lessee is sufficiently given by giving notice of the lease to the ryots or other persons in occupation and requiring them to attorn and pay rent to the l ssee Attornment by the tenants and actual receipt of rent is not necessary to give the transferee possession of the rent Such notice will amount to delivery of possession, only where the transferor himself has possession to give and not where he is himself out of possession NATESA CHETTI *v* VENGU NACHIAR (1909)
I L R 33 Mad. 102

——— *Compromise agreed on behalf of minors by guardian appointed by the Court of Wards—Compromise if binding when not examined and approved by Court—Court of Wards Act (IX of 1879 B C) s 14* A guardian appointed by the Court of Wards on behalf of infants has power to compromise proceedings in the Civil Court to which the infants are parties and such compromise has to be registered by the Court without the nec ssity of the Court examining and assenting to its terms NAKIMO DEWANI *v* MUSAMMAT PEMBA DICHEN (P C.)
25 C W N 797

——— s 375 A—

See s. 373 I L R 36 All 172

——— s. 375 and 464—

See COMPROMISE I L R 42 All. 469
I L R 48 Calc 469

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— ss 378, 506 508 510—

See ARBITRATION I L R 33 All 743

——— s 392—

See CIVIL PROCEDURE CODE, 1908 O XXVI r 9 I L R 44 Mad. 640

See RIGHT OF SUIT
I L R 30 Mad. 501

——— s. 393—*Partition—Preliminary d cree in plaintiff's favour—P rsistance to co nmis ion r—Refusal of plaintiff's application for re issue of commission.* A preliminary decree for partition of a house having b n ma le the Court appointed a commi sioner to vi w the house and prepare a sch me for partition. In this he was resisted by the husband of the plaintiff and was unable to execute the commission. The plaintiff applied for the issue of a fresh commission, but the Court refu ed this and dismissed the suit altogether *Held* that the Court had no authority to nullify its decree by totally dismissing th suit but ought to have acced d to the request of the plaintiff to re issue the commission and to have s en that its order was ob yed MASUM UN NISSA *v* LATIFAN (1910) I L R 32 All 319

——— s 411—*Suit fo dower p nd ng execution of decree for sal upon mortgage* Responden s obtained a decree for sale of the r mortgage on 17th December 1895. Pending execution the wife of the mortgagor brought a suit *in forma pauperis* against her husband and his mortgagees for dower claiming a prior charge It was found that the dower debt was not charged and on the 11th May 1897 her suit was dismissed as against the mortgagees and a money decree passed and under s. 411 of the Civil Procedure Code the amount of Court fees due to Government was made First charge on the amount decreed The Collector in order to get the Court fees brought the property to sale Respondents got it again put up for sale in execution of the decree of the 17th December 1895 *Held* that the second sale was good and took priority RAGHO PRASAD *v* MEWA LAL
I L R 34 All 223

——— s. 424—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s. 80 I L R 37 Mad 113

1 ——— *Suit against Government—Notice—Bhagdari and Narvadari Act (Bom. Act V of 1862) s 5—Mortgage of a narva—Collector declaring the mortgage invalid—Suit against Collector without notice.* The plaintiff filed a suit against the Collector of Kaira to obtain a declaration that an order passed by that offi er und r s. 3 of the Bhagdari and Narvadari Act (Bom. Act V of 186) declaring some mortgages in plaintiff's favour null and void, was inoperative No notice was given to the defendant as provided for by s. 424 of the Civil Procedure Code of 1882 *Held* that the notice required by s. 424 of the Civil Procedure Code of 1882 was necessary to be given for the declaration was a distinct act of the Collector done in the exercise of a statutory power and therefore in his official capacity *Per* CURIAM

The true test of an action for the purposes of s. 424 is whether the wrong complained of as having been done by the publ officer sued amounts first, to a distinct act on his part, and secondly whether that act purported to have been

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd*

———— s. 424—*contd*

[illegible] by him [illegible] the [illegible] ars the [illegible] dent to suit [illegible] The Collector of Kaira (1910)

I L R 35 Bom 42

———— [illegible] *tion—Suit against* [illegible] *—Plaintiff* [illegible] The plaintiff an Inamdar of a village was called upon by the Collector to hand over the management of the village [illegible] on the ground that in the event that had happened the [illegible] had become resumable by Government. The plaintiff thereupon without giving the notice required by s. 424 of the Civil Procedure Code (Act XIV of 1882) filed a suit against the Secretary of State for India in Council for a declaration that he was entitled to hold the village [illegible] and for a permanent injunction restraining the defendant from resuming the village. *Held* that the suit was barred by s. 424 of the Civil Procedure Code (Act XIV of 1882). The term "act" used in s. 424 of the Civil Procedure Code in 1882 relates only to the public officers not to the Secretary of State. The expression "no suit shall be instituted against the Secretary of State in Council" is wide enough to include suits for every kind whether for injunction or otherwise. *Per* HEATON J—Where there is a serious injury so imminent that it can only be prevented by an immediate injunction, a Court will not be debarred from entertaining the suit and issuing the injunction though the section requires previous notice if it is owing to the immediate need of the injunction that the plaintiff has come to the Court for relief before giving the required notice. *Flower* v *Local Board of Low Leyton* 5 *Ch D* 347 followed. SECRETARY OF STATE v GAJANAN KRISHNARAO (1911)

I L R 35 Bom 362

———— s. 443—*Decree in terms of award—Decree passed by consent of minor's mother—Mother not appointed guardian ad litem—Decree not binding on the minor*. In 1896 the plaintiff's father mortgaged his house to defendant No 1 for Rs 1000. After his death his widow on behalf of her minor son (plaintiff) referred the mortgage claim to arbitration. The arbitrators settled the claim at Rs 1200. Defendant No 1 applied to the Court for a decree in terms of the award and the widow having consented a decree was passed. In execution of the decree the house was put up to sale and purchased by defendant No 1 for Rs. 1700. The plaintiff attained majority in September 1911 and sued in August 1912 for a declaration that the decree was null and void, and for taking accounts of the mortgage of 1896 under the provisions of the Dekkhan Agriculturists Relief Act (XVII of 1879). He alleged that the arbitrators in taking accounts did not give him the benefit of the Dekkhan Agriculturists Relief Act that in the Court proceedings that followed on the award no guardian was appointed for him and that at the Court sale the house was sold at an undervalue. *Held* that inasmuch as the plaintiff's interest had not been duly protected the absence of a guardian *ad litem* in the Court proceedings of 1901 rendered the decree null and void under s. 443 of Civil Procedure Code of 1882. *Held* therefore that the plaintiff was entitled to accounts of the mortgage of 1896 under the provisions of the Dekkhan Agriculturists Relief Act 1879. SADASHIV RAMCHANDRA v TRIMBAK KESHAV (1919)

I L R 44 Bom 202

———— ss 443 456—

See MINOR I L R 33 All 287

———— ss 443 456 and 462—

See MINOR I L R 35 All 487
L R 34 Bom 502

———— s 456—

See MINOR I L R 35 All 287
I L R 35 All 487

———— *Application for appointment of guardian—Absence of affidavit whether sufficient to invalidate proceedings—Minor suit by to invalidate proceedings in which he was duly represented by a guardian whether competent—Limitation—Indian Limitation Act IX of 1908 Art 12*. *Held* that the absence of an affidavit such as is required by the provisions of s. 457 of the Code of Civil Procedure of 1882 is not sufficient to render the proceedings illegal and void as against the minor on the ground that he was not properly represented. *Mannu Lal* v *Ghulam Abbas I L R 32 All 287 P C* referred to. *Held* also that where a decree has been made against a minor duly represented by his guardian and the minor on attaining his majority seeks to set aside that decree was a separate suit he can succeed only on proof of fraud or collusion on the part of his guardian. If the guardian neglected to support the case of the minor and there is nothing to show that he did so deliberately that circumstance alone would not entitle the minor to avoid the operation of the decree. *Raghubar Dyal* v *Bhikya Lal I L R 12 Calc 69* and *Chandar Sekhar* v *Balak Ilar (15 Indian Cases 611)* referred to. *Hira Singh* v *Ghulam Qadir 19 P R 1918 Nar sing Narain* v *Jahi Mistry (13 Indian Cases 411)* and *Khiaraj Mal* v *Daim I L R 32 Calc. 296* distinguished. *Held* further that a suit for possession of the property sold in execution of such a decree is governed by Art 12 of the Limitation Act. IMAM DIN v PURAN CHAND

I L R 1 Lah 27

———— s 462—

See s 13 I L R 36 Bom 53

See MINOR I L R 35 All 487

See TRUSTEE I L R 39 Mad. 115

1 ———— *Minor—Compromise—Sanction of Court not obtained—Compromise not binding on minor*. When a suit to which a minor is a party is compromised and no leave of the Court is obtained under s. 462 of the Civil Procedure Code (Act XIV of 1882) the compromise does not bind the minor and is voidable. The fact that it is for the benefit of the minor or that he has derived benefit from it makes no difference. BHIWA v DEVCHAND (1911)

I L R 35 Bom 322

2. ———— *When leave of Court not obtained compromise not binding on minor—Hardship to oth* [illegible] *on ground for upholding*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—contd

———— s 462—contd

compromise—Minor not bound to return any benefit under compromise before it is set aside—Joint contract liability on A compromise entered into on behalf of a minor without obtaining leave of the Court under s. 462 of the Code of 1882 is unenforceable against the minor It cannot be treated as binding upon him on the ground that its being set aside would work hardship on the other party It is also no ground for not setting it aside that it is impossible to place the parties in the position in which they were when the compromise was effected The withdrawal from the suit by the other party cannot be considered as service rendered to the minor for which the minor ought to pay compensation before the compromise is set aside *Aman Singh v Narain Singh I L R 20 All 98* not followed. The fact that a joint contract is not enforceable against one of the parties does not absolve the other party from liability SETHURAM SAHIB v VASANTA RAO ANANDA RAO DHYBAR (1910) I L R 34 Mad 314

3 ———————— *Compromise of decree made in partition suit by guardian* ad litem *without leave of Court—Suit by minor on attaining his majority to set it aside—Father of Hindu joint family made guardian* ad litem *of his son being also himself a defendant in partition suit—Powers of head of Hindu joint family—Decree in partition suit in favour of father—Form of decree in setting aside compromise* S 462 of Civil Procedure Code (Act XIV of 1882) provides that no next friend or guardian for the suit shall without the leave of the Court enter into any agreement or compromise on behalf of a minor with reference to the suit in which be acts as next friend or guardian Where in a suit for partition by a member of a joint family the father was made third defendant and his son a minor was made sixth defendant and the Court appointed the father guardian *ad litem* of the minor *Held* (reversing the decisions of the Courts in India) that the powers of the father were controlled by the provisions of s 462 of the Code and he could not without leave of the Court do any act in his capacity of father or managing member of the joint family which he was debarred from doing as guardian ad litem To hold otherwise would be to defeat the object of the enactment A compromise made without the leave of the Court by the father with the second defendant of a decree passed against the latter was held therefore in a suit brought by a minor on attaining his majority to be not binding on him. The fact that the money was by the decree made payable not to the minor but to the father who was admittedly representing the family made no difference in the duty which lay on him to obtain the leave of the Court to an agreement which was clearly intended to affect the rights and interests of the minor The decree made by their Lordships was to the effect that the compromise was not binding on the minor and he was remitted to his original rights under the decree in the partition suit. *Manohar Lal v Jadunath Singh I L R 28 All 585 589 L R 33 I A 128 131* followed GANESHA ROW v TULJARAM ROW (1913) I L R 36 Mad 295

4 ———————— *Compromise of suit on behalf of minor made without obtaining leave of the Court—Liability of other party to a joint bond so executed as part of the compromise* A compromise made on behalf of a minor without having complied with the requirements of s 462 of the Civil Procedure Code 1882, as to obtaining leave of the Court is not enforceable against the minor The fact that a joint bond executed as a part of the compromise was not enforceable against the minor did not absolve the other obligee from liability JAMNA BAI v VASANTA RAO (1916) I L R 39 Mad. 406

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—contd

———— s 462—concld

———— ss 462 464—

See COMPROMISE I L R 44 Calc 829

———— s 464—

See COMPROMISE I L R 48 Calc 469

———— ss 470 to 474, 578—

See INTERPLEADER I L R 37 Calc 552

———— s 474—

See s 2 I L R 33 Mad. 220

———— s 488—

See ATTACHMENT I L R 38 Calc. 448

———— s 490—

See ATTACHMENT I. L. R. 38 Calc. 448

———— s 492—

See CIVIL PROCEDURE CODE 1908 O XXXIX r 1 I L R 33 All 79

———— s 503—*Receiver appointed under section powers of—Cannot recover from third parties whose rights date prior to his appointment* A receiver appointed under s 503 of the Code of Civil Procedure in respect of any movable or immovable property is entitled to take possession of it from the parties to the suit to manage it etc He is not entitled to recover possession from a third party a stranger to the suit whose rights date prior to his appointment Such a receiver has no right to recover property sold before his appointment by the judgment debtor on the ground that the sale is voidable as against the creditors on the principle embodied in s 53 of the Transfer of Property Act MAHAMED KASIM SAHIB v PANCHAPAKESA CHETTI (1912) I L R 35 Mad 578

———— ss 503 505—

See LEASE I L R 45 Calc 940

———— s 506—

See ARBITRATION I L R 33 All 743
I L R 37 Calc 63

———— s 508—

See ARBITRATION I L R 33 All 743

———— s 510—

See ARBITRATION I L R 33 All 743

———— *Appeal to His Majesty in Council—Valuation of appeal—Attempt to raise valuation by adding interest to the amount decreed by the Court of first instance* A plaintiff claimed a sum which principal and interest amounted to more than Rs 10 000 He obtained in the court of first instance a decree for less than Rs 10 000 with interest The defendant however appealed to the High Court and the plaintiffs suit was dismissed The plaintiff applied for leave to

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—contd

——— s 510—contd

appeal to H M Majesty in C n l H l th t th plaint ff could r t tr h appeal at e the stat tew l l a l t th r nt l erred to t m l s t C st cl st t tr at th rate given l v th l C r l l f N ourt Bole v Or l l l t h t n un l el Ram Kumar v Nekramai Yasti
I L R 42 All 445

——— s 521 (c)—
See Arbitration I L R 38 Calc 522

——— s. 522—Decree made in conformity of an award—No appeal if it is on the ground of illegality of a award—As l s of S h II of the L r Act (XV of l) There is no appeal against a decree m l under s of the Civil Procedure Code upon an award of arbitrators even when the decree is assailed on the ground that there was no award valid in law. *Ghulam Khan v Muhammad Hasan I L R 29 Calc. 1 s c 6 C W N 26* followed. The decision of the Judicial Committee in *Harnarain Singh v Bhagwant Kuar I L R 13 All 300* cannot be treated as in any way in conflict with the later decision of the Judicial Committee in the case of *Ghulam Khan v Muhammad Hasan I L R 29 Calc 16 s c 6 C W N 26* inasmuch as in the former case no question as to the competency of the appeal was raised either before the Judicial Committee or in the High Court. Where no application to set aside the award was made to the lower Court within the period of limitation prescribed by Art 158 of the Limitation Act by the guardian ad litem of the appellant who was a minor at the time *Held* that the appellant could not be allowed to invite the High Court to interfere with the decree in the exercise of its revisional jurisdiction even on the ground that the reference to arbitration was made with the concurrence of a person who had no authority to act on behalf of the guardian of the appellant and that the award had therefore no existence in the eye of the law. Surya Narain Jha v Banwari Jha (1912) 16 C W N 628

——— s 525—
See Appeal I L R 38 Calc 143
See s 210 16 C W N 34

——— Arbitration—Award going beyond terms of reference if valid—Party benefited if may repudiate award—Acceptance of award in part if permissible. The plaintiff's right of passage along a pathway across the defendant's land being disputed by the latter the question of its existence was referred to an arbitrator who found that the pathway did in fact exist as alleged but he laid out a new pathway in lieu of it holding that if the thoroughfare was allowed to continue great inconvenience would be caused to the defendant. *Held* that although an arbitrator is allowed greater latitude than Courts of law in departing from rules of practice which Courts have adopted for general convenience and an arbitrator's award is not open to interview on the merits upon grounds of error of law as well as of facts an arbitrator cannot go beyond the precise questions submitted. But even though the arbitrator may have exceeded his authority it is not open to the party benefited by the award to take exception to it on that ground and the defendant therefore was bound

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—contd

——— s 525—contd

by the award in this case. In a proceeding under s of the Civil Procedure Code (Act XIV of 1882) it is not competent to the Court to direct the award to be filed in part. If the award is bad in part the Court should refuse the application to file it altogether. Nar Singh Narayan Singh v Ajodhya Prosad Singh (1911) 16 C W N 258

——— s 539—
See s 13 I L R 32 All 481
See s 50 I L R 33 All 660
See Mahomedan Law—Endowment I L R 43 Calc 1085
See Religious Endowment I L R 48 Calc 493
I L R 44 Mad 283

1 ——— Suit relating to public religious property—Ejectment of trespasser—Party of suit—Joinder of parties—Practice and procedure. Where a breach of trust is complained of and where the alienee of trust property denies that the property is the subject of a public trust for religious purposes he is a proper and necessary party to a suit brought under the provisions of s. 539 of the Civil Procedure Code of 1882 though no relief can be given as against him by way of a decree in ejectment. Collector of Poona v Bai Chanchalbai (1911) I L R 35 Bom 470

2 ——— Trust for public religious purpose—Dedication of property as Shivarpana—Ejectment of trespassers from the trust property—Court—Jurisdiction—Trust created by will—Trust coming into being at a future date—Duty of heirs to carry out the trust—Hindu law—Will. A suit to eject a trespasser from property which is the subject of a public religious trust does not fall within the purview of s 539 of the Civil Procedure Code of 1882. *Lakshmandas Parashram v Ganpatrao Krishna I L R 8 Bom 365*. *Vishvanath Govind Deshmane v Rambhat I L R 15 Bom 148*. *Kazi Hassan v Sagun Balkrishna I L R 24 Bom 170*. *Panchand v Samal (1856) P J 273* followed. Where the trustees named by the testator for the purpose of making and completing the trust at the point of time fixed by him are dead and the object of the trust as named by him is specific and definite the Court will take the administration of the trust. *Moggridge v Thackwell 7 Ves Jun 36* and *In re Pyne Lilley v Attorney General (1903) 1 Ch 83* followed. Where a Hindu who has directed a trust of his property for a religious purpose dies before giving effect to it the Hindu law authorises his heir to take steps for carrying out his directions after recovering the property from a trespasser. Where the testator merely directs that his property should be endowed for a certain purpose at a certain time by certain persons after his death then until the arrival of the time and the complete dedication of it in the manner and for the object pointed out by the testator the property must be regarded in the eye of law as part of his estate but impressed with a trust or an obligation on the part of those taking that estate as heirs to carry out his directions at the appointed time. He who succeeds him as heir has the right to do what the owner himself would have done or has directed to be done so as to complete the trust with the sanction of the Court. Before he can

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —contd

——— s 539—*contd*

do that he must first secure the property from the wrong doer into whose posses ion it has passed GHELABHAI GAVRISHANKAR v UDERAM ICHARAM (1911) I L R 36 Bom 29

3 ——— *Trust— Public charitable or religious purposes —Trust for b nefit chiefly of a particular sect not necessarily not a public tru t* Where it was clearly established by evidence that certain property had been held for very many generations for the purpose of supporting and maintaining *fakirs* entertaining visitors and for the giving of alms, and there was no evid nce that the property was ever held for any other purpose it was *held* that the Court ought to presume the existence of a charitable or religious trust within the meaning of s 539 of the Code of Civil Proce dure 1882 and the trust was none the less a trust for a public purpose if its main object was in fact the support of *fakirs* of a particular sect and the propagation of the tenets of that sect MAHANT PURAN ATAL v DARSHAN DAS (1912)
I L R 34 All 468

4 ——— *Decree effect of for s heme under bar to private rights—Specific Relief Act (I of 1877) s 42—Cons quential relief—suit for recovery of office of trustee and injunction substantially valued— Actual possession with tenants who were willing to pay to whomsoever was a trustee —Prayer for possession unnecessary* Where the lands of a temple were in the actual possession of tenants who were willing to pay rent to whomso ever was the trustee a suit which merely prays for the recovery of the office of trustee and for an injunction against the defendants who were in possession of the office which injunction was valued at a substantial figure *ie* Rs 2 600 does not offend against the proviso to s 42 of the Sp cific Relief Act (I of 1877) as the plaintiff had asked for such possession as he could under the circumstances and as the possession of the tenants would not be diverse to the plaintiff after his recovery of office *Kunj Behari* v *Keshavlal Hiralal I L R 23 Bom. 567* followed. *Rathna sabapathi Pillai* v *Ramasami Ayyar I L R 33 Mad 452 Abdulkadar* v *Mahom d I L R 15 Mad 15 Narayanan* v *Shankunni I L R 15 Mad 255* and *Jagannatha Charry* v *Rama Rayar I L R 28 Mad 238* distinguished. *Subraman yan* v *Paramaswaran I L R 11 Mad 116* and *Jagadindra Nath Ray* v *Hemanta Kumari Debi I L R 32 Calc. 129* referred to Where an office of trust e was held by the m mb rs of a certain family for nearly a hundred years and by nobody else the office mu t be held to be hereditary in that family S 539 Civil Procedure Code (Act XIV of 1882) corresponding to s 92 Civil Proce dure Code (Act V of 1908) is not applicable to a suit to enforce a private right such as an here ditary trusteeship of a certain family and it is no bar to such a su t *Badree Das Mukim* v *Chooni Lal Johurry I L R 33 Calc 789* referred to A scheme once settled by a Court cannot be alt red except by the Court and th n only on substantial grounds *Attorn y G n ral* v *Wor c ster (Bishop) 9 Hare 328 In re B tton s Charity 77 L J Ch 19. P B own s Hospital* v *Stamford 60 L T 288* and *Re St fords Charity 5 L T 498* follow d. A scheme framed und r s 539 Civ l Pro edure Cod is binding on all (wh th r worshippers or not) including even one who might have claimed a hereditary trusteeship and have brought a suit to enforce such a right before the settlement of the scheme and a decree framing a scheme is a bar to a suit by such a person even though the denial of such a right of suit might act very prejudicially to his interests and even though his application to be made a party to the scheme suit might have been rejected S 539 confers upon the Courts in this country the same powers that the Courts in England posse ed at the time of its enactment and the principles of English law are applicable *Prayag Do s Ji Varu Mahant* v *Tirumala Srirangacharlavaru I L R 28 Mad 319 321 Chintaman Bajaji Dev* v *Dhondi Ganesh Dev I L R 15 Bom 612 Annaji* v *Narayan I L R 21 Bom. 556* and *Prayag Dos Ji Varu* v *Tirumala Srirangacharla Varu I L R 30 Mad 138* referred to RAMADOS v HANUMANTHA RAO (1913) I. L R 36 Mad 364

5 ——— *Held* that the Advocate General can give a qualified sanction under this section and no fresh sanction was necessary for continuing the suit after the death of original plaintiffs and for the purposes of deter mining the scheme the suit could be revised against the son of the hereditary trustee who was the original defendant on latter s death RAJA ANAND RAO v RAMDAS DADURAM 25 C W N 794

——— s 545—

See EXECUTION OF DECREE
I L R 42 All. 158

——— s 546—

PROCEDURE I L R 46 I A 238

——— s 551—

See JURISDICTION OF CIVIL COURTS
I L R 34 Bom 267

——— ss 551 577 586—

See MORTGAGE (FORECLOSURE)
I L R 39 Calc 925

——— s 562 564—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XLI r. 33
I L R 37 Bom 289

——— s 564—

See REMAND I L R 37 Calc 171

——— s 568—

See WILL I L R 36 All 93

1 ——— *Appeal admission of fresh evidence on—Court s power* An app al Court ought no to admit fresh evid n e which it is not sugg sted was not available during the pend ncy of th trial in the Court of first instan e *Kessowji Issur* v *Great Indian Peninsula Rail way Co I L R 31 Bom. 381* and *Krishnama Chariar* v *Narasimha Chariar I L R 31 Mad 114* relied on MIDNAPUR ZEMINDARY COMPANY LD v MUKTAKESHI DASI (1912)
I L R 40 Calc 402
17 C W N 615

2 ——— *Or for any other substantial cause effect of—Power of an appellate Court to admit additional evid n — Oh r n ot*

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —contd.

——— s. 568—contd

ejus lem generis — *To enable it to pronounce judgment, meaning of—Appellate Court all powers of original Court vest in* An Appellate Court has power to admit further evidence under the clause or for any other substantial cause in s. 568 Civil Procedure Code which cannot be read ejusdem generis with the causes stated in the previous part of the section *Kessowji Issur v G I P Railway Company I L R 31 Bom 381* explained and distinguished *Per* SADASIVA AYYAR, J.—The expression to enable it (the Appellate Court) to pronounce judgment means to enable it to pronounce a satisfactory judgment; an Appellate Court has all the powers of an original Court. ANDIAPPA PILLAI v MUTHUKUMARA THEVAN (1913) I L R 36 Mad 477

3. ——— *Admission of evidence to impeach witness's credit—Opportunity to be given for explanation* Where on appeal the Appellate Court admitted fresh evidence to prove that on a date on which a witness deposed to having attested the will he was elsewhere and could not have attended on the testator and the witness, who had not been asked anything in the original Court on this point and whose evidence was otherwise unimpeachable was disbelieved by the Appellate Court without being given an opportunity to offer any explanation of the matter by the Appellate Court *Held* that the procedure was illegal and no witness whatever his standing would be safe from adverse judicial comment under such procedure. JAGRANI KOER v KUAR DURGA PARSAD (1913) 18 C W N 521

——— s 575—

See SALE FOR ARREARS OF REVENUE. I L R 39 Calc 353

——— s 578—

See INTEREST LEADER I L R 37 Calc 552

——— *Suit tried on merits in spite of defective verification—Defect if material* Where a plaint was verified by three out of six plaintiffs who were adults and by one of them on behalf of the next friend of the three remaining plaintiffs who were minors but without the next friend's authority and the Court held that the plaint was not properly verified but nevertheless proceeded to try the case on the merits and dismissed it *Held* that the defect in the verification was cured by the provisions of s 578 of the Code of Civil Procedure *Bisdeo v John Smolt I L R 22 All 93* *Shama Soondure v Rohiruddin 24 W R 71* referred to SASI BHUSAN DAS v PALIK LAL RAY (1912) 17 C W N 989

——— s 582—

See s 581 I L R 34 Mad 76

——— s 583—

See CIVIL PROCEDURE CODE 1877 s 583 I L R 38 All 163

See ASSIGNEE OF A MONEY DECREE I L R 38 Mad. 36

——— *Decree reversed on appeal—Restitution—Mesne profits—Jurisdiction of Court to which application for restitution is made* It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it A Court of Appeal does not necessarily enter into the question whether a decree it is about to reverse has been executed or not *Hurro Chunder Roy Chowdhry v Shoorodhonee Debia 9 B L R 40* *Doraisami Iyyar v Annasami Ayyar I L R 23 Mad 306* and *Collector of Meerut v Kalka Prasad I L R 26 All 665* referred to *Kalka Singh v Paras Ram I L R 22 Calc 434* distinguished A mortgagor obtained a decree for redemption and in execution thereof recovered possession of the mortgaged property On appeal however the High Court enhanced the sum payable by the plaintiff mortgagor and on his failure to pay the suit was dismissed The mortgagee thereupon applied to the Court of first instance asking to be restored to possession of the mortgaged property and also for mesne profits for the period during which he was out of possession *Held* that the Subordinate Judge had jurisdiction not only to make restitution by restoring possession but also to award mesne profits, although the decree of the High Court did not specifically provide for mesne profits PARBHU DAYAL v ALI AHMED (1909) I L R 32 All 79

——— s 584—

See REMAND I L R 43 Calc 1104

See SPECIAL APPEAL. I L R 37 Mad 443; I L R 46 Calc 188

——— ss 584 585—

——— *Second appeal—Questions of law and facts—Construction of document—Wajib ul arz—Land holder and tenant—Rights of Zamindars in respects of house sites and groves* In a suit for a declaration of the proprietary title of the appellants to certain lands in a village the first Court dismissed the suit on the ground that the respondent was the Zamindar and the appellants only tenants of the lands The Subordinate Judge found on the construction of the Wajib ul arz of the village and other documentary evidence that the appellants were the owners of the lands in suit On second appeal to the High Court it was contended that the Court was bound under s 584 of the Civil Procedure Code 1882 to accept the finding of the Subordinate Judge as conclusive the question being one of fact but the High Court rejected that contention *Held* (affirming that decision) that the Subordinate Judge's finding was arrived at by inferences drawn from a misconstruction of the Wajib ul arz The right construction of documents was a question of law which the Court on second appeal was not precluded from considering under s 584 and 585 of the Civil Procedure Code On the true construction it was clear from the documentary evidence that the appellants were only tenants of the land and not proprietors FATEH CHAND v KESHAN KUNWAR (1912) I L R 34 All 579

——— *Second appeal—Finding of fact upon misconstruction of documentary evidence if conclusive—Construction of document question of law—Wajib ul arz as evidence of proprietary right—Extension of Chaukidari Act (XX

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—contd

———— s 584—contd

of 1859) to mouzah of alers proprietary right The right construction of documents is a question of law which Judges in second appeal are not by ss. 584 and 585 of the Civil Procedure Code precluded from considering by any finding of a lower Appellate Court based upon such document Where the Court of first appeal found on its construction of the *wajib ul arz* and other documentary evidence that the plaintiffs were the owners of the lands in suit and the High Court on second appeal on their construction of the *wajib ul arz* and other documents in the suit held that the plaintiffs were not the owners *Held* that the Court of first appeal having misconstrued the *wajib ul arz* the High Court in second appeal was not bound to accept as correct its finding based upon such misconstruction The *wajib ul arz* is cogent evidence of the rights as they existed when it was made of the e hols holding proprietary or other rights of property within the mouzah The Government by applying the Chaukidari Act to the mouzah did not alter and could not have altered proprietary rights in the mouzah or any part thereof FATEH CHAND v KISHEN KUAWAR 16 C W N 1030

———— s 586—
See MORTGAGE I L R 39 Calc 926
16 C W N 1033

———— s 588—
See APPEAL I L R 38 Calc 399

See APPEAL TO PRIVY COUNCIL.
I L R 40 Calc 635

———— 591—*Appeal ostensibly in suit but solely with reference to interlocutory application dismissed—No necessity to appeal separately from every interlocutory order* An interlocutory application by a plaintiff in a suit to amend his plaint was refused and his suit decreed for part only of his claim His appeal in that suit was directed solely against the refusal to amend *Held* that the appeal was directed against the decree in the suit within the meaning of s 591 of the Code of Civil Procedure Act XIV of 1882 though the only reason for the appeal was the erroneous decision in regard to the interlocutory order *Sher Singh* v *Diwan Singh I L R 22 All 366* not followed. *Sheo Nath Singh* v *Ram Din Singh I L R 18 All 19 22* not followed. *Maharaja Moheswar Singh* v *The Bengal Government 7 Moo I A 283 302* relied on. DHAMARA KUMARA THIMMA NAYANIM v BUKKAPATNAM VENKATA CHARLU (1910) I L R 34 Mad 228

———— ss 594 to 598—
See APPEAL TO PRIVY COUNCIL.
I L R 40 Calc 635

———— s 596—Where a concurrent finding of fact was sought to be challenged before the Privy Council the ground that the Court of first instance had misdirected itself inasmuch as in the course of a long judgment certain materials of a most elementary character for arriving at a conclusion had not been set out in the narrative which the judgment contained *Held* that there was no ground for the suggestion that the Court had not taken these circumstances into account That it would be to misconstrue entirely the provisions of s 596 of Act XIV of 1882 as to concurrent findings of fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—contd

———— s 596—contd

of the circumstances minutely and completely exhaustive under the penalty that if they failed to do so the absence from their mind of elementary considerations might be presumed SAJJAD HUSAIN v NAWAB WAZIR ALI KHAN (1912)
16 C W N 859

———— s 603—
See PRIVY COUNCIL, PRACTICE OF
I L R 38 Calc 335

———— s 622—
See ARBITRATION BY COURT
I L R 38 Calc 421

———— *Religious Endowments Act XX of 1863 s 18—District Judge may in disposing of petitions under s 18 make inquiry* An order of a District Judge under s. 18 of Act XX of 1863 is not open to revision under s 622 of Act XIV of 1882 unless he acts illegally in the exercise of his jurisdiction. *In re Venkatesvara I L R 10 Mad 98* referred to A District Judge acting under s 18 of Act XX of 1863 has power to make enquiries before disposing of the application for leave to sue and is not bound to decide on a bare perusal of the application RAMANATHAN CHETTIAR v ANANTHANARAYANA AYYAR (1909) I. L. R 33 Mad. 41

———— ss 626 cl (b) 629—
See REVIEW I L R 42 Calc 830

———— s 629 630—*Application for review granted if reopens whole case or only the special questions found wrongly decided—Final decree appeal against—Grounds on which order for review may be questioned* When an application for review is granted and the case re heard in an appeal against the final decree the propriety of the order whereby the review was granted can be challenged on the ground specified in s 629 of the Code of Civil Procedure When no such ground can be made out but the order is sought to be challenged on the ground that it was made without jurisdiction the proper course for the aggrieved party is to move the High Court in revision. When the application for review has been granted the Court is not restricted at the re hearing to a consideration of that question alone which has been argued upon the rule for review and found to have been erroneously decided The whole case is re opened unless the Court directs under the latter part of s 630 that the case is to be heard only upon special points What was intended to be decided in *Dhurondhar Sen* v *The Agra Bank I L R 5 Calc 86* was that it was competent to the Court in its discretion to refuse to entertain at the re hearing a question which had not been placed before the Court when the review was granted *Hurro Chunder Chakraburtty* v *Ram Kissor Chukraburtty W R (1864) 142 Bygnath Sahay* v *Wu cer Narain 24 W R 427* explained *Sainal Ram Chhod* v *Dullav Darka 10 Bom. H C 360 Emperor* v *Naryan Raghunath Patki I L R 3 Bom 111 Hurkans Salye* v *Thakoor Purshad I L R 9 Calc 209* referred to SADARUDDIN v EKRAMUDDIN (1913) 18 C W N 22

———— s 635—
See PRACTICE I L R 37 Calc 853

———— s 647—
See ss 244 252 647—
I L R 34 Bom 54

A comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Section of Act XIV of 1882	Corresponding Section of Act V of 1908
1	1	49	Cf 137
2	2	50	O VII rr 1 2 4 5 6
3	154 156 157 158	51	O VI rr 14 15 (1)
4	4	52	r 15)
4 A	5	53	O VII r 17
5	7	54	O VII r 11 Cf O VI r 18
6 para. (c) and (d)	Omitted.		
6 last para	6	55	r 12
7	Cf 4.	56	r 13
8	8	57	r 10
9	Omitted	58	r 9
10	Omitted	58 last para	O IV, r 2
11	9	59	O VII r 14
12	10	60	r 15
13	11	61	r 16
Expln. VI	14	62	r 17
14	13	63	r 18
15	15	64	27 O V r 1
16	16	65	O V r 2
16 A	18	66	r 3
17	20	67	r 4
18	19	68	r 5
19	17	69	r 6
20	Omitted	70	r 7
21	Omitted	71	r 8
22	22 23 (1)	72	r 9
23	22 23 (2)	73	r 10
24 paras 1 and 3	22 23 (3)	74	r 11
24 para 2	Omitted	75	r 12
25	24	76	r 13
26	O I, rr 1 4 (a)	77	r 14
27	r 10 (1)	78	r 15
28	r 3 4 (b)	79	r 16
29	r 6	80	r 17
30	r 8 (1)	81	r 18
31	r 9	82	rr 19 20 (1)
32	rr 8 (2) 10 (2) (3) (5) 11	83	r 20 (2)
		84	r 20 (3)
33	r 10 (4)	85	S 28 rr 21 23
34	r 13	86	O V r 22
35	r 12	87	rr 24 29
36	O III r 1	88	
37	r 2	89	r 25
38	r 3	90	r 26
39	r 4	91	r 30 (1) (2)
40	r 5	92	r 30 (3)
41	r 6	93	O XLVIII r 1
42	O II, r 1	94	142 O XLVIII r 2
43	r 2	95	143 O XLVIII r 3
44	rr 4 5	96	O IX r 1
45	rr 3 6	97	r 2
46	Cf O II rr 6 7	98	r 3
47		99	r 4
48	26 O IV r 1	99 A	r 5

A comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908—contd

Section of Act XIV of 1882	Corresponding Section of Act V of 1908
100	O IX r 6
101	„ r 7
102	r 8
103	„ r 9
104	Omitted
105	O IX r 10
106	r 11
107	r 12
108	r 13
109	r 14
110	O VIII r 1
111	r 6
112	r 9
113	r 10
114	*Cf* O VI r 2
115	„ rr 14, 15
116	rr 16 17
117	O X r 1
118	r 2
119	r 3
120	r 4
121	O XI r 1
122	Cf O XLVIII r 2
123	O XI r 3
124	r 5
125	r 6
126	r 8
127	r 11
128	O XII r 2
129	O XI r 12 13
130	r 14
131	r 15
132	r 17
133	r 18 (1)
134	r 18 ( )
135	r 20
136	r 21
137	O XIII r 10
138	r 1 (1)
139	r 2
140	rr 1 (2) 3
141	„ r 4
141 A	r 5
142	r 6
142 A	r 7
143	r 8
144	r 9
145	r 11
146	O XIV rr 1 2
147	r 3
148	r 4
149	r 5
150	„ r 6
151	„ r 7

Section of Act XIV of 1882	Corresponding Section of Act V of 1908
152	O XV r 1
153	r 2
154	r 3
155	r 4
156	O XVII r 1
157	r 2
158	r 3
159	O XVI r 1
160	r 2
161	„ r 3
162	„ r 4
163	r 5
164	r 6
165	r 7
166	„ r 8
167	r 9
168	r 10
169	r 11
170	r 12
171	r 14
172	r 15
173	r 16
174 }	rr 10 to 13
175 }	17 18
176	„ r 19
177	r 20
178	r 21
179	O XVIII rr 1, 2 (1)
180	rr 2 (2) (3) 3
181	„ r 4
182	r 5
183	r 6
184	r 8
185	r 9
185 A 1st & 2nd para	S 138
185 A 3rd para	O XVIII r 7
186	r 10
187	r 11
188	r 12
189	r 13
190	r 14
191	r 15
192	r 16
193	r 17
194	O XIX r 1
195	r 2
196	r 3
197	139
198	S 33 O XX r 1
199	O XX r 2
200 }	Cf S 137
201 }	
202	O XX r 3
203	r 4

A comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908—contd

Section of Act XIV of 1882	Corresponding Section of Act V of 1908
204	O XX r 5
205	r 7
206 1st & 2nd paras	r 6
206 3rd para	152
207	O XX r 9
208	r 10
209	34
210	O XX r 11
211, 212	2 (12) O XX r 12
213	O XX r 13
214	r 14
215	r 15
215 A	r 16
216	r 19
217	r 20
218, 219, 220, 221, 222	Cf 35 O XX r 6 (3)
223 1st para	38
223 2nd & 3rd paras	39
223 4th para	41
223 5th para	O XXI r 4
223 6th paras	r 5
224	r 6
225	r 7
226	r 8
227	r 9
228	42
229	43
229 A	45
229 B	44
230 1st para	O XXI r 10
230 2nd para	r 21
230 3rd & 4th paras	48
231	O XXI r 15
232	r 16
233	49
234	50
235	O XXI r 11 (2)
236	r 12
237	r 13
238	r 14
239	r 26 (1) (2)
240	r 26 (3)
241	r 27
242	r 28
243	r 29
244	47
245	O XXI r 17
245 A	56

Section of Act XIV of 1882	Corresponding Section of Act V of 1908
245 B	O XXI r 37
246	r 18
247	r 19
248	r 22
249	r 23
250	r 24 (1)
251	rr 24 (2) (3) 25 (1)
252	52
253	Cf 145
254	O XXI r 30
255	r 42
256	r 11 (1)
257	r 1
257 A	Omitted
258	O XXI r 2
259	r 31
260	r 32
261	r 34 (1) to (4)
262	r 34 (5)
263	r 35
264	r 36
265	54
266	60
267	O XXI r 41
268	r 40
269	r 43
270	r 51
271	62
272	O XXI r 52
273	r 53
274	r 54
275	r 55
276	64
277	O XXI r 56
278	r 58
279	r 59
280	r 60
281	r 61
282	r 62
283	[illegible]
284	r 64
285	63
286	O XXI r 65
287	rr 66 70
288	Omitted
289	O XXI r 67
290	r 68
291	r 69
292	r 73
293	r 71
294	r

A comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908—contd

Section of Act XIV of 1882	Corresponding Section of Act V of 1908
295	73
296	O XXI r 76
297	r 77
298	r 78
299	r 79 (1)
300	r 79 (2)
301	r 79 (3)
302	r 80
303	r 81
304	r 82
305	r 83
306	r 84
307	r 85
308	r 86
309	r 87
310	r 88
310 A	r 89
311	r 90
312	r 92
313	r 91
314	r 92
315	r 93
316	65 O XXI, r 94
317	66
318	O XXI r 95
319	r 96
320	68 70 and 71
321	Schedule III
322	Schedule III
322 A	Schedule III
322 B	Schedule III
322 C	Schedule III
322 D	Schedule III
323	Schedule III
324	Schedule III
324 A	Schedule III
325	Schedule III
325 A	Schedule III
325 B	Schedule III
325 C	Schedule III
326	72
327	67
328	O XXI r 97
329	r 98
330	r 98
331	r 99
332	rr 100 101
333	r 102
334	rr 97 98
335	rr 97 99 103
336	55
337	O XXI r 38
337 A	r 40

Section of Act XIV of 1882	Corresponding Section of Act V of 1908
338	57
339	O XXI r 39 (1) to (4)
340	r 39 (5)
341	58
342	58
343	O XXI r 25
344—360 A	Repealed by the Provincial Insolvency Act III of 1907
361	O XXII r 1
362	r 2
363	r 3 (1)
364	Omitted repealed by Act VII of 1888 s 32 (1)
365	O XXII r 3 (1)
366	r 3 (2)
367	r 5
368	r 4
369	r 7
370	r 8
371	r 9 (1) (2)
372	r 10
372 A	r 9 (3)
373	O XXIII r 1
374	r 2
375	r 3
375 A	r 4
376	O XXIV r 1
377	r 2
378	r 3
379	r 4
380	O XXV r 1 (1) (3)
381	r 2
382	r 1 (2)
383	O XXVI r 1
384	r 2
385	r 3
386	76 O XXVI r 4
387	O XXVI r 5
388	r 6
389	r 7
390	r 8
391	78
392	O XXVI r 9
393	r 10
394	r 11
395	r 12
396	rr 13 14
397	r 15
398	r 16
399	r 17
400	r 18
401	O XXXIII r 1
402	Omitted

A comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908—contd

Section of Act XIV of 1882	Corresponding Section of Act V of 1908	Section of Act XIV of 1882	Corresponding Section of Act V of 1908
403	O XXXIII r 2	455	O XXXII r 14
404	r 3	456	rr 3 (2) (3) 4 (4)
405	r 5	457	r 4 (1)
406	r 4	458	r 11 (1)
407	r 5	459	r 11 (2)
408	r 6	460	Omitted
409	r 7	461	O XXXII r 6
410	r 8	462	r 7
411	r 10	463	r 15
412	r 11	464	r 16
413	r 15	465	O XXVIII r 1
414	r 9	466	r 2
415	r 16	467	r 3
416	79 O XXVII r 1	468	O V rr 28 29
417	r 2	470	8
418	r 3	471	O XXXV r 1
419	r 4	472	r 2
420	r 5	473	r 4
421	r 6	474	r 5
422	O V r 27	475	r 6
423	O XXVII r 7	476	r 3
424	80	477 } 478 }	O XXXVIII r 1
426 } 427 }	O XXVII r 8	479	r 2
428	81	480	r 3
429	82	481	r 4
430	83	483 } 484 }	r 5
431	84	485	r 6
432	85	486	r 8
433	86	487	r 9
434	87	488	r 10
435	O XXIX r 1	489	r 11
436	rr 2 3	490	r 12
437	O XXXI r 1	491	95
438	r 2	492	O XXXIX, r 1
439	r 3	493	r 2
440	O XXXII rr 1 4 (2)	494	r 3
441	r 5 (1)	495	r 5
442	r 2	496	r 4
443	rr 3 (1) 4 (2)	497	95
444	r 5 (2)	498	O XXXIX r 6
445	r 4 (1)	499	r 7
446	r 9	500	r 8
447	r 8	501	r 9
448	r 10 (1)	502	r 10
449	r 10 (2)	503	O XL rr 1 to 3
450	r 12 (1)	504	r 5
451	r 12 (2) (3)	505	Omitted
452	r 12 (4)	506 to 526	Schedule II
453	r 12 (5)	527	O XXXVI r 1
454	O XXXII r 13	528	r 2

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 2 cl (11) O XXII r 1—*contd*

death of her mother to recover possession of her father s property as his heir from strangers whom she alleged to be trespassers the plaintiff (daughter) died In an application by the grandsons of the deceased plaintiff s father s brother as his heirs to continue the suit *Held* (i) that the right to sue survived within the meaning of O XXII r 1 Civil Procedure Code (Act V of 1908) and (ii) that the applicants were her legal representatives within the meaning of s 2 cl (11) of Civil Procedure Code *Premmoyi Choudhrani* v *Preonath Dhur* I L R 23 Cal 636 and *Ridhan Rai* v *Sheo Pujan Singh* I L R 33 All 5 followed RAMASWAMI *v* PEDAMURNAYYA (1914)
I L R 39 Mad 33?

——— s 2 (11) and O XXII r 3—*Legal representatives of a deceased member of a joint Hindu family—Court fees—Suit to enforce right to share in joint family property—Court Fees Act VII of 1870 s 7 (IV) (b)—reference to arbitration by manager of joint Hindu family—Whether binding on members—Status of after born sons to call in question such reference and the award arbitrator—Whether controlled in his decision by the parties personal law* R K died and a dispute arose between his two sons K K and J G as to his property They referred their dispute to arbitration by means of an agreement dated the 8th of August 1909 At the time J G was sonless but on the 26th of December 1909 a son J N was born to him On the 9th of March 1910 the arbitrator gave his award and on the 25th of July 1910 upon an application made by K K to have the award filed in Court the parties agreed to a compromise by which they accepted the award with certain modifications in favour of J G Upon this a decree was passed D D the second son of J G was born on the 4th of August 1913 The present suit was instituted by J N and D D the minor sons of J G on the 16th of June 1914 for a declaration to the effect that the entire arbitration proceedings were null and void and praying to be awarded joint possession of the property in dispute and they valued the relief sought at Rs 2 500 The property was valued for purposes of jurisdiction at a sum exceeding 8 lakhs and it was contended that the suit should be valued for purposes of Court fees at the actual value of the plaintiff s share During the pendency of the appeal J N died An application was then made under O XXII r 3 Civil Procedure Code praying that his brother D D and his mother Mt P D should be brought on the record as his legal representatives This application was accepted subject to all just exceptions *Held* that there is no such thing as succession properly so called in an undivided Hindu family and the order in chambers making D D and Mst P D the legal representatives of J N deceased must consequently be set aside *Chunilal* v *Pat Mani* (I L R 42 Bom 104) followed also Mayne s Hindu Law 8th Edition page 330 *Held also* that the present suit is not for partition and for possession of a definite share of joint property but is one to enforce the right to share in joint family property This being so the value of the suit is the amount stated in the plaint (Rs 2 500) under s 7 (IV) (b) of the Court Fees Act *D jan* v *Tolaram* (I L R 33 Bom 658) *Har Chand* v *Jiwan Mal* (8 P R 1903) and *Bilhata Roy* v *Ram Chandra* (6 Cal L J 651) distinguished *Held* that under Hindu Law a son conceived is the same as a son born for all purposes and as J N deceased who was conceived before the reference to arbitration could therefore have maintained the present suit the later born son D D was also competent to do so *Sabapathi* v *Somasundaram* (I L R 16 Mad 76) and *Tulshi Ram* v *Babu* (I L R 33 All 651) followed also Mulla s Hindu Law 3rd Edition page 24 and Mayne s Hindu Law 8th Edition page 491 *Held further* that family arrangements or references to arbitration entered into in good faith by the manager of a joint Hindu family or by a father in such a family bind the other members or the minor sons in the absence of fraud or other good reasons to the contrary And if the reference cannot be objected to the award cannot be objected to merely on the ground of inequality of benefit *Balaji* v *Nana* (I L R 27 Bom 287) *Jagan Nath* v *Mannu Lal* (I L R 16 All 231) *Jai Nath* v *Kamta Nath* (7 Indian Cases 31) *Ramlal* v *Chandlas* (7 Indian Cases 134 *Venkataratnam* v *Subbarayudu* (21 Indian Cases 491 496) *Ramlal* v *Motiram* (21 Indian Cases 863) *Uppara Chinnappa* v *Gilliam* (50 Indian Cases 471) and *Girdhari Singh* v *Nirmal Singh* (51 Indian Cases 3?5) followed also Banerji s Law of Arbitration 2nd Edition pages 73 to 75 Mayne s Hindu Law page 491 referred to *Held also* that in proceedings for filing an award the parties are competent to compromise by altering amending or adding to the award *Behari Lal* v *Dhollan Das* (5 Indian Cases 994) followed *Held* that in the absence of any stipulation to that effect an arbitrator is not controlled in his decision by the rules of the personal law of the parties *Muhammad Nawaz Khan* v *Ilam Khan* (70 P R 1891 P C) followed DWARKA DAS *v* KISHAN KISHORE I L R 2 Lah 114

——— s 2 (12)—A Trespasser is only liable to mesne profits from the date on which he take wrongful possession and an assignee for him only of the date he took possession DAMADAR NARAIN CHAUDHRY *v* S A MILLAR (1921)
6 Pat L J 158

——— ss 2 (17) 60 (1) (i) and O XXI r 43—

See ATTACHMENT I L R 43 Bom 716

——— ss 2 (17) and 80—*Receiver—Suit against a receiver—Public officer—Notice necessary—Provincial Insolvency Act (III of 1907) ss 19 20* The plaintiff brought a suit against the defendant who had been appointed a receiver in an insolvency application to get it declared that the property in suit belonged to her The suit was dismissed by the lower Appellate Court on the ground that no notice under s 80 Civil Procedure Code was given On appeal to the High Court *Held* confirming the decision that as soon as the receiver was appointed under the Provincial Insolvency Act he became a public officer within the meaning of s 2 sub s 17 Civil Procedure Code 1908 and he was protected by s. 80 of the Civil Procedure Code against any plaintiff who filed a suit against him with regard to any act done by him as such receiver without giving the requisite notice DE SILVA *v* GOVIND BALVANT (1920) I L R 34 Bom. 895

CIVIL PROCEDUPE CODE (ACT V OF 1908) —contd.

——— s. 2 (17) 80—contd

———*Public officer—Suit against public officer—Notice of claim necessary—Cantonment Committee is public officer—Cantonments Act (XIII of 1889) s 80 applies to actions ex delicto and not to actions excontractu* A Cantonment Committee constituted under the Indian Cantonments Act (XIII of 1889) is a public officer within the meaning of s. 2 cl (17) of the Civil Code of Civil Procedure (Act V of 1908) Before the Committee can be sued notice prescribed by s. 80 of the Code must be given The notice contemplated by s. 80 has to be given for actions sounding substantially in tort and it makes no difference that those actions are by operation of law treated, for certain purposes as actions *ex contractu Jaymal v Harmant I L P 0 Bom 697* considered CECIL GRAY v THE CANTONMENT COMMITTEE OF POONA (1910)
I L R 34 Bom 583

——— s 2(2) 115 151 and 152 O VII— *Held* (1) an order rejecting a plaint under O VII r 11 is not appealable when based on a question of valuation only unless the order involves a question of jurisdiction. (2) When the order necessarily involves a decision of the category or class under which a suit falls even though it incidentally decides a question of valuation the order is appealable CHANDRAMANI KOER v BASDEO NARAIN SINGH
4 Pat L J 57

——— ss 3 115—*Mamlatdars Courts Act (Bom Act II of 1906)—Mamlatdar's decree—Reversal by the Collector on evidence—Collector's judicial functions—Superintendence and control by the High Court—Courts subordinate to the High Court* The Mamlatdars Courts Act (Bom Act II of 1906) expressly constitutes the Collector (taking proceedings under that Act) a Court and when he exercises judicial functions he is subject to the superintendence and control of the High Court under s 115 of the Civil Procedure Code (Act V of 1908) The Collector has no authority to reverse the decision come to by the Mamlatdar upon the evidence S 3 of the Civil Procedure Code (Act V of 1908) in which certain Courts are stated to be subordinate to the High Court does not exclude all other Courts from the category of Courts subordinate to the High Court *The Collector of Thana v Bhaskar Mahadev Sheth I L P 8 Bom 264* referred to PURSHOTTAM JANARDAN v MAHADU PANDU (1912)
I L R 37 Bom 114

——— s 4 (1882 Code s 4)—

See SPECIAL OR SECOND APPEAL
I L R 38 Bom 340

——— ss 4 60 (2) (b) O XXI r 48—

See ARMY ACT ss 145 190
I L R 43 Bom 368

——— ss 4 98 sub s 2—*Bombay High Court—Original Civil Jurisdiction—Appeal—Disagreement of Judges—Procedure* S 36 of the Letter Patent of the Bombay High Court which provides that if the Judges composing a division bench are equally divided in opinion the opinion of the senior Judge is to prevail is not affected by s 98 sub s 2 of the Code of Civil

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— ss 4 98 sub s 2—contd

Procedure 1908 which provides a different procedure in these circumstances BHAIDAS SHIVDAS v BAI GULAB (1921) **I L P 45 Bom 718**

——— ss 7 24—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 24 **I L R 38 Mad 25**

——— ss 7 (b) 94—

See ATTACHMENT BEFORE JUDGMENT
I L R 46 Calc 717

——— s 7(1) (b) *Sch* 69 70 Sch III—*Decree—Interest awarded up to realisation—Execution—Interest calculated in darkhast up to its date—Collector carrying on execution and paying interest and amount as prayed in darkhast—Court directing Collector to continue execution till payment of interest up to realisation—Discretion of Collector—Jurisdiction of Court* The plaintiffs obtained a money decree against the defendants which awarded interest on the decretal amount up to its realisation. They applied to execute the decree and calculated interest over the decretal amount up to the date of the application The Collector to whom the execution proceedings were transferred placed the defendants estate under his management and when the decretal amount and interest as calculated in the plaintiffs application were paid up he treated the decree as satisfied and returned the execution proceedings to the Court The Court sent back the proceedings to the Collector asking him to continue in management till interest over the decretal amount from the date of the application to the date of realisation was paid to the plaintiffs The District Court held on appeal that the Court had no jurisdiction to interfere with what lay completely within the Collector's jurisdiction and reversed the order On second appeal *Held* restoring the order passed by the first Court that under the provisions of s 7 (*1*) (*b*) of the third schedule of the Civil Procedure Code of 1908 the Collector had to take into account the whole amount with the total interest awarded by the decree and that that would include not merely interest up to the date of the application but also interest which would run according to the decree thereafter *Per* CHANDAVARKAR *J*—The Civil Procedure Code (s 69 and 70) of 1908 gives authority to the Collector for the purpose of enabling him to determine the best mode or modes of satisfying the decree whether it is to be satisfied by management by the Collector himself of the land attached in execution of the decree or whether it is to be by its sale or letting So far therefore as the machinery necessary for the satisfaction of the decree is concerned the Collector is the sole authority The discretion is his and no Civil Court can interfere with that discretion. But that discretion does not extend to any jurisdiction in the Collector to determine whether the decree itself has been satisfied or not The latter jurisdiction is the Civil Court's It is that Court above which is competent to determine the question judicially BHURCHAND HANSRAJ v VIRA CHAMPA (1912) **I L R 37 Bom 32**

——— s 8 and 114 and O XLVII—

See PRESIDENCY SMALL CAUSE ACT 1882 CH VII s 48 **I L R 45 Bom 972**

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

———— s 9 (1882 Code s 11)—

See ACT OF STATE I L R 39 Calc 615
See CHURCH I L R 39 Mad 1056
See COMPENSATION I L R 44 Calc 87
See DECREE 3 Pat L J 405
See ELECTION I L R 41 Calc 284

1 ———— *Suit for declaration and injunction—Right to perform Ram Lila such performance not being connected with any shrine or temple and being supported by purely voluntary contributions—Suit not maintainable—Jurisdiction* The plaintiff a minor sued for a declaration that he had the right to perform certain religious pageants in Benares and to receive subscriptions in connection therewith and claimed an injunction to restrain the defendant from interfering with that right It was found that these pageants had been performed for many years past by the plaintiff's father grandfather and great grandfather with the aid of voluntary subscriptions from the Hindu community But the pageants were not connected with any particular temple shrine or sacred spot nor did the plaintiff or his ancestors hold any office by virtue of which they were under any obligation to perform such pageants The performance thereof was in fact wholly voluntary *Held* that the plaintiff's suit would not lie *Tholappala Charlu v Venkata Charlu I L R 19 Mad 62 Srinivasa v Tiruvenrada I L R 11 Mad 450* and *Hur Lall v Jeorakhan Lall (1862) S D A N W P 311* referred to CHUNNU DATT VYAS v BABU NANDAN (1910) I L R 32 All 527

2 ———— *Specific Relief Act (I of 1877) s 42—Suit for declaration that the plaintiff is the Honorary Secretary of an association—Suit maintainable—Jurisdiction* Although the fact that an office is of a purely honorary nature is not by itself sufficient to render a suit respecting such office unmaintainable in a Civil Court yet where a plaintiff complained of his eviction from the office of Secretary to a society which was an honorary office and his continuance therein depended upon rules which the society had power to alter at any moment it was *held* that a Civil Court ought not to entertain a suit for a declaration that the plaintiff had been illegally deprived of such office inasmuch as such Court could not give any decree in his favour which might not be immediately rendered nugatory by the action of the society *Chunnu Datt v Babu Nandan I L R 32 All 527* referred to MAHARAJ NARAIN SHEPURI v SHASHI SHEKHARESHWAR ROY (1915) I L R 37 All 313

3 ———— *Right to officiate at funeral ceremonies suit for declaration of— Right of office* The plaintiff a Hindu priest of Patna sued for a declaration that he had by custom a right to officiate at all funeral ceremonies performed upon the banks of the Ganges between certain points and for recovery of a sum of money paid to the defendant by the members of a household situate within the plaintiff's *birt* for officiating at the funeral ceremony of a member of such household *Held* that no suit for a declaration lay The plaintiff did not claim that any legal character was vested in him within the meaning of s 42 of the Specific Relief Act 1877 or that he was entitled to any right of office within

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

———— s 9 (1882 Code s 11)—contd

the meaning of s. 9 of the Code of Civil Procedure 1908 The freedom of the subject entitles all Hindus to call in at any time any priest whom they may prefer to perform any ceremony and so long as that inherent freedom exists there can vest in no one any legal character or any right to the office of performing ceremonies in private houses *Held further* that the plaintiff was not entitled to recover the money paid to the defendant unless he could prove that there was a contract between himself and the defendant whereby the defendant had bound himself to pay to the plaintiff all sums received from ceremonies performed within the plaintiff's *birt* Mere proof of a custom that among the Brahmin priests of Patna there was an implied contract not to interfere with the rights of each other did not amount to proof of a contract by the defendant to pay to the plaintiff sums of money received for officiating at ceremonies within the plaintiff's *birt* HIRA PANDAY v BACHU PANDAY
1 Pat L J 581

4 ———— *Suit of a civil nature—Right to worship—Temple—Right to carry processions through public streets with music—Practice.* A suit to establish the right to worship a deity according to one's own belief and to carry processions accompanied with music through a public street is a suit of a civil nature within the meaning of s 9 of the Civil Procedure Code 1908 WAMAN BALVANT v BALU HARIHET (1919)
I L R 44 Bom 410

5 ———— *Right to be carried in procession—Claim to dignity and honour—Right claimed as Jagadguru—Alternative claim made as a member of the public—Inconsistent claim—Plaint—Amendment—Civil Court—Jurisdiction* A suit claiming a right to be carried in a cross palanquin procession with Panch Kalash and Birudavali is not maintainable in a Civil Court without proof of special damage *Madhusudan Parvat v Shri Shankaracharya (1905) 33 Bom 278* referred to The plaintiff alleged that he was one of the Jagadgurus of the Lingayats and as such he claimed the right of going in procession seated in a cross palanquin adorned with and accompanied by Panch Kalash and Birudavali One of the issues raised in the trial Court was Is the right to parade in cross palanquin as described in the plaint a general right exercisable by any subject of His Majesty ? On this issue it was contended in second appeal by the plaintiff that the lower Courts which dismissed his suit on the ground that it was not maintainable in a Civil Court should have dealt with the case as if the plaintiff was suing as a member of the public claiming as such to be entitled to be carried in a cross palanquin if he chose to adopt that method of procession The plaintiff also asked that he should be allowed to amend his plaint accordingly *Held* refusing the amendment (1) that the claim made as a member of the public was inconsistent with the plaintiff's original claim that he was entitled to be carried in procession as Jagadguru and (2) that on the pleadings the issue raised in the trial Court was irrelevant and ought not to have been admitted. *Mahomed Buksh Khan v Hosseini Bibi (1888) L R 15 I A 81* relied on ANDANISWAMI v TOTADSWAMI (1920) I L R 45 Bom 590

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— ss 9 and 92—*Offerings made by devotees at a temple—Suit by pujaris to recover offerings from gurvas of the temple—Suit of civil nature—Suit under the purview of s 92* A suit by the hereditary *pujari* of a temple to recover from the *gurvas* (temple servants) offerings placed by devotees before the idol, is a suit of civil nature within the meaning of s. 9 of the Civil Procedure Code 1908 Such a suit however falls within the purview of s 92 of the Code of Civil Procedure where the temple is under the management of the Devasthan Committee and the funds of the temple including the offerings to the deity are administered under a scheme by the members of that Committee *Per* SHAH J —The principle adopted is apparently that the scheme once settled by a Court cannot be altered except by the Court This would seem to preclude suits between parties to establish a private right which if established, would interfere with a charitable scheme settled by the Court *Ramdas v Hanumantha Rao (1911) 36 Mad 364* referred to SAKHARAM DAJI *v* GANU RAGHU (1920)

I L R 45 Bom 683

——— s 9 and O XXI rr 89 to 92—

See BENGAL TENANCY ACT I 4

3 Pat L J 122

——— s 9 Sch II, s 20—*Dispute as to manpán—Suit of civil nature—Award by arbitrators settling dispute out of Court—Application to file award—Award can be filed though referring to mánpan—Agreement to distribute cash allowance —Pension Act (XXIII of 1871)* S 20 of the second Schedule to the Civil Procedure Code (Act V of 1908) is devised for the purpose of enabling where the subject matter of the award lies within more than one jurisdiction any Court within whose jurisdiction a part of the subject matter lies to direct that the award be filed. It does not contemplate that the Court has no jurisdiction to order an award to be filed only because it deals with *manpan* that is matters relating to a complement or dignity about which the Courts would have no jurisdiction to entertain suits It is the policy of law to enable parties who by private arrangement settle a dispute to have that settlement made legally effective If there is something to arbitrate on and there is a reference and an award the policy of the law is that that award should be given effect to without minute inquiry by the Court Disputes about *mánpan* which cannot be settled in the Courts can often only be effectively settled by arbitration. The parties are at liberty without in any way going against the words or the spirit of the Pensions Act (XXIII of 1871) to agree among themselves that when the cash allowance is received from Government it shall be distributed among them in a certain way RAGHAWENDRA AYYAJI *v* GURURAO RAGHAWENDRA (1913) I L R 37 Bom 442

——— s 10 (1882 Code s 12)—

See JURISDICTION I L R 42 Calc 926

See STAY OF SUIT I L R 43 Calc 144

1 ——— *For the same relief —suit for pension—Appeal pending before His Majesty in Council—claim for pension subsequent to first suit—Application for stay when should be made* S 10 of the Code of Civil Procedure 1908 does not apply to a claim relating to a period subsequent to the claim in the former suit It is contemplated by that section that if all the matters in dispute are substantially the same in both suits then the fact that the relief claimed in the subsequent suit is not identical with the relief claimed in the previous suit shall not operate to enable the parties to continue the litigation. The mere fact that the question of title is raised in both suits and decided in the first suit is not sufficient to attract the operation of s 10 In order to attract that section it is necessary that every matter in dispute should be directly and substantially in issue in the two suits *Obiter* The proper stage for making an application for stay under s 10 is after the defence has been disclosed and issues have been framed MAHARAJA KESHO PRASAD SINGH *v* SHIVA SARAN LALL

4 Pat L J 557

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 10 (1882 Code s 12)—*contd*

2 ——— *Application by defendant for stay of plaintiff s suit defendant having filed an earlier suit in a mofussil Court—Plaintiff s application for injunction to restrain defendant from proceeding with his suit—Matter directly and substantially in issue in a previously instituted suit meaning of—Jurisdiction of High Court to order a party before it not to proceed with a suit in another—Practice of Court of Chancery to make an order in personam against a party residing out of the Court s jurisdiction* On the 25th of March 1919 the plaintiffs commission agents in Bombay filed a suit in the High Court against the defendant cotton merchants at Bijapur claiming a sum of Rs 8 ,7 1 0 as being due to them in respect of advances made to the defendants against cotton from time to time The defendants had however on the 13th of March 1919 filed a suit in the Court of First Class Subordinate Judge at Bijapur against the plaintiffs and seven other persons praying *inter alia* that the account between them and the various defendants in that suit be taken after fixing the rate at which their cotton should have been sold in Bombay and that a decree be passed against the several defendants for such amounts as may legally and properly be found due from them respectively On the 29th of April 1919 the defendants applied to the High Court for a stay of the plaintiff suit under 10 of the Civil Procedure Code The plaintiffs opposed the application and asked that an order *in personam* be made against the defendants restraining them from proceeding with their suit in the Bijapur Court The trial Judge holding that s 10 of the Civil Procedure Code did not apply dismissed the defendants application for stay of the plaintiffs suit and made an order against the defendants restraining them from proceeding with their Bijapur suit as against the plaintiff The defendants appealed contending (1) that the High Court suit ought to have been stayed as the matter in issue therein was involved in the earlier suit in the Bijapur Court and (2) that High Court had no jurisdiction to restrain them from proceeding with their suit in Bijapur where they resided and carried on business *Held* (1) that the High Court suit should not be stayed inasmuch as the matter in issue therein was not directly and substantially in issue in the previously instituted suit at Bijapur within the meaning of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 10 (1882 Code s 12)—*contd*

s 10 of the Civil Procedure Code (2) that the High Court had jurisdiction to order a party contesting a suit before it to restrain him from prosecuting a suit filed by him in another Court *Mungle Chand* v *Gopal Ram (1906) 34 Calc. 101* referred to *Narayan Vithal Samant* v *Jankibai (1915) 39 Bom 604* distinguished MULCHAND RAICHAND v GILL & Co (1919)
I L R 44 Bom 283

——— ss 10 and 11—*Stay of suit—Issue common to two suits but parties not occupying the same position* Z and J brought a suit against W and other heirs of W's deceased husband claiming certain property in virtue of a deed of gift from the mother of the deceased. This suit was decreed and the defendant filed an appeal in the High Court Pending this appeal W brought a suit against Z and J and another in which he claimed one sixth of her dower debt exempting the other heirs of her late husband In the second suit the deed of gift in favour of Z and J was again brought in question the plaintiff alleging that it was invalid and inoperative In this suit the Court, at the instance of the defendants made an order under s 10 of the Code of Civil Procedure 1908 staying proceedings until the appeal in the former suit should be decided *Held* on application by W for revision of the order staying proceedings that the Court below had properly applied s 10 of the Code but it would be necessary when the hearing of the second suit should proceed to consider carefully the effect of s 11 of the Code with reference to the facts and circumstances of the two litigations WAHID UN NISSA BIBI v ZAMIN ALI SHAH
I L R 42 All 290

——— ss 10 and 115—*Revision Interlocutory order—staying a suit— Case* An application under s 10 of the Code of Civil Procedure for the stay of a suit is not a case and an order for stay passed on that application is not the decision of a case within the meaning of that word in s 115 of the Code and no revision lies from such an order The word 'case' in s 115 is not confined to a suit but cannot be construed to mean an interlocutory order in a suit such as an order under s 10 of the Code of Civil Procedure although the order may be of such a nature that it cannot be interfered with even under the provisions of s 105 of the Code when an appeal is preferred from the final decree in the suit *Muhammad Ayub* v *Muhammad Mahmud I L R 32 All 623* applied *Bhargava and Co* v *Jagannath Bhajuan Das I L R 41 All 602* doubted and distinguished SULTANAT JAHAN BEGAM v SUNDAR LAL I L R 42 All 409

——— s 11 (1882 Code s. 13)—

See s 10
I L R 42 All 290

See ADOPTION I L R 37 All 496

See BENGAL TENANCY ACT 1885 s 105 A

See BENGAL TENANCY
3 Pat L J 379
I L R 48 Calc 460

See BOMBAY LAND REVENUE CODE 1879 ss 216 AND 217
I L R 45 Bom 1260

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 11 (1882 Code s. 13)—*contd*

See HINDU LAW—ADOPTION
I L R 40 All. 593

See HINDU LAW—JOINT FAMILY
I. L R 42 Bom 69

See HINDU LAW—REVERSIONER
I L R 43 Bom. 869

See LANDLORD AND TENANT
I L R 42 Mad. 702

See LIMITATION ACT 1877 ss 5 7
I L R 34 Bom 589

See MESNE PROFIT I L R 44 Bom. 954

See MORTGAGE 2 Pat L. J 118

See RES JUDICATA
26 C W N 504

See SARANJAM I L R 40 Bom 606

See THIRD PARTY NOTICE
I L R 45 Bom 24

See U P LAND REVENUE ACT s 233
I L R 42 All 309

See WILL I L R 46 Calc 485

1. ——— Res judicata—*Former suit —Application of rule of* res judicata *unaffected by question in which Court an appeal lies* The rule of *res judicata* so far as it relates to the retrial of an issue refers not to the date of the commencement of the litigation but to the date when the Court is called upon to decide the issue *Balkishan* v *Kishan Lal I L R 11 All 148* followed *Held* also that it is the competency of the Court of first instance to entertain the two suits which regulate the application of the rule of *res judicata* the fact that in the two suits appeals may lie in different Courts does not affect the application of the rule BENI MADHO v INDAR SAHAI (1909)
I L R 32 All 67

2 ——— Delay —— *Limitation Act (XV of 1877) ss 5 and 7—Application to file an appeal in* forma pauperis—*Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant*—Res judicata A suit filed in *formâ pauperis* was decided on the 10th February 1908 An application for leave to appeal in *formâ pauperis* was presented to the High Court on the 13th April 1908 but as it was beyond time it was rejected On an application to excuse the delay it was excused on the ground that the applicant having been a minor s 7 of the Limitation Act 1877 applied At the hearing it was objected that the application for permission to appeal in *formâ pauperis* must be treated as an appeal and that s 5 and not s 7 of the Limitation Act applied to it *Held* overruling the contention that whether the application was treated as falling under s 5 or under s 7 of the Limitation Act 1877 the result was the same If it fell under s 5 as an appeal then under the second paragraph of that section which applied to appeals the Court had jurisdiction to excuse delay after the period of limitation prescribed for the presentation of an appeal had expired If on the other hand it be treated as an application and fell under s 7 of the Limitation Act

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——————s 11 (1882 Code s 13)—contd

it was clearly within time and there was no need of excusing delay becau e the section provided that a minor could apply after he had attained th age of majority within a certain period The probate is conclu ive only as to the appointment of executors and the validity and the contents of the will and on the application for probate it is not the province of the Court to go into the question of title with reference to the property of wh ch the will purports to dispose or the validity of su h disposition CHINTAMAN VYANKATRAO v BALCHANDRA VYANKATRAO (1910)

I L R 34 Bom 583

3 ———— Same issue d cid d in two connect d suits—App al in on only The same issue was d id d b we n the same parties in ea h o two conn c ed suits The party against whom the d ision was app al d in the one cas but not in the other the de ree in which became final b fore his app al was heard Held that the h aring of the app al was barred Zaharia v Debi I L R 33 All 51 followed. DAKHNI DEVI v SYED ALI ASGHAR (1910)

I L R 33 All 151

4 ———— Decision of first suit on merits but its dism ssal for not paying—Second suit for trial on sam m rits A previous suit between the parties failed on the ground that the claim was und rvalued and the plaintiff when called upon to pay the deficient Court fees omitted to do so Tn re w re i s on merits also d cid d In a sub equ nt suit for trial on the same merits the d cision in the first suit was pl aded as res judica a Held that the rejection of the suit on the ground of und rvaluation at any stage of it did not make it res judicata for the purposes of a ubsequ nt suit on the same cause of action or lit ating the same titl Held further that the dismissal of the suit on the ground of und rvaluation having b n sufficient by itself the findings on the issues on the m rits were not nece ary for the decision of the suit and could not have the force of res judicata IRAWA KOM LAXMA NA MUGALI v SATYAPPA BIN SHIDAPPA MUGALI (1910) I L R 35 Bom 38

5 ———— Two suits—One jud m nt but two d cre s—App al against on de re b fore the de is on of which the oth r decree becomes final M and Z each fil d a suit for pre emption in respe t of the same sale each claiming a right of pre-emption preferential to that of the other Each plaintiff was made a party defendant to the suit brought by the other A judgment was delivered in the suit of M and a copy thereof was placed on the record as the judgment in the suit of Z but a separate decree was framed in each suit The suit of M was decreed that of Z dismis ed Z appealed from the decree in his own suit but not from the decree in the suit brought by M which became final before Z s appeal was decided Held that the doctrine of res judicata ap lied and Z s appeal was barred *Chajju* v *Shio Sahai I L R 10 All 1?3 Bal Kishan* v *Kishan Lal I L R 11 All 148 Ram Lal* v *Chhab Nath I L R 12 All 578 Mangli* v *Narain All Weekly Notes (1893) 190 Kesho Tiwari* v *Sarju Kunwar All Weekly Notes (1893) 2 1 Abdul Basit* v *A faq Husain All Weekly Notes (1908) 211* and other (unreported) cases of the Allahabad High Court approved and followed *Damodar Das* v *Sheo Ram Das I L R 29 All 730* overruled *Abdul Majid* v *Jew Narain Mahto I L R 16 Calc 233 Mariam nissa Bibi* v *Jojnab Bibi I L R 33 Calc 1101* and *Panchananda Velan* v *Vaithinatha Sastrial I L R 29 Mad 333* dis ented from *Gururaj jammah* v *Venkatakrishnama Chetti I L R 24 Mad 359* referred to ZAHARIA v DEBIA (1910) I L R 33 All 51

6 ———— Consent decree—amount to res judi ata—Consent decree b tween predecessors in title of parti in su t—Injun tion granted in former suit—R s judi ata and estoppel distinguished A cons nt de ree has to all intents and purposes the same effect as res judicata as a decree passed per invitum and this notwithstanding the words in s 11 of the Civil Procedure Code has been heard and finally decided *In re South American and Mexican Company (1895) 1 Ch 37* followed A cons nt d cree come to between the predecessors in intere t of the pre ent parties touching matters now sub tantially and directly in issue between them is res judicata Res judicata ousts the jurisdiction of the Court while estoppel does no more than shut the mouth of a party Estopp l never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it at another time while res judicata means nothing more than that a person shall not be heard to say the same thing twice over BHAISHANKER NANABHAI v MORARJI KESHAVJI & Co (1911) I L R 36 Bom 283

7 ———— Co plaintiff—re judicata as between—Civil Procedure Code (Act XIV of 1882) s 26—Joinder of parties The plaintiff D and his step mother R (defendant) brought a suit against C to recover pos ession of certain ornaments which formed part of the estate of M the fath r of D and husband of R It was held by the Court of first instance that R was entitled to the ornaments because they were her *stridhan* but the Appellate Court held that she was entitled to them not because they were her *stridhan* but because she was the ab olute owner of the property D then sued P for a declaration that he as son and heir to M was entitled to hold the decree The defendant in reply contended *inter alia* that the suit was barred by res judicata Held that the bar of res judicata did not apply inasmuch as there was no final adjudi ation as between R and D and in the first suit it was a matter of no consequence to the defendant therein for the purposes of the relief to be given against him whether R succeeded or whether D succeeded A finding to become res judicata as between co plaintiffs must have been e ential for the purpose of giving relief against the defendants *Ram chandra Narayan* v *Narayan Mahadev I L R 11 Bom 216* followed The Court ought not to hold a point to be res judicata unless it is clear from the pleadings and the findings in the previous suit No Court ought to infer res judicata by mere arguments from a judgment in a previous suit *Attorney General for Trinidad and Tobago* v *Eriche (1893) A C 518* followed. RUKHMINI v DHONDO MAHADU (1911)

I L R 36 Bom

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 11 (1882 Code s 13)—*contd*

7 (*a*) ——— Res Judicata—*Mortgage—Dekkhan Agricultural Relief Act* In a suit brought by a mortgagee to recover interest on his mortgage money the amount was found to be Rs 350 and interest was awarded on that sum The mortgagee subsequently brought another suit to foreclose the mortgage under the provisions of the Dekkhan Agriculturist Relief Act The mortgage amount was found to be Rs 400 and relief granted accordingly It was contended in the appeal that the finding as to the mortgage amount in the first suit operated as *res judicata* in the second suit *Held* that the Dekkhan Agriculturist Relief Act 1879 was in relief of certain class of His Majesty s subjects and therefore the finding in the first suit could not affect and be *res judicata* in the second which was under a special law unless the previous suit also came within that law VITHAL RAMCHANDRA v SITABAI I L R 36 Bom 548

7 (*b*) ——— Certain Puisne mortgagees brought a suit for sale on their mortgage in which although they impleaded the prior mortgagees they simply asked for sale of the property and the prior mortgagees did not set up their rights *Held* that s 11 of the Code was a bar to the prior mortgagees after suing for sale of their property I L R 34 All 599

8 ——— First suit by widow—*alleging that the property was her husband s separate property—Suit decision of—Appeal by widow—Withdrawal of appeal—The widow s daughter contending in a subsequent suit that the property was her father s self acquisition—Plea barred by* res judicata In a suit brought against her husband s nephew a Hindu widow alleged that certain property was her husband s separate property The Court *held* that the property was joint property but allowed the widow to be in possession of it in lieu of her rights to maintenance The widow appealed against the decree but she subsequently withdrew the appeal On the widow s death the property passed into the possession of her daughter who claimed it as heir to her father The nephew filed the present suit to recover possession of the property from the daughter who resisted the claim on the ground that the property having been the separate property of her father had descended to her and that the decision in the first suit was not binding on her *Held* that the first decree operated as *res judicata* against the defendant inasmuch as it was a decree against the widow as representing her husband s estate *Held* further that so far as the first suit was concerned the case was fairly contested and the mere withdrawal of the appeal by the widow was not sufficient to deprive the decree of its operative character in law *Katama Natchiar v The Rajah of Shivagunga 9 Moo I A 39* followed GHELABHAI v BAI JAVER (1912) I L R 37 Bom 172

9 ——— First suit for partition—*Declaratory decree—Second suit by other members for partition of their share—*Res judicata *does not bar the second suit* A Khoti village was owned by two families known as Varang and Desai In 1854 two members of the Desai family brought a suit for partitioning the one half share of the Desai family in the village That suit ended in a decree which awarded them the share The decree remained unexecuted In 1904 the plaintiff a member of the Varang family sued the Varang as well as the Desai members to obtain his $\frac{1}{44}$th share by partition of the village Some of the defendants in both families admitted the plaintiffs claim and asked that their shares also should be awarded to them on partition It was contended that the claim of the defendants to obtain their share in the village was barred as *res judicata* in virtue of the decree of 1854 which awarded to them half a share in the village — *Held* that the first decree was a declaratory decree and did not operate as *res judicata* in the present suit *Babaji Parshram v Kashibai I L R 4 Bom 157* and *Vasrat ullah v Mujibullah I L R 13 All 309* followed *Soni Maganlal v Munshi Himatbhai 3 Bom L R 94* distinguished JAGU BABAJI v BALU LAXMAN (1912) I L R 37 Bom 307

10 ——— Letters Patent cl 12—*Evidence Act (I of 1872) s 44—Suit for restitution of conjugal rights—Previous suit for similar relief—Competency of the Court to try the previous suit—Dismissal of the suit for want of jurisdiction after raising and deciding issues on the merits—No bar of res judicata* The plaintiff filed a suit for restitution of conjugal rights against the defendant and for an injunction restraining her from marrying any other person pending the disposal of the suit The defendant raised the plea of *res judicata* urging that the plaintiff had filed a previous suit against her in the High Court for similar relief and had failed in it The previous suit was filed without obtaining the leave of the Court under cl 12 of the Letters Patent the residence of the parties being outside the jurisdiction of the Court The Court therefore, dismissed the suit for want of jurisdiction though issues on the merits were raised and decided The first Court disallowed the plea of *res judicata* on the ground that the judgment in the previous suit was delivered by the Court not competent to do so in consequence of the absence of leave On appeal by the defendant the Judge dismissed the suit holding that the absence of leave did not go to the root of the jurisdiction of the Court and therefore the judgment of the Court was the judgment of a Court having jurisdiction *Held* on second appeal by the plaintiff that the judgment in the previous suit was delivered by a Court not competent to deliver it within the meaning of s 44 of the Evidence Act (I of 1872) and therefore the plea of *res judicata* could not prevail ABDUL KADIR v DOOLANBIBI (1913) I L R 37 Bom 563

11 ——— Prior and subsequent mortgagees—*Suit by first mortgagee impleading second but no decree as to rights of first mortgagee—Suit for sale by prior mortgagee not barred* A second mortgagee brought a suit for sale on his mortgage in which he impleaded the first mortgagee and asked to redeem The first mortgagee did not appear The plaintiff got a decree for sale but the decree did not either give him redemption of the first mortgage or direct the property to be sold subject to the first mortgage *Held*, that the first mortgagee was not precluded from subsequently bringing a suit for sale on his mort-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s 11 (1882 Code s 13)—*contd*

gare *Srinivasa Rao Saheb* v *Yamuna Bhai Ammall I L R 29 Mad 84 Katchalai Mudali* v *Kuppanna Mudali Mad W N 1912 41* followed. *Sri Gopal* v *Pirthi Singh I L R 24 All 429 Vatu Krishnama Chariar* v *Annangara Chariar I L R 30 Mad 353* and *Gopal Lal* v *Benarasi Per had Choudhry I L R 31 Calc 428* di tinguished AJUDHIA PANDE v INAYAT ULLAH (1912) **I L R 35 All 111**

12 ——— **Issue in a former suit h ard and decided but no' necessary for this deci ion of suit**—The plaintiff as the daughter of one *B* sued to recover po e ion of propertie alleging that they formed part of a *bhag* in the village of Rahad of which *B* had become the owner In a former suit between the parties the defendant claimed the property as the neare t male agnate and heir of *B* An issue was rai ed whether the cu tom of the daughter s exclusion by a *gitrai* heir was proved to have been in exi tence in the *bhagdari* village of Rahad and it was heard and decided but the suit was di mi ed on the ground that the defendant who was the plaintiff in that sui was not proved to be the nearest *gitrai* heir to *B* It was contended that by rea on of this finding the plaintiff's suit was barred by *res judicata* within the meaning of s 11 of the Civil Procedure Code 1908 *Held* that the suit was not barred by *res judicata* because although the i sue was heard and decided it was not finally decided as it was not necessary for the deci ion which the Court came to dismi sing the suit and the plaintiff had no neces ity of appealing against the Court s finding on that i sue BAI NATHI v NARSI DULLABH (1919) **I L R 44 Bom 321**

13 ——— **Two suits one judgment and two decrees**—*Two appeals one of which abates before the other is heard* A plaintiff instituted, on the same day and in the same Court two suits in each of which the claim was for a declaration that he was the *mahant* of a certain *math* The one was against defendant *A* only the other against defendants *A* and *S* Both suits were decided by a single judgment but a separate decree was framed in each In the former suit *A* appealed In the latter *S* appeal d but *A* did not Pending *A* s appeal *S* died and his appeal abated and judgment in the ca e became final. *Held* that the hearing of *A* s appeal was barred *Zaharia* v *Debia I L R 33 All 51* followed. ANANT DAS v UDAI BHAN PARGAS (1913) **I L R 35 All 187**

14 ——— **Previous rent suits**—*Question of area of holding and amount of rent decided previous suit if* res judicata *in subsequent suit* In a previous suit for rent the plaintiffs alleged that the defendants besides holding certain plots of land originally forming their own holding al o held certain other plots belonging to another tenant *S* who had abandoned his holding at a consolidated *jama* of Rs 30 Defendants denied holding the latter plots and contended that their *jama* was only Rs 16 per year It was held that the defendants were liable to pay rent at the rate of Rs 16 per annum for a holding which included the lands alleged to have formerly belonged to *S* *Held* that the questions whether the lands alleged to have been formerly held by *S* formed part of the defendant s holding and of the amount of rent payable were directly and substantially in i sue in that suit and were *res judicata* in a sub equent suit by the plaintiffs against the defendants for establishment of their title to the plots alleged to have formerly belonged to *S* and for rent in the alternative The authorities reviewed MANE MAHAMMAD NASYA v DHANI MAHAMMAD (1912) **17 C W N 76**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 11 (1882 Code s 13)—*contd*

15 ——— **Provincial Insolvency Act**—(*III of 1907*) *ss 22 and 46—Insolvency Court—Application for recovery of property attached by Court—Subsequent suit for same purpose.* A person claiming as his own property attached by the Judge of an In olvency Court as property of an insolvent may apply to the Insolvency Court under s 22 of the Provincial Insolvency Act 1907 for a declaration of his title and for po e ion of the property claimed or he may sue to recover the ame in the ordinary way But where uch per on has elected to pursue his remedy under s 22 of the Provincial Insolvency Act and the claim ha after a full inquiry been decided against him and he has not appealed from the decision under 46 he cannot after w rd file a separate uit with the ame object *Ram Kirpal* v *Rup Kuari I L R 6 All Ex parte Swinbank 11 Ch D 525* and *Ex parte Bull 14 Ch D 765* PITA RAM v JUJHAR SINGH (1917) **I L R 39 All 626**

16 ——— **Specific Relief Act**—(*I of 1877*) *s 9—Suit for pos ession in Munsifs Court —Subsequent suit for damages in Court of Small Causes* The plaintiffs filed a suit under s 9 of the Specific Relief Act 1877 in the Court of a Munsif and obtained a decree on the finding that they had in fact been wrongfully dispossessed by the defendant They then sued in a Court of Small Causes for damages on account of the same wrongful dispo ession *Held* that the finding of the Munsif that the plaintiffs had in fact been disposses ed was a *res judicata* in respect of the subsequent suit in the Court of Small Cau es *Ghulappa bin Balappa* v *Raghavendra Swamirao I L R 28 Bom 338* and *Raja Simhadri Appa Rau* v *Ramchandrudu I L R 27 Mad 63* followed BODLU BHONJA v MOHAN SINGH (1917) **I L R 39 All 717**

17 ——— **Probate action**—*Evidence Act of 1872 s 41—Probate and Adm nistration Act (V of 1881) s 83—Contentious proceeding for probate—Will not proved—Probate refused—Suit for recovery of property from defendants who held as executors—Judgment in the probate proceeding refusing probate not judgment in rem*—Res judicata In a contentious proceeding for probate the will produced by the applicants was held not proved and the probate was refused. The applicants appealed to the High Court which dismissed the appeal. The widow of the deceased thereupon brought a suit for the recovery of the property of the decea ed from the defendants who held it as executors under the will and the firs Court allowed the claim On appeal by the defendants two questions having arisen namely (i) whether the judgment refusing probate was as much within the scope and intention of s 41 of the Evidence Act (I of 1872) as a judgment granting probate and (ii) whether the the probate proceeding operated as *Held*, by

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

————— s 11 (1882 Code s 13)—*contd*

the Full Bench that s 41 of the Evidence Act (I of 1872) was not applicable to the judgment of the Appellate Court refusing probate. *Held* further that the judgment in the probate proceeding operated as *res judicata* between the parties under s 83 of the Probate and Administration Act (V of 1881) and s 11 of the Civil Procedure Code (Act V of 1908) KALYANCHAND LALCHAND v SITABAI (1913) I L R 38 Bom 309

18 ————— Co defendants—Res judicata *between co defendants* Per SHAH J—In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them it is necessary to establish that there was a conflict of interests among the defendants and that there was a judgment defining the real right and obligations of the defendants *inter se.* HARI VINAYAK v VASUDEV JANARDAN (1914) I L R 38 Bom 438

19 ————— Suit as members of the Muhammadan Community—*for a declaration that certain property was waqf—Previous similar suit by other plaintiffs* Where a suit had been brought by two persons as members of the public for a declaration that certain property was waqf property and it had been decided that the property in question was not waqf *Held* that this decision operated as *res judicata* in the case of any other similar suit which might be brought by other members of the public as such claiming a similar declaration MUHAMMAD AMIR v SUMITRA KUNWAR (1914) I L R 36 All 424

20 ————— Benamidar—*First suit alleging herself to be merely a benamidar but found in that suit to be real owner—Second suit by persons alleging themselves to be the real owners* A suit for sale on a mortgage was brought against the ostensible purchaser of the mortgaged property the pleaded that she was not the real purchaser but was merely a benamidar for her three sons The Court however declined to accept this plea and gave a decree against the defendant upon the record as being the real purchaser *Held* in a subsequent suit for possession of the same property brought by the sons that the previous decision did not operate as *res judicata* in respect of their claim *Khub Chand v Narain I L R 3 All 812 Nand Kishore Lal v Ahmed Ata I L R 18 All 69 Yad Ram v Umrao Singh I L R 21 All 380 Kaniz Fatima v Wali ullah I L R 30 All 30* and *Gopinath Chobey v Bhuquat Pershad, I L R 10 Calc 697* referred to MATA PRASAD v PAI CHARAN SAHU (1914) I L R 36 All 446

21 ————— Compromise decree challenged *on the ground of absence of consent—Application for review dismissed—Fresh suit if lies* Where a party to a suit applied for review of a decree passed upon a compromise on the ground that he had not consented to the compromise and failed *Held* that a suit to set aside the decree on the same ground was not maintainable *Ram Gopal v Prasanna Kumar 2 C L J 508 s c 10 C W N 597,* followed *Gulab Koer v Badshah Bahadur 10 C L J 420 s c 13 C W N 1197* distinguished the relief sought in that case having been based on fraud KAILASH CHANDRA PODDAR v GOPAL CHANDRA PODDAR (1914) 18 C W N 1204

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

————— s 11 (1882 Code s 13)—*contd*

22 ————— Suit for declaration and recovery of possession—*Defence of* res judicata—*Parties not adequately represented in the former suit not fully tried—No bar of* res judicata A suit brought by three plaintiffs as surviving coparceners of a joint Hindu family for a declaration that the property in suit formed part of the joint family property and for possession was met by the plea of *res judicata* The previous suit the decision in which was set up as *res judicata* was filed in the year 1900 by the father of the present plaintiffs 2 and 3 who were minors and who were not joined as parties against the present defendants and the present plaintiff 1 as defendant 4 The relief claimed in that suit was the same as that claimed in the present suit The finding in that suit showed conclusively that the father of the present plaintiffs 2 and 3 who were then minors and were not parties did not adequately represent them and the suit was not fully tried and the suit was accordingly dismissed *Held* that the bar of *res judicata* did not arise as the present plaintiffs 2 and 3 were then minors and were not adequately represented *Held* further that the present plaintiff 1 who was defendant 4 in the former suit was no more than a *pro forma* defendant and took no active part and was not bound by the result of that suit the decree in which was in his favour *Raja Pampal Singh v Ram Ghulam Singh L R 29 I A 1?* distinguished SUNDRA v SAKHARAM GOPALSHET (1914) I L R 39 Bom 29

23 ————— Termination of tenancy by decree on prior mortgage—The appellant purchased a plot of land at a sale held in execution of a mortgage decree In the mortgage suit the plaintiff mortgagee s case was that the tenant defendants to that suit had taken their tenancies from the mortgagor after the date of the mortgage and the mortgagee prayed for the sale of the property free from the tenancies The case set up by one of the respondents who was the elder brother of the other respondents was that they held a permanent tenure created prior to the mortgage which was confirmed by a confirmatory lease after the mortgage and that they had created a masonry building on the land. Issues were framed on this point and the Court found in favour of the plaintiff mortgagee and in execution of the mortgage decree the property was sold free of all encumbrances and purchased by the appellant Subsequently a portion of the land so purchased by the appellant was acquired under the Land Acquisition Act and the respondents put in a claim for the compensation money alleging that they had a permanent *mokurari mourasi interest in the land* the tenancy standing in the name of the elder brother *Held* that the matter was directly in issue in the former suit and decided against the respondents and they could not open the question again. KANAI LAL JALAN v PASIK LAL SADHUKHAN (1914) 19 C W N 61

24 ————— Partition—*Plaintiff s share declared and separated by metes and bounds—No proceeding by the defendant to correct errors if any in the apportionment—Subsequent suit by the defendant to correct error if lies—Mistake suit to set aside decree on ground of if lies* If any co sharer applies for a partition of property he

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd.

——— s 11 (1882 Code s 13)—contd

mu t make the o her co harers defendants becau e the partition which is made in his favour is a partition again t his co harers That which gives him a portion of the property takes away all right which they would otherwise have to that portion and therefore it is a decree against them and in favour of him elf Where a decree having been made in a uit for partition declaring the shares of the plaintiffs a Commissioner under the Court s direction went and on the ground measured out the declared shares and the plaintiffs were put into pos ession thereof but the defen dants took no proceeding in the suit such as is provided for in the Code of Civil Procedure to correct errors, if any made in partitioning out *Held* that apart from such proceedings none of which were taken the decree was *res judicata* and a uit institu ed by the defendants in the previous suit with a v ew to correct the apportion ment made in favour of the plaintiffs in the pre vious suit was barred by *res ju licata* NALINI KANTA LAHIRI v SARNAMOYI DEBYA (1914)
19 C W N 531

25 ——— **Rise of value of subject matter**—*Pro forma defendant when bound Person not joined as executor when bound as such—Decree against limited owner upon compromise when binding on reversion—Decree erroneously declared not* res judicata *effect of* To determine for purpo es of *res judicata* whether the Court which decided the former suit had jurisdiction to try the subsequent suit regard must be had to the jurisdiction of the Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit A decree made by a Munsif cannot cease to be *res judicata* by reason of a gradual increa e in the value of the subject matter of the litigation If a defendant actively contested the plaintiff's claim the decision of the suit will bind him even thou h he was merely described as a *pro formâ* defendant and no relief was asked against him A defendant who might have been joined both in his personal capacity and in that of an executor to another s estate cannot be treated as having been a party neces sarily in his character as an executor when he was not des ribed in the pleadings as such Where a deci ion between the parties was considered by the Court and declared not to be *res jud cata* the latter decision even if erroneous in law becomes conclusive between the parties and it was not open to any of them to plead in a later suit that the former decision still operated as *res judicata* An adverse decision obtained against a limited owner such as a Hindu daughter if obtained upon a fair trial is *res judicata* on the issues decided therein against rever ionary heirs A decree passed on a compromise made *bonâ fide* for the benefit of the estate and not for the personal advantage of the limited owner has the same effect and such a decree unless successfully impeached on the ground of fraud coercion collusion or any like reason would operate as *res judicata* again t the reversioners MOHENDRA NATH BISWAS v SHAMSUNNESSA KHATUN (1914)
19 C W N 1280

26 ——— **Prior suit to claim posses sion**—*by virtue of the purchase of mortgagee s rights—Subsequent suit for repayment of the money advanced on mortgage—No bar of* res judicata—*Bhagdari*

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 11 (1882 Code s 13)—contd

Act (Bom Act V of 1862)—Mortgage of unrecog nised share of a bhag—Mortgage void—Unlawful consideration—Indian Contract Act (IX of 1872) s 24—Indian Limitation Act (IX of 1908) s 62 One A mortgaged with pos ession an unrecog nised share of a *bhag* with *R* on May 19 1896 contrary to the provisions of the Bhagdari Act 1862 The mortgage deed provided that after possession by the mortgagee for eleven years the mortgage amount was to be paid to him whenever he should demand it either out of the property or by the mortgagor or his heirs personally In 1908 *B* obtained a money decree against the estate of *R* whose mortgage right was put up to sale and purchased by the plaintiff at a Court sale for Rs 577 In 1910 the plaintiff filed a suit No 176 of 1910 against the representatives of *P* and *K* to obtain po ses ion No claim was made in that suit for payment of the amount of the mortgage debt The suit failed on the ground that the mortgage was invalid and there fore unenforceable In 1911 another suit was filed by the plaintiff against the same parties to recover Rs 788 from the estate of *K* and in the alternative to recover R 577 from the e tate of *B* The defendants Nos 1 to 3 contended that the suit was barred by *res judicata* and also pleaded limitation *Held* that the subsequent suit for the mortgage debt was not barred by *res judicata* as the prior claim of 1910 for possession was not really a claim on the mortgage but a claim by virtue of the purchase by the plaintiff of the mortgagee s rights *Held* further that the consideration for the mortgage being unlawful under s 24 of the Contract Act 1872 it failed *ab initio* and the claim for repayment of the money advanced to the mortgagor as money had and received being brought more than three years after the date of the mortgage deed was barred by reason of Art 62 of Limitation Act 1908 *Javerbhai Jorabhai v Gordhan Narsi I L R 39 Bom 358* followed BAI DIWALI v UMEDBHAI BHULABHAI (1916) **I L R 40 Bom 61**

27 ——— **Prior suit to set aside aliena tion**—*made by minor s mother—Mortgage created by alienee before suit—Mortgagee not made party to the suit—Partial representation by mortgagor—Subsequent suit by mortgagee to support alienation—Privity between parties—Subsequent suit not barred by* res judicata—*Meaning of words claiming under* The property in suit originally belonged to one Devare In 1883 during the minority of Devare his mother sold it to the Bhojes from whom one Bavachi received it in exchange for another parcel of land. In 1891 by a simple mortgage Bavachi mortgaged the property to the plaintiff In 1898 a suit was brought by Davare against his mother Bavachi and the Bhojes in order to set aside the sale by his mother to the Bhojes That suit was successful and the result was that the sale to Bhojes was set aside In 1901 the plaintiff obtained a decree on his mortgage against Bavachi The property was put to sale and was purchased by the plaintiff with permis ion But when the plaintiff endea voured to get po session he was resisted by Davare The plaintiff therefore brought a uit in 1909 against Devare Bavachi and the Bhojes to recover possession The defendant Devare contended that the plaintiff's uit was barred by *res judicata*

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— s 11 (1882 Code s 13)—contd

as he was bound by the decree obtained against his mortgagor Bavachi in the suit of 1893 *Held* that as a mere mortgagee the plaintiff would not be bound by the earlier decision because his title arose prior to the suit in which the decree against his mortgagor was obtained and the mortgagor possessing only the equality of redemption had not in him any such estate as would enable him sufficiently to represent the mortgagee in the suit instituted after the mortgage *Sita Ram* v *Amir Begam I L R 8 All 324 338* followed RAMCHANDRA DHONDO v MALKAPA (1916)

I L R 40 Bom 679

28 ———— Applicability of the principle as against co defendants A deposit of money in a firm was owned in equal moieties by *D* and *L* In a suit brought by *D* in the High Court of Bombay to recover his moiety of the deposit his brother *L* who was a partner in the firm admitted his claim but it was contested by the other partners defendants Nos 1 and 2 Defendants No 3 to 6 contended that they were not partners in the firm at all The Court passed a decree against *L* and defendants Nos 1 and 2 The firm made losses and ceased to work *L* thereupon filed the present suit in the Court of the Subordinate Judge at Surat for a Dissolution of the firm and for taking its accounts *D* was made a party to the suit as a creditor of the firm The defendants Nos 3 to 6 again contended that they were not partners in the firm A question having arisen whether the contention was *res judicata* in the present suit *Held* that the relief given to *D* in the earlier suit did not require or involve a decision of any case between the co defendants and therefore the co defendants were not to be bound as between each other by the Court's proceedings and decision which were necessary only to the decree which *D* obtained *Per* BATCHELOR *J* The Court is slow to enforce the principle of *res judicata* as against co defendants and the limits of the operation of the principle in such cases seem to me to be narrowly laid down FAKIRCHAND LALLUBHAI v NAGINCHAND KALIDAS (1915) I L R 40 Bom 210

29 ———— Decision embodied in decree —*operates as* res judicata In 1900 the defendants obtained a *mulgeni* (permanent) lease of certain lands from the then manager of the temple In 1910 the plaintiff the new manager sued the defendants in ejectment praying that the *mulgeni* lease was not binding on him and that the defendant being annual tenants should be evicted The Court held in favour of the plaintiff on the first ground but for want of notice held that he was not entitled at that stage to evict the defendants Then after due notice given the plaintiff again sued to eject the defendants They again pleaded the *mulgeni* lease The Court held that that defence was not open to them as it was barred by *res judicata* On appeal *Held* that the defence was barred by *res judicata* for the decision of the Court in the earlier suit in favour of the plaintiff upon the first part of his prayer found a place in the decretal order and was as much decreed as the other part of the prayer which in the second part of that decretal order was rejected MOTA HOLIAPPA v VITHAL GOPAL 1916) I L R 40 Bom. 662

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— s 11 (1882 Code s 13)—contd

30 ———— Decision of a Boundary Settlement Officer—*Grounds of decision if res judicata—Boundaries Act (XXVIII of 1860) ss 24 and 25—Estoppel* Where a Boundary Settlement Officer *mittadar* but to the Government on the ground that they never had formed part of the area of the *mitta* and no suit was brought by the *mittadar* to contest the decision under s 25 of the Act *Held* that the ground of the decision as well as the actual decision was *res judicata* in a subsequent suit instituted by the *mittadar* to recover the lands as having formed part of the *mitta* or in the alternative for a reduction of the *peshkash* of the *mitta Kamaraju* v *The Secretary of State for India I L R 11 Mad 309* followed *Per* SESHAGIRI AYYAR *J* The decision of the Survey Officer is binding upon the parties whether it is *res judicata* in the technical sense in which the term is used in the Civil Procedure Code or not *Krishna Behari Roy* v *Brojeswari Choudarnee L R 2 I A 283 286* and *In re Bank of Hindustan China and Japan (Alison s case) L R 9 Ch App 1* referred to MUTHAMMAL v THE SECRETARY OF STATE FOR INDIA (1916) I L R 39 Mad 1202

31 ———— Arbitration—*Award passed into a decree—Finding of arbitrator not incorporated in the Judgment—Surrender of lease—Subsequent suit for rent for another year covered by lease instituted by the zamindar—Previous judgment whether* res judicata—*S 11 Civil Procedure Code whether a rule of jurisdiction or estoppel* A decision in a suit for rent instituted in a Civil Court by the lessee for a term of a zamindari against the tenant is not *res judicata* in a subsequent suit for rent instituted by the zamindar after surrender of the lease by the lessee even though the rent claimed in the later suit was for a period covered by the original lease Surrender by the lessee does not operate as an assignment of the rights of the lessee in favour of the lessor but determines the tenancy so as to let in the lessor s rights RAJAH OF RAMNAD v RAMANATHASWAMI (1921) I L R 44 Mad 514

32 ———— ss 40 to 43 Evidence Act I of (1872)—*S 43 Specific Relief Act (I of 1877)—Judgment not inter parties whether* res judicata A judgment operates as a bar only as between the parties thereto or their privies hence a judgment in a suit by *A* against *B* a rival claimant for an office negativing *A s* title as against *B* is no bar to a suit by *A* against a third party for the emoluments of the said office It is only a piece of evidence on the question of title *Gokul Mandar* v *Pudmanund Singh (1902) I L R 29 Calc 707 (P C)* and *Peari Mohan Shaha* v *Durlavi Dassya (1913) 18 C W N 954* followed *Srinivasa Aiyangar* v *Arajar Srinivasa Aiyangar (1910) I L R 33 Mad 483* and *Ramamurti Dhora* v *The Secretary of State for India in Council (1913) I L R 36 Mad 141* overruled SECRETARY OF STATE v SYED AHMAD BADSHA (1921)

I L R 44 Mad (F B) 778

33 ———— Suit by purchaser at revenue sale to recover rent—*from tenant at rate decreed in favour of ex proprietor* A decree for rent obtained by a proprietor of

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd*

——— s 11 (1882 Code s 13)—*contd*

a revenue paying e tate against a tenant is not *res judicata* in a suit for rent by a purcha er of the e tate at a revenue sale as the purchaser does not claim under the ex propri tor within the meaning of s 11 of the Civil Procedure Code But the purchaser is not in any wor position than the ex proprietor and may elect to tal e advantage of the decree obtained by the latter and if the purcha er sues the tenant for recovery of rent at the same rate the tenant whose right are in no way enlarged by the sale cannot object NAKUL CHANDRA BASU v SOSHTI CHARAN BISWAS 21 C W N 399

34 ——— "Persons litig ting under the same title"—*Reversioner allowed to recover his moiety on proof of absence of legal nec ssity for sale by Hindu wi l w—Fresh suit on the o her moi t falling in—Deci ion on th issue of legal necessity if* res judicata Where the plaintiff having sued the defendant to recover possession as reversioners of property alienated by a Hindu widow obtained a decree in re pect of a moiety of the property upon a finding that the sale was not for legal necessity but the suit was dismissed as regards the other moi ty on the ground that it had not pas ed to the plaintiff and afterwards this moiety too having pa sed to the plaintiff he again sued the def n dant for recovery of this moiety *Held* that the decision in the previous suit that the sale was not for legal necessity was *res judicata* in the present suit as the parties were litigating under the same title in both suits vi the plaintiff as the owner of the reversion and the defendant as purchaser from the widow SURYA KANTA RAY CHOWDHURY v FANI BHUSAN BANARJEE (1913) 18 C W N 883

35 ——— Prior Mortgagee—*Res judicata* Where in a suit on a subs quent mortgage bond a prior mortgagee was made a party and the plaintiff prayed for an account as to the amount due to the prior mortgagee but the Court on the failure of the prior mortgagee to appear pass d an *ex parte* decree but no order was pass d as to plaintiff s prayer for account as against the prior mortgagee *Held* that the Court in passing this decree never intend d to say that the ab en e of the prior mortgag e from the trial caused the mortgagee security of the plaintiff to override the prior security which was held by the prior mortgagee *Ajudhya v Inayet I L R 35 All 111* followed MOHIRUDDIN MONDAL v INDRA KUMARI DASI (1914) 18 C W N 1013

——— s 11 expl II—*Res judicata —Question of title—Previous suit a suit of th nature cognizable by a Court of Small Causes though not tried as a Small Cause Court suit* The title of the plaintiff to a moiety of a certain grove was put in issue in a suit for damages on account of the appropriation of timber by the defendants This suit was tried by a Munsif as a regular suit and the question of title was decided in favour of the plaintiff but the suit was one of the nature cognizable by a Court of Small Causes Subse quently the plaintiff s title to the same grove was again put in issue between the same parties in a regular civil suit *Held* that the decision in the earlier suit operated as *res judicata* in

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd*

——— s 11 expl II—*contd*

respect of the subsequent suit notwithstanding that in the earlier suit no second appeal lay *Musaddi Lal v Jwala Prasad 10 A L J 106* approved RAM FAQIR v BINDESHRI SINGH (1918) I L R 41 All 51

——— s 11 expl IV— *Might and ought —Res judicata even as regards implied decisions if necessary for the decree—Applicability to issues also* A a landlord tendered a patta to B his tenant who objected to the patta on the ground that the extent of his holding was overstated some of the lands included in the patta not belong ing to A but to B himself The issue was raised whether the patta tendered was proper the Court found that it did not contain any objec tionable matt r and was therefore a proper patta Decree was accordingly given for rent in favour of A A tendered a similar patta to B for a subse quent year and B again raised a similar objection to the extent of the holding In a suit brought by A for the rent B objected to the extent of the holding and it was contended that the matter was *res judicata* by reason of the decision in the previous suit *Held* by the Full Bench upholding the contention and agreeing with MUNRO J in *Bayya Naidu v Paradesi Naidu I L R 35 Mad 216* (i) that the question of the extent of the defen dant s holding was dire tly and substantially an issue in the previous suit and must be taken to have been heard and finally decided in plaintiff s favour as such a decision is nece arily involved in the de ree passed in plaintiff s favour seeing that if the de ision had be n the other way it would under the R nt R covery Act have been fa al to his suit which must have been dismissed on the ground that th patta was not a proper one (ii) that even if it was not expres ly in qu stion it must be deemed to have been raised and d ided within the meaning of explanation IV to s 11 of the Civil Pro edure Cod as it was ground of d fen e which might and ought to have b en raised by the d fendant (iii) and that it is unne e sary in su h a ase of failure to raise the available ground of d fence that there should have b en an express de ision by the Court upon it in o der to make it *res judicata* *Sri Gopal v P rthi Singh I L R 24 All 429* and *Mahomed Ibrah m Hos in Khan v Amb ka Pershad S ngh I L R 39 Calc 527* followed BAGAN NAIDU v SURYANARAYANA I L R 37 Mad 70

——— Puisne mortgagee s *suit—Prior mortgagee mad a party if bound to s t up his mortgage in d f nce—Test—Nec ssary party* A prior mortgagee impleaded as such in a pui ne mortgag e s suit is not bound to s t up his prior mortgage in d fen e of his rights But if he has a subs quent mortgage as well he is a necessary party in such a suit and he must set up not merely his later but his prior mortgage as well failing which he will be debarred by the rule of *res judicata* from suing to enforce his earlier mortgage A decree obtained by a puisne mort gagee in a suit in which a prior mortgagee was impleaded as such is no bar to a suit by the latter to enforce his mortgage which he was not bound to set up as a defence in that suit The test in all such cases is—was the defendant impleaded as a puisne mortgagee and therefore a necessary party? *Ibrahim Hussain Khan v Ambika Pershad*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 11 (1882 Code s 13)—*contd*

as he was bound by the decree obtained against his mortgagor Bavachi in the suit of 1898 *Held,* that as a mere mortgagee the plaintiff would not be bound by the earlier decision because his title arose prior to the suit in which the decree against his mortgagor was obtained and the mortgagor possessing only the equality of redemption had not in him any such estate as would enable him sufficiently to represent the mortgagee in the suit instituted after the mortgage *Sita Ram* v *Amir Begam I L R 8 All 324 338* followed RAMCHANDRA DHONDO v MALKAPA (1916)

I L R 40 Bom 679

28 ——— Applicability of the principle as against co defendants A deposit of money in a firm was own d in equal moieties by *D* and *L* In a suit brought by *D* in the High Court of Bombay to recover his moiety of the deposit his brother *L* who wa a partner in the firm admitted his claim but it was contested by the other partners defendants Nos 1 and 2 Defendant No 3 to 6 contended that they were not partners in the firm at all The Court passed a decree against *L* and defendants Nos 1 and 2 The firm made losses and ceased to work *L* thereupon filed the present suit in the Court of the Subordinate Judge at Surat for a Dissolution of the firm and for taking its accounts *D* was made a party to the suit as a creditor of the firm The defendants Nos 3 to 6 again contended that they were not partners in the firm A question having arisen whether the contention was *res judicata* in the present suit *Held* that the relief given to *D* in the earlier suit did not require or involve a decision of any case between the co defendants and therefore the co defendants were not to be bound as between each other by the Court s proceeding and decision which were necessary only to the decree which *D* obtained *Per* BATCHELOR *J* The Court is slow to enforce the principle of *res judicata* as against co defendants and the limit of the operation of the principle in such cases seem to me to be narrowly laid down FAKIRCHAND LALLUBHAI *v* NAGINCHAND KALIDAS (1915) I L R 40 Bom 210

29 ——— Decision embodied in decree —*operates as* res judicata In 1900 the defendants obtained a *mulgeni* (permanent) lease of certain lands from the then manager of the temple In 1910 the plaintiff the new manager sued the defendants in ejectment praying that the *mulgeni* lease was not binding on him and that the defendants being annual tenants should be evicted The Court held in favour of the plaintiff on the first ground but for want of notice held that he was not entitled at that stage to evict the defendants Th n after due notice given the plaintiff again sued to eject the defendants They again pleaded the *mulgeni* lease The Court held that that defence was not open to them as it was barred by *res judicata* On appeal *Held* that the defence was barred by *res judicata* for the decision of the Court in the earlier suit in favour of the plaintiff upon the first part of his prayer found a place in the decretal order and was as much decreed as the other part of the prayer which in th second part of that decretal order was rejected MOTA HOLIAPPA v VITHAL GOPAL (1916)

I L R 40 Bom. 662

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 11 (1882 Code s 13)—*contd*

30 ——— Decision of a Boundary Settlement Officer—*Grounds of decision if res judicata—Boundaries Act (XXVIII of 1860) ss 24 and 25—Estoppel* Where a Boundary Settlement Officer *mittadar* but to the Government on the ground that they never had formed part of the area of the *mitta* and no suit was brought by the *mittadar* to contest the decision under s 25 of the Act *Held* that the ground of the decision as well as the actual decision was *res judicata* in a subsequent suit instituted by the *mittadar* to recover the lands as having formed part of the *mitta* or in the alternative for a reduction of the *peshkash* of the *mitta Kamaraju* v *The Secretary of State for India I L R 11 Mad 309* followed *Per* SESHAGIRI AYYAR *J* The decision of the Survey Officer is binding upon the parties whether it is *res judicata* in the technical sense in which the term is used in the Civil Procedure Code or not *Krishna Behari Roy* v *Brojeswari Choudarnee L R 2 I A 283 286* and *In re Bank of Hindustan China and Japan (Alison s case) L R 9 Ch App 1* referred to MUTHAMMAL v THE SECRETARY OF STATE FOR INDIA (1916) I L R 39 Mad 1202

31 ——— Arbitration—*Award passed into a decree—Finding of arbitrator not incorporated in the Judgment—Surrender of leas —Subsequent suit for rent for another year covered by lease instituted by the zamindar—Previous judgment whether* res judicata—*S 11 Civil Procedure Code whether a rule of jurisdiction or estoppel* A decision in a suit for rent instituted in a Civil Court by the lessee for a term of a zamindari against the tenant is not *res judicata* in a subsequent suit for rent instituted by the zamindar after surrender of the lease by the lessee even though the rent claimed in the later suit was for a period covered by the original lease Surrender by the lessee does not operate as an assignment of the rights of the lessee in favour of the lessor but determines the tenancy so as to let in the lessor s rights. RAJAH OF RAMNAD *v* RAMANATHASWAMI (1921) I L R 44 Mad 514

32 ——— ss. 40 to 43 Evidence Act I of (1872)—*S 13 Specific Relief Act (I of 1877)—Judgment not inter partes whether res* judicata A judgment operates as a bar only as between the parties thereto or their privies hence a judgment in a suit by *A* against *B* a rival claimant for an office negativing *A*'s title as against *B* is no bar to a suit by *A* against a third party for the emoluments of the said office It is only a piece of evidence on the question of title *Gokul Mandar* v *Pudmanund Singh (1902) I L R 29 Calc 707 (P C)* and *Peari Mohan Shaha* v *Durlavi Dassya (1913) 18 C W N 951* followed *Srinivasa Ayyangar* v *Arayar Srinivasa Ayyangar (1910) I L R 33 Mad 483* and *Ramamurti Dhora* v *The Secretary of State for India in Council (1913) I L R 36 Mad 141* overruled SECRETARY OF STATE v SYED AHMAD BADSHA (1921)

I L R 44 Mad (F B) 778

33 ——— Suit by purchaser at revenue sale to recover rent—*from tenant at rate decreed in favour of ex proprietor* A decree for rent obtained by a proprietor of

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— s 11 (1882 Code s 13)—contd

a revenue paying e tate against a tenant is not *res judicata* in a suit for rent by a purchaser of the estate at a revenue sale as the purchaser does not claim under the ex proprietor within the meaning of s 11 of the Civil Procedure Code But the purchaser is not in any worse position than the ex proprietor and may elect to take advantage of the decree obtained by the latter and if the purchaser sues the tenant for recovery of rent at the same rate the tenant whose right are in no way enlarged by the sale cannot object NAKUL CHANDRA BASU v SOSHTI CHARAN PISWAS

2' C W N 393

34 ———— "Persons litigating under the same title"—*Reversioner allowed to recover his moiety on proof of absence of legal necessity for alienation by Hindu widow—Fresh suit on the other moiety failing—Decision on the issue of legal necessity if res judicata* Where the plaintiff having sued the defendant to recover possession as reversioners of property alienated by a Hindu widow obtained a decree in respect of a moiety of the property upon a finding that the sale was not for legal necessity but the suit was dismissed as regards the other moiety on the ground that it had not passed to the plaintiff and afterwards this moiety too having passed to the plaintiff he again sued the defendant for recovery of this moiety *Held* that the decision in the previous suit that the sale was not for legal necessity was *res judicata* in the present suit as the parties were litigating under the same title in both suits viz the plaintiff as the owner of the reversion and the defendant as purchaser from the widow SURYA KANTA RAY CHOWDHURY v FANI BHUSAN BANARJEE (1913)

18 C W N 883

35 ———— Prior Mortgagee—*Res judicata* Where in a suit on a subsequent mortgage bond *a prior mortgagee was made a party and the* plaintiff prayed for an account as to the amount due to the prior mortgagee but the Court on the failure of the prior mortgagee to appear passed an *ex parte* decree but no order was passed as to plaintiff s prayer for account as against the prior mortgagee *Held* that the Court in passing this decree never intended to say that the absence of the prior mortgagee from the trial caused the mortgagee security of the plaintiff to override the prior security which was held by the prior mortgagee *Ajudhya v Inayet I L R 35 All 111* followed MOHIMUDDIN MONDAL v INDRA KUMARI DASI (1914)

18 C W N 1013

———— s 11 expl II——*Res judicata —Question of title—Previous suit a suit of the nature cognizable by a Court of Small Causes though not tried as a Small Cause Court suit* The title of the plaintiff to a moiety of a certain grove was put in issue in a suit for damages on account of the appropriation of timber by the defendants This suit was tried by a Munsif as a regular suit and the question of title was decided in favour of the plaintiff but the suit was one of the nature cognizable by a Court of Small Causes Subsequently the plaintiff's title to the same grove was again put in issue between the same parties in a regular civil suit *Held* that the decision in the earlier suit operated as *res judicata* in

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— s 11 expl II—contd

respect of the subsequent suit notwithstanding that in the earlier suit no second appeal lay *Murli Lal v Jwala Prasad 10 A L J 106* approved RAM FAQIR v BINDESHRI SINGH (1918)

I L R 41 All 51

———— s 11 expl IV— *Might and ought —Res judicata even as regards implied decision if necessary for the decree—Applicability to issues also* A landlord tendered a patta to B his tenant who objected to the patta on the ground that the extent of his holding was overstated some of the lands included in the patta not belonging to A but to B himself The issue was raised whether the patta tendered was proper the Court found that it did not contain any objectionable in ... and was therefore a proper patta De rec... as a cordingly given for rent in favour of A ... tendered a similar patta to B for a subsequent year and B again raised a similar objection to the extent of the holding In a suit brought by A for the rent B objected to the extent of the holding and it was contended that the matter was *res judicata* by reason of the decision in the previous suit *Held* by the Full Bench upholding the contention and agreeing with MUNRO J in *Bijya Naidu v Paradesi Naidu I L R 35 Mad 216* (i) that the question of the extent of the defendant s holding was directly and substantially an issue in the previous suit and must be taken to have been heard and finally decided in plaintiff s favour as such a decision is necessarily involved in the decree passed in plaintiff s favour seeing that if the decision had been the other way it would under the Rent Recovery Act have been fatal to his suit which must have been dismissed on the ground that the patta was not a proper one (ii) that even if it was not expressly in question it must be deemed to have been raised and decided within the meaning of explanation IV to s 11 of the Civil Procedure Code as it was ground of defence which might and ought to have been raised by the defendant (iii) and that it is unnecessary in such a case of failure to raise the available ground of defence that there should have been an express decision by the Court upon it in order to make it *res judicata* *Sri Gopal v Pirthi Singh I L R 24 All 429* and *Mahomed Ibrahim Hossain Khan v Ambika Pershad Singh I L R 39 Cal 527* followed BADAN NAIDU v SURYANARAYANA

I L R 37 Mad 70

———— Puisne mortgage suit—*Prior mortgagee made a party if bound to set up his mortgage in defence—Test—Necessary party* A prior mortgagee impleaded as such in a puisne mortgagee s suit is not bound to set up his prior mortgage in defence of his rights But if he has a subsequent mortgage as well he is a necessary party in such a suit and he must set up not merely his later but his prior mortgage as well failing which he will be debarred by the rule of *res judicata* from suing to enforce his earlier mortgage A decree obtained by a puisne mortgagee in a suit in which a prior mortgagee was impleaded as such is no bar to a suit by the latter to enforce his mortgage which he was not bound to set up as a defence in that suit The test in all such cases is—was the defendant impleaded as a puisne mortgagee and therefore a necessary party? *Ibrahim Hussain Khan v Ambika*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 11 expl IV—*contd*

I L R 39 Calc 527 s c 16 C W N 505 referred to A plea of *res judicata* not taken in the written statement was allowed to be taken on appeal under O XLI r 2 C P O VIII r 2 being held to be no bar to its being taken at that stage KRISHNA DOYAL GIR v SYED MD AMIRUL HASSAN (1914) 19 C W N 942

——— ——— *Subsequent mortgagee who does not appear in prior mortgagee s suit if may subsequently set up an earlier mortgage paid off by advances upon his mortgage* A subsequent mortgagee who has been made a party to a suit on a prior mortgage but who has failed to appear cannot afterwards raise the plea that he had paid off a prior lien and was therefore in the position of a prior mortgagee *Krishna Doyal Gir v Syed Md Amirul Hassan 19 C W N 942* referred to *Ibrahim Hussain Khan v Ambika Pershad I L R 39 Calc 527 s c 16 C W N 505* followed HANKAR RAY v KAMTA PERSHAD SAHU (1915) 19 C W N 947

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——— *Dekkhan Agriculturists Relief Act (XVII of 1879) ss 12 and 15—Prior and subsequent mortgages upon the same property by the same mortgagor to co parcener mortgagees—Suit on subsequent mortgage without reference to the prior mortgage—Subsequent suit on the prior mortgage—Separate causes of action—Subsequent suit barred*—res judicata—*Finding as a matter of fact that the two mortgages had been transactions out of which the suit has arisen* A mortgagee, who has two mortgages of different dates upon the same property having sued upon a mortgage of the later date and having had the property sold without reference to the prior mortgage cannot afterwards bring a suit on the prior mortgage though the causes of action for the two suits are distinct This rule is not the result of O II r 2 of the Civil Procedure Code (Act V of 1908) but it depends upon the principle of *res judicata Per* HAYWARD *J* If the two mortgages had been found as a matter of fact to have been transactions out of which the suit has arisen the subsequent suit on the prior mortgage would have further been barred in view of the previous suit on the subsequent mortgage by the provisions of O II r 2 of the Code and the special provisions of s 13 of the Dekkhan Agriculturists Relief Act (XVII of 1879) Mahadu v Rajaram (1887) P J 216 and *Gopal Purushotam v Yashwantrav (1887) P J 73* referred to DHONDO RAMCHANDRA v BHIKAJI (1914) I L R 39 Bom 138

——— Where a person brings a redemption suit and fails his second suit in ejectment against the same defendant is not barred by *res judicata* the matter involved being essentially different It is the practice of the Bombay High Court to pass a decree for redemption in a case in which the plaintiff has sued in ejectment That is purely in the exercise of the Court s discretionary power and it can hardly be maintained that the plaintiff failing in an ejectment suit ought to pray for the alternative relief by way of redemption when the Court is not bound to grant it as a matter of right MAHOMED IBRAHIM v SHEIKH HAMJA (1911) I L R 35 Bom 507

——— A prior mortgagee has a paramount claim outside the controversy of a suit on a subsequent mortgage unless his mortgage is impugned RADHA KISHUN v KHURSHED HOSSAIN 25 C W N 416

See also THIRD PARTY NOTICE I L R 45 Bom 24

——— s 11 expl V

——— Res judicata—*Private right claimed in common by several persons—Suit by some others being impleaded as defendants—Bona fide litigation—Decision whether binding on representative of deceased defendant not brought on record* Explanation V to s 11 Civil Procedure Code applies not only to cases where leave of Court has been granted under O I r 8 but also to cases where some of the persons claiming a private right in common with others litigate *bonâ fide* on behalf of themselves and such others A decision in a suit instituted and conducted *bonâ fide* by some only of the agraharamdars of a village against the zamindar and the other agraharamdar for a declaration as to the kattubadi payable by them to the zamindar *is res judicata* against the representative of an agraharamdar who was a defendant but died pending the appeal and whose legal representative was accidentally not brought on record either in the Appeal or the Second Appeal *Rangamma v Narasimha Charyulu (1916) 31 M L J 26* followed GOPALACHARYULU v SUBBAMMA (1920) I L R 43 Mad. 487

——— *Mortgage—Suit for sale—Person claiming paramount title impleaded—Decree in favour of mortgagee plaintiff—Suit by paramount owner for declaration of title*—res judicata In a suit brought by a mortgagee to enforce his mortgage a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party and the question of the paramount title cannot be litigated in such a suit *Jot Prasad v Azim Khan I L R 31 All 11* and *Jaggeshar Dutt v Bhuban Mohon Mitra I L R 33 Calc 425* referred to Two suits for sale on separate mortgages of the same property were filed and in each the mortgagees impleaded a third party as a subsequent mortgagee of a portion of the property in suit The party so impleaded was in reality the owner of a considerable portion of the property comprised in the mortgages sued upon though he was not impleaded in that capacity In the first suit the puisne mortgagee did not appear In the second he attempted to set up his paramount title but was not allowed to do so The mortgagors likewise attempted to set up the paramount title of the person impleaded as puisne mortgagee and in their case also the defence was ruled out In the result decrees were passed in favour of the plaintiff The puisne mortgagee then brought a suit for a declaration of his title to part of the mortgaged property *Held* that the suit was not barred by anything which had happened in the course of the previous litigation. *Girija Kanta Chakrabutty v Mohim Chandra Acharjy 35 Indian Cases 294* referred to GOBARDAN v MUNNA LAL (1918) I L R 40 All 584

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 11 expl V—contd

—*Suit for possession of immoveable property and mesne profits—Decree silent regarding future mesne profits—Fresh suit for such profits not barred* The plaintiff claimed possession of immoveable property and mesne profits to the date of suit also mesne profits *pendente lite* and subsequent to decree The Court gave a decree for mesne profits to the date of suit but the decree was silent as to mesne profits *pendente lite* or subsequent to decree *Held* on suit by the plaintiff for further mesne profits to the date of his obtaining possession that there was nothing in the present Code of Civil Procedure of 1908 any more than in the former Code of 1882 to bar such a suit *Ram Dayal* v *Madan Mohan Lal* I L R 21 All 425 followed *Doraiswami Ayyar* v *T Subramania Ayyar* I L R 41 Mad 188 referred to MUHAMMAD ISHAQ KHAN v MUHAMMAD RUSTAM ALI KHAN (1918)
I L R 40 All 292

——— s 11 expl V s 47 and O XX r 12—

See RES JUDICATA I L R 41 Mad 188

——— s 11 Expl VI—Res judicata *Right claimed in common —Jus tertii* In a suit for ejectment in a Revenue Court the defendants denied the title of the plaintiff and set up their own title as to part of the property and a *jus tertii* as to the rest. The Revenue Court elected to try the question of title itself and found that the plaintiff had not established her proprietorship and that decision became final. *Held* in a subsequent suit in the Civil Court for a declaration of title that the decision of the Revenue Court although it constituted a *res judicata* as between the plaintiff and the then defendants could not amount to a *res judicata* as between the plaintiff and the third parties whose rights those defendants had set up JAIMANGAL DEO v BED SARAN KUNWARI (1911)
I L R 33 All 493

——— Res judicata—*Joint Hindu family—First suit by managing member with another member as a* pro forma *defendant—Second suit by latter member* The managing member of a joint Hindu family brought a suit in respect of a house which formed part of the family property asking for an injunction to restrain the defendant from interfering with it A brother of the plaintiff who was a member of the joint family was made a *pro forma* defendant to the suit This suit was dismissed Thereafter the brother filed a second suit asking for the same relief in respect of the same house from the same defendant *Held* that this second suit was barred by the principle of *res judicata* KUNJ MAN v JAGAN NATH I L R 42 All 359

——— ss 11 13—Res judicata—*Foreign judgment—Effect of decision in British India as to title to part of an estate on a suit filed in Rampur for possession of another portion of the same estate situated there* Certain claimants of the estate of a deceased person which was situated partly in the Bareilly district and partly in the State of Rampur sued in Bareilly to recover the portion situated there and obtained a decree Other claimants filed a similar suit in Rampur in respect of the portion situated there *Held* on suit by the plaintiffs in the Bareilly Court for a declaration that the judgment of that Court operated as *res judicata* in respect of the suit in Rampur and for an injunction restraining further proceedings in the Rampur Court that neither relief could be granted MAQBUL FATIMA v AMIR HASAN KHAN (1911)
I L R 37 All 1

——— ss 11 15—*Succession certificate—Summary settlement—Alienation—Will—Probate—Decision of Probate Court not to be reopened by adjudication in a regular suit—*res judicata *Held* that under s 11 of the Code of Civil Procedure it was not open to the Court after the decision of the District Court granting probate of the will to try the question of the authority of the widow to adopt which question was bound up with the question of the revocation of the will in the present suit inasmuch as the issue decided by the Probate Court had conclusively determined between the parties the question of whether or not the testator had revoked his will before death and whether the statement that he had given the authority to his widow to adopt expressed his wishes at the time of his death and inasmuch as the District Court which had tried the probate case was a Court competent to have tried the present case PRESTON v SUNDARABAI (1913)
I L R 38 Bom 272

——— ss 11 47 O XXXIV rr 7 8—

See MORTGAGE I L R 43 Bom 334

——— ss 11 and 47—*Mortgage—Suit for recovery by sale of mortgaged property—Decree for payment within six months in default sale—No further action taken under the decree—Continuance of the relation of mortgagor and mortgagee—Suit by mortgagor for redemption—No bar of ss 11 and 47 of the Civil Procedure Code (Act V of 1908)* The defendant in a suit for sale under a mortgage decree who is given six months time to pay the decretal debt and in default the plaintiff to recover the decretal debt by sale of the mortgaged property is not in a position of a decree holder who has a decree to execute His right of payment within six months is a right which he has in mitigation of his liabilities under the decree If he does not pay within six months and the mortgagee does not apply for decree absolute the latter does not get rid of the relationship of mortgagor and mortgagee and there is nothing to prevent the mortgagor or his representative from filing a suit for redemption but he cannot go behind the decree in the mortgagee s suit in so far as it settled the amount of the mortgage debt up to the date of that decree Such a suit for redemption is not barred either under s 11 or s 47 of the Civil Procedure Code (Act V of 1908) RAMA v BHAGCHAND (1914) I L R 39 Bom 41

——— ———*First suit for redemption—Decree for redemption not executed—Second suit for redemption—Bar of* res judicata*—Remedy by execution and not by fresh suit* On the 8th April 1899 a mortgagor obtained a decree for redemption of a mortgage of 1859 under the provisions of the Dekkhan Agriculturists Relief Act 1879 This decree was not executed. The property mortgaged continued to remain in the possession of the mortgagee The mortgagor again mortgaged the property to the plaintiff on the 20th May [illegible] In 191[illegible] the plaintiff sued to enforce his against the or[illegible] and

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— s 11 expl IV—*contd*

I L R 39 Calc 527 s c 16 C W N 605 referred to A plea of *res judicata* not taken in the written statement was allowed to be taken on appeal under O XLI r 2 C P O VIII r 2 being held to be no bar to its being taken at that stage KRISHNA DOYAL GIR v SYED MD AMIRUL HASSAN (1914) 19 C W N 942

—— ———— *Subsequent mortgagee who does not appear in prior mortgagee's suit if may subsequently set up an earlier mortgage paid off by advances upon his mortgage* A subsequent mortgagee who has been made a party to a suit on a prior mortgage, but who has failed to appear cannot afterwards raise the plea that he had paid off a prior lien and was therefore in the position of a prior mortgagee *Krishna Doyal Gir* v *Syed Md Amirul Hassan 19 C W N 942* referred to *Ibrahim Hussain Khan* v *Ambika Pershad I L R 39 Calc 527 s c 16 C W N 605* followed HARKAR RAY v KAMTA PERSHAD SAHU (1915) 19 C W N 947

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———— *Dekkhan Agriculturists Relief Act (XVII of 1879) ss 12 and 15—Prior and subsequent mortgages upon the same property by the same mortgagor to coparcener mortgagees—Suit on subsequent mortgage without reference to the prior mortgage—Subsequent suit on the prior mortgage—Separate causes of action—Subsequent suit barred—*res judicata—*Finding as a matter of fact that the two mortgages had been transactions out of which the suit has arisen* A mortgagee, who has two mortgages of different dates upon the same property having sued upon a mortgage of the later date and having had the property sold without reference to the prior mortgage cannot afterwards bring a suit on the prior mortgage though the causes of action for the two suits are distinct This rule is not the result of O II r 2 of the Civil Procedure Code (Act V of 1908) but it depends upon the principle of *res judicata* Per HAYWARD J If the two mortgages had been found as a matter of fact to have been transactions out of which the suit has arisen the subsequent suit on the prior mortgage would have further been barred in view of the previous suit on the subsequent mortgage by the provisions of O II r 2 of the Code and the special provisions of s 13 of the Dekkhan Agriculturists Relief Act (XVII of 1879) Mahadu v Rajaram (1887) P J 216 and *Gopal Purushotam* v *Yashwantrav (1887) P J 273* referred to DHONDO RAMCHANDRA v BHIKAJI (1914) I L R 39 Bom 138

———— Where a person brings a redemption suit and fails his second suit in ejectment against the same defendant is not barred by *res judicata* the matter involved being essentially different It is the practice of the Bombay High Court to pass a decree for redemption in a case in which the plaintiff has sued in ejectment That is purely in the exercise of the Court's discretionary power and it can hardly be maintained that the plaintiff failing in an ejectment suit ought to pray for the alternative relief by way of redemption when the Court is not bound to grant it as a matter of right MAHOMED IBRAHIM v SHEIKH HAMJA (1911) I L R 35 Bom 507

———— A prior mortgagee has a paramount claim outside the controversy of a suit on a subsequent mortgagee unless his mortgage is impugned RADHA KISHUN v KHURSHED HOSSAIN 25 C W N 416

See also THIRD PARTY NOTICE I L R 45 Bom 24

———— s 11 expl V

———— Res judicata—*Private right claimed in common by several persons—Suit by some others being impleaded as defendants—Bona fide litigation—Decision whether binding on representative of deceased defendant not brought on record* Explanation V to s 11 Civil Procedure Code applies not only to cases where leave of Court has been granted under O I r 8 but also to cases where some of the persons claiming a private right in common with others litigate *bonâ fide* on behalf of themselves and such others A decision in a suit instituted and conducted *bonâ fide* by some only of the agraharamdars of a village against the zamindar and the other agraharamdar for a declaration as to the kattubadi payable by them to the zamindar is *res judicata* against the representative of an agraharamdar who was a defendant but died pending the appeal and whose legal representative was accidentally not brought on record either in the Appeal or the Second Appeal *Pangamma* v *Narasimha Charyulu (1916) 31 M L J 96* followed GOPALACHARYULU v SUBBAMMA (1920) I L R 43 Mad 487

———— *Mortgage—Suit for sale—Person claiming paramount title impleaded—Decree in favour of mortgage plaintiff—Suit by paramount owner for declaration of title—*res judicata In a suit brought by a mortgagee to enforce his mortgage a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party and the question of the paramount title cannot be litigated in such a suit *Jota Prosad* v *Ali Khan I L R 31 All 11* and *Jaggeshar Dutt* v *Bhuban Mohon Mitro I L R 33 Calc 425* referred to Two suits for sale on separate mortgages of the same property were filed and in each the mortgagees impleaded a third party as a subsequent mortgagee of a portion of the property in suit The party so impleaded was in reality the owner of a considerable portion of the property comprised in the mortgages sued upon though he was not impleaded in that capacity In the first suit the puisne mortgagee did not appear In the second he attempted to set up his paramount title but was not allowed to do so The mortgagors likewise attempted to set up the paramount title of the person impleaded as puisne mortgagee and in their case also the defence was ruled out In the result decrees were passed in favour of the plaintiff The puisne mortgagee then brought a suit for a declaration of his title to part of the mortgaged property *Held* that the suit was not barred by anything which had happened in the course of the previous litigation. *Girija Kanta Chakrabutty* v *Mohim Chandra Acharjya 30 Indian Cases 294* referred to GOBARDAN v MUNNA LAL (1918) I L R 40 All 584

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— ss 14 151—*contd*

fore the disposal of the appeal the Court might have allowed the appellant to withdraw the appeal with a view to apply to the lower Appellate Court for a review of judgment on the ground of the discovery of fresh evidence *Panchanan Mookerjee v Baidyanath Mookerjee I L R 26 Calc ...* and *Paru Kutti v Mama I L R 18 Mad 482* referred to and followed NAND KISHORE *In the matter of the petition of* (1909) I L R 32 All 71

——— s 15 (1882 Code s 15)—

See 11 I L R 38 Bom 272

———*Held* that this section provides for procedure and not jurisdiction and that therefore a suit which is triable by a Munsif may be tried by a Subordinate Judge. TINGOR MAJHI *v* JALADHAR DHASI 14 C W N 322

——— s 16 (1882 Code s 16)—

See JURISDICTION I L R 42 Calc 942

———*Maintenance suit for—Charge of maintenance—Right or interest in immoveable property—Jurisdiction* Plaintiff S filed a suit at Poona Court against her daughter in law L (defendant No 1) and her father (defendant No 2) both of whom resided in a native state beyond the jurisdiction of the Court for a declaration that she was entitled to a maintenance allowance and sought to make the same a charge on the immoveable property of L within the jurisdiction of the Court The lower Court held that it had no jurisdiction to try the suit as the claim for maintenance was not one for the determination of any right to or interest in the immoveable property as required by clause (*d*) of s 16 of the Civil Procedure Code The plaintiff having appealed *Held* that the Court had jurisdiction to proceed against defendant No 1 as the question whether or not plaintiff was entitled to a right or interest in the immoveable property by way of charge as security for maintenance which might be decreed was a question directly within the terms of s 16 (*d*) of the Civil Procedure Code 1908 *Held* also that the Court had no jurisdiction against defendant No 2 SITABAI *v* LAXMIBAI (1915) I L R 40 Bom 357

———*Jurisdiction—Suit for dissolution of partnership and for accounts Held* that a suit for dissolution of partnership with the usual ancillary relief is not a suit for the determination of any other right to or interest in immoveable property within the meaning of cl (*d*) of s 16 of the Code of Civil Procedure 1908 DURGA DAS *v* JAI NARAIN (1919) I L R 41 All 513

——— s 17 (1882 Code s 19)—

See JURISDICTION I L R 42 Mad 813

——— s 20 (1882 Code s 17)—

See DIVORCE ACT INDIAN (IV OF 1869) ss. 2 4 7 AND 45 I L R 38 Bom 125

See TORT I L R 39 Mad 433

See s 9 I L R 37 Bom 442

———*Sale of goods by sample—Vendor and purchaser living in different places—Suit by purchaser for damages for breach of warranty—In which place suit maintainable* A person residing at Allahabad purchased goods by sample from a firm carrying on business at Bombay The goods were sent to Allahabad but on arrival they were discovered to be not according to sample and the purchaser accordingly instituted a suit for damages against the vendor in the Small Cause Court at Allahabad The Small Cause Court returned the plaint for presentation in Bombay *Held* that the test which the Court ought to have applied to the question was whether delivery of the goods at Allahabad was an essential part of the contract between the parties SHEO CHARAN LAL *v* TAJ BHAI ALI BHAI AND SONS (1917) I L R 39 All 368

———*Cause of action—Jurisdiction—Suit to set aside a decree on the ground of fraud—Decree obtained in Bengal—Suit filed in Agra* It is competent to a Court in the United Provinces to grant a declaration that a decree passed by a Court in another province is fraudulent and null and void as against the plaintiff and to grant a perpetual injunction restraining the decree holder from executing it provided that some part of the plaintiff s cause of action has arisen within the jurisdiction of the Court in which the suit is brought *Banke Behari Lal v Pokhe Ram I L R 25 All 48* and *Jawahir v Neki Ram I L R 37 All 189* followed *Umrao Singh v Hardeo I L R 29 All 418* and *Dau Dayal v Munna Lal I L R 36 All 561* distinguished KHUSHALI RAM *v* GOKUL CHAND (1917) I L R 39 All 607

———*Contract between firms at Ranchi and Cawnpore—Goods to be delivered at Ranchi—Suit for damages for breach if lies at Ranchi* Where the plaintiff who owned a shop at Ranchi signed an order form supplied to them at Ranchi by the defendant Company which had its place of business at Cawnpore requesting the Company to forward certain specified articles by goods train to their address at Ranchi (packing and freight free) and to be despatched on a specified date and the Defendant Company agreed to do so *Held* that the contract was to be performed by the delivery of the goods at Ranchi and the Court at Ranchi had jurisdiction to entertain a suit by the plaintiffs for damages for breach of the contract by the defendant A T BHUTTACHARYA *v* CAWNPORE WOOLLEN MILLS CO LD (1911) 16 C W N 325

———*Contract Act (IX of 1872) s 212—Principal and agent—Suit for compensation for loss caused by negligence of agent—Jurisdiction* The plaintiffs who were grain dealers ordered the defendant who was a commission agent at Karachi to purchase some grain for them The latter did so and the plaintiffs sent him some money on account In accordance with the direction of the plaintiffs the railway receipt for the goods purchased was sent by value payable post By some mischance it did not arrive. The defendant instructed the railway authorities not to deliver the goods till the balance due to him was paid. The balance was paid by the plaintiffs to the defendant s agent at Delhi The [illegible] railway officials at Hathras refused to deliver without the

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd*

——— ss 11 47—*concld*

The mortgagee contended that the decree of 1899 was a bar to the suit *Held* that the suit was barred by the decree of 1899 for if it was treated as *a suit for redemption* of the mortgage of 1859 it would be barred under s 11 of the Civil Procedure Code (Act V of 1908) and if it was treated as based on the decree of 1899 taken along with the subsequent conduct of the parties in not executing *the decree and in allowing the possession to remain* with the mortgagee as before it would be barred under s. 47 of the Cod BAPUJI RAMCHANDRA v GUJA MALU (1917) **I L R 42 Bom 246**

——— s 11 O II r 2—

See CIVIL PROCEDURE CODE (1882) ss 13 AND 43 **I L R 33 All 302**

See MORTGAGE **25 C W N 129**

See U P LAND REVENUE ACT 1901 s 111 112 233 **I L R 38 All 302**

——— s 11 and Sch II, r 20—*Reference to arbitration out of Court—Award—Refusal by Court to file the award—Separate suit to enforce the award not barred by* res judicata—*Limitation Act (IX of 1908) Art 120—Limitation for a suit to enforce an award is six years* The parties to a mortgage referred their dispute to arbitration out of Court An award was made in due course but when it was sought to be filed in Court under paragraph 20 of the Second Schedule to the Civil Procedure Code the Court without trying the validity of the award, refused to file it The unsuccessful party then filed a regular suit to enforce the award but it was resisted on the ground that the refusal by the Court to file the award operated as *res judicata* to the present suit —*Held* that the bar of *res judicata* did not apply and that the present suit was maintainable *Kunjlal v Durga Prasad (1910) 32 All 481* referred to A suit to enforce an award is a suit not provided by any other Article by the Limitation Act and the period of limitation for such suit is six years under Art 120 RAJMAL GIRDHARLAL v MARUTI SHIVRAM (1920) **I L R 45 Bom 329**

——— s 12—

See BENGAL TENANCY ACT s 103B **14 C W N 364**

——— s 13 (1882 Code s 14)—

See S 11 **I L R 37 All 1**

See FOREIGN COURT **I L R 39 Mad 733**

See RIGHT OF SUIT **I L R 36 Mad 141**

———*Foreign judgment suit on—Judgment obtained by plaintiff after defence had been struck out and defendant placed in the same position as if he had not defended —Judgment not on the merits of the case* The plaintiff (appellant) sued the defendant (respondent) in the Court of King's Bench in London for a sum of money he alleged to be due to him in respect of transactions he had with the defendant as a member of a firm in Madras who under arrangements between them consigned goods to the plaintiff for sale in London [illegible] defendant [illegible] denied that he was ever a member of the [illegible] in Madras, and also denied that there

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd*

——— s 13 (1882 Code s 14)—*contd*

was any money due by him to the plaintiff or that the arrangements had been made under which the plaintiff asserted that his claim arose The defendant refused to answer interrogatories which the plaintiff was allowed to exhibit calling on the defendant to speak as to some of the material matters in dispute and the defence was thereupon ordered to be struck out ' and the defendant to *be placed in the same position as if he had not* defended, and judgment was entered for the plaintiff In a suit brought in the High Court at Madras on that judgment *Held* (upholding the decision of the appellate High Court) that it had not been given between the parties on the merits of the case within the meaning of s 13 (*b*) of the Code of Civil Procedure, 1908 KEYMER v VISVANATHAM REDDI (1916) **I L R 40 Mad 112**

———*Natural justice meaning of the term—Wrong view as to legal liability or onus whether renders foreign judgment one not given on the merits* A wrong view as to the legal liability of a party or as to onus does not render a *foreign judgment one not given on the merits* within the meaning of s 13 (*b*) of the Civil Procedure Code The term natural justice in s 13 (*d*) of the Code of Civil Procedure with reference to foreign judgments refers rather to the form of procedure than to the merits of the case *Crawley v Isaacs 16 L T (N S) 529 followed. Liverpool Marine Credit Co v Hunter L R 3 Ch App 479* applied and followed. *Imrie v Castrique 8 C B (N S) 405 141 E R 1222* and *Scott v Pilkington 2 B & S 11 121 E R 978* referred to RAMA SHENOI v HALLAGNA (1917) **I L R 41 Mad 205**

———*Suit on foreign judgment—Judgment whether given on the merits of the case —Writ of summons accepted by solicitor on behalf of defendant but defendant unable to be present in person at the hearing* A suit for damages on account of personal injuries alleged to have been sustained owing to the negligence of the defendant in the management of a motor car was filed in England. The writ of summons was accepted by a solicitor who entered an appearance on behalf of the defendant and the case was set down for hearing before a Judge of the Court of King's Bench and a special jury Meanwhile the defendant was suddenly and unexpectedly recalled to India but the case proceeded and resulted in a judgment for the plaintiff *Held* on suit by the plaintiff in India based on this judgment that the *judgment of the Court of* King's Bench could not be said not to have been *given on the merits of the case within the meaning* of s 13 (*b*) of the Code of Civil Procedure 1908 *Keymer v Visvanatham Reddi I L R 40 Mad 112* distinguished. COLE v HARPER (1919) **I L R 41 All 521**

——— ss 14 151 O XLVII r 1—*Review of judgment—Application for review in second appeal based on alleged discovery of new and important evidence* The High Court cannot in a second appeal entertain an application for a review of judgment based on the ground that since the disposal of the appeal, documentary evidence has been discovered which if sufficiently proved would have led the Court below to come to a different finding although had such evidence been discovered be

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s 21 (1882 Code, s 16A)—*Want of territorial jurisdiction—Objection which is allowable by appellate or revisional Court—Objection which is allowable in execution proceedings—Powers of executing Court to which decree transferred* The provisions of s. 21 Civil Procedure Code apply to objections regarding want of territorial jurisdiction Such an objection not taken as provided by the section must be considered cured for all purposes, and cannot be allowed in execution proceedings. A party who does not raise an objection to jurisdiction when a preliminary mortgage decree is made absolute is not entitled to plead in execution that the order was passed without jurisdiction. ZAMINDAR OF ETTIYAPURAM v CHIDAMBARAM CHETTY (1920) I L R 43 Mad 675

———— s 24 (1882 Code s 25)—

See CIVIL RULES OF PRACTICE r 161 (a) I L R 39 Mad 485

See DIVORCE ACT (IV OF 1869) ss 3 to 3 44 I L R 40 Bom 109

See EXECUTION OF DECREE I L R 37 Calc 574

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909) s 99 I L R 38 Mad 47

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887) —

s 17 I L R 38 All 425

s. 32 4 Pat L J 13

1 ———— *Bombay Civil Courts Act (XIV of 1869) Part V—Suit cognizable and heard by the First Class Subordinate Judge—Application to the Court of the District Judge for transfer—Transfer of the application to the Assistant Judge—Order of the Assistant Judge for transfer of the suit to the District Court—Jurisdiction* The plaintiff filed a suit in the Court of the First Class Subordinate Judge claiming Rs 18,797 The suit was heard by that Judge for some days and then the defendant filed an application in the Court of the District Judge for transfer of the suit to another Court. The District Judge transferred the application to the Assistant Judge for disposal The Assistant Judge heard the application and ordered that the suit be transferred to the District Court for trial. The plaintiff having objected that the order of the Assistant Judge was without jurisdiction *Held* setting aside the order that under the provisions of the Bombay Civil Courts Act (XIV of 1869) Part V the limit of the Assistant Judge's jurisdiction for the purpose of hearing suits is Rs 10,000 and that in case of suits and applications when the value of the subject matter does not exceed Rs. 5,000 an appeal in appealable cases lies to the District Judge The Assistant Judge is therefore not a Judge of co-ordinate jurisdiction to the District Judge He is therefore not a Judge of the District Court and the order complained of was not made by the District Court which alone had jurisdiction S 24 of the Civil Procedure Code (Act V of 1908) empowers the District Court to withdraw any suit and try and dispose of it The suit withdrawn being for a sum exceeding the jurisdiction of the Assistant Judge he could not try and dispose of it. He was, therefore, not a Judge of the District Court as contemplated by the section which must be a

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

————s 24 (1882 Code s 25)— *contd*

Court of unlimited pecuniary jurisdiction HAJI UMAR ABDUL RAHIMAN v GUSTADJI MUNCHERJI (1910) I L R 34 Bom 411

2 ———— *Small cause suit instituted in a Subordinate Court—Transfer by the District Judge to District Munsif's Court—Order directing trial as an original suit—Subsequent transfer by the District Judge to another District Munsif's Court—Decree by the latter—Appeal against such decree to the District Court—Transfer of appeal to the Subordinate Court—Decree on appeal by the Subordinate Court—Revision to the High Court—Appeal to the District Court incompetent—Decree of the Subordinate Court cl and as without jurisdiction—Provincial Small Causes Courts Act (IX of 1887) ss 27, 32, 33 and 35—Small Cause Court invested with powers of a Small Cause Court—Character of Court trying a small cause suit on transfer—Civil Procedure Code (Act V of 1908) ss 7 and 24* Where a suit which was instituted as a small cause suit in a Subordinate Judge's Court was transferred by the District Court to a District Munsif's Court for trial as an original suit and was again transferred to another District Munsif's Court for trial and disposal *Held* that the decree passed by the latter District Munsif's Court was the decree of a Court of Small Causes and no appeal lay to the District Court against such decree A Court invested with the powers of a Court of Small Causes is a Court of Small Causes within the meaning of s 24 of the Code of Civil Procedure (Act V of 1908) though the suit was not transferred to such Court immediately from a Court of Small Causes SANKARA RAMA v PADMANABHA (1912) I L R 38 Mad 25

3 ———— *Provincial Small Cause Courts Act (IX of 1887) s 35—Transfer of Small Cause Court suit—Appeal—Jurisdiction* A Small Cause Court suit valued at Rs 473 was pending in the Court of a Subordinate Judge who had Small Cause Court jurisdiction up to Rs 500 The Subordinate Judge went on leave and was succeeded by an officer whose Small Cause Court jurisdiction was limited to Rs 250 Subsequently by order of the District Judge all Small Cause Court suits above Rs 250 in value were transferred to the Court of a Munsif *Held* that with reference to s 24 of the Code of Civil Procedure the suit so transferred must be deemed to have been tried by the Munsif as a Court of Small Causes and from his decision no appeal lay CHATURI SINGH v MUSAMMAT RANIA (1918) I L R 40 All 525

4 ———— *Transfer of a case by Senior Subordinate Judge to the Junior Subordinate Judge—whether intra vires—jurisdiction of Court to which the case has been transferred cannot be challenged if not objected to at the proper time.* *Held* that the Court of the Junior Subordinate Judge is not subordinate to that of the Senior Subordinate Judge within the meaning of s. 24 of the Code of Civil Procedure, and the latter cannot therefore transfer a case to the former under sub-s. (1) cl. (a) of that section notwithstanding that the District Judge has delegated his powers of transfer to him. *Held however* that although the transfer of the present case to the Court of the Junior S Judge was *ultra vires*

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 24 (1882 Code s. 25 —

plaintiffs petitioners having submitted to the jurisdiction of this Court and raised no objection to the irregular way in which the Court had become seized of the case could not now turn round and challenge the legality of the proceedings. Defects of jurisdiction arising from irregularities in the commencement of the proceedings may be waived by failure to take objection at the proper time of the proceedings *Pisani v Attorney-General of Gibraltar (L. R. 5 P C 516)* and *Gurdeo Singh v Chandrikah Singh (I. L. R. 36 Cal. 193 P C)*, referred to KISHEN LAL v JAI LAL

I L R. 1 Lah 158

5 ——— *Transfer of suit—Grounds of transfer—Convenience of parties* Held that the mere convenience of the parties is not a good reason for the transfer of a suit to another Court when the plaintiff who, within the limits assigned by the Code of Civil Procedure has a right to select the forum objects to the transfer *Sicher Nath Mitra v Mukaram* ... *Indian Case* ... referred to MADHO PRASAD v MOTI CHAND (1919) I L R 41 All 381

6 ——— *Transfer of suit—order of transfer by District Judge whether confers jurisdiction on court otherwise incompetent to try suit—Bengal, Agra and Assam Civil Courts Act (XII of 1887) s 19 ( )* The mere fact that the District Judge transfers a case for trial from one court subordinate to his jurisdiction to another similar court does not confer jurisdiction upon the Court to which the case is transferred unless it were competent originally to try the suit *Per* DAWSON MILLER *C J*—A suit cannot be transferred under s 24 ( ) of the Code of Civil Procedure 1908 to a court which has not jurisdiction to try it SHAIKH JANKAI HUSSAIN v SHEIKH GULAM KUTUBUDDIN AHMAD 5 Pat L J 588

7 ——— *Suit instituted in Court of Subordinate Judge invested with Small Cause Court powers—transfer of suit by order of District Judge to Munsif's court—Jurisdiction of Munsif—Appeal—Provincial Small Cause Courts Act (IX of 1887) ss 7 to 35* The expression a Court of Small Causes in s 24 (4) of the Code of Civil Procedure includes Courts invested with Small Cause Court jurisdiction as well as Courts constituted under Act No IX of 1887 Where therefore a suit of a Small Cause Court nature instituted in the Court of a Subordinate Judge invested with the powers of a Judge of Small Cause Court was transferred by the District Judge to the Court of a Munsif not possessing the powers of a Small Cause Court and was tried by him and a decree passed thereon *Held* that no appeal lay from the Munsif's decree *Manjal Sen v* ... and *Sockaram* ... 1 All ... and ... dissented from SUKHA v RAGHUNATH DAS (1919) I L R 39 All 114

——— ss 21 92—

See LIMITATION I L R 41 Calc 866

——— ss 24 (1) (a) 115 —

See SANCTION FOR PROSECUTION I L R 40 Calc 774

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— ss 27 148 and 149—A suit was instituted on the last day for filing the suit under the Limitation Act. The plaint was insufficiently stamped and the deficit Court fee not having been paid within the time fixed by the Court the suit was dismissed. Thereafter on an application for review the order of dismissal was set aside with notice to the Defendant and time was granted for payment of the deficit Court fee *Held*—That at the time the order of dismissal was set aside there was no Opposite Party on whom the notice could be served as the summons in the suit had not been issued on the Defendant and as, until the suit was registered, the suit could not be said to have been duly instituted The order of dismissal passed at that stage of the case can be reviewed without notice to the Defendant Once the order rejecting the plaint is set aside in review the Court has full power under ss. 148 149 of the Civil Procedure Code to extend the time for payment of the deficit Court fee and the plaint having been originally filed within the period of limitation the suit was not barred SURENDRA PRASAD LAHIRI CHOWDHURY v ALTABUDDIN AHMED

25 C W N 391

——— s 32—

See HINDU LAW (CUSTOM)

5 Pat L J 164

——— 32, 115 O XI rr 12 14 15 18 (2) and 21—*Discovery production and inspection of documents—Finality of affidavit denying possession—Superintendence interference with improper interlocutory order* S 32 of the Code of Civil Procedure 1908 applies only to the case of a person who has failed to comply with a summons to attend court issued under s. 30 and has no application to the case of a party who fails to produce documents which he has been ordered to produce An appeal lies to the High Court from an order under O XI r 21 The penalty provided by Rule 21 should only be used in extreme cases and as a last resort and should in no case be imposed unless there is a clear failure to comply with the obligation laid down in the rule It is a good cause for non production of a document with the meaning of rule 15 that the document is not in the possession or power of the person called upon to produce it The affidavit of documents required from a party under rule 12 and 13 is in ordinary circumstances to be taken as conclusive on the question of whether the documents are in his possession or power unless and until the other party makes an application under rule 18 (2) supported by an affidavit for inspection of documents not mentioned in the pleadings or affidavit of his opponent An affidavit accompanying an application under rule 18 ( ) does not immediately entitle the applicant to an order for inspection and if the party from whom discovery is sought swears an affidavit that the documents are not in his possession or power the court will regard this as final and conclusive No order will be made under rule 14 against a party unless he has directly or indirectly admitted the document to be in his possession or power *Semble* Rule 21 has no application to an order for accounts. Interlocutory orders, even where an appeal from the final decree lies may be dealt with under the court's powers of superintendence and revision in order to avoid irreparable injury to the parties KUMAR RAMESHWAR NARAYAN SINGH v RANI PIKHNATH KOERI

5 Pat L J 550

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

—— s 33 O XX rr 1-6 and O XLI r 1—what constitutes a proper decree—

See PUNJAB LAND REVENUE ACT 1887
I L R 1 Lah 223

—— s 33 O XX rr 6 and 7—*Administration suit—Finding on a substantial question of right between parties—Appointment of receiver—Finding—Decree—Appeal* In an administration suit the first Court recorded a finding on a substantial question of right between the parties and appointed receivers. The plaintiff did not apply to have a formal decree drawn up. The plaintiff however appealed against the finding on the ground that it amounted to a decree. The Judge rejected the appeal holding that there was no decree which could be the subject of an appeal. On second appeal by the plaintiff *Held* that the second appeal could not be entertained because there was in fact no formal decree from which an appeal could be preferred. BAI DIWALI *v* SHAH VISHNAV MANORDAS (1909)
I L R 34 Bom 182

—— s 34 (1882 Code s 209)—*Held* that award of interest pending suit is discretionary. SARAJUBALA BEDI *v* SARADNATH BHATTACHARJI
23 C W N 336

—— s 34 and O VII r 7—*Discretionary power of Court to allow interest in a suit for money even if not asked for in the plaint* *Held* that having regard to the provisions of o VII r 7 of the Code of Civil Procedure which lays down that it is not necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for the Court has discretionary power to grant interest under s 34 of the Code in a suit for money although interest was not specifically asked for in the plaint. PUP RAM *v* HARPHUL
I L R 2 Lah 256

—— s 34 O XXXIV rr 2 4—*Mortgage—Preliminary decree on mortgage—Interest—Discretion of Court* Unless for some legal reason it sees fit to interfere with the contract as to the rate of interest a Court passing a preliminary decree in a mortgage suit under Order XXXIV rule 2 of the Code of Civil Procedure (1908) has no power to award interest at other than the contractual rate up to the date fixed for payment. LAJWANTA KUNWAR *v* SHIAM NARAIN SINGH (1914)
I L R 36 All 220

—— In a decree for sale on a mortgage the decree holder is on default of payment by the mortgagor on the date fixed in the decree entitled to subsequent interest on the aggregate amount of the principal interest and costs found payable. Usually 6 per cent but Court has a discretion. VENKATA CHALAPATHI AYYAR *v* THARASI SERRAI
I L R 42 Mad 465

—— s 35—

See O 1 r 8	I L R 42 Bom 556
See COSTS	I L R 39 Mad 476
See DAMAGES	24 C W N 352

—— *Costs—Change in law effect of on award of cost* It is a good cause for depriving the successful respondent of his costs of the appeal that the law has been altered since the filing of the appeal. RAMASAMI NAIKEN *v* VENKATASAMI NAIKEN (1910)
I L R 43 Mad 61

—— s 35 O XXII—*Abatement of suit—Dismissal of suit—Costs against estate of plaintiff when they can be awarded to defendant—Pleader's fee—Only one half to be allowed* If on the death of a sole plaintiff the right to sue does not survive and the suit is dismissed in consequence the Court has power under s 35 Civil Procedure Code to make an order granting the costs of the defendants out of the estate of the deceased. If the suit abate after the framing of issues only one half of the pleader's fee should be awarded. CHENCHAYYA *v* BALAYYA (1920)
I L R 43 Mad 284

—— s 35 and O XLI r 35—Amendment of decree—date from which limitations runs for execution of—

See BENGAL TENANCY ACT 1885
5 Pat L J 472

—— s 36 (1882 Code s 649)—

See GUARDIANS AND WARDS ACT (VIII OF 1890) s 34 I L R 41 Mad 241

—— ss 36 37—

See POWER OF ATTORNEY
I L R 37 Calc 399

—— s 37 (1882 Code s 649)—

See BOMBAY CIVIL COURTS ACT (XIV OF 1869) s 32 I L R 38 Bom 662

See EXECUTION OF DECREE
3 Pat L J 435

—— ss 37 38 39—*Court which passed the decree meaning of—Mortgage decree passed by one Court—Territorial jurisdiction in another Court—Transfer of territorial jurisdiction to a third Court—No transfer of decree for execution to the last Court—Application for execution to such Court whether competent—Power of District Court on appeal to transfer decree for execution when properly exercisable* A mortgage suit instituted in the District Munsif's Court of Srivilliputtur was transferred for trial to the Additional District Munsif's Court of Tinnevelly which had no territorial jurisdiction in respect of the hypotheca in the suit and a decree for sale was passed by the latter Court. Subsequently a part of the territorial jurisdiction of the Court of Srivilliputtur including that in respect of the hypotheca was transferred to the District Munsif's Court of Kovilpatti. The decree holder applied to the Court of Kovilpatti for execution of the decree by sale of the property. On objection being taken to the jurisdiction of the Court of Kovilpatti to execute the decree *Held*, that the District Munsif Court of Kovilpatti had no jurisdiction to execute the decree as it was not a Court which passed the decree under the terms of s 37 of the Civil Procedure Code and the decree was not sent for execution by the Court of Tinnevelly to the former Court under ss 38 and 39 of the Code. *Held* further that the District Judge by his order on appeal allowing the execution petition, ought not to have made it to operate as a transfer of the decree to the Court of Kovilpatti as no transfer should be made so

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 37—contd

as to evade the provi ions of the Limitation Act or to validate an invalid application. VENKATA SALI NAIK v SIVANU MUDALI (1918)
I L R 42 Mad 461

———ss 37 38 and 150—*Mortgage suit of nearly Rs 2 000 in value—Preliminary decree by Munsif specially empowered final decree by Subordinate Judge—Execution by Munsif specially empowered if competent* In a mortgage suit a preliminary decree for nearly Rs 2 000 was made by a Munsif with power to try suits up to the value of Rs 2 000 The Munsif being transferred and his succe sor not being vested with the same power the final decree was made by the Subordinate Judge Execution was how ever taken out in the Court of the Munsif who meanwhile had been empowered to try suits up to Rs 2 000 *Held*—That the Munsif s Court had juri diction to execute the decree under s 150 of the Civil Procedure Code though not under ss 37 and 38 of the Code AMINUDDIN MULLIK v ATARMANI DASI
24 C W N 899

——— *Jurisdiction to execute decree—Pending execution proceedings—Transfer of property sought to be sold to the jurisdiction of another Court—Res judicata in execution proceedings—Ex parte order passed after notice effect of—Objection petition when can be treated as application to set aside ex parte order—Order IX rule 13 application of* Where after attachment of property in execution of a decree for money and an order for sale made by the Court which passed the decree the property was transferred to the local limits of the jurisdiction of another Court, newly established *Held* that the Court which passed the decree ceased to have jurisdiction to continue the execution proceedings and that the new Court having territorial jurisdiction over the property attached was the proper Court to entertain an application for execution by the sale of the property and pass orders thereon In such a case no formal order of transfer of a particular ca e or of all pending cases is necessary On prin cip e unle s the authority which changes the venue reserves the right to the Court which has lost the juri diction to continue pending proceedings affecting the property so transferred to another jurisdiction such proceedings are also *ipso facto* transferred by the change of venue to the new Court the records relating to that action becoming part of the records of the new Court Section 150 Civil Procedure Code implies that the whole bu iness of a Court might be transferred to another Court without any order of transfer by a superior Court under s 24 or any other section of Code thereby adopting the Calcutta view that by changes of venue made by the local Government the bu iness of a Court which loses jurisdiction over a certain area so far as such area is concerned will be *ipso facto* transferred to the new Court The ca e law on the question con idered An *ex parte* order in execution proceedings pa sed after issue of notice and after the Court has held that the service of the notice was duly effected is, on general prin cipl binding as *res judicata* *Mungal Pershad Dichit v Grija Kant Lahiri I L R 8 Calc 51* followed Order IX rule 13 Civil Procedure Cod appl es to *ex parte* orders in execution and unless they are set aside by application under

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 37—concld

Order IX rule 13 or by appeal they cannot be questioned in the further stages of execution pro ceeding An objection statement which is not stamped which contains no prayer to set aside the order and which does not show when the objector had notice of the order cannot be treated as an application to set aside the *ex parte* order *Mochai Mandal v Mesiruddin Mollah 13 C L J 26* distinguished. SUBBIAH NAICKER v RAMANATHAN CHETTIAR (1914) I L R 37 Mad 462

——— *Limitation Act (IX of 1908) Art 182 cl 5—Application for execution of decree—Proper Court—Transfer of territorial jurisdiction of Court which passed the decree to another Court—Subsequent application for execution to former Court whether made to proper Court—Jurisdiction of former and latter Court to execute decree—'Include' in s 37 Civil Procedure Code, meaning of Held* by the Full Bench that the Court which passed the decree is a *proper Court* for execution within the meaning of cl. 5 of art 182 of the Limitation Act notwithstanding the fact that the jurisdiction which it had at the time of the decree was taken away from it and assigned to another Court at the time of the presentation of the application for execution. Ss 37 38 and 150 Civil Procedure Code con stru ed. Dicta in *Subbiah Naiker v Ramanathan Chettiar I L R 37 Mad 462* overruled *Per Wallis C J* We have to deal with clause (b) and where the decree holder had a right under the Code of 1859 to apply to the Court which passed the decree at least for execution by way of transmission and where the present Code provides expressly that a decree may be executed by the court which passed it the contention that this important right must be held to have been taken away because of the provision in section 37 that these words shall be deemed to include ' another Court appears to me to be altogether unten able SEENI NADAN v MUTHUSAMY PILLAI (1919)

I L R 42 Mad 821

——— s 38—

See EXECUTION OF DECREE

2 Pat L J 113

——— ss 38 39 41 and 50 O XXI, rr 16 and 26—*Execution Application—Application to Court which passed the decree after transfer thereof to another Court for execution whether according to law and to the proper Court—Limitation Act (IX of 1908) Art 182* On the application of a decree holder the Court at Vizagapatam which passed the decree sent it for execution to the Court at Parvatipur which after attaching certain properties dismi sed the execution application on 10th March 1905 On 13th December 1907 the decree holder again applied to the Court at Vizagapatam for sale of the attached properties, and the application was simply recorded The present application for execution was made to the Vizagapatam Court on 21st April 1910 for attachment and sale of certain properties. *Held* that the application was barred as the application of the 13th December 1907 though a step in aid of execution [see *Pachiappa Achari v Poojali Seenan, I L R 28 Mad 557*] was not made to the proper Court and hence

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 38—*contd*

could not serve limitation The Court to which a decree is sent for execution is the only Court which has seizin of the execution proceedings and it retains its jurisdiction to execute the decree till it certifies under s. 41 Civil Procedure Code to the Court which passed the decree the fact of execution or if it fails to execute the decree the circumstances attending such failure. In such a case the Court which passed the decree has no jurisdiction to entertain an execution application unless concurrent execution has been ordered or proceedings in the Court to which the decree was sent had been stayed for the purpose of executing the decree in the former Court *Abda Begam v Muzaffar Husen Khan I L R 20 All 129* followed *Saroda Prosad Mullick v Luchmeeput Sing Doogor 14 Moo I A 529 540* and *Kristokishore Dutt v Rooplal Dass I L R 8 Calc 687* distinguished MAHARAJA OF BOBBILI v NARASARAJU PEDA BALIAR SIMHULU (1914) I L R 37 Mad 231

——— s 39 (1882 Code s 223 (2) & (3))—

See GARNISHEE 4 Pat L J 141

——— s 41 (1882 Code s 223 (4))—

See S 38 I L R 37 Mad 231

——— s 42 (1882 Code s 228)—

——— *Surety for judgment-debtor imprisoned in execution of decree—Appeal* Where a person who stood surety for the performance by a judgment debtor of a decree passed against him was arrested and detained in civil jail by order of a Munsif executing the decree of a Small Cause Court *Held* that he was entitled to appeal under ss 42 and 145 of the Civil Procedure Code the provisions of s 104 cl. (*h*) of the Code notwithstanding ADHAR CHANDRA GOPE v PULIN CHANDRA SHAHA (1914)

19 C W N 1085

——— *Order filing award against a firm—Execution court—Question whether a certain person is a partner in the firm—Transfer of order to another court for execution—Such court competent to determine the question* Where an award made under the Indian Arbitration Act 1899 has been made a rule of court it may be transferred for execution to another court just in the same way as a decree and the court to which it is so transferred has as regards any matters which are to be determined in execution proceedings the same powers as the court which passed the decree *i e* as the court which ordered the award to be filed *Adhar Chandra v Pulin Behari 20 C L J 129* referred to SITAL PRASAD v CLEMENT ROBSON AND Co I L R 43 All 394

——— s 43 (1882 Code s 229)—

See POLITICAL AGENT AT SIKKIM COURT OF I L R 38 Calc 859

——— s 44 (1882 Code s 229B)—

See DECREE I L R 40 Bom 504

See FOREIGN COURT

I L R 39 Mad 733

See FOREIGN DECREE

I L R 39 Mad 24

See LIMITATION ACT 1908 ART 182

I L R 42 Bom 420

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 44 O XXI r 7—

See FOREIGN DECREE

I L R 40 Bom 551

——— s 45 (1882 Code s 229A)—

See EXECUTION I L R 40 Mad 1009

See POLITICAL AGENT AT SIKKIM

I L R 38 Calc 859

——— s 47 (1882 Code s 244)—

See S 2

See O XXI R 2 5 Pat L J 70

See O XXI R 90 4 Pat L J 716
1 Pat L J 232

See APPEAL

I L R 41 Calc 418 460

See COMPANIES ACT (VII OF 1913) s 171 I L R 41 All 432

See DECREE

I L R 37 Mad 21

See EXECUTION OF DECREE

1 Pat L J 558

2 Pat L J 198

See MORTGAGE I L R 43 Bom 334 703
I L R 42 Mad 90
I L R 44 Mad 483

See MORTGAGE DECREE

4 Pat L J 207

1 ——— *Execution of decree—Compromise—Allegation by decree holder that a compromise relating to the execution of a decree has been obtained by fraud—Question to be determined by the Court executing the decree* As between the decree holder and the judgment debtor the question of an alleged fraudulent adjustment of the decree must be gone into and decided by the execution Court *Adhar Singh v Sheo Prasad I L R 24 All 400* followed MUHAMMAD KASIM v RUKHIA BEGAM (1919) I L R 41 All 443

2 ——— *Execution Court if may investigate validity of decree—An order improperly passed under s 47 if appealable* Where a jurisdiction is usurped by a Court in passing an order against which an appeal would lie appeal against the order cannot be defeated by showing that the order was without jurisdiction So where a Court purporting to act under s 47 Civil Procedure Code directed execution to proceed against a minor and an appeal was preferred on the ground that the decree sought to be executed did not bind the minor *Held* that the fact that on the Appellant's own showing the minor would not be a party to the decree within meaning of s 47 and thus the order would not be an order under s 47 would not make the appeal incompetent An execution Court must proceed on the assumption that there is a valid decree capable of execution and it is not open to it to investigate the validity of the decree or its binding character BINDESWARI v THAKUR LAKPAT NATH SINGH (1910) 15 C W N 725

3 ——— *Limitation Act (IX of 1908) Art 138—Transfer of Property Act (IV of 1882) s 90—Purchase by decree holder—Suit to recover possession—Execution* In execution of a redemption decree the decree holder (mortgagee) himself purchased the property at the court sale After the confirmation of the sale

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 47—*contd*

the legal representative of the decree holder (mortgagee auction purchaser) brought a suit to recover possession of the property so purchased The defendants (repre entatives of the mortgagors judgment debtors) contended that the question involved in the suit related to the execution of the decree therefore the suit was not maintain able under s 47 of the Civil Procedure Code (Act V of 1908) and that the plaintiff s remedy lay under O XXI r 5 The first Court allowed the claim On appeal by one of the defendants *Held*, reversing the decree that (i) The suit was barred by s 47 of the Civil Procedure Code (Act V of 1908) (ii) A decree holder by becoming a purchaser at a court sale did not cease to be a party to the suit within the meaning of s 47 of the Civil Procedure Code (iii) Proceedings for delivery of po session of property purchased by the decree holder were proceedings in execution of the decree and fell within the scope of s. 47 of the Civil Procedure Code (iv) Art 138 of the Limitation Act (IX of 1908) did not override the provisions of the Civil Procedure Code They should be read together Where the auction purchaser was also a party to the suit in which the decree was passed his claim for the delivery of possession of the property purchased must be determined by the Court in the execution depart ment But where the auction purchaser was a third party it was open to him to bring a suit for posses ion of the property purchased by him and such a suit would be governed by twelve years limitation under Art 138 of the Limitation Act (v) Under s 90 of the Transfer of Property Act (IV of 1882) the execution proceedings did not terminate with the sale The execution of the decree being barred at the date of the suit it was not allowed to be treated as a proceeding in execution. SADASHIV BIN MAHADU *v* NARAYAN VITHAL (1911) **I L R 35 Bom 452**

4 ——— *Execution of decree—Interlocutory order—Appeal* The Court executing a decree struck off the proceedings upon the ground of wilful default on the part of the decree holder in prosecuting his claim Subse quently however finding that the decree holder had not really been in default the Court cancelled its former order held that an attachment which was in existence at that time still sub i ted, and that execution should proceed *Held* that this was not an order to which s. 47 of the Code of Civil Procedure 1908 applied. Observations of BANERJEE J in *Jogodishury Debea v Kailash Chundra Lahiry I L R 24 Calc 7..* followed MUKITAR AHMAD *v* MUQARRAB HUSSAIN (1912) **I L R 34 All 530**

5 ——— *Execution proceed i j orde s i he appealable—Order for delivery of po es ion to decre holder auction purchaser if appealibl* Whether an order in execution pro ceedings is within the scope of s. 47 C P C depends upon its nature and contents. An order for delivery of possession to the execution pur chaser was not an order relating to execution discharge or satisfaction of the decree nor was such an order one ari ing between the parties to the suit or their representatives merely because the decree holder happened to be the execution purcha er BA I BHUSAN MOOKERJEE *v* RADHA NATH BOSE (1914) **19 C W N 835**

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——— s 47—*contd*

6 ——— *Execution of decree—Partition—Objection that decree holders had realised certain debts assigned by the decree to the judgment debtors—Procedure* The decree in a partition suit allotted *inter alia* a sum of money to be paid by the judgment debtor to the decree holders and a signed certain debts on account books to the judgment debtor On application by the decree holders for execution as to the sum allotted to them the judgment debtor took objection that the decree holders had as a matter of fact realized a large amount out of the debts which had been assigned by the decree to him *Held* that the question thus raised was not a matter falling within the purview of s. 47 of the Code of Civil Procedure and that the judgment debtor s remedy was by a separate suit to recover from the decree holders the amount alleged to have been illegally realized MOHAN LAL *v* JAGAN NATH (1913) **I L R 35 All 243**

7 ——— *Execution appli cation for—Court s order when amounts to adjudi cation—Subsequent dismissal of application for de fault—Fresh application by decree holder—Judgment debtor if can raise question of limitation* Where on the application of the decree holder for execution the Court issued notice on the judgment debtor which was duly served and on the latter s prayer for time to put in objections an adjournment was granted but the judgment debtor failed to appear on the 4th January 1908 the date fixed for hear ing and an order was passed by the Court to the following effect Decree holder is to take fur ther steps on or before the 7th January 1908 but on the 7th January the application was dis missed for default *Held* that the order passed on the 4th January necessarily implies an adjudi cation that the decree at the time was capable of execution and it is no longer open to the judgment debtor to re open the matter on a subsequent application by the decree holder for execution and urge that the previous application was made beyond the time allowed by law and consequently the application for execution was barred by limita tion *Mungal Proshad Dichit v Girija Kanta Lahiri I L R 8 Calc 51 Sheikh Budan v Ram Chandra I L R 11 Bom 537* followed. *Held* further that it is not essential in such a case that there should be an order for attachment the principle laid down above being applicable when ever there is an adjudication by the Court upon the rights of the parties to the execution proceed ings *Moa am Hossain v Sarat Coomari Debi 11 C L J 3.7* relied on *Tilesuar Rai v Parbati I L R 15 All 198* dissented from. *Sheoraj Singh v Kamesuar Nath I L R 24 All 283* referred to If an order has been made which directly or by implication determines the rights of the parties to an execution proceeding the fact that the decree holder does not choose to pro ceed with execution and the case is struck off does not entitle either party to re open the ques tion upon which there has been a previous ad judication. *Kamini Debi v Aghore Nath 11 C L J 91* followed. *Bhaguan v Dhondi I L R .2 Bom 83 Monmohan Karmokar v Dwarka Nath Karmokar 12 C L J 31? Khosal Chandra Roy v Uliladdi 14 C W N 114 Mochai Mandal*

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———— s 47—contd

v *Me cruddin Molla 13 C L J 26* distinguished. MURLIDHAR SUKUL v NURSINGH DAS (1911) **17 C W N 113**

8 ———————— *Order by High Court for removal of attachment pending appeal on furnishing security—Order by lower Court accepting such security if appealable* On the application of the judgment debtor the High Court ordered that a certain attachment should be removed pending the hearing of a certain appeal on the petitioner furnishing security to the satisfaction of the Court below for execution of the decree The case went back to the lower Court which accepted the security that was tendered. Again t this order an appeal was preferred to the High Court *Held* that the order appealed against determined no rights of the parties that were in controversy and no appeal lay under the Code of Civil Procedure (Act V of 1908) Every order passed in relation to execution need not necessarily be deemed to come within the scope of the definition in s 2 (2) Civil Procedure Code SARASWATI BARMANIA v MOTI BARMANYA (1913) **17 C W N 1240**

9 ———————— *Decree irreconcilable directions in—Decree impossible of execution—Claim on behalf of Deity—Appeal* The appellant obtained a decree on a mortgage executed by one *G* and had certain properties attached Thereafter one I brought a suit for declaration that the property was *wakf* and could not therefore be attached and sold and obtained a decree On appeal to the High Court against this decree *C* and one A were substituted as the heirs of I who had died in the meantime and the appeal was ultimately dismissed as against *G* and decreed on a compromise as between the appellant and A allowing the appellant to recover the money due to him by sale of 4 annas share of the properties On an application for execution of this decree of the High Court without making *G* a party to the execution *G* appeared and objected that he was the sole mutwalli of the property which was *wakf* and could not be sold in execution of the decree The lower Appellate Court refused execution holding that a suit for declaration could not legally terminate in a mortgage decree and that the decree which could be executed was the original mortgage decree but not the compromise decree *Held* that as *G* was a party to the suit in his personal capacity as also as mutwalli his objection came within s 47 of the Civil Procedure Code and an appeal lay from the order refusing to execute the decree *Kartik Chandra Ghose v Ashutosh Dhara I L R 39 Calc 298 16 C W N 6* distinguished That the ground upon which the application for execution was refused was erroneous the decree of the High Court in the present case was however incapable of execution inasmuch as the decree in so far as it dismissed the appeal as against *G* as a part representative of the former mutwalli was a final decision that the property was *wakf* and inalienable and a direction in the same decree that a portion of the property could be sold was irreconcilable with the rest of the decision and made it impossible to carry the whole decree into effect KALI PRASANNO GHOSH v GOLAM RAHMAN (1913) **18 C W N 910**

10 ———————— *Execution started against deceased judgment-debtor—Sale if may be set aside—Purchaser of occupancy holding if may apply—Limitation—Fraud—Abuse of processes of Court—Onus—Bengal Tenancy Act (VIII of 1885) 153 if bars second appeal in application to set aside sale—Practice—Revision application treated as appeal* Where proceedings to execute a decree for rent obtained against an occupancy raiyat having been started more than a year after the judgment debtor's death writ of attachment and proclamation of sale were issued in his name and returns were filed that processes had been duly served and thereafter at the sale at which no bidders attended the property was purchased by the decree holder who on 8th April 1912 got delivery of possession through Court and within one month thereof the petitioner who had previously purchased the holding from the tenant applied to have the sale set aside *Held* that the execution proceedings were liable to be set aside on the ground of grave irregularity *Quære* Whether the irregularity was such as rendered the sale absolutely void or voidable only *Held* also that the application came within s 47 of the Civil Procedure Code and was not time barred s 18 of the Limitation Act being applicable in the circumstances of the case *Lucinia Ashton v Madhabmoni Dasi 11 C L J 489 s c 14 C W N 560* referred to *Mallarjun v Narahari L R 27 I A 216 s c I L R 25 Bom 337 Stowell v Ajudhia Nath I L R 6 All 255 Sheo Prasad v Hira Lal I L R 12 All 440* distinguished That it was for the decree holder to show that the petitioner had on any date earlier than 8th April 1912 knowledge of the sale That the petitioner from whom rent was received though he might not have been formally registered as a tenant had *locus standi* to apply under s 47 to set aside the sale although he had failed to prove that the holding was transferable by custom *Prosunno Kumar v Rama Churn 13 C W N 652* distinguished That a second appeal lay in the case although the claim in the suit for rent was under Rs 100 The explanation added to s 153 of the Bengal Tenancy Act by the Amending Act of 190 has not completely nullified the Full Bench decision in *Kali Mandal v Ram Sarbeswar I L R 3. Calc 957 s c 9 C W N 771* In this case no question of limitation or court fees arising the petitioner's application for revision was treated as a memorandum of appeal ARJUN DASS v GUNENDRA NATH BASU MULLICK (1914) **18 C W N 1266**

11 ———————— *Suit for money—Death of Defendant during suit leaving will—Heirs substituted in ignorance of will and decree against heirs—Execution against estate—Objection by executor upheld—Executor if bound—Appeal—Remedy of decree holder—Suit upon judgment if lies—Limitation Act (IX of 1908) Sch I Art 122* M the defendant in a suit for recovery of money having died during its pendency leaving a will whereby he had appointed the wives of his sons executrices to his estate the plaintiff who was unaware of the existence of the will substituted his sons in his place on the records without objection and got a decree Execution of the decree against the estate of M was opposed by the executrices *Held* that the executrices were not bound by the decree and the decree could not be executed against the estate in their hands. *Quære* Whether the order of the executing Court dismissing the

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——— s 47—contd

application on the objection of the executrices was not an order under s 47 merely because the executrices could not in popular language be called representatives of the sons of the deceased debtor *Held* that the executrices were not representatives of the judgment debtors inasmuch as they were not bound by the decree That the remedy of the decree holder was either (i) to have the decree vacated the suit restored the executrices brought on the record and a new decree made against them or (ii) to institute a suit on the judgment and obtain a decree thereon against the executrice *Ashibhusan* v *Pelaram* *16 C L J 362 s c 18 C W N 173* and *Prosunno Chander* v *Kristo Chaitanya I L R 4 Calc 31?* *Quære* Under what circumstances a suit lies upon a judgment passed by a Court in British India Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another a legal obligation arises to pay that sum on which an action to enforce the judgment may be maintained provided the judgment cannot be enforced in some other way The Limitation Act cannot give rise to a cause of action where none exists independently of the provisions thereof KALI CHARAN NATH v SUKHODA SUNDARI DEVI (1915) **20 C W N 58**

12 ——— *Auction purchaser —Whether a representative of the judgment-debtor—Court sale* An auction purchaser at a Court sale is not a representative of the judgment debtor within the meaning of s 47 of the Civil Procedure Code 1908 NARSINHBHAT v BANDO KRISHNA (1918) **I L R 42 Bom 411**

13 ——— *Order accepting security proffered by decree holder and delivering possession to him if appealable—Interlocutory order* Where in pursuance of an order of the Court directing that the decree holder on furnishing security to the extent of Rs 50 000 in immoveable property was to be at liberty to proceed with the execution security was offered and accepted by the Court in spite of objection by the judgment debtor and an order was made directing delivery of possession to the decree holder of the property forming the subject matter of the decree *Held* that the order was not an interlocutory order and an appeal lay against it RUDRA NARAIN JANA v NABA KUMAR DAS (1918) **22 C W N 657**

14 ——— *Abandonment of case against defendant properly impleaded whether dismissal against such defendant—Madras Proprietary Estates Village Service Act (II of 1894) s 17—Madras Hereditary Village Offices Act (III of 1895) s 5—Service inam lands—Issue of inam title-deed therefor on one date with notification under s 17 of Madras Act II of 1894 enfranchising the lands at date subsequent to issue of deed—Mortgage of the lands in the interval whether valid—Transfer of Property Act (IV of 1882) s 43 whether applicable to illegal transfers* *Held* by the Full Bench Where a person has been properly impleaded as one of the defendants in a suit but the suit is dismissed as against him on account of the plaintiff's election to abandon his case so far as it affected that defendant such a person is a defendant against whom a suit has been dismissed within s 47 Civil Procedure Code *Krishnappa* v *Periasami I L R 40 Mad 964* distinguished An alienation of village service inam lands in a proprietary estate made after the grant of an inam title deed of enfranchisement but before the date of the notification contemplated by s 17 of the Madras Act II of 1894 is invalid and inoperative on account of the prohibition contained in s 5 of the Madras Act III of 1895 The alienation being a prohibited and illegal one on the date on which it was made the subsequent removal of the prohibition by the notification of enfranchisement of the service inam land does not render the alienation valid s 43 of the Transfer of Property Act cannot be applied to make a transfer valid which on the date on which it was made was prohibited by a statute *Narahari Sahu* v *Korithan Naidu 24 Mad L J 462* and *Sri Kakarlapudi Lakshminarayana Jagannada* v *Sri Raja Kandukuri Balasurya Prasada Rao 28 Mad L J 650* followed *Angannayya* v *Narasayya 18 Mad L J 241* overruled SANNAMMA v RADHABHAYI (1917) **I L Rat 41 Mad 418**

15 ——— *Sale in execution of mortgage decree—puisne mortgagee impleaded—objection by puisne mortgagee that he is the purchaser of portion of the property—objection dismissed—Appeal* In a suit on a prior mortgage a person who held a puisne mortgage in respect of one of the items of the mortgaged property was made a defendant When the mortgaged property had been ordered to be sold in execution of the decree obtained in this suit the puisne mortgagee objected that another item of the mortgaged property had been purchased by him at a revenue sale and that the result of this was the annulment of the mortgage so far as the second item was concerned This objection was summarily dismissed. *Held* that no appeal lay from the order dismissing the application as the objector was not a judgment debtor so far as the particular property which he desired should be exempted from sale was concerned SHAM LAL SAHU v AMAR PRASAD CHAUDHURY **2 Pat L J 129**

16 ——— *Instalment award decree—Decree unregistered—Decretal amount charged on the property of the judgment debtor—Sale of property by judgment-debtor—Subsequent execution of the decree —Property purchased from judgment debtor sold in execution—Suit by purchaser to set aside sale—Purchaser whether representative of judgment debtor—Such purchaser not a representative of judgment-debtor if he could prove that he had no knowledge of the charge created by the decree at the time of his purchase—Transfer of Property Act (IV of 1882) s 41* In 1891 defendant No 1 obtained a decree against one Khanderao The decree was made payable by instalments and it was declared in the decree that the decretal amount was charged on certain lands of the judgment debtor The decree was not registered In 1896 the judgment debtor sold three of the lands mentioned in the decree to the plaintiffs and put them in possession. In 1912 defendant No 1 filed a Darkhast in execution of the decree of 1891 and under that Darkhast lands sold to the plaintiffs in 1896 were put up to sale. The sale was confirmed by the Collector in spite of the objections put in by the plaintiffs. The plaintiffs thereupon sued to set aside the sale Both the lower Courts

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—contd.

———— s 47—contd

dismissed the suit on the ground that the plaintiffs ought to have proceeded under s. 47 of the Civil Procedure Code as they were representatives of the judgment debtors. On appeal to the High Court *Held* remanding the case, that if the plaintiffs could prove that he was an innocent purchaser having had no knowledge of the charge created by the decree at the time he purchased the property it could not be held that he was a representative of the judgment-debtor within the meaning of s. 47 Civil Procedure Code 1908 and in that case there was nothing to prevent the plaintiff from proceeding with the suit *Per* MACLEOD *C J* — If an outsider buys a property of a person who as far as he can judge is the ostensible owner and can give him a good title to the property the mere fact that the ostensible owner is the judgment debtor cannot possibly make his purchaser his representative within the meaning of s 47 of the Civil Procedure Code BALVANT DASO v UMABAI (1920)

I L R 45 Bom 812

17 ———— *Decree—Execution—Money recovered in excess in execution—Application to recover back the excess money—Separate suit not competent—Time taken up in such separate suit can be deducted from the period of limitation—Indian Limitation Act (IX of 1908) s 14* The opponent obtained against the applicant a decree for partition in the Zhansi Court which decree was transferred to the First Class Surbordinate Judge s Court at Ahmednagar for execution. In execution the opponent recovered a sum in excess from the applicant The applicant filed a suit against the opponent on the 14th November 1913 in the Shevgaon Court to recover back the excess amount but the Court dismissed the suit on 31st March 1915 on the ground that the applicant s proper remedy was to apply to the Ahmednagar Court in execution. Whilst the execution was still pending in the Ahmednagar Court the applicant applied to that Court on the 19th May 1915 to obtain refund of the money recovered in excess from him *Held* that the application for refund was properly made under s 47 of the Civil Procedure Code of 1908 to the Ahmednagar Court which was the executing Court *Held* also that the application was not time barred because the time taken up in prosecuting the suit at Shevgaon should be deducted under s 14 of the Indian Limitation Act 1908 GANPATRAO SULTANRAO v ANANDRAO JAGADEORAO (1919)

I L R 44 Bom 97

17 (a) ———— *Instalment award decree—Decree unregistered—Transfer of Property Act (IV of 1882) s 41* In 1891 defendant No 1 obtained a decree against one Khanderao The decree was made payable by instalments and it was declared in the decree that the decretal amount was charged on certain lands of the judgment-debtor The decree was not registered In 1896 the judgment debtor sold three of the lands mentioned in the decree to the plaintiffs and put them in possession In 1912 defendant No 1 filed a Darkhast in execution of the decree of 1891 and under that Darkhast lands sold to the plaintiffs in 1896 were put up to sale The sale was confirmed by the Collector in spite of the objections put in by the plaintiffs The plaintiffs thereupon sued to set aside the sale Both the lower Courts dismissed the suit on the ground that the plaintiffs ought to have proceeded under s. 47 of the Civil Procedure Code as they were representatives of the judgment debtors. On appeal to the High Court *Held* remanding the case that if the plaintiffs could prove that he was an innocent purchaser having had no knowledge of the charge created by the decree at the time he purchased the property it could not be held that he was a representative of the judgment debtor within the meaning of s 47 Civil Procedure Code 1908 and in that case there was nothing to prevent the plaintiff from proceeding with the suit *Per* MACLEOD *C J* — If an outsider buys a property of a person who as far as he can judge is the ostensible owner and can give him a good title to the property the mere fact that the ostensible owner is the judgment debtor cannot possibly make his purchaser his representative within the meaning of s 47 of the Civil Procedure Code BALVANT DASO v UMABAI (1920)

I L R 45 Bom 812

18 ———— *Decree holder—Auction purchaser—Resistance to taking of possession of property by judgment-debtor and by a third party—Suit against both to recover possession maintainable.* The plaintiff obtained a decree against defendant No 1 in execution of which the property in dispute was sold and purchased by the plaintiff with leave of the Court In seeking to take possession of the property the plaintiff was obstructed by the judgment debtor (defendant No 1) as also by a stranger (defendant No 2) The plaintiff filed a suit to recover possession of the property from both defendants but it was objected that the suit was barred by s 47 of the Civil Procedure Code *Held* overruling the objection that the defendant No 2 not being a party to the original suit the plaintiff s proper remedy to get possession of the property purchased as the Court sale was by filing a suit against both defendants although one of them was a judgment debtor of the plaintiff *Sadashiv bin Mahadu* v *Narayan Vithal (1911) 35 Bom 452* distinguished and doubted *Bhagwati* v *Banwari Lal (1908) 31 All 82* approved GOBA NATHU v SAKHARAM TEPI PATIL (1920)

I L R 44 Bom 977

19 ———— When payments have not been certified Whether question can be reopened under this section discussed. RADHA KANT LAL v MUSAMMAT RARBATI KUER

6 Pat L J 337

20 ———— *Decree for possession—Possession not obtained either by execution or by private arrangement —Execution of decree barred by limitation—Suit for possession based on decree not maintainable.* On the 28th of April 1905 the plaintiffs obtained a decree in a suit for pre emption conditional on their paying Rs. 1 000 within three months from the date of the decree The money was paid but for one reason or another the plaintiffs did not get possession of the property either by process in execution, or by private arrangement. On the 25th of April 1917 the plaintiffs sued for possession of the property awarded to them by the decree of 1905 *Held* that the suit was barred by s. 47 of the Code of Civil Procedure *I* [illegible] *Singh* v *Lalhrani Kuar*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 47—*contd*

application on the objection of the executrices was not an order under s 47 merely because the executrices could not in popular language be called representatives of the sons of the deceased debtor *Held* that the executrices were not representatives of the judgment debtors inasmuch as they were no bound by the decree That the remedy of the decree holder was either (i) to have the decree vacated the suit restored the executrices brought on the record and a new decree made against them or (ii) to institute a suit on the judgment and obtain a decree thereon against the executrice *Ashibhusan* v *Pelaram 18 C L J 362* s c *18 C W N 173* and *Prosunno Chander* v *Kristo Chaitanya I L R 4 Calc 342* *Quære* Under what circumstances a suit lies upon a judgment passed by a Court in British India Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another a legal obligation arises to pay that sum on which an action to enforce the judgment may be maintained provided the judgment cannot be enforced in some other way The Limitation Act cannot give rise to a cause of action where none exists independently of the provisions thereof KALI CHARAN NATH v SUKHODA SUNDARI DEVI (1915) **20 C W N 58**

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14 ——— *Abandonment of case against defendant properly impleaded whether dismissal against such defendant—Madras Proprietary Estates Village Service Act (II of 1894) s 17—Madras Hereditary Village Offices Act (III of 1895) s 5—Service inam lands—Issue of inam title-deed therefor on one date with notification under s 17 of Madras Act II of 1894 enfranchising the lands at date subsequent to issue of deed—Mortgage of the lands in the interval whether valid—Transfer of Property Act (IV of 1882) s 43 whether applicable to illegal transfers* *Held* by the Full Bench Where a person has been properly impleaded as one of the defendants in a suit but the suit is dismissed as against him on account of the plaintiff's election to abandon his case so far as it affected that defendant such a person is a defendant against whom a suit has been dismissed within s 47 Civil Procedure Code *Krishnappa* v *Periasami I L R 40 Mad 964* distinguished. An alienation of village service inam lands in a proprietary estate made after the grant of an inam title deed of enfranchisement but before the date of the notification contemplated by s 17 of the Madras Act II of 1894 is invalid and inoperative on account of the prohibition contained in s 5 of the Madras Act III of 1895 The alienation being a prohibited and illegal one on the date on which it was made the subsequent removal of the prohibition by the notification of enfranchisement of the service inam land does not render the alienation valid s 43 of the Transfer of Property Act cannot be applied to make a transfer valid which on the date on which it was made was prohibited by a statute *Narahari Sahu* v *Korithan Naidu 24 Mad L J 462* and *Sri Kakarlapudi Lakshmi narayana Jagannada* v *Sri Raja Kandukuri Balasurya Pra ada Rao 28 Mad L J 650* followed *Angannayya* v *Narasayya 18 Mad L J 241* overruled. SANNAMMA v RADHABHAYI (1917) **I L Rat 41 Mad 418**

15 ——— *Sale in execution of mortgage decree—puisne mortgagee impleaded—objection by puisne mortgagee that he is the purchaser of portion of the property—objection dismissed—Appeal* In a suit on a prior mortgage a person who held a puisne mortgage in respect of one of the items of the mortgaged property was made a defendant When the mortgaged property had been ordered to be sold in execution of the decree obtained in this suit the puisne mortgagee objected that another item of the mortgaged property had been purchased by him at a revenue sale and that the result of this was the annulment of the mortgage so far as the second item was concerned. This objection was summarily dismissed. *Held* that no appeal lay from the order dismissing the application as the objector was not a judgment debtor so far as the particular property which he desired should be exempted from sale was concerned SHAM LAL SAHU v AMAR PRASAD CHAUDHURY **2 Pat L J 129**

16 ——— *Instalment award decree—Decree unregistered—Decretal amount charged on the property of the judgment debtor—Sale of property by judgment debtor—Subsequent execution of the decree —Property purchased from judgment debtor sold in execution—Suit by purchaser to set aside sale—Purchaser whether representative of judgment debtor—Such purchaser not a representative of judgment debtor if he could prove that he had no knowledge of the charge created by the decree at the time of his purchase—Transfer of Property Act (IV of 1882) s 41* In 1891 defendant No 1 obtained a decree against one Khanderao The decree was made payable by instalments and it was declared in the decree that the decretal amount was charged on certain lands of the judgment debtor The decree was not registered. In 1896 the judgment debtor sold three of the lands mentioned in the decree to the plaintiffs and put them in possession. In 1912 defendant No 1 filed a Darkhast in execution of the decree of 1891 and under that Darkhast lands sold to the plaintiffs in 1896 were put up to sale. The sale was confirmed by the Collector in spite of the objections put in by the plaintiffs. The plaintiff thereupon sued to set aside the sale Both the lower Courts

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—contd

——— s. 47—*contd*

suit for establishment of title was necessary PAI BAIJNATH GOENKA v MAHARAJA SIR R P SINGH 26 C W N 906

—— ss 47 50 and 53—*Mortgage decree against Hindu father—in execution sons brought on the record—question of their liability to be decided by executing court* Where a mortgagee has obtained a decree on a mortgage against a Hindu father who has died before the decree is fully executed he is bound to bring the deceased's Judgment debtor's sons on the record as his legal representatives under ss 50 and 53 of the Code and any question relating to the Execution satisfaction or discharge of the decree arising between the holder and such representative must be determined by the executing Court under s 47 and not by separate suit SHEIKH KAROO v PAMESHWAR SAO 6 Pat L J 451

——— s 47 and 50 O XXI r 90—*Transfer of decree to another Court—Judgment debtor death of—Application to bring in legal representatives—Jurisdiction of such Court—Minor legal representative—Guardian ad litem not appointed—Sale in execution—Decree holder and auction purchaser fraud of—Sale validity of—Application under O XXI r 90—Conversion into a suit—Suit for setting aside if necessary—Limitation Act (IX of 1908) Art 12 95 and 166—Suit for other reliefs on the ground of fraud if maintainable* The first defendant obtained decrees in two suits viz Original Suits No 555 and 559 of 1903 on the file of the District Munsif's Court of Vizianagram against one S the husband of the plaintiff and the second defendant S died subsequent to the passing of the decrees which were transferred to the District Munsif's Court of Rajam for execution The first defendant filed an application in the latter Court for bringing on the record the plaintiff and the second defendant as the legal representatives of the deceased judgment debtor and for execution of the decrees The Court passed an order as prayed for The plaintiff (the junior widow of S) was a minor at the time of the application and but she was placed on the record as though she were a major without a guardian ad litem to act for her Both the first defendant (the decree holder) and the third defendant (the auction purchaser) knew at the time that she was a minor The second defendant (the co widow) had then ceased to have any interest in her husband's estate The decree holder applied for sale in Original Suit No 555 of 1903 of properties which were attached in both the aforesaid decrees The third defendant who bid for the properties for Rs 601 caused the sale to be stopped in Original Suit No 555 of 1903 the first defendant in collusion with the third defendant brought them to sale in Original Suit No 559 of 1903 the reserve price was reduced to Rs 300 and the third defendant purchased the property for Rs 301 the executing Court was not informed of the sale in Original Suit No 555 of 1903 and of the third defendant's bid for Rs 601 therein The sale was held on 19th October 1906 and was confirmed on 23rd January 1907 The plaintiff (who attained majority in July 1907) filed an application on the 16th March 1909 in Original Suit No 559 of 1903 under s 47 of the Code of Civil Procedure for setting aside the sale and for a declaration that the sale was invalid and for other relief The petition was converted into a suit under the provisions of s 47 of the Civil Procedure Code The defendants contended that the sale was valid that in any event the sale had to be set aside and that both the applications under s 47 of the Civil Procedure Code and the suit were barred by limitation under arts 162 and 12 of the Limitation Act respectively *Held* that the plaintiff who had no guardian *ad litem* appointed for her in the execution proceedings was not a party to the suit in which the sale was made and was entitled to bring a suit for a declaration that the sale was not binding without regard to the provisions of s 47 of the Civil Procedure Code That the plaintiff not having been a party to the suit and not having been sufficiently represented by any one who was a party the sale was not binding on the plaintiff and did not require to be set aside That the suit which was instituted within three years of the plaintiff's attainment of majority was not barred by limitation *Per* SADASIVA AYYAR J When a judgment debtor has to set aside a sale of his property for fraud of the decree holder or of both himself and the auction purchaser he can only apply under Order XXI rule 90 of the Civil Procedure Code subject to the limitation prescribed in art 166 of the Limitation Act but he may be entitled to bring a suit for other appropriate reliefs on the ground of fraud against the decree holder and the auction purchaser such as for damages or for injunction subject to the limitation prescribed in art 95 of the Limitation Act PAYIDANNA v LAKSHMINARASAMMA (1914)
I L R 38 Mad 1076

——— ss 47 and 52—*Execution of decree—Parties impleaded as representatives of a deceased debtor—Sale in execution—Objection by representatives to sale—Procedure* Persons who are impleaded in a suit as representatives and asset holders of a deceased party are in the same position as regards s 47 of the Code of Civil Procedure 1908 as persons who are parties in their own right An objection therefore raised by such persons to the sale of property in execution of the decree must be taken under the above mentioned section and not by way of a separate suit *Seth Chand Mal v Durga Dei I L R 12 All 313 Bast Ram v Fattu I L R 8 All 146* and *Punchanun Bundopadhya v Rabia Bibi I L R 17 Calc 711* referred to DULLA v SHIB LAL (1916)
I L R 39 All 47

——— ss 47 & 60—
See O XXI R 53 4 Pat L J 336

——— ss 47 and 66 O II, r 2 and O XXI rr 69 and 96—*Civil Procedure Code (Act XIV of 1882) ss 294 317 and 319—Decree—Execution—Court sale—Purchase by a* benamidar *of decree holder—Leave to bid at Court-sale not obtained by mortgagee decree holder from the Court—Effect of want of leave—Parties to suit—Decree holder not a necessary party to a suit by the* benamidar *to recover possession of property—Splitting up of cause of action—Suit to recover a portion of property from one set of defendants—Suit to recover another portion of the property from another set of defendants—Maintainability of the suit.* At a Court sale held in execution of a decree on mortgage the plaintiff purchased as *benamidar* of the mort-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 48—*contd*

of time make any application for execution which it was in the power of the Court to grant because till then there was no decree ripe for execution so far as the personal remedy was concerned *Per Curiam* The execution and application contemplated by s 48 of the Civil Procedure Code of 1908 relate to a decree which is executable at that date in respect of the application made and execution sought and the order for execution contemplated by the provisions of the section refers to an order which the Court could have made and enforced in obedience to the terms of the decree NARHAR RAGHUNATH v KRISHNAJI GOVIND (1912)
I L R 36 Bom 368

2 ——— *Execution of decree —Decree for sale upon a mortgage passed before 1908 —Retrospective effect of Statutes* *Held* that the right to enforce execution of a decree being a substantive right and not a mere matter of procedure s 48 of the Code of Civil Procedure 1908 will not have the effect of barring execution of decrees which were passed prior to the enactment of the Code and were having regard to the Code of Civil Procedure of 1882 and to the Indian Limitation Act 1877 alive at the time of its coming into force *Smith v Callander [1901] A C 297 Phillips v Eyre L R 6 Q B 1* and *Rodda n v Morl y 1 De G & J 1* referred to KAUNSILLA v ISHRI SINGH (1910) **I L R 32 All 499**

COMPARE EXECUTION OF DECREE
I L R 40 Calc 704

3 ——— *Limitation—S 48 if would govern applications for execution of mortgage decrees passed when the previous Code (XIV of 1882) was in force—S 6 General Clauses Act (X of 1897) —Rights and remedies under a repealed Act—Acknowledgment—S 19 of the Limitation Act (IX of 1908)* In support of an application for execution made in 1913 for realisation of the balance of the decretal amount due on a mortgage decree made absolute in 1898 s. 6 of the General Clauses Act 1897 which provides that the repeal of an enactment shall not affect any right acquired under the enactment repealed or affect any legal proceeding or remedy in respect of any such right was relied on and it was contended that s 48 of the Code of Civil Procedure (Act V of 1908) did not apply as the decree was passed when the previous Code Act (XIV of 1882) was in force and inasmuch as s 230 thereof did not apply to mortgage decrees the application was not time barred *Held* that the application was governed by s 48 of the present Code (Act V of 1908) and was time barred as it could not be said that the decree holder acquired any right under the Code of Civil Procedure of 1882 within the meaning of s 6 of the General Clauses Act 1897 *Bisessur Sonamut v Jasoda Lal I L R 40 Calc 704 s c 17 C W N* and *Manjhoori Bibi v Akhl Mahmud 17 C W N 889* followed *Kaunsilla v Ishri Singh I L R 32 All 499* dissented from *Held* further that assuming that there was an acknowledgment of liability within the meaning of s. 19 of the Limitation Act by the judgment debtor in March 190 it would give the decree holder only three years from the time of such acknowledgment within which the decree holder would be entitled to apply for further execution of the decree That the [illegible] ing of the Code of 1908 could not be held to give retrospective operation to the acknowledgment of 1902 in such a way as to give the decree holder a fresh period of 12 years within which to apply for further execution The words a fresh period of limitation in s 19 of the Limitation Act do not refer to the term of 12 years prescribed by s 48 of the Code of Civil Procedure KRISHNA DAYAL GIR v SAKINA BIBI (1916)
20 C W N 952

4 ——— *Limitation of (IX of 1908) s 9—Minor—Extension of time—Decree—Execution* A decree obtained on the 17th February 1898 was sought to be executed in 1901 by the decree holder As the decree holder died thereafter leaving a minor son, further applications to execute the decree were filed by the minor's guardian all within time The minor attained majority in 1910 He then applied for the extension of the period of twelve years for the execution of the decree prescribed by s 48 of the Civil Procedure Code of 1908 on the ground of his minority between 1901 10 *Held* that the period could not be extended under s 48 of the Civil Procedure Code 1908 for once the limitation began to run from the date of the decree the twelve years period must be computed from that date BHAGWANT RAMCHANDRA v KAJI MAHAMAD ABAS (1912) **I L R 36 Bom 498**

5 ——— *Evasion of process of arrest is fraud within the meaning of section—Evidence Act (I of 1872) s 35—Admissibility of returns of serving officers—Proof of due diligence necessity for—Whether power conferred by s 48 is discretionary—Fraud of one judgment debtor effect of on execution against others* Evasion of process of arrest is fraud within the meaning of s 48 of the Code of Civil Procedure 1908 *Per* PHILLIPS *J* The fraud of one of several judgment debtors keeps the decree alive against all the judgment debtors *Per* SUNDRA AYYAR *J* Returns of process servers are admissible under s 35 of the Evidence Act as evidence of facts reported by them Fraud at some time within 12 years prior to the date of application is sufficient under s 48 to entitle the decree holder to apply for execution and it is not incumbent on the decree holder to prove continuous diligence prior to such date or that but for the fraud or force complained of he would have realised the fruits of the decree It is doubtful whether the language of s 48 was intended to confer on Courts a discretion to grant or refuse execution as they might think fit The fraud of one of several judgment debtors will keep the decree alive only against such judgment debtor ABDUL KHADIR v AHAMMAD SHAIWA PAVUTHAR (1912) **I L R 35 Mad 670**

6 ——— *Execution of decree —Limitation—Execution prevented by fraud of judgment-debtor* Upon a correct interpretation of clause (2) of s 48 of the Code of Civil Procedure (1908) the effect of the proviso embodied in that clause is that the bar to execution created by the first clause of the same section is removed *for a period of twelve years from any date on which the judgment debtor has by fraud prevented the execution of the decree* *Sreenath Goho v Yusuf Khan I L R 7 Calc 556* dissented from MASUM ALI v MASUM ALI (1911) **I L R 34 All 20**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s 48—*contd*

7 ———— *Civil Procedure Code (Act XIV of 1882) s 230—Limitation Act (IX of 1908) Art 182—Decree upon a compromise—Payment by instalments—Default—Execution—Minority of the legal representatives of the judgment-creditor—Step in aid of execution—Execution barred by the lapse of twelve year* An instalment decree upon a compromise provided that upon default the judgment creditor was entitled to possession of certain property The decree was dated the 29th July 1884 and default in the payment of instalment was made in 1897 Thereupon the judgment-creditor applied for the execution of the decree. He died in 1898 and the execution proceedings were continued by his brother as his representative In March 1902 the brother also died leaving minor sons On the 2 th June 1902 the guardian or the next friend of the minors applied *to have the minors brought on the record* as representing their father for continuing the execution proceedings This application was rejected in September 1902 and the original application for execution which was presented by the judgment creditor on default was also struck off On the 1st September 1909 a fresh application to execute the original decree was presented by the minor sons of the judgment creditor's said brother one of the minors having in the meanwhile attained majority The application was met by the objection that as it was made after the expiration of twelve years from the date of the default mentioned in the consent decree sought to be executed it was barred by s 48 of the Civil Procedure Code (Act V of 1908) *Held* that the fresh application was time barred as being made twelve years after the date of the default Art 182 of the Limitation Act (IX of 1908) showed that the fresh periods which could be obtained under the provisions of that article did not escape the provisions of s 48 of the Civil Procedure Code (Act V of 1908) S 48 of the Civil Procedure Code (Act V of 1908) is more extensive in its application than s 230 of the Code of 1882 and it is wide enough to cover the compromise decree of which execution was sought BALA RAM VITHALCHAND *v* MARUTI (1914)
I L R 39 Bom 256

8 ———— *Decree in favour of minors—Application for execution twelve years after date of decree—Limitation Act (IX of 1908) s 6* S 6 of the Indian Limitation Act 1908 only refers to periods of limitation prescribed by the Act itself and has no application to a case where the decree is barred by the provisions of s 48 of the Code of Civil Procedure 1908 Minority therefore is not a ground of exemption from the operation of limitation provided for by s 48 of the Code of Civil Procedure *Moro Sadashiv* v *Visaji Raghunath I L R 16 Bom 536* dissented from *Jhandu* v *Mohan Lal Punj Rec (1894) 489* and *Ramana Reddi* v *Babu Reddi I L R 37 Mad 186* followed PREM NATH TEWARI *v* CHATARPAL MAN TEWARI (1915)
I L R 37 All 638

9 ———— *Fraud or force of one judgment-debtor not extending the twelve years as against others* The fraud or force of one of several judgment debtors in preventing execution against him of a decree enables the decree holder to get an extension of the twelve years provided for execution of the decree by s 48 Civil Procedure Code (Act V of 1908) only as against that judgment debtor but not as against his other co judgment debtors who have not been guilty of such conduct *Per* CURIAM The policy of the Limitation Act in the matter of execution of decrees may be different ABDUL KHADIR *v* AHAMMAD SHAIWA PAVUTHAR (1913) I L R 38 Mad 419

10 ———— *Mortgage decree for sale and for recovery of balance if any from the mortgagor—Sale and ascertainment of insufficiency—Execution for balance—Twelve years computable from what date* *Held* by the Full Bench (PHILLIPS J dissenting) —Where a mortgage decree provides for recovery of any balance from the other properties of the mortgagor in case the sale proceeds of the mortgaged properties are found insufficient to satisfy the entire decree amount the decree holder has under s 48 Civil Procedure Code twelve years for the recovery of such balance reckoned from the time when it is ascertained to be due *Ratnachalam Ayyar* v *Venkatarama Ayyar I L R 29 Mad 46* and *Narhar Raghunath* v *Krishnaji Govind I L R 36 Bom 568* followed *Venkata Perumal* v *Prayag Dassji 29 I C 556* overruled *Per* ABDUR RAHIM OFFG *C J* and SESHAGIRI AYYAR *J* — The date of the decree in clause (*a*) of s 48 Civil Procedure Code means the date the decree becomes executable *Per* PHILLIPS *J* —Under s 48 Civil Procedure Code *the period of twelve years for the recovery of the* balance is to be computed from the date the decree actually bears ARASAMIER *v* VENKATACHELA MUDALI (1916) I L R 40 Mad 989

11 ———— *Execution of decree—Limitation— Subsequent order —Order by executing Court giving time for payment—Limitation Act (IX of 1908) s 15* The expression subsequent order in s 48 (*b*) of the Code of Civil Procedure means a subsequent order by the Court which made the decree and acting as that Court and not an order of a Court executing the decree. An order made by a Court executing a decree, allowing a judgment debtor time to pay up the balance of the decretal money would not be subsequent order within the meaning of s 48 and would not give a fresh period to the decree holder to execute his decree. Nor is an order merely giving time for payment an order staying execution or an injunction and the time so given can not be excluded in computing limitation against the decree holder JURAWAN PASI *v* MAHABIR DHAR DUBE (1918) I L R 40 All 198

12 ———— *Retrospective effect—Decree on mortgage passed under old Code—Execution proceedings governed by new Code* The plaintiff obtained in 1895 a decree on mortgage The decree was made absolute in 1898 The plaintiff applied in 1914 to execute the decree — *Held* that the application for execution having been made more than twelve years after the passing of the decree absolute was barred by s 48 of the Civil Procedure Code of 1908 S 48 of the Civil Procedure Code of 1908 has a retrospective effect *Lakeswar Sonamut* v *Jagodi Lal Chowdhry (1913) 40 Calc 604* followed *Kaunsilla* v *I[illegible] Singh (1910) 32 All 459* not followed [illegible] TRIBHOWAN (1920) I L R

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 48 O XX r 6—*Mortgage decree —Direction that unrealized balance of decree should be recovered from mortgagor personally—Application to execute it may be made after 12 years* Where a mortgage decree directed that the property mortgaged should be sold and if the proceeds of the sale be insufficient the balance of the decree should be realized from the other properties and the person of the judgment debtor an application made more than 12 years after the date of the decree for attachment and sale of the mortgagor's other properties is barred by s 48 of the Civil Procedure Code JNANDRANATH BOSE v KHULNA LOAN COMPANY LIMITED (1913)
18 C W N 492

——— s 48 and Sch I O XXI—*Execution proceedings—Decree in Baroda Court—Transmission to Bombay High Court for execution —Application to execute—Limitation* On 17th July 1903 the plaintiff obtained a decree in the Amreli Court in the territory of His Highness the Gaekwar of Baroda On 12th May 1894 an application for execution was made On 10th July 1905 a second application was made the prayer being for the attachment of moveable properties of the defendant in whatsoever villages and at whatsoever places in Okhamandal Okhamandal being within the jurisdiction of the Amreli Court the order for attachment was made On 5th July 1909 the decree was transmitted on plaintiff's application to the Bombay High Court for execution and on 15th October 1909 an application for execution by attachment of property in Bombay was made *Held* that the application was a substantive application with regard to the property in Bombay and being made more than 12 years after the date of the decree was barred by the provisions of s 48 of the Civil Procedure Code (Act V of 1908) An order by a Court passing a decree for the transmission of a decree for execution to another Court is not an order for the execution of the decree nor is an application for the transmission of an application for execution. *Hussein Ahmad Kaka v Saju Mahamad Saleh I L R 15 Bom 28* distinguished JEEWANDAS DHANJI v PANCHOODAS CHATURBHUJ (1910) **I L R 35 Bom 103**

——— s 48 Sch III para 11 (3)—*Execution of decree—Limitation* *Held* that clause (3) of paragraph 11 of the third schedule to the Code of Civil Procedure (1908) is wide enough to include the case of an application to which s 48 of the Code applies and is not confined to periods of limitation prescribed by the Indian Limitation Act 1908 *Muhammad Abdul Karim Khan v Ne[illegible] Singh 13 Oudh Case 305* approved. *Ju[illegible] Bahadur D[illegible] I L R 40 All 1[illegible]* distinguished SHIAM KARAN v THE COLLECTOR OF BENARES **I L R 42 All 118**

——— s 49 (1882 Code s 233)—

See EXECUTION **I L R 42 Mad 338**

——— s 50 (1882 Code s 234)—

[illegible] **I L R 3[illegible] Mad 231**

[illegible] **I L R 38 Mad 10[illegible]8**

——— s 50 O XXII r 12—*Execution of decree—Death of judgment debtor—[illegible] proceeding* Where

——— s 50—*contd*

after an attachment of the judgment debtor's property in execution of a decree the judgment debtor dies the decree holder is not bound, on peril of his application abating to bring upon the record the legal representative of the respondent So long as execution of the decree is not barred by limitation he can execute it against the legal representative of the deceased judgment debtor On the other hand there is no bar to the decree holder if so advised applying to have the legal representative made a party to the execution proceedings *Sheo Prasad v Hira Lal I L R 12 All 440* and *Gulabdas v Lakshman Narhar I L R 3 Bom 221* referred to BHAGWAN DAS v JUGAL KISHORE **I L R 42 All 570**

——— s 51—*Held* that though Ghatwali tenure cannot be sold in execution of an attachment a Receiver of the Rents and profit can be appointed KESHABAT KOERI v MOHON CHANDRA MONDAL **I L R 39 Calc 1010**

——— ss 51 and 72—

——— temporary alienation of the land of an agriculturist—

See EXECUTION OF DECREE (65) **I L R 1 Lah 192**

——— s 52 (1882 Code s 252)—

See ss 47 AND 52 **I L R 39 All 47**

See HINDU LAW (SUCCESSION) **I L R 34 All 79**

——— s 53 (cf 1882 Code s 273)—

See s 2 (11) **I L R 42 Bom 504**
See HINDU LAW **2 Pat L J 396**

——— *Execution of decree—Effect of previous order in execution—Res judicata* When the court executing a decree had decided that the decree as it stood was incapable of enforcement against the ancestral property of the original debtor but could only be enforced against property in the hands of the judgment debtors by way of inheritance and not by way of survivorship *Held* that this decision was *res judicata* between the parties to the decree and was not affected by the provisions of ss 52 and 53 of the Code of Civil Procedure 1908 COLLECTOR OF SHAHJAHANPUR v KUNJ BEHARI LAL (1910) **I L R 32 All 210**

——— s 54 (1882 Code 265)—

See SPECIFIC RELIEF ACT s 42 **2 Pat L J 221**

——— s 54—*Execution of Decree—Partition made by Collector—Jurisdiction of Civil Court to re open partition* The Civil Court has no jurisdiction to re open a partition made by the Collector under s. 54 of the Civil Procedure Code 1908 BHIMANGAUDA v HANMANT PUNGAPPA (1918) **I L R 42 Bom 639**

——— s 55 (1882 Code s 8)—

See EXECUTION OF DECREE **I L R 41 Calc 50**

——— ss 55 and 145—*Surety—Undertaking that [illegible] will file insolvency petition—Failure to file the petition—effect of* Where a surety undertook to pay the decretal amount to the

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 55—*contd*

decree holder (i) if the judgment debtor did not file an insolvency petition in the proper court or (ii) if the insolvency petition was rejected and the surety failed to produce the judgment debtor *Held* (1) that on the failure of the judgment debtor to file an insolvency petition the surety was liable to be proceeded against in the same manner as if a decree for the amount decreed against the judgment debtor had been passed against himself and that no question arose as to whether he had failed to produce the judgment debtor upon being called upon to do so (2) upon a construction of the bond, that the surety's liability was a general one and that the mere fact that the execution proceedings against the judgment debtor had been dismissed did not bar the decree holder's application to proceed against the surety *Querae* whether under the Code of Civil Procedure 1908 if the surety fails to produce the judgment debtor during the pendency of execution proceedings the surety is liable even after the dismissal of such proceedings against the judgment debtor DEDHRAJ v MAHABIR PRASAD 5 Pat L J 417

——— s 58 (1882 Code ss 342 341)—

——— s 59—*Document not produced with plaint and treated in trial Court as piece of evidence it should be treated in appeal as document creating rights—Disadvantage to defendant from such procedure* *Held* that the High Court should not have treated a Razi petition which the plaintiff did not produce in Court when he presented his plaint or which or a copy whereof he did not deliver to be filed with the plaint as required by s 59 of the Civil Procedure Code as creating rights and when the trial Court did not treat it otherwise than as a piece of evidence for had it been put forward by the plaintiff as creating right then apart from any difficulty as to its admissibility in the absence of registration (a point on which their Lordships expressed no opinion) a line of defence requiring evidence might have been adopted which was unnecessary so long as it was used merely as a piece of evidence SULAIMAN v BIYATHTHUMMA (1916) 21 C W N 553

——— s 60 (1882 Code 266)—

See s … I L R 43 Bom 716

See O XXI r 53 4 Pat L J 336

See CARNISHEE I L R 4 Pat L J 141

See INSOLVENCY I L R 2 Lah 78

——— **Permanent tenancy**—*With a condition of forfeiture on transfer—Holding saleable in execution* The word saleable in 60 of the Civil Procedure Code means saleable by auction at a compulsory sale under the orders of the Court and not transferable by act of parties Where in a permanent lease there was a condition that the landlord would re-enter if the tenant made any transfer of the land demised *Held* that the lease forbade a sale by the tenant but did not prevent a sale by the Court KESHAB CHANDRA PRAMANIK v AJAHAR ALI BISWAS (1914) 19 C W N 1182

——— **Right to future maintenance** *including allowance not a debt … r—Not liable to attachment under s 60 (1) Civil Procedure Code—No right to appoint receiver to collect it … O XL r 1 Civil Procedure Code* A mere right to receive maintenance in the future at certain rate fixed by an agreement is not a *debt* within the meaning of s 60 (1) Civil Procedure Code it cannot be attached in execution of a decree such a step being prohibited by s 60 (n) Civil Procedure Code and as there can be no attachment no receiver can be appointed under O XL r 1 Civil Procedure Code to collect the future allowances as and when they fall due for satisfying the decree *Nanammal v The Collector of Trichinopoly 20 Mad L J 94* and *Tara Sundari Debi v Saroda Charan Banerjee 12 C L J 146* followed *Rani Annapurni Nachiar v Swaminatha Chettiar I L R 34 Mad 7* considered PALIKANDI MAMMAD v KRISHNAN NAIR (1916) I L R 40 Mad 302

——— **Defendant agriculturist consenting to sale of his non transferable holding** *and dwelling houses in execution of decree—Decree holder's application for attachment and sale—Judgment-debtor if may oppose* In a suit for recovery of money certain non transferable occupancy holdings and other properties which were the dwelling houses of the Defendant who was an agriculturist were attached before judgment and a decree was passed by consent under which on default by the Defendant to pay the decretal money in certain instalments the Plaintiff would be entitled to realise the same from the properties and a portion of the Defendant and that the properties attached would remain charged for the decretal amount *Held*—That upon a proper construction of the decree the properties attached before judgment were liable for the satisfaction of the amount of the decree and the Defendant could not in execution proceedings object to the attachment and sale of the properties in execution of the decree UZIR BISWAS v HARADEV DAS AGARWALLA 24 C W N 575

——— **Insurance Policy**—*Transfer of Property Act (IV of 1882) s 130—Trust Act (II of 1882)—Contract Act (IX of 1872) s … (1)—Married Women's Property Act (III of 1874)—Life policy expressed to be for the benefit of the wife of the assured—Attachment of the policy by the judgment creditor of the assured—Suit by the widow of the assured for a declaration that the policy was not liable to attachment—D…* A policy of insurance effected by the assured upon his own life was expressed to be for the benefit of his wife Subsequently upon the death of the assured his judgment creditor having attached the policy his widow applied to raise the attachment Her application being rejected she filed a suit for a declaration that the policy was not liable to attachment in execution of the defendant's decree *Held* dismissing the suit that under s 60 of the Civil Procedure Code (Act V of 1908) the policy was attachable as a security for money or saleable property belonging to the judgment debtor over which he had a disposing power which he might exercise for his own benefit The policy was a contract between the deceased and the Insurance Company expressed to be for the benefit of the wife of the assured whereby the Company promised on proof of the death of the assured, to pay the policy monies to the trustee or trustees who might be appointed by the a… separate writ

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— s 60—*contd*

and in default of trustees to the beneficiary (that is the widow of the assured) and if the beneficiary be dead to the assured s heirs executor administrators or assigns Unless and until the appointment of trustees on behalf of the wife it was in the power of the assured at any time to put an end to the contract by ceasing to pay the premia or otherwise to defeat the expectation of his wife by assigning the policy to a creditor He could divest himself of his beneficial interest in the policy only by assignment in writing as provided by s 130 of the Transfer of Property Act (IV of 1882) or signed declaration of trust as provided by s 5 of the Trusts Act (II of 1882) He had adopted neither course The policy on his death therefore formed part of his estate the right of action against the Company being in his executors or other representatives untrammelled by any trust in favour of his wife Married Women s Property Act (III of 1874) is not applicable to Hindus There is nothing in the Contract Act (IX of 1872) to show an intention that a person not a party to the contract can sue on it *In re Flavell 25 Ch D 89 Bhalaji* v *Dattatraya 2 Bom L R 888 Simu I* v *Ananthanalla I L R 6 Mad 351 Chinnaya Rau* v *Ramaya I L R 4 Mad 137* distinguished SHANKAR VISHVANATH v UMABAI (1915) **I L R 37 Bom 471**

———— s 60(c) agriculturists—*Dekhan Agricultural Relief Act (XVII of 1879) s 22—Decree—Execution—Agriculturist—Exemption from liability to attachment or sale—Absence of proof of exemption—Jurisdiction of the Court to order sale* S 60 of the Civil Procedure Code (Act V of 1908) lays down the general rule that property liable to attachment and sale in execution of a decree is lands, houses etc belonging to the judgment debtor An Agriculturist in order to resist the application of that general rule must prove that he belongs to the privileged class so as to render s 22 of the Dekkhan Agriculturists Relief Act (XVII of 1879) applicable to his case. In the absence of such proof the exemption from liability to attachment or sale does not exist for the purpose of execution proceedings and the executing Court has therefore complete jurisdiction to make the order for sale NARAYAN ANANDRAM v GOWBAI (1912) **I L R 37 Bom 415**

———— *Agriculturist' meaning of* A judgment debtor put in an application before a Subordinate Judge claiming that his house attached in execution should not be sold by reason of the provisions of s 60 (c) of the Civil Procedure Code 1908 as he was an agriculturist The lower Courts dismissed the application on the ground that the judgment debtor had ceased to be an agriculturist in the ordinary sense of the term and had become a mere agricultural labourer On appeal to the High Court *Held* that the judgment debtor should be protected from the attachment of the house as the term agriculturist as used in s 60 of the Civil Procedure Code should be held to include persons engaged in cultivating the soil for remuneration although they may have no proprietary interest in the soil DEVAJI HRODE v VAIKUNT SUBAYA (1917) **I L R 41 Bom 475**

———— *Execution of decree—Mortgage—Agriculturist s house not appurtenant to* his holding *Held* by RICHARDS C J and TUDBALL J (BANERJI J *dissentiente*) that s 60 of the Code of Civil Procedure will not operate to bar the sale of a house belonging to an agriculturist in execution of a decree on mortgage of the same if such house is not an appurtenance of the mortgagor s holding which he is prohibited by law from mortgaging or transferring *Per* BANERJI J the Legislature clearly intended that no Court should sell a house belonging to and occupied by an agriculturist provided that the house is of the description mentioned in clause (c) of the proviso to s 60 Code of Civil Procedure and it makes no difference in the powers of the Court whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged The proviso forbids both attachment and sale that is where an attachment must precede a sale it forbids attachment as well as sale and where attachment is not a preliminary step it forbids sale *Ram Dial* v *Narpat Singh I L R 35 All 1 ?* referred to BHOLA NATH v MUSAMMAT KISHORI (1911) **I L R 34 All 25**

———— *Execution of decree—Attachment—Objection that attached property is the house of an agriculturist—Judgment debtor both zamindar and agriculturist—Burden of proof* Where a judgment debtor whose house was attached in execution of a decree took objection that the house was the house of an agriculturist to which s 60 (c) of the Code of Civil Procedure applied and was not susceptible of attachment and it was found that the judgment debtor was both an agriculturist and a zamindar *Held* that it lay on the judgment debtor to prove that the house was strictly of the nature contemplated by the provision of s 60 (c) JAMNA PRASAD RAUT v RAGHUNATH PRASAD **I L R 35 All 307**

———— *Exemption from attachment of agriculturist s house—Agriculturist who is—Plea claiming exemption must be set up and proved by judgment debtor* The agriculturist whose house is protected from attachment by s 60 (c) of the Code of Civil Procedure is one belonging to the class of common agriculturists that are known in Bengal whose main source of livelihood is by cultivation i e the raiyat who tills the field The plea that he is an agriculturist within the meaning of the section has got to be set up and proved by the judgment debtor ASHMATULLA SARKAR v RAN MAHMUD CHOWDHURY (1915) **20 C W N 874**

———— *Execution of decree—Sale in execution—House of an agriculturist—Objection not taken at time of sale but in answer to a suit for possession by the auction purchaser—Estoppel* *Held* that a judgment debtor who could and ought to have raised objections to the sale of his property at the time of the sale could not be permitted long after the sale had been confirmed to raise the same objections in answer to a suit by the auction purchaser for possession of the property purchased by him *Umed* v *Jas Ram I L R 29 All 612 Pandurang Balaji Ingole* v *Krishnaji Govind Laral I L R 28 Bom 125* and *Dwarka Nath Pal* v *Tarini Sankar Roy I L R 34 Calc 199* followed LALA RAM v THAKUR PRASAD (1918) **I L R 40 All 680**

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 60 (f)—

——— Birt Mah Brahmani—*Execution of decree—Things not saleable or attachment and sale in execution* The office of a mahabrahmin or a birt a harja is a right to perform personal service and as such is exempt from attachment and sale in execution of a decree under the provisions of s 60 cl (f) of the Code of Civil Procedure *Durga Prasad v Central* All Weekly Notes 1889 *169* followed *Rajaram v Ganesh* I L R *23 Bom 131* referred to DURGA PRASAD v SHAMBHU (1919) I L R 41 All 656

——— s 60 (g)—
See PENSION ACT 1871 s 11
I L R 36 All 318

——— *Grant of jagir whether of revenue or land—Grant whether absolute or for maintenance—Political pension* A Government sanad purported to grant the taluka of a certain pargana together with the lands cultivated or uncultivated to one K for life as revenue free jagir by way of maintenance and went on to say that after the death of K the said ilaka will continue to stand in the names of his children and grand children as a permanent zemindari assessed to a light amount of jawa *Held* that the grant to K was of land rather than of revenue charged on the land and was not a political pension within s 60 (*g*) of the Civil Procedure Code The word jagir primarily points to occupancy though it may be occupancy of an office such as that of collector of revenue Where however a jagir held for life only is as in this sanad used in contradistinction to an ilaka held as a permanent zamindari it is an almost necessary inference that the occupancy referred to is an occupancy of land That though the grant to K was expressed to be for his maintenance it was not in the case of his descendants That in the hands of the latter the subject matter of the grant was liable to attachment in execution of a decree SAKINA BAI v KANIZ FATIMA BEGUM (1917) 22 C W N 577

——— s 60 (i)—
See s 60 2 (*b*)

——— Public officer —*Execution of decree—Limitation—Limitation Act (IX of 1908) Sch I Art 182 cl (5)—Attachment—Pay of officer of regular forces not attachable—Statutes 44 & 45 Vict Cap LVIII s 136—Statutes 58 & 59 Vict Cap V s 4* An officer of His Majesty s regular forces serving in India is not a public officer within the meaning of s 60 of the Code of Civil Procedure 1908 The pay of such an officer therefore is not liable to be attached in execution of a decree of a Court in British India *Calcutta Trades Association v Ryland I L R 24 Calc 102* and *Watson v Lloyd I L R 25 Mad 402* referred to LECKY v BANK OF UPPER INDIA LIMITED (1911) I L R 33 All 529

But see ATTACHMENT
I L R 43 Bom 716

——— s 60— (n)—*Annuity made payable personally to judgment debtor but charged on property if may be attached and sold in execution—Restraint on alienation illegal—Spendthrift trust when valid involuntary sale of—Direction in execution for payment of annuity in Court if valid—Annuity charged on property distinguished from covenants to pay future maintenance* P finding himself unable to pay his debts conveyed all his properties for consideration to his son who assumed the payment of specific debts and agreed to pay to P a monthly sum of Rs 4 000 payable on the first day of each month and two annual sums of Rs 2 000 and Rs 1 900 respectively These sums were made first charges on a portion of the estate conveyed subject to the then existing mortgages executed by the vendor In the deed it was further provided that the allowance was not to be alienated by the vendor in any manner and that the sums as they fell due were in no circumstances to be payable to or demandable by any person other than the vendor The respondent having obtained a decree for money against P applied for attachment and sale of the right title and interest of P in the monthly allowance payable from and charged upon the estate in the hands of the vendee P objected that the right to the annuity was not saleable property within s 60 Civil Procedure Code The Subordinate Judge overruled the objection and issued a prohibitory order directing the payment of the allowance into Court periodically as it fell due *Held* that the right sought to be attached was saleable property within the meaning of s 60 Civil Procedure Code, being a right to receive money charged upon property and enforceable if necessary by sale thereof It was not a mere right to receive future maintenance within cl (*n*) of the proviso to that section That the clause making the allowance inalienable and payable only to the vendor was an illegal restraint on alienation and did not even if considered valid as being in the nature of a spendthrift trust necessarily imply a bar to involuntary alienation at the instance of creditors That the direction for payment into Court of the allowance as it fell due was contrary to law the judgment creditor being entitled only to bring to sale the right of the judgment debtor who would therefore be entitled to take out the sums already deposited in Court in pursuance of the erroneous order of the Subordinate Judge PADMANUND SINGH v RAMA PROSHAD MOHI (1912) 17 C W N 662

——— *Execution of decree—Right to future maintenance —Younger brother put in possession of certain property by way of maintenance—Mode of taking out execution against such property* Under a family arrangement between two brothers the younger was given certain villages in lieu of maintenance The grantee was to enjoy the income of the villages during his life without power of transfer and at the elder brother s death he was to become full owner *Held* that such property was not exempt from process in execution of a decree against the life tenant but the proper mode of execution was not by sale of the life tenant s interest in the property —whatever it might be worth—but by the appointment of a receiver who might administer the property on behalf of the Court and apportion the income between the creditor and the life tenant. SUNDAR BIBI v RAJ INDAR NARAIN SINGH
I L R 43 All. 617

——— A mere right to future maintenance is not protected from attachment PALAKANDI MAMMAD v CHINGORAN KELOTH alias V APPA I L R. 40 Mad. 302

——— s 60 Sub s 2 (b)—
See s 60(i)
See ARMY 43 Bom 363

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 60 Sub s 2(b)—contd

——— Army Act 1881 (44 & 45 Vict c 58) ss 136 and 190 sub sec 8 as amended by Army Annual Act 1895 (58 & 59 Vict c 7) s 4—Officer on the Indian Staff Corps—Money decree—Execution—Salary not liable to attachment Messrs K K & Co filed a suit and obtained a decree for a sum of money against Major D an officer in the Indian Army They subsequently attached a moiety of that officer s pay under Order XXI rule 48 of the Civil Procedure Code and in pursuance of such attachment the Deputy Controller of Military Accounts remitted such moiety to the Sheriff of Bombay who had paid out a portion of the moneys received by him under Messrs K K & Co s attachment and had in his hands a further sum which in the ordinary course would have been paid out likewise when Major D took out a summons calling on the plaintiffs to show cause why their attachment should not be raised and the sums recovered thereunder refunded *Held* that Major D under s 190 sub sec 8 of the Army Act 1881 was an officer of His Majesty s Regular Forces and under s 136 of the Army Act 1881 and s 60 of the Code of Civil Procedure he was entitled to receive his pay without any deduction and that the attachment must be raised and that the Sheriff must pay to Major D the sum received by him under attachment and not yet paid away *Velchand* v *Bourchier I L R 37 Bom 26* applied *Held* however that as the moneys actually paid out to the execution creditors had not been paid out under coercion or under a mistake of fact though possibly under a mistake of law Major D was not entitled to a refund of such money KING KING & Co v MAJOR DAVIDSON (1914) I L R 38 Bom 667

——— Army Act 1885 (44 & 45 Vict) 136—Officer of the British Army serving in India—Money decree—Execution—Salary not liable to attachment S 60 cl (2) (b) of the Civil Procedure Code (Act V of 1908) leaves the provisions of the Army Act 1885 (44 & 45 Vict) untouched S 136 of the Army Act 1885 (44 & 45 Vict) amended in 183 provides that the salary of the officer in the British army serving in India shall be paid to him without deduction unless the Legislature in India has directed to the contrary in that behalf There is no law in India which expressly or by necessary implication directs that such officer s salary is liable to attachment in execution of a decree VELCHAND v BOURCHIER (1912) I L R 37 Bom 26

——— Execution of decree—Attachment—Pay of officer in the Indian Army *Held* that the pay of an officer of the Indian Army may be attached in execution of a decree against him to the extent of one half *Lucky* v *The Bank of Upper India Limited I L R 33 All 529* distinguished *Pink* v *Murray & Co 23 Indian Cases 935* followed HAY v RAM CHANDAR 1917) I L R 39 All 308

——— s 63 (1882 Code s 285)—

See RATEABLE DISTRIBUTION
I L R 46 Calc 64

——— Definition of decree —Same property attached by both Civil and Revenue Courts—Sale in execution of Revenue Court decree —Auction purchaser entitled to retain possession or

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 63—contd

S 63 of the Code of Civil Procedure only applies as between Civil Courts of different grades or as between Revenue Courts of different grades It cannot apply where the conflict is between a Civil Court on the one hand and a Revenue Court on the other Hence where the same property was attached in execution of a Civil Court decree and also in execution of a Revenue Court decree but was actually sold in execution of the latter it was *held* that the auction purchaser was entitled to retain possession *non obstante* the decree of the Civil Court and the attachment thereunder *Raghubar Dayal* v *Banke Lal I L R 2 All 18*? followed POSHAN LAL v MUHAMMAD MASHKUR ALI KHAN I L R 43 All 612

——— ss 63 and 73—When the same property was attached by two Courts one superior to the other *Held* that the claimant in the inferior Court was entitled to rateable distribution in respect of one of his decrees in which there was a prior attachment by him but not in another case in which the attachment was subsequent to that affected in the superior Court An application to a superior Court for transfer of an execution case to itself from an inferior Court cannot be treated as an application for execution to the superior Court within the meaning of s 73 KRISHNA KUMAR GHOSH v PASUPATI BANERJEE 25 C W N 740

——— s 64 (1882 Code s 276)—

See O XXI r 58 25 C W N 544

See ATTACHMENT IN EXECUTION OF MONEY DECREE
I L R 44 Mad 232

——— Effect of—Attachment of land by one decree holder—Application for rateable distribution by other decree holders—Satisfaction of attaching decree holder s decree by subsequent private alienation of the land attached—The other decree holders cannot impeach the alienation Where a decree holder attached land in execution of his decree and the other decree holders applied for rateable distribution without attaching the land in execution of their decrees and subsequently the judgment debtor alienated the land and paid off the attaching decree holder *Held* by the Full Bench that the other decree holders were not entitled to question the alienation under s 64 of the Civil Procedure Code *Mina Kumari Bibi* v *Bijoy Singh Dudhuria I L R 44 Calc 662* relied on Effect of Explanation to s 64 Civil Procedure Code considered ANNAMALAI CHETTIAR v PALAMALAI PILLAI (1917) I L R 41 Mad 265

——— Attachment—Claim for rateable distribution—Private alienation not impeachable by application for rateable distribution unless he has himself attached the property claimed *Held* on a construction of the explanation to s 64 of the Code of Civil Procedure 1908 that a person claiming rateable distribution of assets cannot get the benefit of it unless he has himself got an attachment on the assets from which he seeks to benefit The mere fact that he has filed a petition asking to share in the distribution is not sufficient *Annamalai Chettiar* v *Palamalai Pillai I L R 41 Mad 265* followed *Mina Kumari Bibi* v *Bijoy Singh Dudhuria*,

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 64—contd

I L R 44 Calc 66 referred to BHULAL v KUNDAN LAL I L R 43 All 399

——— s 64 and O XXI r 54—

——— *Attachment of moveable property—Order for attachment made—Alienation by judgment debtor subsequent to order but before proclamation of attachment validity of—Prohibition against alienation effective from what date* An attachment operates as a valid prohibition against alienation of the attached property only from the date on which the necessary proclamation is made and copy of the order affixed as contemplated in O XXI r 54 Civil Procedure Code *Ramanayakudu v Boya Pedda Basappa I L R 42 Mad 565* approved *Venkatasubbiah v Venkata Seshiah I L R 42 Mad 1* distinguished *Venkatachelapathi Rao v Kamesuaramma I L R 41 Mad 151* and *Kanai Lal v Alred I ur 55 I C 552* referred to SINNAPPAN v ARUNACHELLAM PILLAI (1919) I L R 42 Mad 844

——— *Attachment when effective against alienation* An attachment of land which is only ordered but not communicated to the judgment debtor by the issue of a prohibitory order under O XXI r 54 Civil Procedure Code does not affect an alienation made before the judgment debtor has knowledge of the prohibitory order RAMANAYAKUDU v BOYA PEDDA BASAPPA (1919) I L R 42 Mad 565

——— *Execution of decree—Purchase by decree holder—Interest—Time when decree is satisfied—Confirmation of sale* A decree the satisfaction of which has resulted from the decree holder himself bidding the full amount of the same at the execution sale is not actually satisfied until the sale has been confirmed If therefore the decree carries interest the decree holder is entitled to claim interest between the date of the sale and the date of its confirmation *Ganesh v Purshottam I L R 33 Bom 311 316* referred to KHALIL UR RAHMAN v GOKUL PRASAD (1919) I L R 41 All 526

——— s 64 O XXXVIII r 10—*Attachment before judgment scope and effect of section if limited only to transaction subsequent to attachment—Contract to sell entered into before attachment but specifically performed thereafter and before execution sale—Purchaser at execution sale and purchaser under contract to sell respective rights of* The plaintiffs attached the disputed property before judgment and purchased it at an execution sale Before the attachment by the plaintiffs the debtor had executed an agreement of sale in respect of the same property in favour of the defendant which was followed by a suit for specific performance In pursuance of the decree in this suit the Court before the date of the execution sale executed a *kobala* conveying the property to the defendant who also obtained possession before the said sale Before the plaintiff purchased at the execution sale he had notice of the agreement under which the defendant's purchase was made *Held* that the provision in s 64 of the Civil Procedure Code is for the protection of a creditor only against transactions subsequent to the attachment and the defendant's purchase must prevail There is no reason to hold that the provision in O XXXVIII r 10 is limited to rights *in rem* That the defendant had a right to have the contract to sell specifically performed and under s 489 of Act XIV of 1882 corresponding to O XXXVIII r 10 of the present Code that right was not affected by the attachment MADAN MOHAN DEY v REBATI MOHAN PODDAR (1916) 21 C W N 158

——— s 65 (1882 Code s 316)—

See SALE FOR ARREARS OF REVENUE I L R 40 Calc 81

——— *Purchase by decree holder—Interest—time when decree is satisfied—Confirmation of sale* A decree the satisfaction of which has resulted from the decree holder himself bidding the full amount of the same at the execution sale is not actually satisfied until the sale has been confirmed If therefore the decree carries interest the decree holder is entitled to claim interest between the date of the sale and the date of its confirmation *Ganesh v Purshottam I L R 33 Bom 311* referred to KHALIL UR RAHMAN v GOKUL PRASAD I L R 41 All 52

——— s 66 (1881 Code 317)—

See s 47 I L R 44 Bom 351

See BENAMI I L R 43 Calc 20

See CIVIL PROCEDURE CODE 1882 s 317 I L R 35 Bom 342

See HINDU LAW JOINT FAMILY PROPERTY I L R 49 All 159

See SALE IN EXECUTION OF DECREE I L R 43 Mad 643

See TITLE 23 C W N 601

——— *Auction sale in the name of defendant—Agreement to sell half share to plaintiff after sale certificate is obtained—Sale whether benami—Agreement subsequent to sale to convey—Suit for specific performance of latter agreement whether barred* Where the defendant agreed that certain immovable property should be purchased in his name in Court auction and that one half of it should be conveyed by him to the plaintiff after the sale certificate was obtained and under an agreement subsequent to the purchase the defendant agreed to execute a registered conveyance *Held* by the Full Bench in a suit being brought for specific performance of the latter agreement that the suit was not barred under s 66 of the Civil Procedure Code VENKATAPPA v JALAYYA (1919) I L R 42 Mad. 615

——— *Execution of decree—Benami purchase—Claim against certified purchaser but not by representative of the real purchaser* The widow of one Bhola Nath purchased a house at a Civil Court auction sale in the name of her son in law Baldeo and incorporated it into another house left by her husband who had died sonless On her death one of her daughters claimed the house as an heir of her deceased father The son in law in whose name the house was purchased raised the plea that he was the certified auction purchaser and the suit was barred by s 66 of the Code of Civil Procedure *Held* that as the plaintiff did not claim through the widow but through the widow [illegible] her father the

CIVIL PROCEDURE CODE (ACT V OF 1908)—contd

———— s 66—*contd*

suit did not come within the purview of s 66 of the Code *Ram Narain* v *Mohanlan I L R 28 All 82* distinguished NARAIN DEI v DURGA DEI (1913) **I L R 35 All 138**

———— *Suit by beneficiary against benami certificated purchaser at Court sal when lies* Where a Mahomedan father having bought land at a Court sale with his money in th name of one of his sons settled the same with a tenant who attorned to him and paid his heirs rent after his death *Held* in a suit brought by the heirs other than the certificated purchaser against the tenant for arrears of rent mal ing the certificated purchaser a *pro formâ* Defendant in which the tenant alleged that he was bound to pay rent to the certificated purchaser only and the latter supported him that the suit was not barred by s 66 of the Civil Procedure Code MAHAMMAD EMARTULLA SIRCAR v MAHAMMAD DIDAR BUX **24 C W N 51**

———— *Civil Procedure Code (Act XIV of 1882) ss 316 317—Suit for declaration of title against recorded purchaser at execution sale—Title of auction purchaser when accrues—Certificate of sale value of—Construction of statute—Amending Act—Retrospective operation—Vested rights* An execution sale was held and confirmed when the Code of 1882 was in force but the sale certificate was issued after the new Code of 1908 came into operation The recorded purchaser conveyed the property to another person and the plaintiff sued for a declaration of his title to the property on the ground that it was purchased by him in the name of the recorded purchaser *Held*—That a sale certificate does not create title but is merely evidence of title and the title of the purchaser accrued under s 316 from the date of the confirmation of the sale That the suit was not barred by s 66 of the Civil Procedure Code of 1908 which is not applicable to an execution purchaser whose title was perfected when s 317 of the Code of 1882 was in force Both s 317 of the Code of 1882 and s 66 of the Code of 1908 although placed in a Code of Procedure impose in essence a serious restriction upon the title of the real purchaser at the execution sale PROMOTHO NATH PAL CHOWDHURY v SAURAVI DOSI CHOWDHURANI **24 C W N 1011**

———— *Agreement by certified purchaser to convey property—Suit to enforce if maintainable* S 66 of the Civil Procedure Code does not affect an agreement subsequent to the purchase and a suit lies against the certified purchaser for specific performance of such an agreement *Venkatappa* v *Jalayya I L R 42 Mad 613 (F B) (1919)* approved RAMATHAI VADIVELU MUDALIAR v PERIA MANICKA MUDALIAR **24 C W N 699**

———— *Certified purchaser suit against if barred—Real purchaser s possession—Certified purchaser s failure to assert right whether amounts to waiver or transfer* The general language of s 66 of the Code of Civil Procedure (Act V of 1908) is not restricted to *benami* purchases made by or on behalf of judgment debtors *Hanuman Prasad Thakur* v *Jadunandan Thakur 20 C W N 147 1915)* followed *Ganga Shahai* v *Kesri 42 C L J 608 (P C) (1915)* and *Bodh Singh Doodhoria* v *Gunesh Chundra Sen 12 B L R 317 (P C) (1873)* referred to The failure of the alleged *benamdar* the certified purchaser to assert his rights against the real purchaser during the latter s possession after the auction purchase cannot be regarded as a waiver or transfer of the rights *Monappa* v *Surappa I L R 11 Mad 234 (1886)* disapproved *Bishan Dial* v *Ghazi ud din I L R 23 All 175* (1901) followed The title of the certified purchaser was extinguished by three years possession of the landlord the alleged real purchaser under the 3rd Schedule of the Bengal Tenancy Act and the latter acquired a title by adverse possession HARISH CHANDRA GUHA v NRIPENDRO KUMAR CHUCKERBUTTY **24 C W N 1024**

———— *Hindu law—Joint Hindu family—Status of females in a Joint Hindu family—Property purchased benami by father in name of his wife* Certain property was purchased at an auction sale held in execution of a decree by the father in a joint Hindu family *benami* in the name of his wife After the death of the father one of the sons sued for a declaration that the property so purchased was joint family property having been purchased from joint family funds in the name of a member of the family *Held* that females in a joint Hindu family not being members of the family in the sense of having a right to a share in the family property the purchase could not be taken to have been made for the benefit of the family but the defendant was in the position of a pure *benamidar* and a suit for the declaration asked for by the plaint was prohibited by s 66 of the Code of Civil Procedure *Bodh Singh Doodhooria* v *Gunesh Chunder Sen 12 B L R 317* and *Achhaibar Dube* v *Tapasi Dube I L R 29 All 657* referred to BAIJNATH DAS v BISHAN DEVI **I L R 43 All 711**

———— *Benami auction purchase—Suit against transferee from certified purchaser—Transfer made before but suit brought after the coming into force of the present Code—Suit governed by the present Code—Waqf—Hanafi law—Requirements of valid waqf where waqif appoints himself as mutawalli* Prior to 1900 certain properties were purchased at auction sales ostensibly by X and Y who were recorded as the certified purchasers but the purchase money was in fact provided by A S and A L. In 1900 these properties were transferred or purported to be transferred to Z In 1916 the representatives of A S and A L sued for possession of these properties upon the ground that both the original purchases and the subsequent transfers to Z were benami transactions and that the plaintiffs were the real owners of the properties. *Held* that s 66 of the present Code of Civil Procedure and not s. 317 of the Code of 1882 applied and the suit was barred. *Quære* whether even under the former Code the interpretation placed upon s 317 that it did not extend to a suit against the transferee from a certified purchaser was correct? *Sibta Kunwar* v *Bhagoli I L R 21 All 196* referred to According to the Hanafi law where the owner of property has declared it to be *waqf* and has appointed himself as *mutawalli* there is no need for any further formal transfer of possession neither will the conduct of a subsequent

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 66—*contd*

mutawalli accepting his appointment under the terms of the *wakfnama* invalidate the *waqf* ABDUL JALIL KHAN v OBED ULLAH KHAN
I L R 43 All 416

——— s 66 O XXI, rr 84 94—*Agreement by purchaser at Court sale before deposit of balance to share property with others—Latter s remedy* The person who is declared to be the purchaser after the bids are concluded is the person in whose name the certificate is to be granted under O XXI r 94 C P C. Where the Defendant after having bid for the property and paid the earnest money on his own account entered into an agreement with the Plaintiffs to buy the property for Plaintiffs and himself jointly in certain shares and paid the balance in part out of money taken from Plaintiffs *Held*—That the case was not covered by the second proviso to sec 66 of the Civil Procedure Code but that the plaintiffs were entitled to sue the defendants for specific performance of the agreement Plaint allowed to be amended accordingly BABURAM MANDAL v DOKHINA SUNDARI NAMASUDRANI 24 C W N 27

——— s 68 (1881 Code s 320)—

——— *Allahabad Civil Court—Power to order sale* An ancestral grove with a house which has been assessed by Government cannot be sold in execution of a decree through the Court but the Court must transfer the decree to the Collector who alone has jurisdiction to execute it I L R 36 All 33

——— ss 68 70 r 14 O XXI, 101—*Decree—Execution by Collector—Court functus officio for the time being—Exhaustion of all the power conferred upon the Collector for execution—Matters requiring to be done in execution must be done by the Court which passed the decree* After a decree has been transferred to a Collector for execution the Court which passed that decree is for the time being *functus officio* for all purposes of execution but as soon as the Collector has exhausted all the powers of execution conferred upon him by rule 14 framed under s 70 of the Civil Procedure Code (Act V of 1908) then any matters requiring to be done and usually regarded as in execution must be done by the Court which made the decree *Pita v Chunilal I L R 31 Bom 207 referred* to ARJUNA BIN RAGHU v KRISHNAJI (1914)
I L R 38 Bom. 673

——— ss 68 and 70—Sch III—*Exemption of a decree by Collector—Delegation to Assistant Collector of functions of Collector—Application to Assistant Collector to take action—Ultra vires—Penal Code (Act XLV of 1860) s 198* A obtained a decree for money against B In execution thereof certain immoveable property was ordered to be sold and the execution was transferred to the Collector of Basti under s 68 of the Code of Civil Procedure The property was sold and purchased by C B applied for permission to deposit the sum decreed and 5 per cent of the purchase money He next presented a petition saying that he had made the required deposit Subsequently he put in a petition to the effect that some unauthorized person had paid the money into the Treasury and that he had been compelled to put his thumb impression on a blank paper which was used for the petition aforesaid This petition

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 68—*contd*

was presented to the Assistant Collector and the officer ordered B s prosecution under s 182 Indian Penal Code *Held* that inasmuch as the Assistant Collector had no power to deal with B s applications except by passing them on to the Collector 182 of the Indian Penal Code did not apply and the Assistant Collector had no jurisdiction to order B to be prosecuted thereunder EMPEROR v BHAJAN TEWARI (1915)
I L R 37 All 334

——— s 68 O XXI, r 100—*Decree—Execution proceedings transferred to Collector—Sale—Auction purchaser placed in possession of property—Application by person wrongly dispossessed to be made to Collector and not to Civil Court—Collector not ministerial officer—Jurisdiction—Civil Court* Where execution proceedings are transferred to a Collector and a person is wrongly ousted or dispossessed under the Collector's order he should apply to the Collector and not to the Court complaining of such ouster or dispossession. O XXI r 100 of the Civil Procedure Code 1908 has no application to a case where the execution of the decree has been transferred to the Collector and he has acted under the powers conferred on him by the Local Government under s 70 of the Code RAGHO CHANDRARAO v HANMATI CHANDRARAO (1913) I L R 37 Bom 488

——— ss 69 and 70—

See SCH. III I L R 37 Bom 32

——— s 70 (1882 Code 320)—

See s. 68 I L R 37 All 334

——— *Execution of decree—Ancestral property—Sale held by Collector and confirmed by Commissioner—Suit in Civil Court to set aside sale—Rules framed by Local Government* Where a sale of ancestral property held by a Collector in accordance with rules framed by the Local Government under s 70 of the Code of Civil Procedure 1908 has been duly confirmed no suit will lie in a Civil Court for the purpose of setting aside such sale FARHAT UN NISSA BIBI v SUNDARI PRASAD I L R 42 All 475

——— s 70 O XXI, r 72—*Bombay Civil Circulars Chap II cl 91 sub cl. 16—Execution proceedings transferred to the Collector—Court s power to entertain application for leave to bid at Court-sale—Set-off cannot be allowed by Court* When the execution of a decree is transferred to the Collector the Court has no power to entertain an application by the decree holder for leave to bid at the auction sale it should be made to the Collector under sub-sec. 16 of Cl. 91 of the Manual of Bombay Civil Circulars No set off can be allowed either by the Collector or the Court SHRINIWAS APPACHARYA v JAGADEVAPPA (1918)
I L R 42 Bom 621

——— s 71 (1882 Code s. 320)—

——— s 72 (1881 Code 326)—

See EXECUTION OF DECREE.
I L R 1 Lah 192

——— s 73 (1882 Code s. 295)—

See ss 2 & 63 5 Pat L J 415

See s 47 I L R [illegible] Mad. 5[illegible]0

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 89—*contd*

and the operation of the Second Schedule is excluded by the words used in s 89 of the Code Save in so far as is otherwise provided by or by any other law for the time being in force which last words are applicable to O XXIII r 3 HARAKHBAI v JAMNABAI (1912) I L R 37 Bom 639

——— s 89 O XXIII r 3 Second Schedule —Paras 14 15 20 and 21—*Civil Procedure Code (Act XIV of 1882) s 375—Indian Arbitration Act (IX of 1899)—Reference to arbitration without intervention of Court while suit pending—Procedure to enforce award—Award not adjustment of suit under Order XXIII rule 3* The plaintiff sued on the 11th of June 1915 to recover a sum of Rs 5 353 9 6 as the price of goods sold to the defendant The defendant in his written statement pleaded *inter alia* that the goods supplied by the plaintiff were not of the quality agreed upon by the parties On the 21st of August 1915 the parties without the intervention of the Court agreed to refer the matters in dispute between them concerning the contract referred to in the plaint in respect of which the suit had been filed in High Court to the arbitration of M D and P M The arbitrators made their award on the 28th of October 1915 whereby they awarded to the plaintiff a sum of Rs 4 001 4 0 with interest at 6 per cent till the date of payment The award was filed by the arbitrators on the 10th of December 1915 On the 10th of January 1916 the plaintiff took out a notice of motion for an order that the adjustment of the suit arrived at between the plaintiff and the defendant as stated in the plaintiff's affidavit should be recorded under Order XXIII rule 3 of the Civil Procedure Code and a decree in accordance therewith should be passed The defendant disputed the legality of the award on two grounds first that the arbitrators exceeded their jurisdiction and decided something which was not within their power to decide and secondly that they refused an opportunity to the defendant to call witnesses or that after they had given him to understand they would adjourn the matter to enable him to call evidence they published the award without giving him any such opportunity *Held* (i) that the plaintiff had adopted a wrong procedure in applying for a decree on an award under Order XXIII rule 3 (ii) That the defendant was entitled to be heard on the objections raised by him under paragraph 21 of the Second Schedule of the Civil Procedure Code *Iraqlas v Girdharlas I L R 26 Bom 76* and *Ghellabhai v Nandubai I L R 21 Bom 335* considered *Per* MACLEOD J —No application can be made to obtain a decree on an award except as provided for in s 89 of the Code of Civil Procedure (Act V of 1908) Under that section the provisions of the Second Schedule govern all arbitrations in a suit or otherwise except such arbitrations as are specially excluded An arbitration between the parties to a suit without an order of the Court has not been excluded and must therefore come under the provisions which deal with arbitrations without the intervention of the Court SHAVAKSHAW v TYAB HAJI AYUB (1916) I L R 40 Bom 386

——— s 90 (1882 Code 311)—

See BOMBAY MUNICIPAL ACT s 140 143 I L R 43 Bom 281

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 90—*contd*

See PRESIDENCY BANKS ACT 1876 s 23 I L R 45 Bom 138

——— s 91 (1882 Code 313)—*Vesting of highway in public authority if precludes private individuals suing with leave in respect of public nuisance on street—Dedication acceptance of how established—User as evidence of dedication Calcutta Municipal Act (Beng III of 1899), s 336* S 336 of the Calcutta Municipal Act by vesting public streets including the soil in the Calcutta Municipal Corporation does not take away the right of members of the public to sue under s 91 of the Civil Procedure Code in respect of a nuisance committed on the street Where a highway is dedicated to the public acceptance by the public requires no formal act of adoption by any persons or authority but is to be inferred from public user of the way SERAJMAL KHORAD v ABHOY KUMAR ROY CHOWDHURY (1917) 21 C W N 595

——— s 92 (1882 Code 539)—

See S 9 I L R 45 Bom 683

See CIVIL PROCEDURE CODE 1882 ss 30 AND 539 I L R 33 All 660

See HINDU LAW —WILL I L R 39 Mad 365

See JURISDICTION I L R 41 Calc 866

See PARTIES I L R 42 Calc 1135

See PUBLIC RELIGIOUS TRUST I L R 41 Calc 749

See RELIGIOUS ENDOWMENTS ACT 1863 s 3 I L R 39 Mad 700

See TRANSFER I L R 39 Calc 146
I L R 48 Calc 53

1 ——— *Public religious trust—Suit to recover trust property from stranger* The provisions of s 92 of the Civil Procedure Code (Act V of 1908) do not apply to a suit brought by the trustees of a public religious trust to recover property belonging to the trust which has gone wrongfully into the possession of strangers to the trust MALHAR BHAGVANT v NARASINHA KRISHNA (1912) I L R 37 Bom 95

2 ——— *Waqf—Suit for declaration of plaintiff's right as mutawalli and for possession—Jurisdiction* Where the plaintiff came into court alleging that he was the rightful *mutawalli* of a certain *waqf* and that the defendant on the death of the last incumbent had wrongfully taken possession of the *waqf* property and asking to be put into possession thereof as *mutawalli* it was *held* that this was not a suit which fell within the purview of s 92 of the Code of Civil Procedure and was properly filed in the court of a Subordinate Judge *Budree Das Mukim v Chooni Lal Johurry I L R 33 Calc 789* and *Ghelabhai Gavrishankar v Uderam Ichharam, I L R 36 Bom 29* referred to *Muhammad Ibrahim Khan v Ahmad Saiyid Khan I L R 32 All 503* and *Said Ali v Ali Jan I L R 35 All 98* distinguished. MUHAMMAD ABDUL MAZID KHAN v AHMAD SAID KHAN (1913) I L R 35 All 459

3 ——— *Applicability of to the suit—Religious Endowment—Temple subject to superintendence of Temple Committee—Offerings by*

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— s 92—cont l

wo shipper ownership of—Perma ie t al enation of offerings by Committee valid ty of—S it to et as le—Limitation—Ca of a t on—Civil Proce lure Code (Act V of 1908) O I r 8—Suit by two worshippers on behalf of th m lt s a l oth rs un l r maintain ability of—P lgiou s Endowments Act (XX of 1863) s 18 or Civil Procedure Code (Act V of 1908) s 9 sanction un l r neces ity of—Suits in which reliefs asked for again t strangers to trust no necessity for anction for— Vesting any property in trustees — S 92 clause (h) m aning of—Scope of—Respective r ghts and duties of trust es and Temple Committees Two of the worshippers of a temple near Karur pur porting to sue on behalf of them elves and others, with the leave of the Court obtained under O 1 r 8 of the Code of Civil Procedure instituted a suit a ain t the members of the Devasthanam Com mittee of Karur to who e superintendence the t mple was subject and the *archakas* and *stanikas* of the temple for a decree (i) declaring the in validity as against the temple of a perpetual lease granted by the Committee to the *archakas* and *stanikas* of the right to collect offerings made by the pilgrims and (ii) directing that only the trustee or the manager duly appointed should retain the right of collecting the said offerings The plaint alleged that the alienation in que tion was highly detrimental to the intere t of the temple and was beyond the power of the Committee The trustee of the temple was not impleaded in the suit and no sanction as provided by 9 of the Civil Proce dure Code (Act V of 1908) or s 18 of the Religious Endowments Act (XX of 1863) was obtained for instituting the suit *Hell* by the Full Bench —(i) that s 9 of the Civil Procedure Co le (Act V of 1908) is not applicable to suits whose object is to e tablish the right of the temple to property in the hands of strangers or alienees from the temple authorities an l (ii) that th suit was therefore maintainal le without such sanction *Obiter* The alienation in question is void *Per* ABDUR RAHIM OFFG *C J* The reliefs prayed for in the suit are not of the kind mentione l in s 92 Civil Procedure Code The phra e vesting any property in trustees in s 92 contempl t s cases where new tru tees have been app inted o other ca es of a imilar nature su ch as tho e mentioned in s 6 to 30 of the Tru tee Act of 1893 (56 57 Vict cap 53) of England Clause (l) of s 9 must be read al n with the specified reliefs and the relief that can be granted under it should not be of a character different from those expressly mentioned *Per* COUTTS TROTTER and SESHAGIRI AYYAR *JJ* (in the Divi ion Bench) The alienation in question relating not only to exi ting but to future income the cause of action to question such an alienation accrue l every time the offering was wrongfully receive l *Pe* SESHA IRI AYYAR, *J* (in the Division Bench) Res pective rights an l dutie of tru tees an l temple committees di cu sed VENKATARAMANA AYYAN GAR v KASTURIRANGA AYYANGAR (1916)

I L R 40 Mad. 212

4 ———————— *Suit under nature of—D ath of pl unt ff—I o of Con t to add p rties* A suit brought under 9 of the C de of Civil Procedure is a representative suit an l the Court has p wer un ler O I r 10 clause (2) of the Code to a l l per ons as a l litional p rtie whose pre en e may be nec ss ary in or ler to enabl th Court effect ually and completely to adjudicate upon the questions involved in the suit *Varadayya Chetty v Munu ami Chetty 10 Mad L T 514* followed *Chhabile Ram v Durga Prasad I L R 37 All 296* dis ented from PARAMESWARAN MUNPEE v NARAYANAN NAMBODRI (1916)

I L R 40 Mad 110

5 ———————— *Suit by a Mukte ar of a temple against sup rseded Muktesars—The supersed d Muktesars also trustees of the endowment —Prayers for recovery of property belonging to the temple mesne profits and for taking accounts of the managem nt—Jurisdiction of Court to entertain suit —Religious Endowm nts Act (XX of 1863) s 14* The plaintiff who claimed to be heir of the original donor and a newly appointed Muktesar of a temple sued the defendants who were the trustees of the endowment and the sup r eded Muktesars of the temple praying for posses ion of immoveable and moveable properties belonging to the temple for mesne profits and for accounts The trial Court being of opinion that th suit was governed neither by s 92 of the Civil Procedure Cod nor by s 15 of the Religious Endowments Act decreed it on merits The suit was however dismisse l by the District Judge on the preliminary ground that the cognizance of the suit wa barred by 92 of the Civil Proce lure Code The plaintiff having ap pealed *Held* that the suit clearly f ll within the scope of s 92 of the Civil Pro edure Code ina much as taking the plaint as a whole the suit was one for the removal of the defendants from their position as trustee for the restoration of the trust property to the plaintiff a Mukte ar for taking accounts and for damages for their wrongful acts as trustee *Held* further that the defendants were not in the po ition of trang r for they w re trustees and claimed as such to be entitled to hold the lands from generation to generation subject to the due fulfilment of the trust *Per* MARTEN J — There is much which i in common between the two sections (s 92 of the Civil Proce lure Code and s 14 of the Religious Endowments Act) but s 92 is substantially the wider and provides *inter alia* for settling a scheme which is a juri di tion of a very wide and benefi ial nature I think, therefore that a plaintiff may proceed for appropriate relief under eith er Act an l that the opening words in s 92 (2) only mean that if he elects to proceed under the Reli ious En lowm nts Act he is not to be p evented from o doing by s 92 (2) HANSRAJ LADDA HET v ANANT PADMANABH (1918)

I L R 42 Bom 742

6 ———————— *Sanction of Advo cate Gen ral—Plaint a n n l d—New defendant and prayers adde l—No sa ctio of Advocate G neral to a nen lments* Two plaintiffs as relators having previou ly obtained the sanction of the Advocate General under s. 92 of the Civil Procedure Code filed a suit against three defen lants in respect of certain charitable properties When the suit was calle l on for hearing t vo of the defendants were truck off and the plaintiffs a ked for an l obtained leave to a l l another person as d f ndant and they amen led the plaint an l prayed for certain reliefs again t the ad led def ndant No sanction of the Advocate General was obtained previous to the amendment of the plaint and the a ldition of the new def ndant *Held* that the plaintiffs were not entitled to maintain t uit again t the added

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 92—*contd*

were not properly stamped *Held* that the cross objections must be stamped as on an appeal relating to the sum of Rs 6 000 decree against 1st defendant *Held* also that the suit was not bad on the ground that the statutory notice provided for by s 31 had not been given since it was a suit relating to the property of a religious institution and not to the property of the 1st defendant *Held* further that the suit was not bad under s 32 of the Court of Wards Act as the section did not say that if the Court of Wards was not named as guardian from the commencement the suit was bad The omission might under the circumstances be treated as a mere defect or irregularity in procedure not affecting the merits of the case or the jurisdiction of the Court and be corrected under s 152 of the Civil Procedure Code 1908 *Rup Chand v Dasodha I L R 30 All 55* and *Bibi Walian v Banke Behari Pershad Singh L R 30 I A 182* followed SAYAD AMIR SAHEB v SHEKH MASLEUDDIN (1916) **I L R 40 Bom 541**

17 ——— *Hindu temple—Worshipper—Right of suit of—Interest meaning of—Mere right to worship whether sufficient interest to maintain suit under s 92—Religious Endowments Act (XX of 1863) ss 14 and 15—Definition of interest therein whether applicable to s 92—Lord Romilly's Act—English decisions thereon whether proper guidance in construction of s 92—Interest nature of to maintain suit—Policy of Act and Code—Act and Code whether in pari materia* Where a Hindu residing in Madras and another residing in Tellicherry instituted a suit in the District Court of North Malabar under s 92 of the Civil Procedure Code in respect of a Hindu temple situated in Tellicherry in North Malabar after obtaining sanction under the section and it appeared that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry and he relied on his right as a Hindu to worship in the temple as entitling him to institute the suit *Held* by OLDFIELD and COUTTS TROTTER JJ (ABDUR RAHIM J dissenting) that though as a Hindu he might have the right to worship in the temple he had not on that ground alone the interest required by s 92 of the Code to maintain the suit Interest under s 92 of the Code denotes an interest which is substantial and not sentimental or remote it must be a present and substantial and not a remote and fictitious or purely illusory interest The definition of interest in s 15 of the Religious Endowments Act (XX of 1863) cannot be used as a guide in interpreting the word as used in s 92 of the Code The English decisions under Lord Romilly's Act which lay down that the petitioners under the Act must have an interest which is clear or direct should be a guidance in interpreting the provisions of s 92 of the Civil Procedure Code *Per* ABDUR RAHIM J —In the case of a temple or a mosque persons entitled to attend there for purposes of worship are beneficiaries and must as such be held to possess a sufficient interest to support a suit under s 92 of the Civil Procedure Code English and Indian decisions on the subject reviewed. T P RAMCHANDRA AIYAR v PARAMESWARAN UNNI (1918) **I L R 42 Mad 360**

18 ——— *Religious Endowments Act (XX of 1863) s 14—Sanction for suit—Trustees of a temple—Appointment of a trustee by a Devastanam Committee in bad faith—Suit without sanction by two trustees for declaration as to invalidity of appointment and for injunction—Maintainability of the suit—Jurisdiction of Civil Courts to question appointment* Two out of three trustees of a temple instituted a suit in a Subordinate Judge's Court for a declaration that the appointment by the Devastanam Committee of one of the defendants as a trustee in the place of a deceased trustee was invalid and for an injunction to restrain him from interfering with the affairs and the property of the temple The plaintiffs trustees did not obtain sanction either under s 92 Civil Procedure Code or s 14 of the Religious Endowments Act (XX of 1863) The defendants pleaded, *inter alia* that the suit was not maintainable for want of sanction and that the Civil Courts could not question the appointment made by the committee *Held* that the suit was not maintainable for want of a sanction under s 92 Civil Procedure Code and that a Civil Court can question an appointment of a trustee by a Devastanam Committee if it is not made reasonably or in good faith. *Per* ABDUR RAHIM J s 14 of the Religious Endowments Act (XX of 1863) did not apply to the present suit as it was not a case of misfeasance breach of trust or neglect of duty by a trustee SUBRAMANIA PILLAI v KRISHNASWAMI SOMAYAJIAR (1919) **I L R 42 Mad 668**

19 ——— *Suit by two persons one of whom had no interest under the section—Leave under the section obtained subsequently by two others having such interest—Latter joined as additional plaintiffs—Suit whether maintainable.* Where a suit was instituted under s 92 Civil Procedure Code by two plaintiffs one of whom had no interest such as that required by that section and two other persons having the requisite interest subsequently obtained leave under the section and were joined as additional plaintiffs in the suit *Held* that the suit was maintainable under s 92 of the Code and ought to be tried on the merits *Ramayyangar v Krishnayyangar (1887) I L R 10 Mad 185* applied. JEKKAM REDDI v SIR S SUBRAMANIA AYYAR (1920) **I L R 43 Mad 720**

——— ss 92 and 93—*Alienee from trustee—Declaration against—Appeal by alienee—Death of trustee pending appeal—Abatement—Right to sue meaning of—Alienee for consideration but not in good faith or without notice—Limitation Act (IX of 1908) s 10 effect of* Where in a suit brought by the Collector of a district under s 92 of the Code against the trustee and the alienee from him a declaration was granted to the effect that the alienation in favour of the latter was not binding on the trust and the alienee appealed making the Collector and the trustee parties to the appeal but pending appeal the trustee died and his legal representative was not brought on the record *Held* that the appeal did not abate as the trustee was not a necessary party to it *Held* also that the cause of action against the alienee (who was an alienee for consideration) arose on the date of the alienation and as the suit was brought more than six years after that date it was barred by limitation under Art 120 of the

CIVIL PROCEDURE CODE (ACT V OF 1908) —concld

——— s 92—concld

Limitation Act Time will run in favour of an alienee for consideration though he may not be an alienee in good faith Trust property in the hands of alienees for consideration and in good faith and without noti e cannot be followed at all *Per* TYABJI J —The phrase right to sue with reference to appeals means right to obtain relief PRASANNA VENKATACHELLA REDDIAR v THE COLLECTOR OF TRICHINOPOLY (1914)

I L R 38 Mad 1064

——— ss 92 115—

See PUBLIC CHARITY 14 C W N 932

——— s 92 O I r 3—

See PARTIES I L R 42 Calc 1135

——— s 92 O I r 10 (2)—*Suit by plaintiffs after obtaining consent of Advocate General—Application by Advocate General to be added as co plaintiff—Power of Court to add parties*] In a suit und r section 92 Civil Procedure Code instituted by persons who had obtained t[illegible] consent of the Advocate General [illegible] in on the application of the Adv[illegible] [illegible] him as a co plaintiff [illegible] *Sannadhigal v The* [illegible] (1910) I L [illegible]

——— s 93 (1882 [illegible]

See S 92 [illegible]

——— *Duties im[illegible] not to be discharged* [illegible] are imposed upon C[illegible] s 93 of the C[illegible] 1908) are of very [illegible] the which often [illegible] may not be d[illegible] s nate The [illegible] an Collector was disch[illegible] Collector under the [illegible] Revenue Code (Bom. [illegible] matters he was th[illegible] his functions with [illegible] s 92 of the Civil P[illegible] is erroneous SOMCHAND [illegible] LAL (1911) [illegible]

——— s 94 (C & [illegible]

See ATTACHMENT [illegible]

I [illegible]

See BENGAL TENANCY [illegible]

——— s 94 (d)—*Receiver mortgage suit—Mortgagee s ri[illegible] —In erest an l Government revenue sufficient ground—Nomination of* [illegible] the appointment of a Receiver [illegible] matter entirely within the discre[illegible] it must in the exercise of that [illegible] by the circumstances of each [illegible] it has been laid down as a general [illegible] appointment of a Receiver [illegible] of course on the appli ation of a [illegible] interest payable un ler the [illegible] Where it appeared that the [illegible] sued upon had trebled and [illegible] had been paid to the [illegible] other hand the mortgagees [illegible] advance money to pay the

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 94—contd

the mortgaged properties in order to save them from sale for arrears and that to recover the sums so advanced they had been compelled to bring another suit *Held* that it was a fit case for the appointment of a Receiver As a general rule the right to propose a person for appointment as Receiver belongs to the party interested in obtaining the appointment and effect will be given to his nomination But if the Court appoints a Receiver at the instance of a mortgagee—the mortgagee not having without the assistance of the Court power to appoint a Receiver—then the Court exercises its discretion as to who shall be appointed Receiver and appoints the Receiver whom having regard to the interest of both mortgagee and mortgagor the Court considers the best person THE EASTERN MORTGAGE AND AGENCY COMPANY LIMITED v RAKEA KHATUN (1912) 16 C W N 997

——— s 94 (e)—*Temporary injunction application for—Ord r by Court calling upon defendant to fu[illegible] rity and submit accounts—Order if* [illegible] *ction—Appeal—Revision* Where on [illegible] application for the issue of a [illegible] restraining the defendant [illegible] ies on the property in suit [illegible] directing the defendant [illegible] e extent of Rs 5 000 and [illegible] minerals appropriated [illegible] of [illegible] ication [illegible] not [illegible] sed under [illegible] Code and [illegible] XLIII [illegible] made [illegible] the [illegible] v [illegible] 918 [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 92—*contd*

were not properly stamped *Held* that the cross objections must be stamped as on an appeal relating to the sum of Rs 6 000 decree against 1st defendant *Held* also that the suit was not bad on the ground that the statutory notice provided for by s 31 had not been given since it was a suit relating to the property of a religious institution and not to the property of the 1st defendant *Held* further that the suit was not bad under s 32 of the Court of Wards Act as *the section did not say that if the Court of* Wards was not named as guardian from the commencement the suit was bad The omission might under the circumstances be treated as a mere defect or irregularity in procedure not affecting the merits of the case or the jurisdiction of the Court and be corrected under s 152 of the Civil Procedure Code 1908 *Rup Chand* v *Dasodha* *I L R 30 All 55* and *Bibi Walian* v *Banke Behari Pershad Singh* *L R 30 I A 182* followed SAYAD AMIR SAHEB v SHEKH MASLEUDIN (1916) **I L R 40 Bom 541**

17 ——— *Hindu temple—Worshipper—Right of suit of—Interest meaning of—Mere right to worship whether sufficient interest to maintain suit under s 92—Religious Endowments Act (XX of 1863) ss 14 and 15—Definition of interest therein whether applicable to s 92—Lord Romilly's Act—English decisions thereon whether proper guidance in construction of s 92—Interest nature of to maintain suit—Policy of Act and Code—Act and Code, whether in* pari materia Where a Hindu residing in Madras and another residing in Tellicherry instituted a suit in the District Court of North Malabar under s 92 of the Civil Procedure Code in respect of a Hindu temple situated in Tellicherry in North Malabar after obtaining sanction under the section and it appeared that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry and he relied *on his right as a Hindu to worship in the temple* as entitling him to institute the suit *Held* by OLDFIELD and COUTTS TROTTER *JJ* (ABDUR RAHIM *J* dissenting) that though as a Hindu he might have the right to worship in the temple he had not on that ground alone the interest required by s 92 of the Code to maintain the suit Interest under s 92 of the Code denotes an interest which is substantial and not sentimental or remote it must be a present and substantial and not a remote and fictitious or purely illusory interest The definition of interest in s 15 of the Religious Endowments Act (XX of 1863) cannot be used as a guide in interpreting the word as used in s 92 of the Code The English decisions under Lord Romilly's Act which lay down that the petitioners under the Act must have an interest which is clear or direct should be a guidance in interpreting the provisions of s 92 of the Civil Procedure Code. *Per* ABDUR RAHIM *J*—In the case of a temple or a mosque persons entitled to attend there for purposes of worship are beneficiaries and must as such be held to possess a sufficient interest to support a suit under s 92 of the Civil Procedure Code English and Indian decisions on the subject reviewed. T R RAMCHANDRA AIYAR v PARAMESWARAN UNNI (1918) **I L R 42 Mad 360**

——— s 92—*contd*

18 ——— *Religious Endowments Act (XX of 1863) s 14—Sanction for suit—Trustees of a temple—Appointment of a trustee by a Devastanam Committee in bad faith—Suit without sanction by two trustees for declaration as to invalidity of appointment and for injunction—Maintainability of the suit—Jurisdiction of Civil Courts to question appointment* Two out of three trustees of a temple instituted a suit in a Subordinate Judge's Court for a declaration that the appointment by the Devastanam Committee of one of the defendants as a trustee in the place of a deceased trustee was invalid and for an injunction to restrain him from interfering with the affairs and the property of the temple. The plaintiffs trustees did not obtain sanction either under s. 92 Civil Procedure Code or s 14 of the Religious Endowments Act (XX of 1863) The defendants pleaded *inter alia* that the suit was not maintainable for want of sanction and that the Civil Courts could not question the appointment made by the committee *Held* that the suit was not maintainable for want of a sanction under 92 Civil Procedure Code and that a *Civil Court can question an* appointment of a trustee by a Devastanam Committee if it is not made reasonably or in good faith. *Per* ABDUR RAHIM *J* s 14 of the Religious Endowments Act (XX of 1863) did not apply to the present suit, as it was not a case of misfeasance breach of trust or neglect of duty by a trustee SUBRAMANIA PILLAI v KRISHNASWAMY SOMAYAJIAR (1919) **I L R 42 Mad 668**

19 ——— *Suit by two persons one of whom had no interest under the section—Leave under the section obtained subsequently by two others having such interest—Latter joined as additional plaintiffs—Suit whether maintainable.* Where a suit was instituted under s 92 Civil Procedure Code by two plaintiffs one of whom had no interest such as that required by that section, and two other persons having the requisite interest subsequently obtained leave under the section and were joined as additional plaintiffs in the suit *Held* that the suit was maintainable under s 92 of the Code and ought to be tried on the merits *Ramayyangar* v *Krishnayyangar* (1886) *I L R 10 Mad 185* applied. JEKKAM PEDDI v SIR S SUBRAMANIA AYYAR (1920) **I L R 43 Mad 720**

——— ss 92 and 93—*Alienee from trustee—Declaration against—Appeal by alienee—Death of trustee pending appeal—Abatement—Right to sue meaning of—Alienee for consideration but not in good faith or without notice—Limitation Act (IX of 1908) s 10 effect of* Where in a suit brought by the Collector of a district under s 92 of the Code against the trustee and the alienee from him a declaration was granted to the effect that the alienation in favour of the latter was not binding on the trust and the alienee appealed making the Collector and the trustee parties to the appeal but pending appeal the trustee died and his legal representative was not brought on the record *Held* that the appeal did not abate as the trustee was not a necessary party to it *Held* also that the cause of action against the alienee (who was an alienee for consideration) arose on the date of the alienation and as the suit was brought more than six years after that date it was barred by limitation under Art 20 of the

[illegible]

I L R [illegible]

[illegible]

I L R [illegible]

[illegible]

—— s 94 [illegible] ... in order to save them ... same ... had been ... the ... Court of the ... power to ... The ... Lawrence ... [illegible]

10 C W N 937

—— s 94 [illegible] ... infant ... Defendant ... under ... O XIIII ... male ...

[illegible]

—— s 94 (d)—[illegible] ... It is ... rest ... made ... within the discretion of ... the exercise of that discretion by the circumstances of each particular ... it has been laid down as a general rule ... appointment of a Receiver will be made as a course on the application of a ... interest payable under the security is ... Where it appeared that the original ... upon ... had been paid to the mortgagees and ... other hand the mortgagees had been advance money to pay the Governm

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

———— s 92—contd

were not properly stamped *Held* that the cross objections must be stamped as on an appeal relating to the sum of Rs. 6 000 decree against 1st defendant *Held* also that the suit was not bad on the ground that the statutory notice provided for by s 31 had not been given since it was a suit relating to the property of a religious institution and not to the property of the 1st defendant *Held* further that the suit was not bad under s 32 of the Court of Wards Act as the section did not say that if the Court of Wards was not named as guardian from the commencement the suit was bad The omission might under the circumstances be treated as a mere defect or irregularity in procedure not affecting the merits of the case or the jurisdiction of the Court and be corrected under s 152 of the Civil Procedure Code 1908 *Rup Chand v Dasodha I L R 30 All 55* and *Bibi Walian v Banke Behari Pershad Singh L R 30 I A 182* followed. SAYAD AMIR SAHEB v SHEKH MASLEUDIN (1916) I L R 40 Bom 541

17 ———— *Hindu temple—Worshipper—Right of suit of—Interest meaning of—Mere right to worship whether sufficient interest to maintain suit under s 92—Religious Endowments Act (XX of 1863) ss 14 and 15—Definition of interest therein whether applicable to s 92—Lord Romilly's Act—English decisions thereon whether proper guidance in construction of s 92—Interest nature of to maintain suit—Policy of Act and Code—Act and Code whether in pari materia* Where a Hindu residing in Madras and another residing in Tellicherry instituted a suit in the District Court of North Malabar under s 92 of the Civil Procedure Code in respect of a Hindu temple situated in Tellicherry in North Malabar after obtaining sanction under the section and it appeared that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry and he relied on his right as a Hindu to worship in the temple as entitling him to institute the suit *Held* by OLDFIELD and COUTTS TROTTER JJ (ABDUR RAHIM J dissenting) that though as a Hindu he might have the right to worship in the temple he had not on that ground alone the interest required by s 92 of the Code to maintain the suit Interest under s 92 of the Code denotes an interest which is substantial and not sentimental or remote it must be a present and substantial and not a remote and fictitious or purely illusory interest The definition of interest in s 15 of the Religious Endowments Act (XX of 1863) cannot be used as a guide in interpreting the word as used in s. 92 of the Code The English decisions under Lord Romilly's Act which lay down that the petitioners under the Act must have an interest which is clear or direct should be a guidance in interpreting the provisions of s. 92 of the Civil Procedure Code. *Per* ABDUR RAHIM J —In the case of a temple or a mosque persons entitled to attend there for purposes of worship are beneficiaries and must as such be held to possess a sufficient interest to support a suit under s. 92 of the Civil Procedure Code English and Indian decisions on the subject reviewed. T I RAMCHANDRA AIYAR v PARAMESWARAN UNNI (1918) I L R 42 Mad 360

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

———— s 92—contd

18 ———— *Religious Endowments Act (XX of 1863) s 14—Sanction for suit—Trustees of a temple—Appointment of a trustee by a Devastanam Committee in bad faith—Suit without sanction by two trustees for declaration as to invalidity of appointment and for injunction—Maintainability of the suit—Jurisdiction of Civil Courts to question appointment* Two out of three trustees of a temple instituted a suit in a Subordinate Judge's Court for a declaration that the appointment by the Devastanam Committee of one of the defendants as a trustee in the place of a deceased trustee was invalid and for an injunction to restrain him from interfering with the affairs and the property of the temple The plaintiffs trustees did not obtain sanction either under s 92 Civil Procedure Code or s 14 of the Religious Endowments Act (XX of 1863) The defendants pleaded *inter alia* that the suit was not maintainable for want of sanction and that the Civil Courts could not question the appointment made by the committee *Held* that the suit was not maintainable for want of a sanction under s 92 Civil Procedure Code and that a Civil Court can question an appointment of a trustee by a Devastanam Committee if it is not made reasonably or in good faith. *Per* ABDUR RAHIM J s 14 of the Religious Endowments Act (XX of 1863) did not apply to the present suit as it was not a case of misfeasance breach of trust or neglect of duty by a trustee SUBRAMANIA PILLAI v KRISHNASWAMY SOMAYAJIAR (1919) I L R 42 Mad 668

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———— ss 92 and 93—*Alienee from trustee—Declaration against—Appeal by alienee—Death of trustee pending appeal—Abatement—Right to sue arising of—Alienee for consideration but not in good faith or without notice—Limitation Act (IX of 1908) s 10 effect of* Where in a suit brought by the Collector of a district under s 92 of the Code against the trustee and the alienee from him a declaration was granted to the effect that the alienation in favour of the latter was not binding on the trust and the alienee appealed making the Collector and the trustee parties to the appeal but pending appeal the trustee died and his legal representative was not brought on the record *Held* that the appeal did not abate as the trustee was not a necessary party to it *Held* also that the cause of action against the alienee (who was an alienee for consideration) arose on the date of the alienation and as the suit was brought more than six years after that date it was barred by limitation under Art 20 of the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*concld*

——— s 92—*concld*

Limitation Act. Time will run in favour of an alienee for consideration though he may not be an alienee in good faith Trust property in the hands of alienees for consideration and in good faith and without notice cannot be followed at all *Per* TYABJI, J —The phrase right to sue with reference to appeals means right to obtain relief PRASANNA VENKATACHELLA REDDIAR v THE COLLECTOR OF TRICHINOPOLY (1914)
I L R 38 Mad 1064

——— ss 92 115—

See PUBLIC CHARITY 14 C W N 932

——— s 92 O I r 3—

See PARTIES I L R 42 Calc 1135

——— s 92, O I r 10 (2)—*Suit by plaintiffs after obtaining consent of Advocate General—Application by Advocate General to be added as co plaintiff—Power of Court to add parties*] In a suit under section 92 Civil Procedure Code instituted by persons who had obtained the requisite consent of the Advocate General the Court can on the application of the Advocate General add him as a co plaintiff *Ambalavana Pandara Sannadhigal v The Advocate General of Madras* (1920) I L R 43 Mad 707

——— s 93 (1882 Code s 539)—

See S 92 I L R 38 Mad 1064

——— *Duties imposed upon Collectors—Duties not to be discharged by subordinat* Duties which are imposed upon Collectors by Government under s 93 of the Civil Procedure Code (Act V of 1908) are of very special nature the discharge of which often requires serious consideration and they may not be discharged by the Collector s subordinate. The conclusion that because an Assistant Collector was discharging the functions of the Collector under the provisions of s 11 of the Land Revenue Code (Bom Act V of 1879) in revenue matter he was therefore entitled to discharge his functions with reference to suits filed under s 92 of the Civil Procedure Code (Act V of 1908) is erroneous. SOBHCHAND BHIKHABHAI v CHHAGANLAL (1911) I L R 35 Bom 243

——— s 94 (C & E)—

See ATTACHMENT BEFORE JUDGMENT
I L R 46 Calc 717

See BENGAL TENANCY ACT s 69
5 Pat L J "6

——— s 94 (d)—*Receiver appointment of mortgage suit—Mortgagee s right—Court s discretion—Interest and Government revenue left in arrears if sufficient ground—Nomination of Receiver* Though the appointment of a Receiver *pendente lite* is a matter entirely within the discretion of the Court it must in the exercise of that discretion be guided by the circumstances of each particular case and it has been laid down as a general rule that the appointment of a Receiver will be made as a matter of course on the application of a mortgagee if the interest payable under the security is in arrear Where it appeared that the original mortgage debt sued upon had trebled and no interest whatever had been paid to the mortgagees and that on the other hand the mortgagees had been compelled to advance money to pay the Government revenue on the mortgaged properties in order to save them from sale for arrears and that to recover the sums so advanced they had been compelled to bring another suit *Held* that it was a fit case for the appointment of a Receiver As a general rule the right to propose a person for appointment as Receiver belongs to the party interested in obtaining the appointment and effect will be given to his nomination But if the Court appoints a Receiver at the instance of a mortgagee—the mortgagee not having without the assistance of the Court power to appoint a Receiver—then the Court exercises its discretion as to who shall be appointed Receiver and appoints the Receiver whom having regard to the interest of both mortgagee and mortgagor the Court considers the best THE EASTERN MORTGAGE AND AGENCY LIMITED v RAKEA KHATUN (1912) [illegible] N 997

——— s 94 (e)—*Tem[illegible] cation for—Order [illegible] Court to furnish s[illegible] c[illegible] ibmit made with pur[illegible]*
on the [illegible]
temporary inj[illegible]
from working
the Court pas[illegible]
to furnish secu[illegible]
submit accoun[illegible]
every week fro[illegible]
Held that the o[illegible]
r 1 of O XXXIX
was not appealable
That the order was
under cl (*e*) of s 94
ends of justice from
not be set aside in
F F CHRISTIAN ([illegible]

——— s 95 (1882

See INJUNCTION

——— s 96 (1882

See S 2

See S 47

See LAND ACQUISITION
s 54 I L

See SUCCESSION C
s 26 I L R

——— Plaintiff
an alleged account stated which
India found to be a fraudulent an
one. Plaintiffs being thus compelled
items of claim contained in a gen
it was found that each of these items
by limitation but the Defendant
consented to a decree being passed in
favour for each of the items as were
the trial Court passed a decree upon
Held—That the findings on the [illegible]
tion decree was a
[illegible]ed on s

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

—————— s 92—*contd*

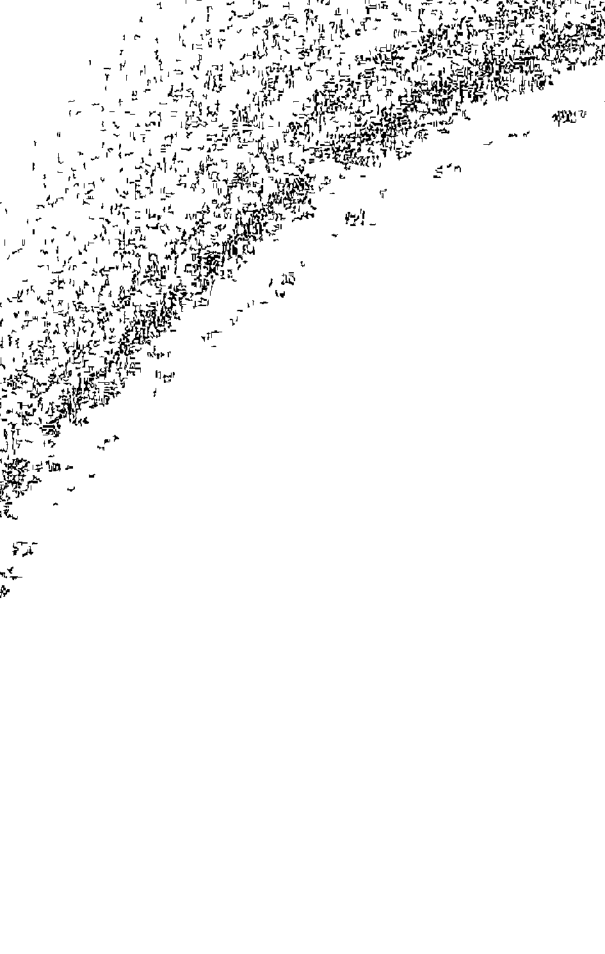
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17 —————— *Hindu temple—Worshipper—Right of suit of—Interest meaning of—Mere right to worship whether sufficient interest to maintain suit under s 92—Religious Endowments Act (XX of 1863) ss 14 and 15—Definition of interest therein whether applicable to s 92—Lord Romilly's Act—English decisions thereon whether proper guidance in construction of s 92—Interest nature of to maintain suit—Policy of Act and Code—Act and Code, whether in pari materia* Where a Hindu residing in Madras and another residing in Tellicherry instituted a suit in the District Court of North Malabar under s 92 of the Civil Procedure Code in respect of a Hindu temple situated in Tellicherry in North Malabar after obtaining sanction under the section and it appeared that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry and he relied on his right as a Hindu to worship in the temple as entitling him to institute the suit *Held* by OLDFIELD and COUTTS TROTTER JJ (ABDUR RAHIM J dissenting) that though as a Hindu he might have the right to worship in the temple he had not on that ground alone the interest required by s 92 of the Code to maintain the suit Interest under s 92 of the Code denotes an interest which is substantial and not sentimental or remote it must be a present and substantial and not a remote and fictitious or purely illusory interest The definition of interest in s 15 of the Religious Endowments Act (XX of 1863) cannot be used as a guide in interpreting the word as used in s 92 of the Code The English decisions under Lord Romilly's Act which lay down that the petition is under the Act must have an interest which is clear or direct should be a guidance in interpreting the provisions of s 92 of the Civil Procedure Code *Per* ABDUR RAHIM J —In the case of a temple or a mosque persons entitled to attend there for purposes of worship are beneficiaries and must as such be held to possess a sufficient interest to support a suit under s 92 of the Civil Procedure Code English and Indian decisions on the subject reviewed T I RAMCHANDRA AIYAR v PARAMESWARAN UNNI (1918) **I L R 42 Mad 360**

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CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

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I L R 38 Mad 1064

——— ss 92 115—

See PUBLIC CHARITY 14 C W N 932

——— s 92 O I r 3—

See PARTIES I L R 42 Calc 1135

——— s 92, O I r 10 (2)—*Suit by plaintiffs after obtaining consent of Advocate General—Application by Advocate-General to be added as co plaintiff—Power of Court to add parties*] In a suit under section 92 Civil Procedure Code instituted by persons who had obtained the requisite consent of the Advocate General the Court can on the application of the Advocate General add him as a co plaintiff *Ambalavana Pandara Sannadhigal v The Advocate General of Madras* (1920) I L R 43 Mad 707

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CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd*

——— s 94—*contd*

the mortgaged properties in order to save them from sale for arrears and that to recover the sums so advanced they had been compelled to bring another suit *Held* that it was a fit case for the appointment of a Receiver As a general rule the right to propose a person for appointment as Receiver belongs to the party interested in obtaining the appointment and effect will be given to his nomination But if the Court appoints a Receiver at the instance of a mortgagee—the mortgagee not having without the assistance of the Court power to appoint a Receiver—then the Court exercises its discretion as to who shall be appointed Receiver and appoints the Receiver whom having regard to the interest of both mortgagee and mortgagor the Court considers the best person THE EASTERN MORTGAGE AND AGENCY COMPANY LIMITED v RAKEA KHATUN (1912) 16 C W N 997

——— s 94 (e)—*Temporary injunction application for—Order by Court calling upon defendant to furnish security and submit accounts—Order if made with jurisdiction—Appeal—Revision* Where on the plaintiffs application for the issue of a temporary injunction restraining the defendant from working mica mines on the property in suit the Court passed order directing the defendant to furnish security to the extent of Rs 5 000 and submit accounts of the minerals appropriated every week from the date of the application: *Held* that the order was not one passed under r 1 of O XXXIX of the Civil Procedure Code and was not appealable under cl (r) of r 1 of O XLIII. That the order was an interlocutory order made under cl (e) of s 94 of the Code to prevent the ends of justice from being defeated and should not be set aside in revision. SITO MAHTON v F F CHRISTIAN (1912) 17 C W N 318

——— s 95 (1882 Code ss 491 and 497)—

See INJUNCTION I L R 42 Calc 550

——— s 96 (1882 Code s 540)—

See S 2 I L R 42 Mad 52

See S 47 I L R 32 All 3

See LAND ACQUISITION ACT (I OF 1894) s 54 I L R 38 Bom 337

See SUCCESSION CERTIFICATE ACT ss. 9 25 26 I L R 36 Bom 272

——— Plaintiff sued upon an alleged account stated which the Courts in India found to be a fraudulent and fabricated one. Plaintiffs being thus compelled to rely on items of claim contained in a general account it was found that each of these items was barred by limitation but the Defendant nevertheless consented to a decree being passed in Plaintiffs favour for such of the items as were proved, and the trial Court passed a decree upon that basis *Held*—That the findings on the question of limitation standing the decree was a consent decree which could not be modified on appeal. SRI SRI SRI RAMACHANDRA DEO GARU RAJAH OF KALLIKOTTA v CHAITANA SAHU 24 C W N 1055

——— s 96 cl (3) O XXIII, r 3 O XLIII, r 1 cl (m)—

R. 43 Calc. 85

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CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— s 96 and 97—*Partition*—*Appeal Passing of final decree no bar to the hearing of an appeal against the preliminary decree* When an appeal has once been filed and is pending against the preliminary decree in a suit for partition the passing of a final decree does not render the appeal nugatory The final decree depends upon the preliminary decree and if as the result of an appeal the latter is set aside the former must fall with it *Kuriya Mal v Bishambhar Nath I L R 32 All 225* overruled *Khiroda moyi Dasi v Adhar Chandra Ghose 18 C L J 321* dissented from *Muhammad Akhtar Husain Khan v Tassadduq Hussain I L R 34 All 493* and *Lakshmi v Maru Devi I L R 37 Mad 29* followed. *Abdul Jalil v Amar Chand Paul 18 C L J 223* referred to KANAHAIYA LAL v TIRBENI SAHAI (1914) I L R 36 All 532

———— ss 96 100—*Land Acquisition Act (I of 1894) s 53 54—Land—Compulsory acquisition—Compensation—Award by Assistant Judge—Appeal to the District Judge—Second appeal—Practice and procedure* Where an award is made by the Assistant Judge under the provisions of the Land Acquisition Act 1894 and there has been an appeal to the District Judge no second appeal can lie from the appellate decision MATHURBHAI NARANDAS v MANORDAS LALDAS (1911) I L R 36 Bom 360

———— s 97—

See s 2 (2) I L R 39 Bom 422
I L R 38 Bom 392

See APPEAL I L R 42 Calc 914

See PARTITION I L R 34 All 493

1 ———— *Preliminary decree—Appeal—Status of agriculturists—The question if not appealed from as preliminary decree cannot be agitated in appeal on merits—Party's duty to ask Court to draw up decree—Practice and procedure* The plaintiff brought a suit to redeem mortgage according to the provisions of the Dekkhan Agriculturists Relief Act 1879 A preliminary issue was raised whether the plaintiffs were agriculturists and decided against the plaintiffs The Court ordered the plaintiffs to pay the requisite court fee within a week's time which not having been done the suit was dismissed In the appeal which the plaintiffs preferred against the final decree they sought to question the finding on the preliminary issue *Held* that the preliminary decree having become extinct by reason of the final decree and the plaintiffs not having exercised their right of presenting an appeal from that decree it was not open to them in the present appeal to challenge finding on the preliminary issue *Held* further that though the statutory obligation lay on the Court [illegible] a preliminary decree to entitle the plaintiff to appeal yet it was equally the duty of the plaintiff to ask the Court to draw up that decree in order to enable them to present an appeal against it GOVIND HARICHAND v VITHAL GOPAL (1912) I L R 36 Bom 536

2 ———— *Preliminary decree—Appeal—Finding on preliminary issue but no decree drawn up—Appeal not necessary—Duty of [illegible]—Practice and procedure* In a suit [illegible] a preliminary issue was raised and [illegible] the plaintiff was an agriculturist [illegible] taken under the provisions of the Dekkhan Agriculturists Relief Act (XVII of 1879) and a redemption decree was passed On appeal from the final decree the question as to the status of the plaintiff was raised and the Court of Appeal decided that the plaintiff was not an agriculturist and varied the decree by increasing the amount of redemption On second appeal it was contended that the lower Appellate Court was wrong in going into the preliminary point at the stage it did *Held* that no appeal was necessary against the preliminary finding and that unless there was a preliminary decree no appeal could be under the provisions of s 97 of the Civil Procedure Code (Act V of 1908) *Bai Divali v Shah Vishnav Manordas I L R 33 Bom. 182* followed *Govind Ramchandra v Vithal Gopal I L R 36 Bom 536* explained. SAKHARAM VISHRAM v SADASHIV BALSHET (1913) I L R 37 Bom 480

3 ———— *Preliminary decree—Appeal—Findings on preliminary issues—No Appeal lies from findings—Decree drawing up of—Duty to draw up decree is of the Court—Civil Circulars (1912) cl 159* In a suit for accounts the first Court recorded findings on certain preliminary issues and ordered accounts to be taken on the basis of those findings No preliminary decree was drawn up by the Court and none was asked for by the plaintiff's pleader The accounts were next taken by a commissioner and a decree was passed in accordance with his report dismissing the suit The plaintiff appealed against the final decree and urged objections against finding on preliminary issues. *Held* that the plaintiff was not barred of his right to urge objections against the findings on preliminary issues for under the Civil Procedure Code (Act V of 1908) s 97 his right to appeal arose only when there was a decree based on those findings That the practice in the mofussil Courts was in accordance with the provisions of the Civil Procedure Code and Civil Circulars cl. 159 [illegible] that the Court was to draw up the decree and that the pleaders if any in the case were to see that it was in accordance with the judgment There is no provision requiring a party or his pleader to move the Court to draw up a decree and mere omission to ask the Court to do what which it is the duty of the Court to do on its own motion cannot affect his right to appeal KALURAM PIRCHAND v GANGARAM SAKHARAM (1913) I L R 38 Bom 331

4 ———— *Preliminary decree—Appeal—Decision that suit not barred as caste question* A decision in favour of the plaintiff upon a preliminary defence that the matters in dispute are caste questions outside the jurisdiction of Civil Courts does not amount to a preliminary decree attracting the provisions of s 97 of the Civil Procedure Code (Act V of 1908) *Siddanath Dhonddev v Ganesh Govind I L R 37 Bom 60* overruled. *Narayan Balkrishna v Gopal Jiv Ghadi I L R 39 Bom 39* dissented from CHANMALSWAMI v GANGADHARAPPA (1914) I L R 39 Bom 339

5 ———— *Preliminary decree—Decision as to res judicata* A decision that a matter is not *res judicata* is not a preliminary decree *Chanmal v [illegible] v Gangadharappa I L R 39 Bom 339* followed DHARMA BIN SHIDDAPPA v BHAMAGAVDA (1915) I L R 39 Bom 421

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

——— s 97—concld

6 ——— *Partnership account suit for —Preliminary decree declaring partnership dissolved and directing inquiries and accounts —Part ordering inquiries if to be separated from decree and treated as order—Validity of order if may be questioned on appeal from final decree* In a suit to have partnership accounts taken the Trial Judge by a formal adjudication dated 30th June 1905 (i) declared that the partnership was dissolved as from 1st July 1907 and ordered and decreed, (ii) that inquiry be made by the referee as to who were the partners and (iii) that the referee should take an account of the dealings of the parties with the assets of the partnership business No appeal was preferred from this adjudication and inquiry was made and account taken The decision of the referee upon the inquiry which was adverse to the appellant was confirmed by the Judge In an appeal against the final decree the appellant took exception to the inquiry ordered by the Judge (as to who were the partners) as erroneous *Held* that the adjudication by the Trial Judge in which the inquiry was ordered was a preliminary decree and no having been appealed against could not under s 97 of the Civil Procedure Code be questioned on the final appeal The adjudication did not cease to be a decree because a subordinate part of it if correctly made might have been made separately as an order The Code makes no provision for something which is neither a decree nor an order nor anything which is both neither does it provide that one adjudication by the Court can be resolved into diverse elements some of which are decrees and some orders AHMED MUSAJI SALEJI *v* HASHIM EBRAHIM SALEJI (1915) 19 C W N 449

——— ss 97 and 2—*Preliminary decree —Preliminary issue whether a party is an agriculturist—Finding on the issue not an adjudication which can be embodied in a decree—Practice—Procedure* A finding on a preliminary issue whether a party is an agriculturist is not by itself an adjudication which can be embodied in a preliminary decree within the meaning of s 97 of the Civil Procedure Code 1908 *Per* MACLEOD C J —It is only when the finding on an issue is sufficient for the decision of a suit or a part of the suit that the Court may pronounce judgment When the finding is not sufficient for the decision the suit must be postponed for further hearing Accordingly the stage of the case at which judgment is pronounced will determine whether the decree is preliminary or final *Per* FAWCETT J —It is an abuse of the procedure intended by the Code for a Court to draw up a preliminary decree directing accounts to be taken under s 13 of the Dekkhan Agriculturists Relief Act before it had even decided whether the mortgage sued upon was proved *Municipal Committee of Nasik City v The Collector of Nasik (1915) 39 Bom 422* considered DATTATRAYA PURSHOTTAM *v* RADHABAI (1920) I L R 45 Bom 627

——— s 97 O XXXIV rr 1 5—

See TRANSFER OF PROPERTY ACT (IV OF 1882) ss. 88 89
I L R 40 Bom 321

——— s 98 (1882 Code s 575)—

See INCUMBRANCE I L R 43 Calc 558

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

——— s 98—contd

See LETTERS PATENT CL 15
I L R 41 Mad 943

See MINOR I L R 35 All 437

See SALE FOR ARREARS OF REVENUE
I L R 39 Calc 303

1 ——— *High Court Judges difference between—Practice as to reference to third judge change of—Case to be conditionally decided and point only to be referred* JENKINS C J The intention of s 98 of the Civil Procedure Code is that the Judges hearing the appeal should come to a complete decision with the reservation on the point of law on which they differ and they should by their judgment make it clear that if the point of law is decided in one way it will have a certain final result and if it is decided in another way it will have another and a different final result GAUHAR ALI *v* SAMIRUDDIN SIKH (1913)
18 C W N 33

2 ——— *Second appeal from the mofussil—Difference of opinion—Procedure—Letters Patent 1865 cl 36* In second appeals from the mofussil on the Appellate Side of the High Court where Judges differ the procedure is governed by s. 98 of the Civil Procedure Code 1908 and not by cl. 36 of the Letters Patent 1865 BHUTA *v* LAKADU DHANSING (1918)
I L R 43 Bom 433

3 ——— *Bombay High Court —Original Civil Jurisdiction—Appeal—Disagreement of Judges—Procedure* S 36 of the Letters Patent of the Bombay High Court which provides that if the Judges composing a division bench are equally divided in opinion the opinion of the senior Judge is to prevail is not affected by s 98 sub s 2 of the Code of Civil Procedure 1908 which provides a different procedure in these circumstances BHAIDAS SHIVDAS *v* BAI GULAB
I L R 45 Bom 718

——— s 99 (1882 Code 578)—

See HINDU LAW—RELIGIOUS ENDOWMENT I L R 42 Calc 536

——— *Misjoinder includes non joinder—What parties necessary in suit against karnavan of tarwad to enforce contract of previous karnavan—When acts of karnavan impeachable* In a suit to enforce against the karnavan of a tarwad in his capacity as such karnavan a contract made by a previous karnavan on behalf of the tarwad it is not necessary to add the other members of the tarwad as parties. Misjoinder in s 99 of the Civil Procedure Code of 1908 includes non joinder A contract made by the karnavan of a tarwad if prudent and fair at the time it was made is binding on his successor in office. YAKKANATH EACHARA UNNI VALIA KAIMAL *v* MANAKKAT VASUNI ELAYA KAIMAL (1909) I L R 33 Mad. 436

——— In a rent suit if a minor tenant s mother refuses to act as guardian the proper course is to get an officer of the Court appointed to represent him. The defect be cured under s. 99 for each tenant is not for the entire rent and cannot be sued BARENDRA NATH BOSE *v* AGHORE NATH

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— ss 99 100 108—

See JURISDICTION I L R 45 Calc 926

——— ss 99 107 (1) (b) O XLI r 23—

See REMAND I L R 41 Calc 108

——— ss 99 107 Sch II—*Arbitration—Appellate Court powers of—Reference once made unaffected by death of party* An application for a reference to arbitration under Sch II to the Code of Civil Procedure 1908 may be made to an Appellate Court as well as to a Court of original jurisdiction and the Court is bound to accept and act upon such application if made by all the parties interested in the appeal When an application for arbitration has been made it will not lapse by reason of the death of one of the parties but if the right to sue survives the arbitration must be proceeded with after substitution of the representatives of the deceased party *Perumalla Setyanarayana v Perumalla Venkata Pargayya I L R 27 Mad 112* referred to DUTTA v KHEDU (1911)

I L R 33 All 645

——— s 99 and O I r 3—*Suit by reversioners for the usual declaration in respect of a sale and previous mortgages of land—Misjoinder of parties—remand by Lower Appellate Court for a fresh decision* The plaintiffs minor sons of G through their maternal uncle brought the present suit for the usual declaration in respect of a sale and previous mortgages of land effected by their father and his two brothers defendants 1 3 in favour of the vendee defendant 4 and the previous mortgagees defendants 5 10 The first Court held that the suit was bad for misjoinder of parties and returned the plaint to the plaintiffs for amendment The plaint was accordingly amended by striking out the mortgages and the suit was thereafter dismissed it being found that necessity had been proved for the bulk of the sale price On appeal the District Judge held that the suit was not bad for misjoinder of parties and remanded the case for a fresh decision after impleading the previous mortgagees From this order the vendee appealed to this Court *Held* that as common questions both of law and fact arose in the case there was no misjoinder of parties—*vide* Order I rule 3 of the Code of Civil Procedure Mussammat *Gopal Devi v Jai Narain (1 P R 1905)* not followed *Rup Narain v Mussammat Gopal Devi (93 P P 1909 P C) Protabati Debi v Rameswar Mandal (6 Indian Cases 248)* and *Rameswar Mandal v Protabati Debi (25 Indian Cases 94)* followed. *Held also* that the order of remand by the District Judge was not opposed to the provisions of s 99 of the Code as the order of the first Court vitally affected the merits of the case RALLIA RAM v MULK RAJ I L R 1 Lah 295

——— s 100 (1881 Code s 584)—

See S 4 I L R 38 Bom 340

See S 96 I L R 36 Bom 360

See CHOTA NAGPUR TENANCY ACT 1908

5 Pat L J 697

See CONSTRUCTION OF DOCUMENTS

5 Pat L J 251

See CONTRACT I L R 42 Bom 344

See JURISDICTION L L R 46 I A 140

I L R 45 Calc 926

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 100—*contd*

See MAHOMMEDAN LAW PRE EMPTION

I L R 44 Calc 47

See SECOND APPEAL.

I L R 39 Calc 241

——— *Second appeal—Finding of fact—Land tenures in Kumaun—Custom—Pasture land—Grant of pasture land disputed* According to the special law relating to land tenures in Kumaun land which was not allotted to villagers for purposes of cultivation was held to belong to the Government and might be granted to individual villagers for cultivation or the planting of tree But if such land were *gauchar* or pasture land a grant could only be made if it was not inconsistent with the general wishes and well being of the village community and it was open to any villager to bring a suit to dispute the validity of such grant *Held* on such a suit being filed, that the finding of the Appellate Court that the grant in question was inconsistent with the general wishes and well being of the community was a finding of fact and could not be disturbed in second appeal GITA RAM v KIRPA RAM (1914)

I L R 36 All 256

——— *Fact finding of based upon evidence assumed to exist if contrary to law—Second appeal* Where the lower Appellate Court not merely misunderstood the effect of a witness s deposition but referred to evidence which did not exist at all and based its decision principally if not entirely upon it the decision though on a question of fact would be contrary to law and liable to be set aside on second appeal. *Bibee Ameerun v Shaik Cherag Ali 24 W R 343* relied on *Durga Chaudhurani v Jewahir Singh Chaudhury L P 17 I A 122 I L R 18 Calc 23 Ram Rattan Sukul v Nandu L R 19 I A 1 I L R 19 Calc 249* referred to BHUPENDRA KUMAR CHUCKERBUTTY v PEARY MOHAN PAL (1912) 17 C W N 37

——— *Finding of fraud without any evidence—Power in second appeal to decide case on issue not expressly framed on the evidence as it stood and reverse decision of lower Appellate Court* The Plaintiff had executed a sale deed in respect of immovable property in favour of the Defendant on the 26th June 1909 which was a Saturday and the deed contained a stipulation that the consideration money was to be paid in the presence of the registration officer Under a prior agreement the last day for payment of the purchase money was the 27th June 1909 The deed was presented by the vendor for registration and though Defendant s agent was present at the registration office with the money it was not paid immediately as Defendant had not yet come and when the latter came the registration officer had left earlier than usual owing to indisposition and the Plaintiff also had left the office The Defendant offered to pay the money at the registration office on Monday the 28th June 1909 the 27th being Sunday but the Plaintiff refused to accept it In a suit by Plaintiff for cancellation of the sale deed no issue was framed as to whether the Defendant was ready and willing on the 26th June to pay the purchase money and was prevented from doing so by the action of the Plaintiff but both the trial Court and the first Court of Appeal held that no new agreement had been come to

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 100—*concld*

between the parties substituting the 28th June for the 27th as the date of completion of the sale and they al o held that the Defendant had deli berately and fraudulently acted as he did on the 26th June in order not to have to pay the purchase money by the stipulated date *Held*—That there was in point of law no evidence to support the finding of fraud and the Judicial Commis ioner in second appeal was competent upon the evidence and in the ab ence of an express issue to find that the Defendant was ready and willing to pay the purchase money on the 26th June but was prevented from doing so by the action of the Plaintiff and to rever e the decisions of the lower Appellate Court on that ground DAM USA v ABDUL SAMAD 24 C W N 81

——— *Custom or usage having the force of law—Extent of juri diction of High Court in second appeal in deciding custom or usage—Mirasidar in Chingleput di trict right to thundu taram by custom from Government ryots—Onus of proving custom on mirasidar—Civil Procedure Code s 103—Power of High Court to decide facts under —Admissions of a party binding nature of unless explained—Provincial Small Cause Courts Act (IX of 1887) sch II art 13—Thunduvaram dues within —Burden of proving abandonment of customary right—Non exercise of right for a long time effect of Held* by the Full Bench The existence of a *custom or u age having the force of law* is a mixed que tion of fact and law S 100 Civil Procedure Code precludes the High Court from interfering in second appeal with the findings arrived at by the lower Court of actual facts from which the existence of the custom has been inferred the inference as to the existence and the decision as to the validity of the custom being matters of law revisable by the High Court in second appeal *Kalarla Abbayya v Raja Venkata Papayya Rao I L R 29 Mad 24* overruled *Kailas v Padma kisor 25 C L J 613* and *Pankajammal v The Secretary of State for India I L R 40 Mad 1108* followed. *Palaniappa Chetty v Sreemath Devasi kamony Pandarasannadhi I L R 40 Mad 709* referred to *Held* further (a) that in a suit by an *ekoboga mirasidar* in a village in the Chingleput district for certain customary dues called *thundu varam* from the non mirasidar Government ryots in the village the onus of proving the custom was on the mira idar (b) that on the facts found he had established the cu tom (c) that express admis sions of a party to a suit are strong evidence against him unless and until explained and (d) that the onus of proving discontinuance of the custom was on the ryot *Per* SADASIVA AYYAR J The High Court can under s 103 Civil Procedure Code decide in second appeal the genuineness or otherwise of the material documents in the case in the absence of a finding by the lower Appellate Court *Held* by the Divi ion Bench (SADASIVA AYYAR and NAPIER JJ) Mirasi right is an interest in the village lands though not a proprietary intere t therein The *thunduvaram* payable to the mirasidar by a ryot according to custom is not in the nature of rent but falls under dues within art. 13 of the second schedule to the Provincial Small Cause Courts Act (IX of 1887) and in a suit for such dues a second appeal lies to the High Court KUMARAPPA REDDI v MANAVALA GOUNDAN (1917) I L R 41 Mad. 374

CIVIL PROCEDURE CODE (ACT V OF 190 —*contd*

——— s 100 O VI r 6—

See SPECIFIC RELIEF ACT (I OF 18 7 s 39 I L R 39 Bom 1

——— s 100 O XLV r 27—*Refusal admit additional evidence in appeal—Discretion Court—Appeal* A refusal in the exercise of di cretion to admit additional evidence under O XLI r 27 of the Code of Civil Procedure w not afford a ground for econd appeal. *Pa Piari v Kallu I L R 23 All 191* followe DURGA PRASAD v JAI NARAIN (1911) I L R 33 All 3

——— s 101 (1882 Code s 585)—

——— s 102 (1882 Code s 586)—

See HOMESTEAD LAND I L R 42 Calc 6

See POSSESSORY SUIT I L R 45 Calc 5

See PROVINCIAL SMALL CAUSE COUR ACT (IX OF 1887) SCH II ART 8 I L R 41 Bom 3

——— *Second Appeal—Su of a nature cogni able by a Small Cause Co meaning of—Suit by a landholder for rent und the Madras Estates Land Act (I of 1908) ss and 189—Second Appeal in such suits wheth competent—Provincial Small Causes Courts (IX of 1887) s 15* A suit by a landholder f rent under the Madras Estates Land Act is cogni able only by a Revenue and not by a Civil Court and such a suit is therefore not of a *nature* cogni able by a Court of Small Causes within the term of s 102 Civil Procedure Code and consequentl a Second Appeal in such a suit is not barred b that section *Soundaram Ayyar v Sennia Naicke (1900) I L R 23 Mad 547 (F B)* applie ZAMINDAR OF TARLA v KANDA BARIKI ADU (19 I L R 44 Mad 6

——— s 103—

See ONUS OF PROOF I L R 43 Mad 56

See SECOND APPEAL. I L R 47 Calc 10

——— s 104 (1882 Code s 588)—

See APPEAL I L R 38 Calc 3

See EXECUTION OF DECREE. I L R 42 Calc 44

See S 2 (2) I L R 35 All 58

See S 42 19 C W N 10

See S 47 I L R 29 Mad. 5 I L R 32 All I L R 1 Lah 7 I L R 44 Bom 47

See S 89 I L R 43 All. 10

——— sub s 1 (c)—*Arbitration award ord modifying—Appeal against how far lies* Cl. (c) sub s. (1) of s. 104 of the Civil Procedure Co does not confer an unrestricted right of appea in other words, when an order has been made which an award has been modified or correcte In an appeal preferred against that order t validity of the whole award cannot be called question, the true effect of the clause being to allo an appeal against the in so far as

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 104— contd

modifies or corrects the award RAJBUNS SAHAY v SOORJEE LAL (1911) 17 C W N 617

——— Sub-s 1 (d)—

See SCH II PAR 17

I L R 36 Mad 353

——— sub s 1 (f)—

See APPEAL I L R 45 Calc 502

See ARBITRATION ACT 1899 ss 11 AND 20 I L R 43 All 248

s 4 I L R 43 All 348

——— *Arbitration without intervention of Court—Award—Order filing award, if appealable after decree in accordance with award.* An appeal lies against an order filing an award made upon an arbitration without the intervention of the Court even after a decree is passed upon the award. The decree based upon the award is no doubt final if it is in accordance with the award, but the validity of the decree depends upon the validity of the order directing the award to be filed and if the latter is set aside the decree must be declared inoperative KHETTRA NATH GANGOPADHYAY v USHABALA DASI (1914)

18 C W N 331

——— *Arbitration—Application to file an award in an arbitration made without the intervention of the Court—Appeal—Duties of arbitrator* *Held* that an appeal lies from an order directing the filing of an award in an arbitration made without the intervention of the Court *Held* further that in an arbitration proceeding if the parties come to terms on a certain point it does not absolve the arbitrator from passing judgment on that point incorporating the terms of the compromise in the award HARI KUNWAR v LAKHMI RAM JAIN (1916) I L R 38 All 380

——— ss 104 117, O IX rr 8 9—

See APPEAL I L R 43 Calc 857

——— *Arbitration—Order directing award to be filed—Appeal—Misconduct of arbitrator* An appeal lies against an order filing or refusing to file an award in an arbitration made without the intervention of court and the bare fact that a decree has been drawn up after the passing of the order does not take away the right of appeal against the order *Saudamini Ghosh* v *Gopal Chandra Ghosh 10 C W N, 949* and *Hari Kunwar* v *Lakhmi Ram Jain I L R 38 All 380* referred to An arbitrator cannot decide the case submitted to him on his own knowledge and without taking evidence unless the terms of the reference especially permit him to do so LACHMI NARAIN v SHEO NATH PANDE

I L R 42 All 185

——— ss 10 and 141 O IX rr 4 and 9 and O XLII r 1 (c)—

See RESTORATION OF SUIT

2 Pat. L J. 720

——— s 104 O XXI, rr 90 92 O XLIII, r 1 (j)—*Execution of decree—Sale in execution—Application to set aside sale rejected—Appeal.* Under O XXI r 90 of the Code of Civil Procedure 1908 an application may be made to set aside a sale held in execution of a decree upon the ground, amongst others of fraud in the publication or conduct of the sale and if this application is refused under r 92, an appeal lies under O XLIII r 1 cl. (j) but no second appeal is allowed from the order of the Appellate Court SHEO PRASAD SINGH v PREMNA KUNWAR (1917)

I L R 40 All 122

——— s 104 cl (2), O XLIII, r 1 (a)—

——— *Order returning a plaint for presentation to proper Court—Appeal—Case remanded to Court of first instance—Appeal from order of remand inadmissible.* A Munsif returned for presentation to the proper Court a plaint filed before him Then plaintiff appealed against this order to the District Judge who transferred the appeal to a Subordinate Judge who in turn remanded the case to the Munsif for trial on the merits *Held* that no appeal would lie from the appellate order of remand. NAUBAT SINGH v BALDEO SINGH (1911) I L R 33 All 473

——— *Held* that no appeal will be under s 10 of the Letters Patent from an order of a Single Judge of the High Court dismissing an appeal from an order of an execution Court under O XXI r 90 refusing to set aside a sale PIARI LAL v MADAN LAL

I L R 39 All 191

——— *Order of returning a plaint for presentation in the proper court—Appeal* *Held* that an appeal will lie from the order of an appellate court returning a plaint to be presented in the proper court *Dalip Singh* v *Kundan Singh I L R 36 All 58* followed. NAND KISHORE v ABDUR RAHMAN

I L R 42 All 74

——— s 104, O XLIII, r 1 O XXI r 90 —*Letters Patent s 10—Appeal from an order of a single Judge dismissing an appeal from an order refusing to set aside a sale* *Held* that no appeal will lie under s 10 of the Letters Patent from an order of a single Judge of the High Court dismissing an appeal from an order of an execution Court under O XXI r 90 of the Civil Procedure Code refusing to set aside a sale *Nasimullah Khan* v *Ishan ullah Khan I L R 11 All 236* followed. PIARI LAL v MADAN LAL (1916)

I L R 39 All 191

——— s 104 O XLIII, r 10 (a)—*Order of Appellate Court returning plaint for presentation to proper Court—Appeal—Suits Valuation Act (VII of 1887) s 11* *Held* that an appeal lies under the Code of Civil Procedure 1908 as it did under the former Code from an order returning a plaint to be presented to the Court *Wahidullah* v *Kanhaya Lal I L R 25 All 174* followed. Where however such an order is to be made by an Appellate Court, it is the duty of such Court first to consider whether the over valuation or under valuation of the suit has prejudicially affected its disposal on the merits and thereafter to take action in the manner prescribed by s. 11 of the Suits Valuation Act, 1887 DALIP SINGH v KUNDAN SINGH (1913) I L R 36 All 58

——— s 104, and Sch II, r 11—*Arbitration—Statement of special case for opinion of Court—Appeal from order of Court—Indian Arbitration Act*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— 104—*concld*

(*IX of 1899*) *s 10* In a suit filed for partition of joint family property the parties agreed to refer the matter to arbitration, and a consent order of reference was taken A similar agreement referred to the same arbitrators questions as to the partition of such immoveable property as was outside the jurisdiction of the Court in the suit The arbitrators disagreed on certain points but instead of referring their differences (as the agreement of reference authorised them to do) to an umpire they submitted their own opinions in the form of a special case for the opinion of the Court In doing so they purported to act under the provisions of the Civil Procedure Code (Act V of 1908) Sch II r 11 and of the Indian Arbitration Act (IX of 1899) s 10 (*b*) The matter was decided by the Chamber Judge and an appeal was preferred against the decision. *Held* that no appeal lay Inasmuch as the special case was in no sense an award it did not come within the Civil Procedure Code (Act V of 1908) Sch II r 11 but in so far as it related to the agreement which was not the subject of the Court's order it fell under the Indian Arbitration Act (IX of 1899) s 10 (*b*) PURSHOTUMDAS RAMGOPAL *v* RAMGOPAL HIRALAL (1910) I L R 35 Bom 130

——— s 105 (1882 Code s 591)—

See APPEAL 15 C W N 830

See APPEAL TO PRIVY COUNCIL. I L R 33 Mad 509

1 ——— *Arbitration* —*Appeal* *Held* that an order of a court setting aside the award of an arbitrator and deciding that the case shall be tried by the Court is an order affecting the decision of the case within the meaning of s 105 of the Code of Civil Procedure and is therefore liable to be challenged in appeal against the decree *Ganga Prasad* v *Kura I L R 28 All 408 Kalyan Das* v *Pyare Lal 4 All L J R 206* dissented from *Shyama Charan Pramanik* v *Prohlad Darwan 8 C W N 390* referred to *Kanak Chand* v *Ram Narain I L R 2 All 18 Ram Jiwan* v *Nawal Singh 5 All L J R 611 Damodar Trimbak Dharap* v *Raghu Nath Hari I L R 26 Bom 551 Achuthayya* v *Thimmayya I L R 31 Mad 315 Mathooranath Tewaree* v *Brindaban Tewaree 14 W R 327* followed. RAM AUTAR TEWARI *v* DEOKI TEWARI (1915) I L R 37 All 403

2 ——— *Order by Court returning plaint for amendment—not appealable under present Code—whether it may be challenged in appeal from the decree notwithstanding that it has been complied with* Plaintiff sued ¼th share by partition of certain portions of premises. The Court on 30th April 1917 ordered him to amend his plaint so as to include the whole of the premises under the penalty in case of default of having his suit dismissed The plaintiff amended his plaint accordingly He subsequently appealed from the decree of the Court to the District Judge and in his grounds of appeal challenged the order of 30th April 1917 The District Judge held that by complying with the order and amending the plaint as ordered the plaintiff had divested himself of the right to dispute any part of the premises being included in the property to be partitioned. *Held* that under s. 105 of the Code of Civil Procedure the plaintiff could challenge the correctness of the order of 30th April 1917 in his appeal from the decree notwithstanding that he had complied with the order and that he could have allowed his suit to be rejected and appealed from the rejection SHAH JAHAN *v* INAYAT SHAH I L R 1 Lah 54

——— ss 105 108 109 O XLI s 23—*Remand—Appeal—Privy Council* *Held* that an order remanding a case to the lower Appellate Court passed by the High Court under O XLI r 23 of the Code of Civil Procedure 1908 is not appealable to His Majesty in Council *Forbes* v *Ameeroonnissa Begum 10 Moo I A 315 Mahant Ishwargar Budhgar* v *Caudasama Amarsang I L R 8 Bom 518 Saiyid Muzhar Hossein* v *Musammat Bodha Bibi I L R 17 All 112* and *Radha Kishan* v *The Collector of Jaunpur I L R 23 All 220* referred to AHMAD HUSAIN *v* GOBIND KRISHNA NARAIN (1911) I L R 33 All 391

——— s 105 115 Sch II Art 15—*Arbitration in a suit—Award—Objection as to validity of order of reference—Absence of fresh written statement by defendant who alleged minority but was found to be of full age—Award set aside—Revision* The defendant to a suit on a contract pleaded infancy and filed a written statement through a person who professed to act as his guardian Issues were framed amongst them one as to the age of the defendant This was tried first and it was found that the defendant was not an infant The defendant did not put in a fresh written statement as the result of this finding but accepted the statement originally filed on his behalf At this stage the parties agreed to refer the suit to arbitration and the issues which had been framed were by order of the Court referred to an arbitrator who in due course submitted his award This was in favour of the defendant The plaintiff filed objections and took exception *inter alia* to the absence of a written statement filed by the defendant after he had been found to be of full age The court accepted this plea and on this ground alone set aside the order of reference and the award *Held* on application in revision by the defendant that the application would lie The court below had in this case no jurisdiction to reverse the order of reference which in substance it had done and in setting aside the award on the sole ground of some supposed defect in the order of reference which was irrelevant it had acted with material irregularity *Ghulam Khan* v *Muhammad Hassan I L R 29 Calc 167* and *Lutawan* v *Lachiya I L R 36 All 69* referred to PIGGOTT J while agreeing that the order complained of was unsustainable expressed a doubt as to whether the proper course for the defendant was not to wait for the final decree of the trial court and to challenge the order setting aside the award in his memorandum of appeal, in the event of the suit ending in a decree against him. KANHAIYA LAL *v* JAGANNATH PRASAD HANUMAN PRASAD I L R 43 All 305

——— s 105 (2) O XLI rr 23 and 25—*Procedure—Appeal—Distinction between an order under r 23 and an order under r 25* Where in the course of an appeal a Judge or a Bench has made an order under r 25 of the Code of Civil Procedure issues for trial by the lower court ... Judge or Bench

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 110—*contd*

Court agreeing with this contention declined to exercise its discretion under s 149 and dismissed the appeals The appellant then presented the petition for leave to appeal against the judgment and decree of the High Court aforesaid to His Majesty in Council *Held* that the judgment of the High Court dismissing the appeals must be considered as one affirming the decision of the Court below *Krishnasami v Ramasami* (23 *Mad L J 219* and *Ram Karan v Madhukar Prasad 29 Indian Cases 469* followed *Held also* that the petition did not involve any substantial question of law *Krishnasami v Ramasami 23 Mad L J 219 Muhammad Abdul Ghafur Khan v Secretary of State I L R 36 All 325* and *Bhagat Singh v Jai Ram 22 P R 1915* followed. MUSSAMMAT SATTO v AMAR SINGH

I L R 1 Lah 220

——— s 110 O XLI r 5— *Substantial question of law —Stay of execution—Appellate Court —Jurisdiction* *Held* (1) that an appellate court cannot order a stay of sale unless it has seisin of the case in which the sale was ordered to take place and (2) that the question whether or not an appellate court could order a stay of sale without having seisin of the case in which the sale was ordered to take place was not a *substantial* question of law within the meaning of s 110 of the Code of Civil Procedure *Purshottam Saran v Hargu Lal I L R 43 All 128* followed PURSHOTTAM SARAN v HARGU LAL

I L R 43 All 513

——— s 110 O XLV r 4—*Appeal to His Majesty in Council—Valuation—Two suits between same parties—Consolidation—Separate judgment in original court but appeals decided together by High Court on the evidence in both suits—Certificate granted* Two suits between the same parties in which the same question was raised were decided by separate judgments in the original court There were two appeals in the High Court which were heard together and by consent of both parties the evidence in the two suits was considered as a whole In the result the decree of the lower court was set aside Leave to appeal to the Privy Council was granted in one of the suits As to the other suit it was held that although the valuation of that suit and of the appeal to the Privy Council therefrom was below Rs 10 000 and there was no question of law involved it was a proper case to which the procedure sanctioned by O XLV r 4 should be applied and leave granted BHAGWAN SINGH v BHAWANI DAS BHAGWAN DAS

I L R 43 All 223

——— s 110 and O XLV rr 4 7 and 8—*Appeal to His Majesty in Council—Consolidation of appeal —failure of one appellant to furnish security effect of* The applicant referred to in r 7 of O XLV of the Code of Civil Procedure 1908 is the appellant Where there are two or more persons whose appeals must be consolidated before the conditions necessary for granting the application for leave to appeal are fulfilled the security required by r 7 is the whole security and not a portion only of that which the appellants together have to furnish. Where two appeals to His Majesty in Council were allowed to be consolidated under r 4 of O XLV and a certificate was granted that the consolidated appeal complied with the provision of s 110 and subsequently the appeal of one of the appellants was stayed for failure to furnish security *Held* that since the remaining appeal did not fulfil the requirements of s 110 the appeal could not proceed MUSSAMMAT BIBI NAJI ZOHRA v BAIJNATH GOENKA BAHADUR 4 Pat L J 193

——— s 110 O XLV r 5—*Leave to appeal to the Privy Council—Certificate—Second appeal—Substantial point of law—Dispute as to the value of property involved—Finding of the trial Judge acquiesced in—Finding cannot be re opened for the purposes of a certificate* In an application for leave to appeal to the Judicial Committee of the Privy Council in a second appeal the applicant contended that the appeal involved a substantial point of law and asked for a remand to the lower Court for enquiry as to the amount or value of the subject matter under O XLV r 5 of the Civil Procedure Code 1908 on the ground that a dispute between the parties had arisen on the point The trial Judge had on enquiry found that the value of the property was Rs 4 000 and this finding was acquiesced in by the applicant till the disposal of the second appeal *Held* that the applicant was concluded by the result of the enquiry already made and he could not be allowed to re open a finding as to the value of the property in order to provide him with the means of taking the litigation to the Privy Council ANANT NARAYAN v RAMCHANDRA GANGADHAR (1918)

I L R 42 Bom 609

——— s 111 (1882 Code s 597)—

See UNDER S 109—112

3 Pat L J 179

——— ss 112 (1882 Code s 616)—

See HIGH COURT JURISDICTION OF

I L R 40 Calc 955

——— s 113 (1882 Code s 617)—

See REFERENCE

See SPECIFIC PERFORMANCE

I L R 43 Calc 59

——— 114 (1882 Code s 623)—

See DECREE I L R 40 All 579

See REVIEW

——— *Review —New evidence what is—Review granted on inadmissible judgments—O XLI r 27—Additional evidence in the Appellate Court—No discretion where no jurisdiction* The plaintiff was a co sharer landlord of a mauza contiguous to which a *chur* was thrown up The principal defendants claimed that the *chur* was a reformation *in situ* of their estate and the other defendants were the tenants of the *chur* One *S* also claimed a portion of the *chur* The plaintiff brought a suit for rent against the tenant defendant The principal defendants also sued them for rent and the tenants deposited the amount claimed under s 149 Bengal Tenancy Act The plaintiff then brought a suit against the principal defendants under cl (3) of the section The plaintiff s suit for rent was decreed by the Court of first instance Judgment was next delivered in the suit brought by the principal defendants as also in the suit under s 149 The decree in the plaintiff's suit for rent was then affirmed in appeal by the District Judge After this judgment was

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 114—*contd*

delivered in a suit for rent brought by *S* as also in the s 149 case in the Appellate Court Neither to this suit of *S* nor to that brought by the principal defendant was the plaintiff or any of his co land lords a party The District Judge subsequently reviewed his judgment in appeal in plaintiff s suit for rent relying on the judgments in the suits of the principal defendants and S and in the s 149 case *Held* that none of the judgments was admissible for the purpose of the review and the order made thereon must be vacated. The District Judge had no jurisdiction to review his original judgment in the light of a judgment turning on facts subsequently delivered in an other Court in a suit which was not *inter parte*. That the judgment in the suit of *S* which was not in existence at the time when the case was tried in the Primary and Appellate Courts was not new evidence in the sense in which the expression is generally used nor was the judgment in the suit of the principal defendants which came into existence at the original hearing of the appeal but was not tendered on that occasion That they merely added a debateable item to the evidence on the record and the District Judge *had no power to admit them as additional evidence* under O XLI r 27 of the Code That the objection that the lower Appellate Court admitted in review evidence which he had no authority so to admit may be taken on an appeal from the decree as made on review SARAT KUMAR ROY *v* SRIPATI CHATTERJI (1918) 23 C W N 242

——— ss 114 115 121 O XLVII (1)—

See ARBITRATION I L R 43 Calc 290

——— ss 114 151—

See PROBATE AND ADMINISTRATION ACT (V OF 1881) s 50
I L R 37 All. 380

——— s 114 O XLVII r 1—

See REVIEW I L R 44 Calc 1011

——— s 114 O'O XLIII r 1 (v) XLVII—

See REVIEW I L R 39 Calc 1037

——— s 115 (1882 Code s 622)—

See APPEAL I L R 41 Calc 323

See APPEAL, RIGHT OF
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See ARBITRATION 4 P L J 265
I L R 43 Calc 290

See ARBITRATION BY COURT
I L R 38 Calc 421

See AWARD I L R 38 Mad. 256
4 Pat L J 20 642

See CHOTA NAGPUR TENANCY ACT
3 Pat L. J 143

See CIVIL PROCEDURE CODE
S 3
I L. R 37 Bom. 114
S 10
I L R 42 All 409
S 47
I L. R 42 Mad. 776

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 115—*contd*

See CIVIL PROCEDURE CODE
S 148 4 Pat L J 428
O XXI r 89 4 Pat L J 340
I L R 38 Mad 775
O XXIII I L R 41 Mad 701
O XXXIV rr 3 8
I L R 33 Mad 882
O XLI r. 27 5 Pat L J 263

See CRIMINAL JURISDICTION
14 C W N 806
I L R 37 Calc 714

See CRIMINAL PROCEDURE CODE s 476
I L. R 34 All 393
I L R 38 All 695
I L R 39 All 367

See DISMISSAL FOR DEFAULT
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I L R 35 Bom 487

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1 Pat L. J 465

See PUBLIC CHARITIES
14 C W N 932

See RELIGIOUS ENDOWMENTS ACT (XX OF 1863) s 10
I L R 40 Mad 793

See REVISION

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See SANCTION FOR PROSECUTION
I L. R. 37 Calc. 13
I L. R 39 Calc 774
I L. R. 43 Calc 597
I L. R 44 Calc. 816

See SONTHAL PARGANAS
I. L R 41 Calc. 876

1 ——— Order granting leave to sue in forma pauperis——*Revision. Held* that no application in revision will lie to the High Court from an order granting an application for leave to sue *in forma pauperis* *Harsaran Singh v Muhammad Raza I L R 4 All 91* and *Balneshri Devi v Bahadur All. Weekly Notes (1887) 69* followed. *Fat Musammat Muhammad Khan v A* [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 110—*contd*

Court agreeing with this contention declined to exercise its discretion under s 149 and dismissed the appeals The appellant then presented the petition for leave to appeal against the judgment and decree of the High Court aforesaid to His Majesty in Council *Held* that the judgment of the High Court dismissing the appeals must be considered as one affirming the decision of the Court below *Krishnasami* v *Ramasami* (23 *Mad L J* 219 and *Ram Karan* v *Madhukar Prasad* 29 *Indian Cases* 469 followed *Held* also that the petition did not involve any substantial question of law *Krishnasami* v *Ramasami* 23 *Mad L J* 219 *Muhammad Abdul Ghafur Khan* v *Secretary of State I L R* 36 *All* 325 and *Bhagat Singh* v *Jai Ram* 22 *P R* 1915 followed MUSSAMMAT SATTO *v* AMAR SINGH

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I L R 43 All 223

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CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

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———— ss 114 115 121 O XLVII (1)—

See ARBITRATION I L R 43 Calc 290

———— ss 114, 151—

See PROBATE AND ADMINISTRATION ACT (V OF 1881) s 50
I L R 37 All 380

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4 Pat L J 20 642

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3 Pat L. J 143

See CIVIL PROCEDURE CODE
S 3
I L. R 3" Bom 114
S 10
I L. R 42 All 409
S 4"
I L. R 42 Mad ""6

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— s 115—*contd*

See CIVIL PROCEDURE CODE
S 148 4 Pat L J 428
O XXI r 89 4 Pat L J 340
I L R 38 Mad 775
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O XXXIV rr 3 8
I L. R 33 Mad 882
O XLI r. 27 5 Pat L J 263

See CRIMINAL JURISDICTION
14 C W N 806
I L R 37 Calc 714

See CRIMINAL PROCEDURE CODE s 476
I L. R 34 All 393
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See SONTHAL PARGANAS
I. L. R 41 Calc. 8"6

1 ———— Order granting leave to sue in forma pauperis——*Revision* *Held* that no application in revision will li to the Hi h Court from an order granting an application for leave to sue *in forma pauperi* *Harsaran Singh v Muhammad Raza I L R 4 All 91* and *Bulaki Das v Buladir All. Weekly Notes (1887) 69* followed. *Fat Mu ammat Muhammad Khan v A* [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd*

———— s 115—*contd*

All Weekly Notes (1893) 218 Musammat Changia v Joti Prasad Civil Revision No 24 of 1910 dated May 24th 1910 Ghulam Shabbir v Dwarka Prasad I L R 18 All 163 and *Debi Das v Eja Husain, I L R 28 All 72* referred to MUHAMMAD AYAB *v* MUHAMMAD MAHMUD

I L R 32 All 623

2 ———— Wrong decision of the lower Appellate Court that the first Court had or had not jurisdiction—*to entertain a suit—Revision —Power of High Court to interfere in* *Held* by the FULL BENCH (SADASIVA AYYAR *J* dessenting) that the High Court has jurisdiction to interfere under s. 115 Civil Procedure Code (Act V of 1908) where an Appellate Court erroneously decides in the exercise of its admitted jurisdiction as an Appellate Court that the Court of first instance had or had not jurisdiction to entertain a suit Case law on the subject reviewed *Per* WALLIS *C J* The power of the High Court to interfere in such matters is under the third part of s 115 *Per* SUNDARA AYYAR *J* The power of the High Court to interfere in such matters is under the first part of s. 115 The function of an Appellate Court is to do that which the first Court ought to have done *Per* SADASIVA AYYAR *J* Under none of the three parts of s 115 has the High Court power to interfere in such matters. Cls (*a*) and (*b*) of s. 115 apply only to jurisdiction of the Court whose decree or order is sought to be revised, to pass such order or decree and not to its decision on the jurisdiction of some other Court. The words acted illegally ' in s 115 Civil Procedure Code mean giving a wilfully perverse but not a mere erroneous decision on a question of law ATCHAYYA *v* SRI SEETHARMACHANDRA RAO (1912) I L R 39 Mad 195

3 ———— Case in which no appeal lies—*High Court—Extraordinary civil jurisdiction—Temporary injunction restraining a Hindu widow from adopting—Application against the order— Case' meaning of—Jurisdiction under s 5 of Bombay Regulation II of 1827—High Courts Act (24 & 25 Vic. Ch 104) s 9—General Repealing Act (XII of 1873)* In the course of a pending suit the first Court granted a temporary injunction restraining defendant No 1 from making an adoption but afterwards dissolved it on appeal the District Judge granted the temporary injunction The defendant No 1 having applied to the High Court against the order a preliminary objection was taken that the application was not competent under s. 115 of the Civil Procedure Code. *Held* overruling the objection that the application was competent under s. 115 of the Civil Procedure Code Act (V of 1908) as the order was a case decided in which no appeal lies within the meaning of the section. *Held* further that the order was open to consideration under the wider provisions of s 5 of Regulation II of 1827 continued in force by virtue of s. 9 of the High Courts Act, 1861 and saved from repeal by the operative sections of the General Repealing Act (XII of 1873) *Per* BATCHELOR, *J* ' The word case which occurs in s 115 of the Civil Procedure Code (Act V of 1908) is a word of wide or comprehensive import and clearly covers a far larger area than would be covered by such a word as suit or appeal " Ina much as s. 115 is merely an empowering section granting certain jurisdiction to the High Court and as the use of exercise of that jurisdiction will within the prescribed limits be regulated by the discretion of the High Court the section ought to receive rather a liberal than a narrow interpretation BAI ATRANI *v* DELPSING BARIA THAKOR (1915)

I L R 40 Bom 86

4 ———— Bombay District Municipalities Act—(*Bom Act III of 1901*) *s 160* No application can be made under the revisional jurisdiction of the High Court from the decision of a District Court under cl (*3*) of s 160 of the Bombay District Municipalities Act (Bombay Act III of 1901) MUNICIPALITY OF BELGAUM *v* PUDRAPPA (1916)

I L R 40 Bom 509

5 ———— Agra Tenancy Act—(*II of 1901*) *—Suit relating to an agricultural holding—Order adjourning suit indefinitely—Revision—Powers of High Court—Statutes 5 and 6 Geo V Cap IXI s 107* Plaintiff brought a suit in a Civil Court alleging that the defendant s father had been a lessee of certain property for 7 year that after the expiry of the lease he became manager of the property and after his death the defendant also became manager He pleaded that the defendant had been dismissed from his position as manager and asked for possession of the property which comprised shares in 26 villages a market and some collection houses. The defendant pleaded that he was a thekadar within the meaning of the Tenancy Act, and filed an application praying the Court to exercise its jurisdiction under s. 202 of that Act The Court acceded to this prayer and adjourned the suit to an indefinite period till the question was decided by the Revenue Court. The plaintiff applied in revision against the order *Held* (*Per* PIGGOT *J*) that the revision was incompetent as it was directed against an interlocutory order and a remedy by way of appeal was open to the plaintiff wherein all matters could be decided (*Per* WALSH *J*) that a revision lay to the High Court DHANDEI KUNWAR *v* CHOTU LAL (1916) I L R 39 All 254

6 ———— Small Cause Court—*Suit tried as a regular suit—Jurisdiction—Appeal—Revision* Where a Small Cause suit is tried by a Munsif on the original side and his decision is reversed on appeal the High Court is bound to set aside the appellate decree as being passed without jurisdiction *Kollipara Seetapathy v Kankipati Subbayya I L R 33 Mad 393* followed. ABDUL MAJID *v* BEDYADHAR SARAN DAS (1916)

I L R 39 All 101

7 ———— Suit intentionally undervalued—*Powers of Court as regards amendment of valuation—Court fee* When a Court is of opinion that a suit has been insufficiently valued and that the plaintiff has done so intentionally it may require the plaintiff to make a fresh valuation and pay the proper Court fee but it has no power to amend the valuation itself ASHIQ ALI *v* IMTIAZ BEGAM (1917) I L R 39 All 723

8 ———— Bombay Act XII of 1850—*Nazir's embezzlement—District Judge ordering recovery by attachment under Bom Act of 1850 s 4—Jurisdiction of the High Court to revise the order* Under s. 115 of the Civil Procedure Code 1908

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 115—*contd*

the High Court has no jurisdiction to revise an order made by a District Judge acting under s. 4 of the Bom. Act XII of 1850 as it is an order made by him as a per on at the head of an office and not an order made by a Court in any way sub ordinate to the High Court COOPER *In re* (1917) I L R 42 Bom 119

9 ——— Jurisdiction—*Question of law or fact bearing on jurisdiction of Court* When a *question of jurisdiction is involved* the High Court is competent to revi e a conclu ion of law or fact which bears on such question. *Balakrishna Udayar* v *Vasudeva Ayyar I L R 40 Mad 793* explained BIHARI LAL v BALDEO NARAIN (1918) I L R 40 All 674

10 ——— Order preliminary to the hearing of a suit deciding whether or not the trying Court had jurisdiction The decision of a question of jurisdiction by the Court of fir t instance as a preliminary to the hearing of the suit before it and after taking evidence and hearing arguments is within the meaning of s 115 of the Code of Civil Procedure 1908 the decision of a case from which no appeal lies and is therefore open to the *revisional jurisdiction of the High Court and the* High Court may properly consider the evidence given in the Court below *Bihari Lal* v *Baldeo Narain I L R 40 All 674* approved. *Udayar* v *Vasudeva Ayyar I L R 40 Mad 793* and *Rashmoni Dasi* v *Ganada Sundari Dasi 26 Indian Cases 275* referred to BHARGAVA AND Co v JAGANNATH BHAGWAN DAS (1919) I L R 41 All 602

11 ——— Onus Misplaced—Trial of wrong issue—*Onus wrongly placed—Decision not supported by any evidence—Quantum of evidence.* Mere errors in decision on matters of law and fact are not within the scope of s. 115 of the Civil Procedure Code 1908 Cls. (*a*) and (*b*) of that section deal with the question of jurisdiction and cl (*c*) refers to illegal or irregular processual acts. An application under s 115 of the Civil Procedure Code was made to the High Court from a decision of the Judge of the Presidency Small Cause Court on the following grounds —(i) That the wrong issue was tried (ii) that the onus was misplaced (iii) that there was no evidence to support the decision. *Held* that the trial of the issue in the form it was raised amounted to an error in law and not to an illegality or material irregularity in the procedure *Held* further that under the circumstances of the case the mere fact that the onus was wrongly placed on the defendant did not entitle the Court to interfere under s. 115 *Held* al o that inasmuch as there was some evidence on which the Court acted there could not be any interference under the section HARAN CHANDRA CHATTERJI v CORPORATION OF ROYAL EXCHANGE ASSURANCE (1919) 23 C W N 759

12 ——— Criminal Procedure Code s. 195 (6)—*Sanction to prosecute—Sanction granted by Munsif—Revisional powers of District Judge* One of the parties to a civil suit applied for sanction to prosecute the plaintiff on the ground that he had instituted a false claim. The Munsif dis mis ed the application on technical grounds. The applicant applied to the District Jud e under s. 195 *(6)* of the Code of Criminal Procedure The Judge remanded the case to the Mun if for trial of the application. *Held* that the powers of revision exercisable by the District Judge were confined to those conferred by s. 195 Criminal Procedure Code and he had no jurisdiction to make the order of remand. BENI PRASAD v SARJU PRA AD THAKURIA (1911) I L R 33 All 512

13 ——— Interlocutory order—*High Courts power of revision—Charter Act (24 & 25 Vict c 104) s 115—Revision where adequate remedy exi ts Quære* Whether s 115 of the Civil Pro cedure Code or s. 15 of the Charter Act gives power to the High Court to interfere with inter locutory orders. *Held* that there is one common principle which governs its interference under both sections vi that it will not have recour e ordinarily at least to its revisional or superin end ing powers where there is another and an adequate remedy open to the applicant. An order refusing to amend the pleadings if erroneous may be cor rected upon appeal from the decree to be pa ed in the suit Such an order not being likely to cause irreparable injury should not be interfered with under the Charter Act CHANDI RAY v KRIPAL RAY (1911) 15 C W N 682

14 ——— The High Court will interfere *with an interlocutory order if irreparable injury* would be caused to one of the litigants if matters were not set right AMJAD ALI v ALI HUSSAIN JOHAN (1910) 15 C W N 353

15 ——— Final order—*Letters Patent s 39—Privy Council leave to appeal to— Final order passed on appeal—Order passed by High Court on revision if passed on appeal—Order relating to discovery if final order—Order that Land Acquisition Judge cannot entertain objections to award by Government if final order when reference at claim ants instance still pending—Interlocutory order —Civil Procedure Code (Act V of 1908) ss 109 115* Orders passed by the High Court in the exercise of its revisional jurisdiction under s 115 of the Civil Procedure Code or of its power of superintendence under s. 15 of the Charter Act are orders made or passed on appeal within the meaning of s. 39 of the Letters Patent Whether a particular order is a final order within the meaning of s. 109 of the Civil Procedure Code for the purpose of grant ng leave to appeal to His Majesty in Council mu depend upon its nature and contents and its relation to the proceedings in which it has been made As a general rule an order cannot rightly be considered final which settles a point only of several issues of law or fact, in other word if the order decid s a question the solution of which cannot whatever may be taken of it terminate the proceeding before the Court it cannot be appropriately called a final order An order of the High Court which d al *with the question of the propriety of an order of a* Land Acquisition Judge for discovery is not a final order within the meaning of s. 39 of the Letters Patent or s. 109 of the Civil Procedure Code An order of the High Court holding tha the Land Acquisition Judge could not review at the instance of the Secretary of State the award of the Collector in so far as it was not challenged by the claimants, the objections of the claimants to the award still remaining to be determined by the Judge was not a fi order within the mean ing of s. 39 of the ...tent and s. 109 of the Civil Procedure C... ...Y OF STATE FOR INDIA v BRITISH ...AVIGATION CO. (1910) ... C W N 843

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— s 115—*contd*

16 ———— Award—*Decree framed upon award—Appeal—Application under revisional jurisdiction—Decree set aside—Grounds—Jurisdiction* The plaintiff as Mutawali of a Musjid at Zanzibar, brought a suit against the defendant for the recovery of certain pots and pans Three other persons who alleged themselves to be Mutawalis were joined as parties apparently without any amendment of the plaint After some progress of the suit the presiding Judge was asked by all concerned in the Jamat (community) to arbitrate upon all matters in difference between them The Judge framed an award on the 30th June 1904 and the award was read out in Court after notice to the parties In the year 1909 a pleader for the plaintiff applied to have a decree framed in the terms of the award and the Judge accordingly passed a decree on the 7th April 1909 One of the defendants having appealed against the decree which was not appealable the appeal was allowed to be converted into an application under the revisional jurisdiction s 115 of the Civil Procedure Code (Act V of 1908) and the decree was set aside as being passed by the Judge without any sort of jurisdiction whatever The grounds being (i) There was no written reference to arbitration as required by law (ii) The reference was made by a great number of persons who were not parties to the suit (iii) The matters in difference submitted to arbitration were matters not in suit at all (iv) The result of the said irregular proceedings was to expand the claim for the possession of a few cooking utensils into a suit for framing a scheme for the administration of a large religious endowment and no suit of the kind could have been properly launched without the previous sanction of the Advocate General or such officer as is clothed with his functions (v) The award was made on the 30th June 1904 and the application to have it filed was not made till 1909 The application was therefore manifestly time barred (vi) The plaintiff died early in the year 1905 and no application was ever made to bring his heirs or legal representatives on record The suit had therefore abated by July of that year MERALI VISRAM v SHERIFF DEWJI (1911) **I L R 36 Bom 105**

17 ———— Interlocutory order—*Scope of section* *Held* by KARAMAT HUSAIN J that an application under s 115 of the Code of Civil Procedure cannot be entertained in the case of those interlocutory orders against which though no immediately appeal lies a remedy is supplied by s 105 which provides that they may be made a ground of objection in appeal against the final decree *Moti Lal Kasibhai v Nana I L R 18 Bom 35* followed Inasmuch as an order under O IX r 13 setting aside an *ex parte* decree can be attacked in appeal from the final decree no application will lie for revision of such an order *Gopal Chetti v Subbier I L R 26 Mad 604* followed NAND RAM v BHOPAL SINGH (1912) **I L R 34 All 592**

18 ———— High Courts jurisdiction—*Prejudice must be proved—Valuation of suits—Agreement to grant mourasi lease—Suits to enforce how valued* Where the District Judge set aside the decision of the Subordinate Judge as to the proper valuation of a suit and simply accepted the valuation given by the plaintiff without giving any reason for arriving at that decision and without attempting to ascertain the materials on which that valuation was based and in fact without arriving at a judicial decision at all *Held* that the High Court should interfere in such a case under s 115 Civil Procedure Code if satisfied that the decision of the District Judge was wrong *Amir Hassan v Sheo Baksh I L R 11 Calc 6* distinguished Where the Subordinate Judge in his view of the value of the suit returned the plaint for presentation to the Munsif and the District Judge set aside that decision and it was contended that the High Court should not interfere as there was no prejudice *Held* that as the law requires that suits of a particular value should be brought in particular Courts where an order was against that law no question of prejudice arises in setting aside that order Where a land was taken for clearing and bringing under cultivation under an agreement that after a certain number of years the defendant would grant a *mokurari mourasi* lease and a suit was subsequently brought by the lessee for a declaration of his *mourasi mokurari* title and for the execution of the lease *Held* that the suit was in effect one to enforce the agreement to lease The *mourasi mokurari* title would only accrue after the lease was granted and the suit could therefore be valued on the footing of that title PORT CANNING AND LAND IMPROVEMENT COMPANY LD v ROSON ALI MOLLAH (1912) **17 C W N 160**

19 ———— Jurisdiction, failure to exercise—*Limitation Act (XV of 1877) s 7—Revision on the ground of limitation* *Semble* A Court decreeing or allowing a time barred suit or application without considering whether it is so or not may be said to have failed to exercise jurisdiction vested in it by law so as to bring the matter within the scope of s 115 of the Civil Procedure Code *Held* that a Court cannot be said to have failed to exercise jurisdiction merely because it omitted to consider *ex proprio motu* the question whether a person was entitled to proceed out of time by reason of some special provision of law e g s 7 of the Limitation Act such question not having been raised by him or on his behalf The mere fact that in the headings to certain applications made in the case the person was described as a minor represented by a guardian was not sufficient to entitle him to the benefit of s 7 of the Limitation Act or to throw upon the Court the duty of raising the point on his behalf *Benod Behari Bhadra v Ram Sarup Chamar 16 C W N 1015* followed PANCHU MONDAL v SHEIKH ISAF (1913) **17 C W N 867**

20 ———— Error of law—*committed by lower court—Contribution meaning of—Suit for contribution what is—Suit of the value of less than Rs 500 cognisable by a Court of Small Causes appeal in—Decree for rent obtained by co-sharer landlord against tenants—Deposit of decretal amount by purchaser from one of the tenants to prevent sale—Right of such depositor to be reimbursed—Provincial Small Cause Court Act (IX of 1887) Art 41 Sch II—Indian Contract Act (IX of 1872) ss 69 70* The plaintiffs purchased the interest of one of the defendants in a tenancy held by them all Some out of the entire body of landlords who claimed a half share in the superior tenancy obtained a decree for rent and in execution thereof were about to bring the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

—— s 115—*contd*

property to sale when the plaintiffs deposited in Court the necessary amount in satisfaction of the decree The plaintiffs brought an action for declaration that the defendants were liable to pay the judgment debt and they themselves had paid the money under circumstances which entitled them in equity to recover the same from the defendants The suit was described as one for contributions The lower Courts dismissed the plaintiffs claim on the ground that as the decree had been obtained by co sharer landlords the interest of the plaintiffs in the tenancy was not in jeopardy and the payment made by them must consequently be deemed voluntary The plaintiffs appealed to the High Court *Held* that contribution signifies payment by each of the parties interested of his share in any common liability Consequently an action for contribution is a suit brought by one of such parties who has discharged the liability common to them all to compel the others to make good their shares That the suit as framed could not be deemed a suit for contribution it was really a suit by the plaintiffs for recovery of money paid by them for the benefit of the defendants That Art 41 of the Second Schedule to the Provincial Small Cause Courts Act does not cover the present case The suit was clearly one of a nature cognizable by a Court of Small Causes and as the sum claimed was less than Rs 500 the appeal was incompetent under s 102 Civil Procedure Code and must be dismissed That the view taken by the lower Courts that the payment made by the plaintiffs was voluntary as the decree for rent was obtained by co sharer landlords who could not have executed it so as to prejudice the interest of the plaintiffs was erroneous The question of the precise effect of a sale in these circumstances would at any rate be a matter for controversy and the party liable to be affected would consequently be entitled to satisfy the decree to protect himself from the apprehended injury to his right he would also be entitled if he made the payment to be reimbursed under s 69 or s 70 of the Indian Contract Act *Held* however as to the application of the plaintiffs for the memorandum of appeal being treated as an application for revision that the error committed by the lower Court being one of law and not affecting the jurisdiction of the Court the High Court could not interfere in the exercise of its revisional powers SATYA BHUSAN BANNERJEE *v* KRISHNA KALI BANNERJEE (1914) 18 C W N 1308

21 —— **Pleader appearing for each party**—*A pleader who had appeared for a party in proceedings under s 145 of the Code of Criminal Procedure must before appearing for the opposite party in a subsequent civil suit flowing out of such proceedings satisfy the court that in acting in those proceedings he did not as a fact obtain from his then client any knowledge which would be of use to his present clients or that if he did obtain any such knowledge then such knowledge is now so to speak public property available to any pleader who can obtain inspection of the record of the proceedings in the Magistrate s Court If he fails to do so, he brings himself within r 2 7 of the Rules of Practice framed by the High Court and it cannot be said that the Court has wrongly exercised its discretion in refusing him audience *Little* v *Kingswood Collieries Company* 20 Ch D 733 referred to SRINIVASA RAU *v* PICHAI PILLAI (1913) I L R 38 Mad 650

22 —— **Jurisdiction**—*Error in the exercise of whether wrong decision on question of limitation is* An erroneous decision that a petition for restoration is not barred by limitation when in fact it is so barred is not an error in the exercise of jurisdiction under s 115 of the Code of Civil Procedure 1908 JHOTU LALL GHOSE *v* GANOURI SAHU 3 Pat L J 376

23 —— **Interlocutory orders**—*whether High Court will interfere with—Court fees whether High Court will revise preliminary order on question of* The High Court will not interfere in revision with an interlocutory order where there is another course open to the applicant and no irremediable harm can be suffered by the interlocutory order MUSSAMMAT LACHMIBATI KUMARI *v* NAND KUMAR SINGH 5 Pat L J 400

24 —— **Order returning plaint for want of jurisdiction**—*Order reversed on appeal—Revision* The court to which a plaint in a suit based on contract was presented returned the plaint for presentation to the proper court upon the ground that no part of the cause of action had arisen within the jurisdiction The plaintiff appealed against this order and the appellate court reversed the order and remanded the suit for trial on the merits *Held* on application in revision by the defendants that no revision would lie even if the conclusions of the appellate court were wrong either in fact or law *Mathura Nath Sarkar* v *Umes Chandra Sarkar* I C W N 626 and *Jwala Prasad* v *East Indian Railway Company* 16 A L J 535 followed *Badami Kaur* v *Dinu Rai* I L R 8 All 111 *Zamiran* v *Fateh Ali* I L R 32 Calc 146 *Sri Narain* v *Jagannath* 15 A L J 655 and *Vuppaluri Atchayya* v *Sri Kanchumarti Venkata Seetaramachandra Rao* 24 M L J 117 referred to CHANDU LAL *v* KOKA MAL I L R 43 All 334

25 —— **Attachment before judgment**—*at the instance of petitioner—Sale proceeds paid into Court—Opponent withdrawing the proceeds in execution of a decree—Notice of payment not given to the petitioner—Petitioner s suit for rateable distribution—Dismissal of suit—No material irregularity* The petitioner filed Suit No [illegible]1 of 1916 against one Kondanmal and applied for attachment before judgment The property attached was sold and the sale proceeds were paid into Court to the credit of the suit Eventually a decree was passed in the suit on the 10th April 1916. On the [illegible]th April 1916 the opponent who had previously got a decree against Kondanmal applied for execution and asked that the sale proceeds which were lying in Court to the credit of the petitioner s suit be attached His application was heard and the money in Court was paid to him on the 19th April 1916 without any notice to the petitioner The petitioner who could not then apply for execution as he had not obtained a copy of the decree in his suit brought the present Suit No [illegible]9 of 1916 against the opponent to recover an amount which he could have go[illegible] of the moneys there had been di[illegible]tribution dismissed suit The to the Court under jurisdi[illegible]ion

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— s 115—*contd*

that there was no material irregularity which would entitle the Court to interfere under s 115, Civil Procedure Code 1908 although the attaching Court before it paid out the proceeds of the petitioner s atachment to the opponent, ought to have given the petitioner notice as a matter of equity VISHNU v RAMPRATAP (1920)
I L R 45 Bom 360

26 ———— Contempt of Court—*Order passed by Munsif to show cause why proceedings in relation to an alleged contempt should not be taken* *Held* that an order passed by a Munsif calling upon parties to a civil suit to show cause why they should not be proceeded against in respect of an alleged contempt of court is an order which is amenable to the revisional jurisdiction of the High Court either under s 115 of the Code of Civil Procedure or under s 107 of the Government of India Act *In the* MATTER OF THE PETITION OF KADHORI
I L R 42 All 26

26 (a) ———— An erroneous decision that a petition for restoration is not barred by limitation when in fact it is so barred is not an error in the *exercise of jurisdiction* under s 115 JHOTU LAL GHOSE v GANOURI SAHU
3 Pat L J 370

27 ————Jurisdiction—A Munsif having before him a suit on a promissory note first passed an order (illegal in the circumstances of the case) dismissing the suit for want of prosecution On this a decree followed which was signed by the Munsif Subsequently the Munsif cancelled his first order and decree and having reinstated the suit fixed a day for its hearing On that date the plaintiff appeared and tendered some evidence but the defendant did not appear The Munsif thereupon passed a decree in favour of the plaintiff *ex parte* *Held* on application by the defendant for revision of the Munsif's second order reinstating the suit that the High Court had the power and ought to set aside not only the order complained of but all the proceedings of the Munsif and restore the suit to its original position *Hingu Singh* v *Jhuri Singh I L R 40 All 590* and *Govind Singh* v *Kalyan Dass 15 A L J 24* referred to ABDUL AZIZ v SHEKHAR CHAND I L R 42 All 18

28 ———— Interlocutory order— Under s 115 the High Court might call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto but it has no power to call for the record of any case which is under trial by a Court subordinate to the High Court BAI PAMI v JAGA DULLABH (1919) I L R 44 Bom 619

29 ———— When other remedy available—*Injunction issued by Mamlatdar—Order set aside by Collector—Summary Proceedings—High Court not to exercise powers of revision unless the party has no other remedy* The petitioner sued the opponents in Mamlatdar s Court for an injunction to restrain the opponents from disturbing the petitioner in the possession of his land The Mamlatdar issued the injunction The opponents then applied to the Collector who set aside the Mamlatdar s order under s 23 of the Mamlatdars Courts Act (Bom Act II of 1906) The petitioner having applied to the High Court under s 115 Civil Procedure Code 1908 *Held* discharging the rule that the High Court would not exercise its powers of revision under s 115 Civil Procedure Code 1908 unless the party applying to the Court had no other remedy In a case where the proceedings which are sought to be revised are purely summary proceedings and which do not finally decide the dispute between the parties the High Court should not exercise its powers of revision IRBASAPPA v BASANGOWDA (1919) I L R 44 Bom 595

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— s 115—*concld*

30 ————Executing Court—*Decree under execution cannot be questioned* It is not competent to an executing Court to go behind a decree and question its propriety *Ramchandra Govind* v *Jayanta (1920) 45 Bom 503* followed RAMNATH v GAJANAN (1920) I L R 45 Bom 946

31 ————Probate Proceedings—Revision of order of the District Judge in probate proceedings declaring that caveator has no *locus standi* RADHA RAMAN CHOWDHURY v GOPAL CHANDRA CHUCKERBUTTY 24 C W N 316

———— *Revision—Jurisdiction of High Court—Order deciding issue of jurisdiction in favour of the plaintiff— Case* In a suit for damages for breach of contract filed in the court of Munsif the defendants pleaded *inter alia* that the court had no jurisdiction to try the case. The Munsif by consent of parties tried this plea on the evidence separately from the other issues in the suit and passed a formal order to the effect that the suit was cognizable by his court Against this order the defendants preferred an application in revision to the High Court under s 115 of the Code of Civil Procedure and a preliminary objection was taken by the plaintiff that no revision lay *Held* by PIGGOTT RYVES and GOKUL PRASAD *JJ* (MUHAMMAD RAFIQ and WALSH *JJ* dissenting) that no revision lay inasmuch as no case ' had been decided by the court below within the meaning of s. 115 of the Code of Civil Procedure All that had been decided was one out of several issues in the suit and the defendants had their remedy by way of appeal from the decree *in the suit if it should be decided against them* *Bhargava and Co* v *Jagannath Bhagwan Das I L R 41 All 602* overruled. *Per* MUHAMMAD RAFIQ and WALSH *JJ* *contra* In the circumstances the decision of the question of jurisdiction was the decision of a case within the meaning of s. 115 of the Code of Civil Procedure and therefore the High Court had jurisdiction to entertain an application for revision. *Chhattarpal Singh* v *Raja Ram I L R 7 All 661* referred to by MUHAMMAD RAFIQ J *Dhapi* v *Ram Pershad I L R 14 Calc 768* referred to by WALSH J BUDDHU LAL v MEWA RAM
I L R 43 All. 564

———— ss. 115 and 151—

———— Arbitrators' award decree—*without inquiry into the nature of the award —Manual of High Court's Circulars Chapter II para 2—Inquiry—Real point of difference—Decree set aside—Abuse of judicial process* The plaintiff a money lender filed in Court an arbitrator s award passed against the defendant debtor and prayed for a decree in the terms of the award The Court having presumed that there was a real point of difference between the parties passed a decree in

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— ss 115 and 151—contd

the terms of the award without instituting inquiry directed by a circular of the High Court (Manual of High Court s Circulars Chapter VI para 2 page 181) *Held* setting aside the decree under s 115 and 151 of the Civil Procedure Code (Act V of 1908) that there was an abu e of judicial proce s. VELCHAND CHHAGANLAL v LIEUT LISTON (1914) I L R 38 Bom 638

——— ss 115 151 and 152 O VII, r 11 O XLIII—r 1 (u)—*Incorrect valuation of relief claimed—Plaint returned—Review of order returning plaint—Appeal—Court fees Act (VII of 1870) s 12 and sch II art 17 (vi)* *Held* that (1) an order rejecting a plaint under O VII r 11 of the Civil Procedure Code is not appealable when such order is ba ed on a question of valuation *pure and simple* (2) When the order necessarily involves a decision of the category or class under which a suit falls even though it incidentally decides a question of valuation the order is appealable (3) In cases falling under (1) where the other involves a question of jurisdiction the High Court may interfere either under s 115 of the Code of Civil Procedure 1908 or under s 107 of the Government of India Act by virtue of the residue of juri diction which the Court will always exercise wherever it appears that there has been something in the nature of denial of the right of fair trial and that (4) Before or after an order of demand fructifies by non compliance into a recorded order of rejection the Court con templated in s 12 of the Court fees Act 1870 may for good and sufficient reasons review its own order of demand on application by the plaintiff or revise that order on its own motion CHANDRAMANI KOER v BASDEO NARAIN SINGH 4 Pat L J 57

——— ss 115 and 151 O IX rr 9 and 13 and O XXI, r 110—*Default dismissal for—Application for re hearing maintainability of* A party not bound by a decree may under O IX r 9 of the Code of Civil Procedure 1908 obtain a re hear ing of a claim made by him under O XXI r 100 which has been dismissed for default An appli cation under R 100 is in the nature of a summary suit and the provisions of the Code of Civil Proce dure for the trial of suits apply to it SATYA NARAYAN LAL v GOBIND SAHAY 3 Pat L J 250

——— ss 115 151 O XLI, r 23—*Remand of ca e by lower Appellate Court—Refund of Court fees paid on memorandum of appeal—Court fees Act (VII of 1870) s 13—Refusal to pass the order—Application to High Court* The lower Appellate Court remanded a case under O XLI r 23 of the Civil Procedure Code 1908 but declined to order refund of Court fees paid on the memorandum of appeal *The appellant having applied to the High Court against the order* *Held* that the applica tion was not within the scope or intention of s 151 of the Civil Procedure Code 1908. *Held* further that the application must be allowed under s 115 of the Code as the lower Appellate Court in refusing to pa s the order had acted with illegality or with material irregularity *Per* BEAMAN J I think it is very clear that that s (151) is in tended to empower Courts to deal with their own decrees and orders and was not intended to give authority to superior Courts by way of conferring supplemental jurisdiction to that conferred by s 115 BHAU ING v CHAGANIRAM HUKCHAND (1918) I L R 42 Bom. 363

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 115 O XI r 12—

See LAND ACQUISITION I L R 38 Calc 230

——— s 115 O XXI r 66—

——— The Act of a Court in settling the terms of a sale proclamation under O XXI r 66 is a Judicial Act. MUNSHI RAGHU NATH SINGH v HAZARI SAHU 2 Pat L J 131

——— s 115 O XXI r 89—

——— *Private sale by judg ment debtor after Court auction—Application to set aside Court sale—Whether purchaser in private sale or judgment debtor entitled to apply—Dismissal of petition as of person not entitled to apply—Powers of High Court—Revision* A judgment debtor who *after the Court sale transfers his interest in the* properties sold in execution of a decree retains sufficient interest within the meaning of O XXI r 89 to allow him to apply under the rule *Subbarayudu v Lakshminarasamma (1915) I L R 38 Mad 775* overruled *Pandurang Laxman v Govind Dada (1916) I L R 40 Bom 557* and *Mussumat Dhanwati Kuer v Sheo Sankar Lal (1919) 4 Patna L J 340 s c 52 I C 873 (Patna)* followed *Ishar Das v Asaf Ali Khan (191) I L R 34 All 186* dissented from The pur chaser of such properties after Court sale is pre cluded from applying under the rule *Lakshmi Ammal v Sankaran Nair (1913) 24 M L J 205* overruled *The High Court can interfere in revision* if an application under O XXI r 89 has been dismissed on the ground that it was made by a person who was not entitled to apply SUNDARAM v MAUSA MAVUTHAR (1921) I L R 44 Mad (F B) 554

——— *Decree—Executi o n—Auction sale—Deposit in Court—No application to set aside sale—Sale confirmed—subsequent applica tion to set aside sale—Application refused—No irre gularity—Titles arising from judicial sales should be settled as soon as possible* The property of the applicant was sold in execution of a decree against him Within thirty days of the date of sale the applicant deposited in Court the amount of the decree together with interest on the purchase money for the property sold The applicant how ever having made no application to set aside the sale the sale was confirmed and the Court called *upon the applicant to take away his money* The applicant then applied that his deposit should be considered as an application to set aside the sale Having failed in both the Lower Courts he applied to the High Court under s 115 of the Civil Proce dure Code 1908 *Held* that the application would not lie under s 115 of the Civil Procedure Code as there was no defect whatever in jurisdiction and no irregularity in the exercise of jurisdiction The Civil Procedure Code with the Limitation Act provides a short period within which applications specifying their object should be made to set aside sales and the shortness of time allowed may be taken as indicative of the policy of the Legislature that titles arising from judicial sales should be settled as soon as possible PAOJI v BAN ILAL NARAYAN (1919) I L R 43 Bom 735

——— s 115 O XXII, r 5—*Suit for rent in a Revenue Court—Death of plaintiff—Conflict rg*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 115—*contd*

that there was no material irregularity which would entitle the Court to interfere under s 115, Civil Procedure Code 1908 although the attaching Court before it paid out the proceeds of the petitioner s atachment to the opponent ought to have given the petitioner notice as a matter of equity VISHNU v RAMPRATAP (1920)

I. L R 45 Bom 360

26 ——— Contempt of Court —*Order passed by Munsif to show cause why proceedings in relation to an alleged contempt should not be taken* Held that an order passed by a Munsif calling upon parties to a civil suit to show cause why they should not be proceeded against in respect of an alleged contempt of court is an order which is amenable to the revisional jurisdiction of the High Court either under s 115 of the Code of Civil Procedure or under s 107 of the Government of India Act *In the* MATTER OF THE PETITION OF RADHORI

I L R 42 All 26

26 (a) ——— An erroneous decision that a petition for restoration is not barred by limitation when in fact it is so barred is not an error in the exercise of jurisdiction under s 115 JHOTU LAL GHOSE v GANOURI SAHU

3 Pat L J 376

27 ———Jurisdiction—A Munsif having before him a suit on a promissory note first passed an order (illegal in the circumstances of the case) dismissing the suit for want of prosecution On this a decree followed which was signed by the Munsif Subsequently the Munsif cancelled his first order and decree and having re instated the suit fixed a day for its hearing On that date the plaintiff appeared and tendered some evidence but the defendant did not appear The Munsif thereupon passed a decree in favour of the plaintiff *ex parte* Held on application by the defendant for revision of the Munsif's second order re instating the suit that the High Court had the power and ought to set aside not only the order complained of but all the proceedings of the Munsif and restore the suit to its original position *Hingu Singh* v *Jhuri Singh I L R 40 All 590* and *Govind Singh* v *Kalyan Dass 15 A L J 24* referred to ABDUL AZIZ v SHEKHAR CHAND

I L R 42 All. 18

28 ——— Interlocutory order— Under s 115 the High Court might call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto but it has no power to call for the record of any case which is under trial by a Court subordinate to the High Court BAI RAMI v JAGA DULLABH (1919) I L R 44 Bom 619

29 ——— When other remedy available—*Injunction issued by Mamlatdar—Order set aside by Collector—Summary Proceedings—High Court not to exercise powers of revision unless the party has no other remedy* The petitioner sued the opponents in Mamlatdar s Court for an injunction to restrain the opponents from disturbing the petitioner in the possession of his land The Mamlatdar issued the injunction The opponents then applied to the Collector who set aside the Mamlatdar s order under s 23 of the Mamlatdars Courts Act (Bom Act II of 1906) The petitioner having applied to the High Court under s 115 Civil Procedure Code 1908 Held discharging the rule that the High Court would not exercise its powers of revision under s 115 Civil Procedure Code 1908 unless the party applying to the Court had no other remedy In a case where the proceedings which are sought to be revised are purely summary proceedings and which do not finally decide the dispute between the parties the High Court should not exercise its powers of revision IRBASAPPA v BASANGOWDA (1919) I L R 44 Bom 595

30 ———Executing Court—*Decree under execution cannot be questioned* It is not competent to an executing Court to go behind a decree and question its propriety *Ramchandra Govind* v *Jayanta (1920) 45 Bom 503* followed RAMNATH v GAJANAN (1920) I L R 45 Bom 946

31 ———Probate Proceedings—Revision of order of the District Judge in probate proceedings declaring that caveator has no *locus standi* RADHA RAMAN CHOWDHURY v GOPAL CHANDRA CHUCKERBUTTY 24 C W N 316

——— *Revision—Jurisdiction of High Court—Order deciding issue of jurisdiction in favour of the plaintiff— Case* In a suit for damages for breach of contract filed in the court of Munsif the defendants pleaded *inter alia* that the court had no jurisdiction to try the cause The Munsif by consent of parties tried this plea on the evidence separately from the other issues in the suit and passed a formal order to the effect that the suit was cognizable by his court Against this order the defendants preferred an application in revision to the High Court under s 115 of the Code of Civil Procedure and a preliminary objection was taken by the plaintiff that no revision lay Held by PIGGOTT RYVES and GOKUL PRASAD JJ (MUHAMMAD RAFIQ and WALSH JJ, dissenting) that no revision lay inasmuch as no case had been decided by the court below within the meaning of s 115 of the Code of Civil Procedure All that had been decided was one out of several issues in the suit and the defendants had their remedy by way of appeal from the decree in the suit if it should be decided against them *Bhargava and Co* v *Jagannath Bhagwan Das I L R 41 All 602* overruled. *Per* MUHAMMAD RAFIQ and WALSH JJ *contra* In the circumstances the decision of the question of jurisdiction was the decision of a case within the meaning of s. 115 of the Code of Civil Procedure and therefore the High Court had jurisdiction to entertain an application for revision *Chhattarpal Singh* v *Raja Ram I L R 7 All 661* referred to by MUHAMMAD RAFIQ J *Dhapi* v *Ram Pershad I L R 14 Calc 768* referred to by WALSH J BUDDHU LAL v MEWA RAM

I L R 43 All 564

——— ss. 115 and 151—

——— *Arbitrators' award decree—without inquiry into the nature of the award —Manual of High Court's Circulars Chapter VI para 2—Inquiry—Real point of difference—Decree set aside—Abuse of judicial process* The plaintiff a money lender filed in Court an arbitrator's award passed against the defendant debtor and prayed for a decree in the terms of the award The Court having presumed that there was a real point of difference between the parties, passed a decree in,

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd.

——— ss 115 and 151—*contd*

the terms of the award without instituting inquiry directed by a circular of the High Court (Manual of High Court s Circulars Chapter XI para 2 page 181) *Held* setting aside the decree under s 115 and 151 of the Civil Procedure Code (Act V of 1908) that there was an abuse of judicial process. VELCHAND CHHAGANLAL v LIEUT LISTON (1914)
I L R 38 Bom 638

——— s 115 151 and 152 O VII, r 11 O XLIII—r 1 (w)—*Incorrect valuation of relief claimed—Plaint returned—Review of order returning plaint—Appeal—Court fees Act (VII of 1870) s 12 and sch II art 17 (vi)* *Held* that (1) an order rejecting a plaint under O VII r 11 of the Civil Procedure Code is not appealable when such order is based on a question of valuation *pure and simple* (2) When the order necessarily involves a decision of the category or class under which a suit falls even though it incidentally decides a question of valuation the order is appealable (3) In cases falling under (1) where the other involves a question of jurisdiction the High Court may interfere either under s 115 of the Code of Civil Procedure 1908 or under s 107 of the Government of India Act by virtue of the residue of jurisdiction which the Court will always exercise wherever it appears that there has been something in the nature of denial of the right of fair trial and that (4) Before or after an order of demand fructifies by non compliance into a recorded order of rejection the Court contemplated in s 12 of the Court fees Act 1870 may for good and sufficient reasons review its own order of demand on application by the plaintiff or revise that order on its own motion CHANDRAMANI KOER v BASDEO NARAIN SINGH 4 Pat L J 57

——— ss 115 and 151 O IX rr 9 and 13 and O XXI, r 110—*Default dismissal for—Application for re hearing maintainability of* A party not bound by a decree may under O IX r 9 of the Code of Civil Procedure 1908 obtain a re hearing of a claim made by him under O XXI r 100 which has been dismissed for default An application under R 100 is in the nature of a summary suit and the provisions of the Code of Civil Procedure for the trial of suits apply to it SATYA NARAYAN LAL v GOBIND SAHAY 3 Pat L J 250

——— ss 115 151 O XLI, r 23—*Remand of case by lower Appellate Court—Refund of Court fees paid on memorandum of appeal—Court fees Act (VII of 1870) s 13—Refusal to pass the order—Application to High Court* The lower Appellate Court remanded a case under O XLI r 23 of the Civil Procedure Code 1908 but declined to order refund of Court fees paid on the memorandum of appeal The appellant having applied to the High Court against the order *Held* that the application was not within the scope or intention of s 151 of the Civil Procedure Code 1908. *Held* further that the application must be allowed under s 115 of the Code as the lower Appellate Court in refusing to pass the order had acted with illegality or with material irregularity *Per* BEAMAN J I think it is very clear that that s (151) is intended to empower Courts to deal with their own decrees and orders and was not intended to give authority to superior Courts by way of conferring supplemental jurisdiction to that conferred by s 115 BHAUSING v CHAGANIRAM HURCHAND (1918) I L R 42 Bom. 363

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— s 115 O XI r 12—

See LAND ACQUISITION
I L R 38 Calc 230

——— s 115 O XXI r 66—

——— The Act of a Court in settling the terms of a sale proclamation under O XXI r 66 is a Judicial Act. MUNSHI RAGHUNATH SINGH v HAZARI SAHU
2 Pat L J 131

——— s 115 O XXI r 89—

——— *Private sale by judgment debtor after Court auction—Application to set aside Court sale—Whether purchaser in private sale or judgment debtor entitled to apply—Dismissal of petition as of person not entitled to apply—Powers of High Court—Revision* A judgment debtor who after the Court sale transfers his interest in the properties sold in execution of a decree retains sufficient interest within the meaning of O XXI r 89 to allow him to apply under the rule *Subbarayudu* v *Lakshminarasamma (1915) I L R 38 Mad 775* overruled *Pandurang Laxman* v *Govind Dada (1916) I L R 40 Bom 557* and *Mussumat Dhanwati Kuer* v *Sheo Sankar Lal (1919) 4 Patna L J 340* s c *52 I C 873 (Patna)* followed *Ishar Das* v *Asaf Ali Khan (1912) I L R 34 All 186* dissented from The purchaser of such properties after Court sale is precluded from applying under the rule *Lakshmi Ammal* v *Sankaran Nair (1913) 24 M L J 205* overruled The High Court can interfere in revision if an application under O XXI r 89 has been dismissed on the ground that it was made by a person who was not entitled to apply SUNDARAM v MAUSA MAVUTHAR (1921)
I L R 44 Mad (F B) 554

——— *Decree—Execution—Auction sale—Deposit in Court—No application to set aside sale—Sale confirmed—subsequent application to set aside sale—Application refused—No irregularity—Titles arising from judicial sales should be settled as soon as possible* The property of the applicant was sold in execution of a decree against him Within thirty days of the date of sale the applicant deposited in Court the amount of the decree together with interest on the purchase money for the property sold The applicant however having made no application to set aside the sale the sale was confirmed and the Court called upon the applicant to take away his money The applicant then applied that his deposit should be considered as an application to set aside the sale Having failed in both the Lower Courts he applied to the High Court under s 115 of the Civil Procedure Code 1908 *Held* that the application would not lie under s 115 of the Civil Procedure Code as there was no defect whatever in jurisdiction and no irregularity in the exercise of jurisdiction The Civil Procedure Code with the Limitation Act provides a short period within which applications specifying their object should be made to set aside sale and the shortness of time allowed may be taken as indicative of the policy of the Legislature that titles arising from judicial sales should be settled as soon as possible RAOJI v BANSILAL NARAYAN (1919)
I L R 43 Bom 735

——— s 115 O XXII, r 5—*Suit for rent in a Revenue Court—Death of plaintiff—Conflict rg*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 115 O XXII, r 5—*contd*

claims to represent plaintiff by widow and father—Necessity for inquiry—Order of District Collector recognizing widow as land holder effect of—Order of Revenue Court recognizing widow as legal representative—Revision to High Court competency of—Madras Estates Land Act (I of 1908) ss 3 (5) 192 and 205 construction of In a suit for rent instituted in a Revenue Court the plaintiff died the widow of the deceased plaintiff claimed to be his legal representative to continue the suit as against the father who claimed to be such representative as the legatee under an alleged will of the deceased plaintiff Subsequent to the institution of the suit the District Collector had passed an order under s 3 (5) of the Madras Estates Land Act recognizing the widow as *land holder* in succession to the deceased plaintiff The Revenue Court held that the widow should be held to be the legal representative to continue the suit and dismissed the claim of the father without inquiring into the genuineness and validity of the will The latter preferred a Civil Revision Petition to the High Court under s 115 of the Civil Procedure Code The respondent raised a preliminary objection that no revision petition lay to the High Court and also contended that the point was concluded by the order of the District Collector *Held* (i) that the High Court was competent to revise the order of the Revenue Court under s 115 of the Civil Procedure Code which is made applicable to proceedings in Revenue Courts by s 192 of the Madras Estates Land Act and s 205 of the Act does not relate to interlocutory orders in rent suits the final decrees in which are appealable under Part A of the schedule (ii) that the Revenue Court is bound under O XXII r 5 of the Civil Procedure Code to hold an inquiry into the claims of the several claimants and determine who was entitled to be brought on the record as legal representative in the place of the deceased plaintiff and (iii) that the order of the District Collector recognizing the widow as land holder under s 3 (5) of the Madras Estates Land Act was not only not conclusive on the point but has no bearing on it and could not be the basis of an order of the Court under O XXII r 5 of the Code or obviate the necessity for an enquiry thereunder PARAMASWAMY AYYANGAR v ALAMELU NATCHIAR AMMAL (1918) I L R 42 Mad 76

——— s 115 O XXIII, r 1—

See JURISDICTION OF HIGH COURT I L R 44 Calc 454

See WITHDRAWAL OF SUIT 3 Pat L J 460

——— s 115 O XXIII r 1—*Withdrawal of suit—Order of Appellate Court granting withdrawal—Revision power of High Court to interfere in* The High Court has power in its revisional jurisdiction to interfere with an order passed by a subordinate Appellate Court granting the plaintiff leave to withdraw his suit with permission to bring a fresh suit upon the same cause of action Where in an appeal by the plaintiff from an order dismissing his suit the one party defendant filed cross appeals in which they alleged that the suit must fail owing to a formal defect in the pleadings *Held* that it could not be urged by that party defendant that the Court had no jurisdiction to allow the plaintiff to withdraw the suit with permission to bring a fresh suit on the same cause of action BISHESHAR AHIR v BRIJRA MISIR 3 Pat L J 630

——— s 115, O XXXVIII rr 9 11—

See ATTACHMENT BEFORE JUDGMENT I L R 45 Calc 780

——— s 115 O XL r 1—

See RECEIVER 3 Pat L J 573

——— s 115 O XL rr 1 and 4—

See RECEIVER 5 Pat L J 94

——— s 115 Sch II para 15—

See ARBITRATION I L R 36 All 354

——— s 115 Sch II para 16—*Arbitration Award—Award filed in Court—Court should give time to the parties to file objections to the award—Procedure and practice* In a pending suit the parties referred their disputes to an arbitrator who heard the parties made the award and filed it in Court On the day the award was filed the Court examined the parties who happened to be in Court overruled the objections which one of the parties made to the award and passed a decree in terms of the award *The party aggrieved having* applied to the High Court *Held* that though no appeal lay from the decree so made on the ground that there was any defect in the award itself yet the High Court could under s 115 of the Civil Procedure Code set aside the decree and remit the award to the lower Court to enable the applicant to file his objections to it within the time prescribed by law *Walji Mathuradas v Ebji Umersey (1904) 29 Bom 285* followed PANJIBHAI v DAHYABHAI (1920) I L R 45 Bom 832

——— s 117 (1882 Code s 632)—

See INSOLVENCY I L R 43 Calc 243

——— ss 117 to 130—

See LETTERS PATENT 25 C W N 557

——— ss 119 (1882 Code s 635)—

See PRACTICE I L R 37 Calc 853

——— s 632 121—

See ARBITRATION I L R 43 Calc 293

——— s 122 (1882 Code ss 633 652)—

See POWER OF ATTORNEY I L R 41 Bom 40

——— *Power of High Court to make rules—Rules of Court of the 18th January 1898 Chap III r 2—Appeal—Limitation—Limitation Act (IX of 1908) s 12* The High Court framed a rule with reference to the presentation of the appeals from appellate decrees that No memorandum of appeal from an appellate decree or from any order shall be presented unless accompanied by a copy of the decree or order appealed against and *where it exists a copy of the judgment of the Court of first instance* *Held* on construction of this rule that it did not connote that the appellant had a right to exclude from the period of limitation for filing his appeal the time requisite for obtaining a copy of the judgment of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 122—*contd*

the Court of first in tance *Held* al o that having regard to s 122 of the Code of Civil Procedure 1908 the rule in que tion was not *ultra vires* NARSINGH SAHAI *v* SHEO PRASAD (1917)
I L R 40 All 1

——— ss 122, 123 124 and 125—

See RULES OF THE PATNA HIGH COURT 1916 5 Pat L J 719

——— s 128 (1882 Code s 637)—

See CONTRACT ACT ss 39 73 120
I L R 34 Bom 192

——— s 128 (2) (e) & O I r 10 (2)—

See PARTIES I L R 46 Calc 48

——— s 129 (1882 Code s 652)—

See O XII r 10
I L R 37 Bom 572
16 C W N 119

See PRACTICE I L R 37 Calc 853

——— s 132 (1882 Code s 640)—

See EXAMINATION ON COMMISSION
I L R 45 Calc 697

——— ss 132 133—

See EXAMINATION ON COMMISSION
I L R 45 Calc 492

——— s 133 (1882 Code s 641)—

——— s 135 (1882 Code s 642)—

See s 47 I L R 32 All 3

——— s 135 O XXXVIII, r 3—*Surety for appearance of defendant—Defendant present in Court to conduct his case—Application by surety to be released from obligation—Voluntary surrender* A surety for the appearance of a defendant who had been arrested before judgment is not entitled to be di charged from his obligation under O XXXVIII r 3 when the defendant appears in Court to conduct his case as such appearance is not a voluntary surrender with in the meaning of the rule nor is he entitled to such discharge becau e the defendant submitted to a consent decree without his assent S 135 of the Indian Contract Act does not apply APPUNNI NAIR *v* ISACK MACKDAN (1920)
I L R 43 Mad 272

——— s 141 (1882 Code s 647)—

See LEGAL PRACTITIONERS ACT 1879
See s. 2 (?) I L R 1 Lah 187
s 14 1 Pat L J 576

See RESTORATION OF SUIT
2 Pat L J 720

——— 141 144 and O II r 2—

See RESTITUTION 3 Pat L J 367

——— ss 141 and 151—*Procedure relating to suits—whether appl cable to applications for execu tion—application for execution dismissed for de fault whether it can be restored—inherent power of Court* *Held* that s 141 of the Code of Civil Procedure 1908 does not apply to a proceeding for execution *Thakur Prasad* v *Fakir Ullah* (*I L R 17 All 106 P C*) *Hari Charan* v *Manmatha Nath Sen* (*I L R 41 Ghose Cal 1*) and *A Balasubramania* v *Swarnammal* (*I L R 38 Mad 199*) followed *Held however* that in the exerci e of its inherent power expres ly re cogni ed by s 151 of the Code a Court can re tore an application for execution after it has di missed it for default and should do so notwith tanding that the applicant has an alternative remedy by making a second application for execution if he satisfies the Court that it should exerci e its in herent jurisdiction *ex debito justitiæ* *Debi Bakhsh Singh* v *Habib Shah* (*I L R 35 All 331 P C*) referred to *Babui Pilu Kuer* v *Alakhdeo Narain Singh* (4 Patna L J 330) explained BHOLU *v* RAM LAL I L R 2 Lah 66

——— ss 141 151 and O IX r 9—*Applica tion for restoration of suit* (*wrongly d cribed as a review*) *after a previous application had been di missed in default—appl cation for which there is no express provision in the Code* Plaintiff petitioners suit was dismis ed in default on 9th October 1918 by *Lala* Hari Chand Senior Sub Judge und r O IX r 8 Civil Procedure Code An application for restoration of the suit was put in by their Pleader on the same date On 22nd Novemb r this application was consigned to the Record room in default of appearance of plaintiff On 19th December 1918 the plaintiffs made an application described as a review of the order of the 22nd November but which in substance was one for a restoration of the suit M Zafar Ali the then Senior Sub Judge decided that he had no jurisdiction to entertain the ap plication for review as his predeces or *Lala* Hari Chand had not issued notice *Held* that the application of 19th December 1918 was in fact an application for restoration of the suit and should not have been treated as an application for review though erroneously described as such *Held al* that s 141 of the Code of Civil Procedure was applicable to such an application *Manakji* v *Suraj Mal* (*10 Indian Cases 705*) followed *Held further* that it is not necessary in every ca e to have the support of a section of the Code to em power a Court to pa s an order not expre ly or impliedly forbidden and which is es ential in the interests of justice *Hukum Chand Boid* v *Ka malanand Singh* (*I L R 33 Calc 927 948*) approved ABDUL RAHMAN SHAH *v* SHAHANA
I L R 1 Lah 339

——— s 141 O II, r 2—

See EXECUTION I L R 38 Mad 199

——— s 141 O IX r 13—

See EXECUTION PROCEEDINGS
I L R 41 Calc 1

——— s 141 O XVI r 12—*Proceeding against a pleader under the Legal Practitioners Act* (*XVIII of 1879*) *before a District Judge—Court s order calling for production of a document if legal* The words any Court of Civil Jurisdiction in s 141 of the Civil Procedure Code include the Court of a Di trict Judge holding an enquiry under the Legal Practitioners Act and an order may be legally made by the District Judge in such a proceeding calling for the production of a docu ment under O XVI r 12 of the Civil Procedure Code NANDA LAL ROY *v* NASER ALI (1919)
23 C W N 560

——— s 141, r 90 O IX—*Appli cation for setting* ... *missed for default*—

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 145 O XXXII r 6—*contd*

directed to be realized by attachment of the property of the surety *Held* that the order for attachment was made without jurisdiction as neither s 145 nor any other provision of the Code of Civil Procedure empowers the Court to attach the property of the surety KURUGODAPPA *v* SOOGAMMA (1917) I L R 41 Mad 40

——— s 145, and O XXXIV r 14—

See EXECUTION OF DECREE 2 Pat L J 197

——— *Execution of decree—Security for default of judgment debtor—Mode of enforcement of security* On attachment of certain property under a decree by a decree holder a third party came forward claiming the attached property as his own but subsequently entered into a compromise with the decree holder whereby he made himself responsible for payment of the decretal amount and executed a security bond in which in addition to undertaking a personal liability for the judgment debtor's default he also hypothecated certain property *Held* that default having been made by the judgment debtor the decree holder was at liberty to enforce the security in the manner provided for by s 145 of the Code of Civil Procedure, and that O XXXIV r 14 was no bar to his enforcing it against the hypothecated property as well as any other property of the surety *Janki Kuar* v *Sarup Rani* *I L R 17 All 99* referred to MUKTA PRASAD *v* MAHADEO PRASAD (1916) I L R 38 All 327

——— s 145 O XLI, r 5—

See EXECUTION OF DECREE I L R 38 Cal 751

——— s 146 (of 1882 Code s 158 A)—*Suit originally filed in a District Munsif's Court—Plaint returned and filed in a Subordinate Judge's Court—Suit property mortgaged to another during pendency of suit in the former Court—Decree for plaintiff by Subordinate Court—Petition to District Court by mortgagee for permission to appeal if competent—Appeal by mortgagee against decree of Subordinate Judge's Court whether maintainable* A plaint filed in a District Court was on objection taken by the defendant to the valuation of the suit ordered to be returned and was presented in the Subordinate Judge's Court. While the suit was pending in the District Munsif's Court the suit property was mortgaged by the defendant to the appellant On the suit being decreed by the Subordinate Judge in favour of the plaintiff the defendant did not prefer an appeal the *appellant* as the mortgagee of the suit property pending suit alleging collusion between the plaintiff and the defendant filed an application in the District Court under O XXII r 10 for an order allowing him to prefer an appeal and also preferred an appeal against the decree The District Judge dismissed both the petition and the appeal as incompetent The appellant preferred to the High Court a Civil Miscellaneous Appeal and a second appeal against the decisions respectively *Held* that O XXII r 10 only governs applications made to continue a suit and that an application presented after the termination of the suit was not within the rule *Subba Pillai v Ranganam (1917) Mad. W N 396* and *The Collector of Muzaffernagar* v *Husain Begam* *I L R 18 All 85* followed. *Held* also that under s 146 of the Civil Procedure Code it was competent to the mortgagee to prefer an appeal to the District Court against the decree of the Subordinate Judge and that the District Judge was bound to dispose of the appeal on the merits notwithstanding the dismissal of the petition under O XXII r 10 Where a plaint is returned for presentation to the proper Court any devolution of interest during the pendency of proceedings in the first Court must be taken to be a devolution of interest during the pendency of the suit in the second Court *Seshagiri Row* v *Vapa Velayudam Pillai I L R 36 Mad 492* distinguished SITARAMASWAMI *v* LAKSHMI NARASIMHA (1917) I L R 41 Mad 510

——— s 148—

See CIVIL PROCEDURE CODE 1908 ss 104 AND 148 I L R 35 All 532

O XXXIV R 8 PROVISO I L R 39 Mad 878

See S 2 (2) I L R 35 All 582

See PRACTICE I L R 37 Calc 549

——— *Pre-emption decree for—extension of time for deposit of purchase money power of Court to grant* When a decree for pre-emption has been made O XX, r 14 of the Civil Procedure Code 1908 does not deprive the Court making the decree of the power vested in it under s 148 of the Code to extend the time fixed in the decree for the deposit of the purchase money ABU MUHAMMAD MIAN *v* MUKUT PERTAP NARAIN 1 Pat L J 92

——— ss 148 and 149—

See S 27 26 C W N 391

——— ss 148 and 115 and O IX rr 8 9 and 13—*Dismissal for default—application for reinstatement—Limitation Act (IX of 1908) ss 5 and 18—arbitrary exercise of discretion to extend time* The discretion conferred by s 148 of the Code of Civil Procedure 1908 cannot be arbitrarily exercised in matters to which the rules of limitation apply and in which by those rules the Court can only extend the time after a proper judicial consideration of the cause shewn under s. 5 or the fraud established under s 18 of the Limitation Act 1908 A Court cannot keep alive a cause of action for an indefinite period by granting without cause shewn and without consideration indulgence under s 148 to litigants who are guilty of the grossest *laches* and who fail to comply with the order of the Court MUSAMMAT DUKHNO *v* MUNSHI SAHU 4 Pat L J 423

——— ss 148 and 151 O XXXIV r 8 O XLVII—*Decree conditioned upon payment of money within a fixed period—Court not competent to extend time for payment otherwise than in the case of mortgage decrees* Except in the case of a decree in a mortgage suit to which O XXXIV r 8 of the Code of Civil Procedure applies, a court has no power to extend the time limited for payment of money ordered by a decree to be paid as a condition precedent to its operation. *Suranjan Singh* v *Ram Bahal Lal I L R 35 All 582* followed

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— ss. 148 and 151—*contd*

Idumba Parayan v Pethi Peddi I L R 43 Mad 55 dissented from. KANDHAIYA SINGH MUSAMMAT v KUNDAN I L R 42 All 639

——— s 148 O IX r 13—*Decree ex parte—Conditional order setting aside decree—Condition not fulfilled—Court competent either to extend time for compliance with condition or to pass a fresh conditional order* On an application to set aside an *ex parte* decree the Court passed an order in favour of the applicants, but conditional on their paying to the plaintiff by a certain date a sum of money as damages. This condition was not fulfilled, and the Court holding that it had no jurisdiction to receive the prescribed payment after the date fixed, disallowed the defendants application to set aside the decree. *Held* (i) that an appeal lay from this order and (ii) that the Court below had jurisdiction to extend the time for payment of the damages or to pass a fresh conditional order setting aside the decree upon terms the original order having become inoperative *Suranjan Singh v Ram Bahal Lal I L R 35 All 582* distinguished. JAGARNATH SAHI v KAMTA PRASAD UPADHYA (1913) I L R 36 All 77

———Pre emption—decree for —where a decree for pre emption has been made O XX, r 14 of the Code does not deprive the Court making the decree of the power vested in it under s 148 to extend the time fixed in the decree for the deposit of the purchase money ABU MUHAMMAD MIAN v MUKUL PERTAP NARAIN 1 Pat L J 92

——— s 148 and O XXI, r 89—*Sale application to set aside—Limitation whether court may extend period of* An application to set aside a sale under r 89 or O XXI of the Code of Civil Procedure 1908 must be made within 30 days of the date of the sale unless the parties agree to an extension of this period, and the court has no power to extend this time except under the provisions of the Limitation Act 1908 The court has no jurisdiction to set aside a sale by allowing the judgment debtor to deposit the decretal amount after the period of limitation has passed CHAUDHRY RAMESHWAR MISSER v CHAUDHRY SURESHWAR MISSER 2 Pat L J 16

——— s 148 O XXXIV r 8—*Mortgage—Redemption—Mortgage money not paid within time limited by decree—Power of Court to extend time* S 148 of the Code of Civil Procedure applies to cases in which the time fixed by the Code of Civil Procedure for the doing of some act is extended and not to the extending of the time fixed by a mortgage decree for the payment of a prior mortgage. The plaintiff in a suit for redemption of a mortgage obtained a decree which provided in the event of non payment not that he should be debarred from all right to redeem the mortgaged property but that his suit should be dismissed Owing to a *bona fide* mistake the plaintiff paid into Court within the time limited less than the sum actually due. *Held* that the Court had power under O XXXIV r 8 of the Code of Civil Procedure to extend the time limited for payment of the full decretal amount HET SINGH v TIKA RAM (1912) I L R 34 All 388

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 148 Sch II s 15 (c)—

See ARBITRATION I L R 38 Calc 522

——— s 149—

See s 110 I L R 1 Lah 220

See COURT FEE I L R 1 Lah 234

See LIMITATION 1 Pat L J 420

——— s 150—

See s 37 I L R 37 Mad 462

——— *Assignment of business within local limits of one Subordinat Court to another by District Judge if transfer of business —Civil Courts Act (XII of 1887) s 13 (2)* A decree was passed by the third Subordinate Judge s Court in respect of a claim the cause of action whereof arose within certain local limits Subsequently the business arising within these limits was assigned to the fourth Subordinate Judge s Court by the District Judge under s 13 (2) of the Bengal and Assam Civil Courts Act (XII of 1887) *Held* —That the fourth Subordinate Judge s Court could not entertain an application to execute the decree An assignment of business under s 13 (2) of Act XII of 1887 is not the same thing as transfer of business within the meaning of s 150 of the Civil Procedure Code MUNSHI MOHAMMAD KAZEMALI v MUNSHI NIAMUDDIN AHMED 26 C W N 216 I L R 49 Mad 821

——— s 151—

See S 14 I L R 32 All 71

See APPEAL I L R 41 Calc 418

See S 47 2 Pat L J 361

See S 115 I L R 38 Bom 638
4 Pat L J 57
3 Pat L J 250
I L R 42 Bom 363

See CASTE I L R 34 Bom 467

See CIVIL PROCEDURE CODE, 1905 s 144 18 C W N 1299

See COURT FEES 3 Pat L J 452

See EXECUTION OF DECREE
3 Pat L J 435
4 Pat L J 330

See HIGH COURT JURISDICTION OF I L R 40 Calc 955

See INSOLVENCY I L R 43 Calc 243

See LIMITATION ACT 1908 ART 168 I L P 1 Lah 363

See PROBATE AND ADMINISTRATION ACT (V OF 1881) s 50 I L R 37 All 380

See STAMP ACT 1899 s 52 14 C W N 1101

See TRUSTS ACT I L R 34 Bom 437

1 ——— Decree of Small Caus Court— *Money lying in d posit in the Court of the First Class Subordina. Judge—Attachment and recovery of money in ex cution of the Small Cause Court decree—Suit in the Court of the First Class Subordinate Judge for a declaration that the attachment was invalid and for refund of money—Decree a cord*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— **s 151**—*contd*

ingly—Proceedings in the Small Cause Court and order for refund by that Court—Order not sustainable The plaintiff brought a suit in the Court of the *First Class Subordinate Judge and finally obtained* a decree declaring that an attachment on certain money already lying in deposit in that Court levied by the defendant in execution of his Small Cause Court decree was invalid and decreeing that the defendant should repay the same to the plaintiff *In execution of the said decree in the suit of the* Court of the First Class Subordinate Judge the plaintiff applied to the Small Cause for the refund of the money and that Court passed an order for the refund The defendant thereupon preferred an application to the High Court under the extra ordinary jurisdiction *Held* setting aside the order that such an order could only be made if it was necessary for two purposes namely for the ends of justice or to prevent the abuse of the process of the Court The plaintiff had already a decree which he was entitled to execute in the First Class Subordinate Judge's Court GANESH NARAYAN *v* PURUSHOTTAM GANGADHAR (1910)

I L R 34 Bom 135

2 ——— **Caste questions**—*Trustees of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste questions—Application of Indian Trusts Act (II of 1882) ss 5 and 6 to creation of trusts to caste fund —Civil Procedure Code (Act V of 1908) s 151* *Held* that when according to well established principles certain questions have been removed from the jurisdiction of the Court they cannot be brought within the jurisdiction under s 151 of the Civil Procedure Code (Act V of 1908) JETHABHAI NARSEY *v* CHAPSEY COOVERJI (1909)

I L R 34 Bom 467

3 ——— **Costs against persons behind benamidar creditor obtaining adjudication**—*order in insolvency proceedings* Certain persons were adjudicated insolvents on the application of a lady who professed to be a creditor The insolvents questioned the right of the lady to claim as a creditor in the insolvency before the Official Assignee who held that the lady was not a creditor *but a benamidar for certain other persons* *Against* this decision of the Official Assignee the lady preferred an appeal which was ultimately dismissed by the court of Appeal The adjudication order was also cancelled On the application of those who had been adjudicated insolvents *Held* that they *are entitled to costs in respect of the proceedings* connected with the *benamidar's* claim as a creditor in insolvency against the real persons behind the *benamidar* when it appeared that the person put forward was of no means and was put forward by them with a view to abusing the process of the Court KETORA CHARAN BANERJI *v* SARAT KUMARI DEBI (1917) **21 C W N 826**

——— **ss 151 and 154**—*Money deposited in Court—Withdrawal by one party—Undertaking by party to repay amount—No provision in undertaking to pay interest—Application by party entitled to recover amount with interest—Power of Court to enforce undertaking—Liability for interest* The plaintiffs having sued to establish their right to certain moneys which had been paid into Court by a third party the defendant was allowed to draw the money on an undertaking to repay it if the plaintiffs

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— **ss 151 and 154**—*contd*

succeeded The plaintiffs having obtained a decree *held* that the Court had inherent power to order the defendant to repay the money, and that he *could be made liable for interest* as he had had the wrongful use of the money *Rodger v The Comptoir D Escompte DeParis I L R 3 P C 465* *Subbarayudu v Yerram Setti Seshasani I L R 40 Mad 299* and *Indra Chund Bothra v Mr A H Forbes 2 Pat L J 149* referred to ALAGAPPA CHETTIAR *v* MUTHUKUMARA CHETTIAR (1917) **I L R 41 Mad 316**

——— **ss 151 47 O XLVII r 2**—*Court inherent power if to be exercised in contravention of prohibition of statute and if to be exercised when not tending towards substantial justice—statute application of* In exercise of its inherent powers under s 151 of the Civil Procedure Code the Court cannot assume jurisdiction to grant a review where it has been expressly forbidden by the Legislature to entertain such application On any point specifically dealt with by the Code the Court cannot disregard the letter of the enactment according to its true construction though as the Legislature cannot anticipate and make express provisions to cover all possible contingencies it is the duty of a Judge to apply the provisions of the law not only to what appears to be regulated expressly thereby but also to all cases to which just application of them may be made and which appears to be comprehended either within the express sense of the law or within the consequences that may be gathered from it The inherent power of a Court can be invoked only for the attainment of the ends of substantial justice for the administration of which alone Courts exist A sale certificate is merely evidence of title and does not create title so that if the Court should refuse to grant such a certificate to the auction purchaser possession should not be delivered to him as required by the Code This will not preclude him from suing for a declaration of title and for recovery of possession within 12 years of the date when the sale was confirmed Where purporting to act under s 151 Civil Procedure Code a Munsif cancelled an order for delivery of possession passed *by his predecessor on the ground that the application* for delivery of possession having been made more than 3 years after the date of confirmation of the sale was manifestly barred by limitation *Held* that as the Munsif was expressly forbidden by statute to entertain an application for review he could not entertain the application in exercise of his inherent powers That the order should not have been made as its only effect would be to drive the auction purchaser to institute a suit SASI BHUSAN MOOKERJEE *v* RADHA NATH BOSE (1914) **19 C W N 835**

——— **ss 151 and 182**—

See AMENDMENT OF DECREE

4 Pat L J 330

1 ——— *Decree in apparent conformity with judgment—True intention of Court as to costs awarded to successful party whether against one or more defendants as gathered from whole judgment if may be given effect to by way of amendment—Review application if only remedy* Where one only of several defendants contested the suit which was decreed in favour of the plaintiff

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— s 151—*contd*

and from the judgment as a whole it appeared that the Court intended to make defendant No 1 alone liable for the costs and not the other defendants but in concluding its judgment it said the suit be decreed with costs *Held* that this portion of the judgment was elliptical and ambiguous and the true intention of the Court was to be gathered from the judgment as a whole and the decree of the Court which following the concluding portion of the judgment awarded costs against all the defendants was not really in accord with the true intention of the Court That the defect in the decree could be amended under either s 151 or s 152 of the Civil Procedure Code and an application for review of judgment was not the only remedy of the other defendants *Brij Ratan* v *Jay Narain I L R 37 Calc 649 659 In re Swire 30 Ch D 239* referred to Such an amendment could be made even after an appeal had been lodged from the decree *E* v *E* (*1903*) *P 88* followed BARHAMDEO SINGH v HARMANOGE SINGH (1913) 18 C W N 772

——— ss 151 152—*Inherent jurisdiction of Court—Scope of s 151—Amendment of decree* S 152 does not in any way affect the inherent jurisdiction of the Court under s 151 and in exercise of this jurisdiction the Court can amend a decree even when s 152 has no application MOHABIR PROSHAD CHOUDHURY v CHANDRA SEKHAR SAHI (1914) 19 C W N 1021

——— If a decree embodying a compromise is inaccurate or does not embody true terms the only remedy is by an independent suit to set aside the decree for mistake and fraud or other such ground. RAM LAGAN SAHU v RAM BIRICH KOERI 4 Pat L J 205

——— s 151 O IX, r 13—*Procedure—Minor—Decree against minor set aside on ground of want of proper appointment of guardian* ad litem—*Remedies open to plaintiff* Under the Code of Civil Procedure a suit may be instituted against a minor by name It is the duty of the Court to appoint a proper guardian *ad litem* The institution of the suit is complete and saves limitation but its further progress depends upon the appointment of a suitable guardian *ad litem* Where proceedings taken to appoint a guardian *ad litem* for a minor in a suit have been declared to be invalid and a decree passed against a minor has been set aside because the minor was not properly represented in the suit the Court whose duty it ultimately is to appoint a guardian has inherent power under s 151 of the Code of Civil Procedure to revive the suit under O IX r 13 of the Code *Raj Kumar Roy* v *Hara Krishna Chakrabarti 10 Indian Cases 355* BHAGWAN DAYAL v PARAM SUKH DAS (1916) I L R 6 All 8

——— s 151 Os IX and XLVII—
See EXECUTION OF DECREE
4 Pat L J 330

——— s 151 O XXXIX r 1—
See INSOLVENCY PROCEEDINGS
3 Pat L J 456

——— s 151 O XLI, rr 1 11—
See APPEAL I L R 42 Calc 433

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s 151 and O XLI, r 19—*Indian Limitation Act (IX of 1908) s 6 and Art 168—Appeal dismissed for default—Appellant minor at the date of default—Application to re admit the appeal by the minor on attaining majority—Court—Inherent powers—Practice and procedure* An application to re admit an appeal under O XLI r 19 of the Civil Procedure Code 1908 is outside the scope of s 6 of the Indian Limitation Act 1908 and is governed by Art 168 of that Act O XLI R 19 does not exhaust the powers of the Court in a proper case to re admit an appeal or an application dismissed for default and it is open to the Court in exercise of its inherent powers to deal with those applications under s 151 of the Code of Civil Procedure and to make an order to that effect for the ends of justice or to prevent abuse of the Court without any reference to the period of limitation fixed for applications to re admit appeals of to restore any other proceeding dismissed for default *Lalla Sheo Churn Lal* v *Ramnandan Dobey (1894) 22 Calc 8* and *Raja Debi Bakhsh Singh* v *Habib Shah (1913) L R 40 I A 151* referred to SONUBAI v SHIVAJIRAO (1920) I L R 45 Bom 648

——— s 151 O XLIII, r 23—
See REMAND 3 Pat L J 253

——— s 152 1882 Code 206 (3)—
See S 151 19 C W N 1021
See PRACTICE I L R 37 Calc 649

——— *Refusal of Court to correct an accidental mistake in the drawing up of a decree—Revision—Jurisdiction* In a suit for sale on foot of a mortgage one of the defendants pleaded a prior mortgage An issue was expressly struck on the point and was found in favour of the prior mortgagee The operative portion of the judgment directed that a decree for sale should be prepared in accordance with the provisions of O XXXIV r 4 of the Code of Civil Procedure but the decree which was drawn up was one for sale of the property in suit without any reference to the prior mortgage The prior mortgagee presented an application under s 152 of the Code of Civil Procedure to the Court which passed the decree to have it amended *Held* that the prior mortgagee whether or not he had preferred an appeal from the decree was entitled with reference to s 152 to have it amended and the Court in refusing to amend had failed to exercise a jurisdiction vested in it by law SAHADEO CIR v DEO DUTT MISIR (1915) I L R 37 All 623

——— s 152 O XLVII, r 1—
See PRACTICE I L R 44 Calc 28

——— s 153—
See DECREE HOLDER
I L R 38 Mad 6—
See HINDU LAW—PARTITION
1 Pat L J 393
See PROCEDURE I L R 48 Calc 832

——— *Partition suit—Omission by plaintiff to put in some properties in the list of joint property in the plaint—Dismissal of suit—Power of amendment of plaint by the first Court as also by the Appellate Court* Per JWALA PRASAD J

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— s 153—*contd*

In a suit for partition of joint family property by a Hindu all the properties must be included in the action and the reason for this proposition is to save the parties from multiplicity of proceedings If by inadvertence mistake or fraud of any of the parties some of the joint properties are not partitioned in the original suit there will be no bar after the partition to have the properties excluded at the first partition divided when the mistake or fraud is discovered *Jogendra Nath Mukherji* v *Jugobundhu Mukherji I L R 14 Calc 122* and *Jogendra Nath* v *Baladeo Das I L R 35 Calc 961 s c 12 C W N 127* referred to O VI r 17 enables the Court to allow either party to alter or amend his pleadings at any stage on such terms as may be just S 153 C P C empowers the Court to make itself all necessary amendments for the purpose of determining the real questions or issues raised in the action This power is vested both in the original as well as in the Appellate Court *Srimohan Thakur* v *MacGregor I L R 28 Calc 769* approved *Per* ATKINSON *J* To avoid multiplicity of suits the law has endowed all Courts in all countries with just and most ample powers of amendment The widest power of amendment is given not only to the primary Court but to the High Court which enables the Court to try all matters properly in dispute between the parties MUKUNDA LAL CHAKRAVARTI *v* JOGESH CHANDRA CHAKRAVARTI (1916) **20 C W N 1276**

———— O I r 1 (1882 Code s 26)—

See APPEAL TO PRIVY COUNCIL. **I L R 38 Mad 406**

See MISJOINDER OF PARTIES **1 Pat L J 437**

See NUISANCE **I L R 40 Bom 401**

———— *Co mortgagees*—Where property is mortgaged to two persons as tenants in common and there is no separate covenant for repayment and one mortgagee wants to realise and the other does not the former should sue in respect of the whole amount joining his co mortgagee as defendant. SUNITABALA *v* DHARASUNDARI **24 C W N 297**

———— O I, rr 1 3—*Apply to questions of joinder of parties as well as causes of action* Questions of joinder of parties and causes of action are governed by the same principle whether the claim is founded on breach of contract or on tort PARENDRO NATH RAY *v* BROJENDRO NATH DAS (1917) **21 C W N 794**

———— O I, rr 1 3 O II, r 3—

See MISJOINDER OF PARTIES **I L R 45 Calc 111**

———— O I, r 3 (1882 Code s 28)—

See PARTIES **I L R 42 Calc. 1135**

See PROVINCIAL INSOLVENCY ACT 1907 **I L R 45 Bom 810**

———— Suit by reversioner for possession—*Other reversioners and transferees from widow joined as defendants* *Held* that it was competent to a reversioner suing for possession of immoveable property after the death of a Hindu widow to join as defendants both other reversioners in possession of the property claimed and also transferees of such property from the widow

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— s 153—*concld*

and the suit was not bad for multifariousness *Parbati Kunwar* v *Mahmud Fatima I L R 23 All 267* *Kubra Jan* v *Ram Bali I L R 30 All 560* and *Ganeshi Lal* v *Khairati Singh I L R 16 All 279* referred to BAL KRISHNA DAS *v* HIRA LAL BAGLA (1914) **I L R 36 All 408**

———— *Misjoinder—Agreement to sell his share by one member of a joint Hindu family—Suit by vendee for specific performance partition and possession against vendor and the vendor s coparceners—Specific Relief Act (I of 1877) s 27 (b) and (c)* Where a plaintiff sued a member of a joint Hindu family for specific performance of a contract to sell his share and included in the same suit a claim for partition and possession against all the members of the family based on an allegation that a subsequent partition made between all the members of the family by which the items contracted to be sold to the plaintiff were allotted to the other members was made with a view to defraud the plaintiff of his rights under the contract *Held* by the Full Bench (ABDUR RAHIM *J contra*)—(i) that the claim for partition was wrongly joined with the claim for specific performance as at the date of suit the plaintiff had no right to sue for partition not having completed his title by a sale deed and (ii) that by reason of the subsequent partition the other members of the joint family were properly made parties to the suit for specific performance as subsequent transferees with notice *Tasker* v *Small 3 My & Cr 63* applied. *Per* ABDUR RAHIM *J*—The suit as framed for specific performance as well as for partition and possession against all the members of the family is maintainable under O I r 3 Civil Procedure Code and s 27 (c) of the Specific Relief Act A right to ask both for specific performance as well as for partition and possession arises at the time the vendor refuses to carry out the bargain and give possession of the property The right to possession *arises out of* the contract to sell within the meaning of O I r 3 Civil Procedure Code RANGAYYA REDDY *v* SUBRAMANIA AYYAR (1917) **I L R 40 Mad 365**

———— O I, r 3 O II r 3—*Grades of several defendants in one suit— Same act or transaction — Series of acts or transactions —Practice* In reading O I r 3 of the Civil Procedure Code (Act V of 1908) it seems quite obvious that the word same which precedes the words acts or transaction governs also the words *series* of acts or transactions and must be read before those words also The first condition to be fulfilled before joining several persons as co defendants in the same suit is that the right to relief sought in the suit must arise against all the defendants from the *same* act or transaction or from the *same series* of acts or transactions. The second condition to be fulfilled under the rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons. Before a plaintiff can join several defendants in the same suit *both* the conditions laid down in the rule must be fulfilled *first* the relief sought against the defendants whether jointly severally or in the alternative must arise from the same act or transac

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd*

——— O I r 3 O II r 3—*contd*

tion or the same series of acts or transactions And *secondly* there must rise between the plaintiff and all the defendants some common question of law or fact. The plaintiff may in one action unite several causes of action against several defendants provided that all such defendants are jointly liable in respect of each and all of such causes of action and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants is that such defendants must all have a joint interest in the main question raised by the litigation and that causes of action joined in one suit against several defendants must be causes of action in which the defendants are all jointly interested. It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit but it is necessary that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary UMABAI *v* BHAU BALWANT (1908) I L R 34 Bom 358

——— O I r 3 O XXIII r 1—*Procedure—Suit dismissed for misjoinder of parties and of causes of action—Plaintiff permitted to withdraw suit with liberty to bring fresh suits* Where it was found on second appeal to the High Court that the suit out of which the appeal had arisen was bad for misjoinder of parties and of causes of action in that there was no community of interest between the various defendants whose sole connection with each other was that they were purchasers of different portions of property the whole of which was claimed by the plaintiff the High Court permitted the suit to be withdrawn on terms as to costs with liberty to the plaintiff to bring separate suits against each of the defendants. AFZAL SHAH *v* LACHMI NARAIN (1917) I L R 40 All 7

——— O I r 8 (1882 Code ss 30 and 32)—

See CHOTA NAGPUR ENCUMBERED ESTATE ACT ss 17 18 4 Pat L J 580

See HINDU LAW 24 C W N 206

See MAHOMEDAN LAW—WAQF I L R 35 All 197

See MOSQUE PROPERTY SUIT FOR. I L R 44 Calc 258

See MUTT I L R 41 Mad 124

See RELIGIOUS ENDOWMENT I L R 40 Mad 212

——— Suit filed by Representing body of creditors— *Application to be made party— Administration suit* Where a suit has been filed on behalf of a body of persons and an individual member of that body applies to be made a party he must show that his interests will be seriously prejudiced if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands or that action prejudicial to his interest is being taken by those who purport to represent him In an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason. The willingness of the applicants to bear their own costs does not counterbalance the delay caused by the addition of a party and the consequent increase in the cost of other parties.

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd*

——— O I r 8 (1882 Code ss 30 and 32) —*contd*

VASSONJI TRICUMJI & Co *v* ESMAILBHAI SHIVJI (1909) I L R 34 Bom 420

——— *Suit for declaration of public right of way if can succeed without proof of special damage—Advocate General's permission under s 9 C P Code if necessary where permission of Court is taken under O I r 8—Limitation Act (IX of 1908) s 23 Arts 120 and 144 applicability of in such suit* Plaintiff sued for a declaration that a village path was a public way and sought relief for himself and his fellow villagers The permission of the Court was taken under O I r 8 of the C P Code The suit was decreed and the decree confirmed on appeal The Appellate Court found that the Plaintiff suffered special damage and the finding was challenged in second appeal *Held* that the question of whether the Plaintiff suffered special damage or not did not arise because a suit for a declaration that a pathway is a village pathway can succeed without proof of special damage *Harihar Das* v *Chandra Kumar Guha* 25 *C W N* 91 followed The suit was one to which O I r 8 C P Code was appropriate and the Court's permission having been obtained under that rule recourse to the Advocate General was not necessary Art 144 and not 120 of the Limitation Act applied to the suit And in either case the Plaintiff could have recourse to s 23 of the Limitation Act HARISH CHANDRA SAHA *v* PRAN NATH CHAKRABARTY 26 C W N 587

——— Representing the section of a caste— *to take account and to recover moneys belonging to the section—Meeting not properly convened—Suit opposed by numerous members of the section—Suit as representing the plaintiffs supported by a large number of the members—Representative suit not maintainable* The caste of the Dasa Lad Banias of Broach was divided into two section known as the Mojumpurias and Sheherias The accounts and the funds of each section were separately kept by defendant No 1 who was the headman of the whole caste The plaintiffs were authorised to bring the present suit at a meeting at the Mojumpuria section held on the 28th April 1909 It appeared that the meeting was irregularly convened The plaintiffs brought the present suit under O I r 8 of the Civil Procedure Code to take accounts of the funds belonging to the Mojumpuria section from defendant No 1 and to recover from him the amount that might be found due on such accounts being taken. Out of the 183 members constituting the Mojumpuria s 112 supported the plaintiffs contentions whilst 70 members supported those of defendant No. 1 The first Court granted the reliefs sought but the District Court disallowed the second relief. On second appeal *Held* that the suit as constituted must fail for the plaintiffs could not represent nor sue on behalf of those numerous members of the Mojumpuria section who admittedly were in diametrical opposition to them in the present controversy *Held also* that the plaintiffs could not call in aid the private expressions of consent obtained after suit filed so as to supply that authority which was admittedly lacking at the time when the suit was in fact filed. HARKISHANDAS SHIVLAL *v* [illegible]GANLAL NARSIDAS (1915) I L R 40 Bom. 158

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

———— **O I r 8 (1882 Code ss 30 and 32)**
—concld

———— **Death of some of the persons on whose behalf a suit was brought**—*impleaded as respondents in the Appellate Court—abatement of appeal—order that appeal has abated—whether a decree and open to appeal* The *Jat* proprietors 393 in number claimed to be alone entitled to the income of the *hamilat* land of the village as against the *Brahman* proprietors 53 in number The plaint was signed by 6 persons and was accompanied by a petition by the same persons under O I r 8 Civil Procedure Code praying that they be allowed to sue on behalf of all the *Jat* proprietors and that two of the defendants be permitted to defend the suit on behalf of all the *Brahman* proprietors This was sanctioned by the Court and a decree was eventually passed in favour of the plaintiffs for a declaration of their rights as prayed The defendants appealed and in the list of parties in their memorandum of appeal set out the names of 52 defendants as appellants and the 393 plaintiffs as respondents On the date of hearing it was discovered that three of those respondents had died and applications to bring their legal representatives on the record had not been presented within the period of limitation Thereupon the Lower Appellate Court decided that the appeal had abated *in toto* relying on *Hadu* v *Lala* (*41 P R 1915*) On appeal to this Court it was contended that no appeal was competent as the order of the Lower Appellate Court was not a decree *Held* that the order of the Lower Appellate Court was in effect that inasmuch as the interest of all the plaintiffs was common and the legal representatives of the deceased plaintiffs had not been brought on the record within time the whole appeal had abated and that such an order falls within the definition of the term decree and is appealable as such. *Niranjan Nath* v *Afzal Hussain* (*128 P R 1916 F B*) followed *Held also* as the plaintiffs respondents who died were not among the six plaintiffs who had instituted the suit in accordance with the order of the Court under O I r 8 of the Code Civil of Procedure but among the persons on behalf of whom the 6 plaintiffs had sued they were not parties to the suit and were unnecessarily made respondents in the appeal It was therefore not necessary to bring their legal representatives on the record and the appeal had not abated *Ram Dyal* v *Mohammad Raja Shah* (*46 P R 1919*) followed
RONKI v HUK I L R 1 Lah 582

———— **O I r 8 O XXI r 89 and s 35**—

See CONTRACT ACT (IX OF 1872) s 70
I L R 43 Bom 556

———— **O I r 9 (1882 Code s 31)**—

See O XXXIV r 1
6 Pat L J 640

See LIMITATION ACT 1877 ss 2 23
I L R 34 Bom 91

See MALABAR LAW
I L R 44 Mad. 344

See RIGHT OF WAY 25 C W N 249

———— *Parties non joinder dismissal of suit for it proper—Amendment—O II r 5 joining claims against executors personally and as executors—O I r 1—Joinder of claims in the alternative as shebait and as owner—Inconsistent positions* Plaintiff alleged that one *J* was in possession of shares of coparcenary properties belonging to himself and others including one *N* from whose widow (it was averred) *J* had improperly obtained an *ekrar* under which he retained possession of *N s* share till his death. After his death defendants Nos 2 to 6 (who it transpired were executors to the will of *J*) remained in possession of that share After *J s* death *N s* widow adopted plaintiff as *N s* son and plaintiff brought this suit to recover possession of *N s* share with mesne profits as from the date of adoption making defendant No 1 who was heir and residuary legatee of *J* and defendants Nos 2 to 6 in their personal capacity defendants the allegation being that these defendants were keeping the plaintiff out of possession The plaintiff stated that so far as he had come to know on inquiry the properties in suit were *debutter* properties and that he and others of the family had *shebaits* interest therein but that in case the properties were found not to be *debutter* he might be allowed to recover as owner The defendants *inter alia* objected that defendants Nos 2 to 6 having been in possession as executors the suit could not proceed against them in their personal capacity and that the plaintiff could not maintain the suit as a *shebait* and at the same time in his own right as owner The first Court dismissed the suit on the first of these grounds and was also of opinion that the suit was not maintainable by plaintiff alternatively as *shebait* and owner his interest as *shebait* being in conflict with his interest as owner *Held* that though under O I r 9 the Court could not dismiss the suit on the ground that defendants Nos 2 to 6 were not sued as executors in order effectually and completely to adjudicate all the questions involved in the case defendants Nos. 2 to 6 should be sued personally as well as executors and defendant No 1 (who was found not to be in possession) should be sued as residuary legatee and heir of *J* and the plaint should be amended accordingly That O II r 5 was no bar to the amendment as defendants Nos 2 to 6 claimed to be in possession of the properties as part of *J s* estate and prevented the plaintiff from taking possession professedly in their character as executors The word estate as used in O II r 5 means both the estate rightly and properly held as executors and the estate in its physical sense That the claim of the plaintiff in the alternative as *shebait* and as owner was not open to objection having arisen out of the same transaction and there being really no conflict the plaintiff claiming as owner only in the event of the properties being found to be not *debutter* NIRLENDRO NATH RAY v BIRENDRO NATH RAY (1917) 21 C W N 939

———— **O I r 9**—

See O XXXIV r 1
I L R 35 All 441

See MALABAR LAW
I L R 44 Mad. 344

———— **O I r 9 and O XXXIV r 1**—
Mortgage suit—non joinder of part—joinder of parties after expiration of period of limitation r 9 of O I of the Code of Civil Procedure 1908

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O I r 9 and O XXXIV r 1—contd

is subordinate to r 1 of O XXXIV A mortgage is indivisible and if all the parties entitled to a share in the money due on the mortgage are not upon the record the suit must be dismissed in its entirety When a necessary party has not been impleaded at the time of the institution of the suit but has been brought on the record after the period of limitation has expired the whole suit must be dismissed When it is intended to sue in the name of a managing member of a joint Hindu family governed by the *Mitakshara* on account of a breach of contract made by a former managing member of the family it must be clearly stated in the plaint that the suit is by that managing member It is not sufficient that he should be accidentally on the record as one out of many members of the family of whom several have been omitted GIRWAR NARAIN MAHTON v MUSSAMAT MAKBUNESSA I Pat L J 468

——— O I r 10 (1882 Code ss 27 32 and 33)—

See ACCOUNTS 24 C W N 110

See INSOLVENCY I L R 42 Calc 72

See MADRAS ESTATE LANDS ACT 1908 s 90 I L R 44 Mad 43

See PARTIES I L R 46 Calc 48

See SPECIFIC RELIEF ACT (I OF 1877) s 42 I L R 42 Mad 219

1 ——— *Suit instituted by administratrix after power as such had terminated*—Bona fide *mistake—Due care and attention if must be established* For a *bona fide* mistake as contemplated by O 1 r 10 of the Civil Procedure Code it is not necessary that the party who committed it should have exercised due care and attention Where it is not deliberately but honestly made the mistake is *bona fide.* NISTARINI DASYA v SARAT CHANDRA MAZUMDAR (1915) 20 C W N 49

2 ——— *Scope and effect of as to powers of Courts in striking off and adding parties—Dismissing suit for non prosecution when plaintiffs compromise with only some of the defendants—Court if bound to pass a decree embodying the terms of the compromise under O XXIII r 3—Appeal if lies when no decree passed—Alternative remedy by way of revision under s 115 C P C if lies—Erroneous application of section of law if open to revision under s 115 C P C* In a suit for dissolution of partnership and for accounts the plaintiffs having received a large sum of money from some of the defendants filed a compromise petition and asked for dismissal of the suit The other defendants objected to the dismissal of the suit praying that they might be made plaintiffs and allowed to continue the suit and the plaintiffs if necessary might be made defendants The Court held that it had no power under the new Civil Procedure Code to make the transposition of parties asked for and hence dismissed the suit for non prosecution The objecting defendants then asked the Court to draw up a decree so that they might appeal but the Court did not draw up any decree *Held* that the Court had ample powers under the new Civil Procedure Code to make transposition of parties and it ought to have done that That

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O I r 10 (1882 Code ss 27 32 and 33)—contd

it was not bound to pass a decree under O XXIII r 3 and no appeal lies against the order of dismissal That the lower Court having failed to exercise the discretion vested in it under O I r 10 failed to exercise a jurisdiction vested in it in refusing to make the transposition prayed for and hence that order is liable to be set aside on revision by the High Court *Krishnabai* v *Sonubai 2 Bom H C R 310 Eduljee* v *Fullee bhoy I L R 7 Bom 167* and *Saiyad Abdul Hak* v *Gulam Jilani I L R 20 Bom 677* followed BROJENDRA KUMAR DAS v GOVINDA MOHAN DAS 1916) 20 C W N 752

3 ——— *Plaintiff described as a minor really a major*—Bona fide *mistake of next friend—Dismissal of suit if proper—Procedure to be adopted* Where a plaintiff was described in the plaint as a minor but had really attained majority some four days before the plaint was filed by his next friend who was under a *bona fide* belief that he was still a minor when she filed the suit on his behalf as his next friend *Held* that the suit ought not to be dismissed but that the proper procedure to be adopted in the case was to return the plaint for presentation after making the necessary amendments by striking off the description of the plaintiff as a minor suing through his next friend and making other consequential alterations in the plaint *Taqui Jan* v *Obaidulla I L R 21 Calc 866* followed *Sheorama* v *Bharat Singh I L R 20 All 90* referred to SHANMUGA CHETTY v NARAYANA AYYAR (1916) I L R 40 Mad 743

4 ——— *Limitation Act (IX of 1908) Art 171—Partition suit—Death of a party—Abatement—Application to set aside the abatement—Limitation of sixty days—In a partition suit all parties should be before the Court —Inherent power of the Court to add a party at any stage of the suit for the ends of justice* On the 5th April 1892 the plaintiff obtained a decree for partition and died in October 1893 leaving him surviving a minor son who attained majority in February 1907 At a very late stage of the execution proceeding the son made an application on the 16th April 1910 for the issue of a commission to effect partition according to the rights declared in the partition decree *Held* that as soon as the Civil Procedure Code (Act V of 1908) came into force the suit abated so far as regarded the applicant s father who was a party and the application to set aside the abatement by adding the applicant as the legal representative of the deceased not having been made within sixty days under Art 171 of the Limitation Act (IX of 1908) the application was time-barred *Held* further that in a partition suit all the parties should be before the Court and that there was nothing in the Civil Procedure Code (Act V of 1908) limiting or affecting the inherent power of the Court to make such orders as might be necessary for the ends of justice LAKHMICHAND PEWACHAND v KACHUBHAI (1911) I L R 35 Bom 393

5 ——— *Parties—Competence of Court to add parties in second appeal* *Held* that the High Court cannot in second appeal add a person as a party unless such person was a party to the appeal before the lower Appellate Court not [illegible] that he was a party to

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O I r 10 (1882 Code ss 27, 32 and 33)—*concld*

the suit in the Court of first instance *Chunni Lal v Lala Ram I L R 16 All 5* followed PACHKAURI RAUT v RAM KHILAWAN (1914) I L R 37 All 57

——— O I, r 10 (2) and O XXXIV r 1——*Mortgage—Suit for redemption—Suit by some of the heirs of mortgagor—Application to add remaining heirs as defendants after cause of action had become time barred—Indian Limitation Act (IX of 1908) s 22* Some of the heirs of a mortgagor sued to redeem the mortgage a few days before the expiry of the period of limitation To meet an objection raised for non joinder of parties the plaintiffs subsequently applied to make the remaining heirs party defendants to the suit The lower Courts declined to make them parties on the ground that the claim as regards them was barred by s 22 of the Indian Limitation Act 1908 The plaintiffs having appealed *Held* that the plaintiffs right to redeem which they had when they filed the suit was not lost by their omission to make the remaining heirs partie They were only necessary parties to save multiplicity of suits and to prevent the mortgagee being subjected to suits being filed against him in succession by various parties entitled to the equity of redemption *Held* also that it was within the discretion of the Court under O I r 10 sub r (2) of the Civil Procedure Code to make the remaining heirs co defendants and then to consider what would be the legal result of such addition *Per* FAWCETT J — There is no provision in either the Civil Procedure Code or the Indian Limitation Act which says that a party cannot be added after his right of suit or liability to be sued (as the case may be) is barred by the provisions of the Indian Limitation Act Accordingly I think it is absurd to hold that the plaintiffs right of redemption is entirely lost because he has not complied with the provisions of O XXXIV r 1 That in my opinion would be subordinating justice to a technicality of procedure SHIVUBAI v SHIDDHESHWAR MARTAND (1920) I L R 45 Bom. 1009

——— O I, r 10 and O XXII, r 10— A trespasser cannot be said to have brought the suit on behalf of the rightful owner and the latter is consequently not entitled to have himself substituted for the trespa er When a person has obtained a decree for po e ion of an estate it is not neces ary for him to take out execution of the decree in order to sue an agent of his predecessor in po se sion for an account MAHARAJA KESHO PRA AD SINGH v LAL BRIJ MOHAN LAL 2 Pat L J 199

——— O I, rr 10 and 11—*Defendant if may be joined as plaintiff—Bona fide mistake* Where a plaintiff had brought a suit for the recovery of pos e ion of property falsely denying the title of persons whom he had joined as defendants and asserting that an exchange by which he had transferred this property to the o defendants had never been acted upon and it was found that the exchange had in fact terminated the plaintiff's title and had been acted on and that he had therefore no *locus standi* to sue the principal defendant *Held* on an application for liberty to join his transferee defendants as plaintiffs that it could not be said that the plaintiff had made a *bonâ fide* mistake within the meaning of O I r 10 Civil Procedure Code GANENDRA NATH RAY CHOWDHURY v SURYA KANTA RAY CHOWDHURY (1912) 17 C W N 462

——— O I r 13 (1882 Code s 34)— Where parties without objection join issue and go to trial defendant cannot later rai e irregularities in initial procedure to defeat jurisdiction JOY CHANDRA DUTTA v SARAWBALA DEBI 23 C W N 876

——— O II rr 1 2 and 3—(1882 Code ss 42 43 and 45)—*Previous suit for declaration dismissal of, for want of prayer for possession—Later suit for declaration and possession maintainability of* The dismissal of a previous suit for a declaration of title to certain properties on the ground that the plaintiff was found entitled to posse sion is no bar to a suit for possession ba ed on the same title as the causes of action for which the allegations in the plaints must be looked to are different in the two cases O II rr 1 2 and 3 are no bar to the later suit *Chand Kour v Partab Singh I L R 16 Calc 98 Thrikaikat Madathil Raman v Thiruthiyil Krishnan Nair I L R 29 Mad 153 Ramaswami Ayyar v Vythinatha Ayyar I L R 26 Mad 760 Nonoo Singh Monda v Anand Singh Monda I L R 12 Calc 291 Jibunti Nath Khan v Shib Nath Chuckerbutty I L R 8 Calc 819* and *Mohan Lal v Bilaso I L R 14 All 512* followed *Muthu Narayana Reddi v Rayalu Reddi 6 Mad L J 51* and *Rangasami Pillai v Krishna Pillai I L R 22 Mad 259* not followed SILIMAN SAIB v HAS ON (1913) I L R 38 Mad 247

——— O II r 2 (1882 Code s 43)—

See O VII r 6 I L R 2 Lah 13

See AGRA TENANCY ACT (II OF 1901) s 34 I L R 35 All. 512

See AMENDMENT OF PLAINT I L R 45 Calc 305

See CAUSE OF ACTION I L R 41 Calc 825; I L R 46 Calc 640

See CIVIL PROCEDURE CODE (1882) s 43 I L R 32 All 625; I L R. 33 All 244

See EXECUTION I L R 38 Mad 199

See LIMITATION ACT (IX OF 1908) SCH I ARTS 62 AND 120 I L R 40 Mad. 291

See MAHOMEDAN LAW—DOWER I L R 33 All 291

See MORTGAGE 25 C W N 129

See RES JUDICATA I L R. 45 Bom. 805

See SANTAL PARGANAS SETTLEMENT REGULATION 1872 6 Pat L. J 373

See SPECIFIC PERFORMANCE 5 Pat. L. J 314

1 ——— Landlord and tenant—*Lease —Landlord to recover possession on tenants failure to pay rent—Suit by landlord to recover possession on tenants failure—Decree entitling plaintiff to*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O II r 2 (1882 Code s 43)—*contd*

reco er pos e sion on tenants failure to pay rent within three months—Defendants failure and re covery of pos es ions by plaintiff—Prayer in the plaint for reservation of leave to bring a suit for rent not granted—Subsequent suit by the plaintiff to recover rent—Subsequent suit barred A lea o provided that on the tenants failure to pay rent the landlord hould be entitled to take pos ess on of the lands The tenants having failed to pay the rent of two year the landlord sued them and obtained a decree which directed that on the defendants default to pay all the arrears of rent and cos s with n three month the plaintiff should take po e sion of the land In the said suit the plaintiff had a ked for permi sion to bring a separate suit for the rent in arrears for two years but none was given Subsequently the plaintiff having brought a suit for the said rent of two years *Held* that the suit was barred under O II r 2 of the Civil Procedure Code (Act V of 1908) as the claim in the suit for rent up to the date of forfeiture arose upon the same con tract as did the landlord s right of forfeiture for non payment of rent that no neces ty or reason existed for a separate suit for rent where there had been a forfeiture or non payment and that the claim for posse sion and the claim for rent ought to be enforced in one suit provided the cause of action was the same unless the Court should give leave for the reservation of one of the remedies KASHINATH RAMCHANDRA v NATHOO KESHAV (1914) I L R 38 Bom 444

2 ———— Hundi—*given in discharg of debt on accounts—Failure of suit on* hundi—*Subse q tent suit based on the accounts* A debtor gave his creditor a *hundi* for the amount of his debt The creditor accepted the *hundi* but the debtor failed to pay it at maturity The creditor then sued the debtor on his *hundi* but failed to recover it *Held* that this was no bar to his suing on the accounts to recover the debt The cause of action on the *hundi* was totally distinct from the cause of action in respect of the original debt *Preonath Mukerji v Bisnath Prasad I L P* ?9 *All* ?6 doubted *Pajana Reena Lajana Saminathan Chetty v Pana Lana Palaniappa Chetty 18 C W N 617* referred to BENI RAM v RAM CHANDAR (1914) I L R 36 All 560

3 ———— Causes of action different though claim same—*Agreement admitting liability and prescribing payment by promissory notes—Promissory notes materially altered—Suit on pro missory notes dismissed—Suit upon agreement if lies— Accord and satisfaction by substituted agree ment —Claim on prior rights extinguished—Suit on such claim if lies—Ceylon Civil Procedure Act s 34 (cf Civil Procedure Code O II r)—Plead ings faulty—Claim in plaint based on wrong grounds—No objection by d fendant—Amendment* A whose claim to receive certain items of moneys from B was di puted by the latter agreed with B to refer the disputes to arbitrators who after an informally conducted investigation drew up what was termed a receipt which B signed the arbi trators witnessed and A accepted and acted upon The document dealt *seriatim* with seven sums thereby admitted to be due from B to A amounting in all to Rs 28 ?24 odd and prescribed the mode in which it was to be paid namely by a cash

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O II r 2 (1882 Code s 43)—*contd*

payment of Rs 224 odd (which was immediately paid) and by pas ing two promissory notes for Rs 14 000 each payable with interest on two dates The amount of interest was (probably by oversight) not specified but there was no doubt that the parties intended that it would be at a certain customary rate which worked out to between 6 and 7 per cent per annum A however subsequently and without communication with B went to one of the arbitrators and (without bad faith either on his part or the arbitrator s persuaded him to alter both promi sory notes by in erting therein 9 per cent as the rate of interes A s action on the two promissory notes having been dismissed on the ground of material altera tion he sued B for two items of moneys amount ing to Rs 12 297 odd which he had claimed before the arbitrators and which were included in their award *Held* that the receipt constituted the award of the arbitrators That whether it did or did not amount to an award it was clearly an accord and satisfaction by a substituted agreement whereby the respective rights of the parties *inter se* were abandoned in consideration of the acceptance by all of a new agreement That the arrangement for the discharge of the unpaid balance of the amount found due by means of the promi sory notes only expressed the mode of payment which was essentially a matter of form only the substance of the award being that the specified amount was actually due the plaint iff could therefore sue for the balance due upon the agreement when his action on the promissory notes failed That the form of the plaintiff's action which was based on rights already extin guished by the agreement was faulty But the present action should be treated as one based on the new agreement the defendant not having taken exception to plaintiff s statement of the grounds of his claim so as to give him an oppor tunity to amend them at an earlier stage That a claim on the promissory notes and a claim for the amount found due under the award were not the same cause of action but were really incon sistent and mutually exclusive cau es of action and the plaintiff was not required in his suit on the promi sory notes to ask for relief on the cau o of action arising out of the agreement by s 34 of the Ceylon Civil Procedure Act That the plaintiff s suit which was for a part only of the unpaid balance should be decreed But he would be precluded by s 34 of the Ceylon Civil Proce dure Act from bringing a fre h action for the remainder The object and meaning of s 34 of the Ceylon Civil Procedure Act (which is very similar to O II r 2 of the Indian Code) explained This section is directed to securing the exhaustion of the relief in re pect of a cau e of action and not to the inclusion in one and the same action different causes of action even though they arise from the same transactions The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in the action. The second portion makes it incumbent on him to ask for the whole of his remed es. The final paragraph (*Explanation* in the Indian Code) is not intended to be an illustration of the foregoing provi ions, but a substantive enactment making what otherwise would be independent causes of act ~ use of action for the purposes of the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O I r 10 (1882 Code ss 27 32 and 33)—*concld*

the suit in the Court of first instance *Chunni Lal v Lala Ram I L R 16 All 5* followed PACHKAURI RAUT v RAM KHILAWAN (1914) I L R 37 All 57

——— O I r 10 (2) and O XXXIV r 1——*Mortgage—Suit for redemption—Suit by some of the heirs of mortgagor—Application to add remaining heirs as defendants after cause of action had become time barred—Indian Limitation Act (IX of 1908) s 22* Some of the heirs of a mortgagor sued to redeem the mortgage a few days before the expiry of the period of limitation To meet an objection raised for non joinder of parties the plaintiffs subsequently applied to make the remaining heirs party defendants to the suit The lower Courts declined to make them parties on the ground that the claim as regards them was barred by s 22 of the Indian Limitation Act 1908 The plaintiffs having appealed *Held* that the plaintiffs right to redeem which they had when they filed the suit was not lost by their omission to make the remaining heirs parties They were only necessary parties to save multiplicity of suits and to prevent the mortgagee being subjected to suits being filed against him in succession by various parties entitled to the equity of redemption *Held* also that it was within the discretion of the Court under O I r 10 sub r (2) of the Civil Procedure Code to make the remaining heirs co defendants and then to consider what would be the legal result of such addition *Per* FAWCETT *J* — There is no provision in either the Civil Procedure Code or the Indian Limitation Act which says that a party cannot be added after his right of suit or liability to be sued (as the case may be) is barred by the provisions of the Indian Limitation Act Accordingly I think it is absurd to hold that the plaintiffs right of redemption is entirely lost because he has not complied with the provisions of O XXXIV r 1 That in my opinion would be subordinating justice to a technicality of procedure SHIVUBAI v SHIDDHESHWAR MARTAND (1920) I L R 45 Bom 1009

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——— O I, rr 10 and 11—*Defendant if may be joined as plaintiff—Bona fide mistake* Where a plaintiff had brought a suit for the recovery of possession of property falsely denying the title of persons whom he had joined as defendants and asserting that an exchange by which he had transferred this property to these defendants had never been acted upon and it was found that the exchange had in fact terminated the plaintiff's title and had been acted on and that he had therefore no *locus standi* to sue the principal defendant *Held* on an application for liberty to join the transferee defendants as plaintiff that it could not be said that the plaintiff

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O I rr 10 and 11—*concld*

had made a *bonâ fide* mistake within the meaning of O I r 10 Civil Procedure Code GANENDRA NATH RAY CHOWDHURY v SURYA KANTA RAY CHOWDHURY (1912) 17 C W N 462

——— O I r 13 (1882 Code s 34)—Where parties without objection join issue and go to trial defendant cannot later raise irregularities in initial procedure to defeat jurisdiction JOY CHANDRA DUTTA v SARAWBALA DEBI 23 C W N 876

——— O II rr 1 2 and 3—(1882 Code ss 42 43 and 45)—*Previous suit for declaration dismissal of for want of prayer for possession—Later suit for declaration and possession maintainability of* The dismissal of a previous suit for a declaration of title to certain properties on the ground that the plaintiff was found entitled to possession is no bar to a suit for possession based on the same title as the causes of action for which the allegations in the plaints must be looked to are different in the two cases O II rr 1 2 and 3 are no bar to the later suit *Chand Kour v Partab Singh I L R 16 Calc 98 Thrikaikat Madathil Raman v Thiruthiyil Krishnan Nair I L R 29 Mad 153 Ramasuami Ayyar v Vythinatha Ayyar I L R 26 Mad 760 Nonoo Singh Monda v Anand Singh Monda I L R 12 Calc 291 Jibunti Nath Khan v Shib Nath Chuckerbutty I L R 8 Calc 819* and *Mohan Lal v Bilaso I L R 14 All 512* followed *Muthu Narayana Reddi v Rayalu Reed 6 Mad L J 51* and *Rangasami Pillai v Krishna Pillai I L R 22 Mad 259* not followed SILIMAN SAIB v HASSON (1913) I L R 38 Mad. 247

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See O VII R 6 I L R 2 Lah 13

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See CAUSE OF ACTION I L R 41 Calc 825; I L R 46 Calc 640

See CIVIL PROCEDURE CODE (1882) s 43 I L R 32 All 625; I L R 33 All 244

See EXECUTION I L R 38 Mad 199

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See MORTGAGE 25 C W N 129

See RES JUDICATA I L R 45 Bom 805

See SANTAL PARGANAS SETTLEMENT REGULATION 187— 8 Pat L J 373

See SPECIFIC PERFORMANCE 5 Pat. L. J 314

1 ——— Landlord and tenant—*Lease—Landlord to recover possession on tenants failure to pay rent—Suit by landlord to recover possession on tenants failure—Decree directing plaintiff to*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O II r 2 (1882 Code s 43)—*contd*

recovery of possession on tenants failure to pay rent within three months—Defendants failure and recovery of possessions by plaintiff—Prayer in the plaint for reservation of leave to bring a suit for rent not granted—Subsequent suit by the plaintiff to recover rent—Subsequent suit barred A lease provided that on the tenants failure to pay rent the landlord should be entitled to take possession of the lands The tenants having failed to pay the rent of two year the landlord sued them and obtained a decree which directed that on the defendants default to pay all the arrears of rent and costs within three months the plaintiff should take possession of the land In the said suit the plaintiff had asked for permission to bring a separate suit for the rent in arrears for two year but none was given Subsequently the plaintiff having brought a suit for the said rent of two years *Held* that the suit was barred under O II r 2 of the Civil Procedure Code (Act V of 1908) as the claim in the suit for rent up to the date of forfeiture arose upon the same contract as did the landlord s right of forfeiture for non payment of rent that no necessity or reason existed for a separate suit for rent where there had been a forfeiture or non payment and that the claim for possession and the claim for rent ought to be enforced in one suit provided the cause of action was the same unless the Court should give leave for the reservation of one of the remedies KASHINATH RAMCHANDRA *v* NATHOO KESHAV (1914) I L R 38 Bom 444

2 ———— Hundi—*given in discharge of debt on accounts—Failure of suit on hundi—Subsequent suit based on the accounts* A debtor gave his creditor a *hundi* for the amount of his debt The creditor accepted the *hundi* but the debtor failed to pay it at maturity The creditor then sued the debtor on his *hundi* but failed to recover it *Held* that this was no bar to his suing on the accounts to recover the debt The cause of action on the *hundi* was totally distinct from the cause of action in respect of the original debt *Preonath Mukerji v Bisnath Prasad I L R 29 All 256* doubted *Payana Reena Layana Saminathan Chetty v Pana Lana Palaniappa Chetty 18 C W N 617* referred to BENI RAM *v* RAM CHANDAR (1914) I L R 36 All 560

3 ———— Causes of action different though claim same—*Agreement admitting liability and prescribing payment by promissory notes—Promissory notes materially altered—Suit on promissory notes dismissed—Suit upon agreement if lies— Accord and satisfaction by substituted agreement —Claim on prior rights extinguished—Suit on such claim if lies—Ceylon Civil Procedure Act s 34 (cf Civil Procedure Code O II r 2)—Pleadings faulty—Claim in plaint based on wrong grounds—No objection by defendant—Amendment* A whose claim to receive certain items of moneys from *B* was disputed by the latter agreed with *B* to refer the disputes to arbitrators who after an informally conducted investigation drew up what was termed a receipt which *B* signed the arbitrators witnessed and *A* accepted and acted upon The document dealt *seriatim* with seven sums thereby admitted to be due from *B* to *A* amounting in all to Rs 28 224 odd and prescribed the mode in which it was to be paid namely by a cash payment of Rs 224 odd (which was immediately paid) and by passing two promissory notes for Rs 14 000 each payable with interest on two dates The amount of interest was (probably by oversight) not specified but there was no doubt that the parties intended that it would be at a certain customary rate which worked out to between 6 and 7 per cent per annum *A* however subsequently and without communication with *B* went to one of the arbitrators and (without bad faith either on his part or the arbitrator s persuaded him to alter both promissory notes by inserting therein 9 per cent as the rate of interest *A* s action on the two promissory notes having been dismissed on the ground of material alteration he sued *B* for two items of moneys amounting to Rs 12 297 odd which he had claimed before the arbitrators and which were included in their award *Held* that the receipt constituted the award of the arbitrators That whether it did or did not amount to an award it was clearly an accord and satisfaction by a substituted agreement whereby the respective rights of the parties *inter se* were abandoned in consideration of the acceptance by all of a new agreement That the arrangement for the discharge of the unpaid balance of the amount found due by means of the promissory notes only expressed the mode of payment which was essentially a matter of form only the substance of the award being that the specified amount was actually due the plaintiff could therefore sue for the balance due upon the agreement when his action on the promissory notes failed That the form of the plaintiff s action which was based on rights already extinguished by the agreement was faulty But the present action should be treated as one based on the new agreement the defendant not having taken exception to plaintiff s statement of the grounds of his claim so as to give him an opportunity to amend them at an earlier stage That a claim on the promissory notes and a claim for the amount found due under the award were not the same cause of action but were really inconsistent and mutually exclusive causes of action and the plaintiff was not required in his suit on the promissory notes to ask for relief on the cause of action arising out of the agreement by s 34 of the Ceylon Civil Procedure Act That the plaintiff s suit which was for a part only of the unpaid balance should be decreed But he would be precluded by s 34 of the Ceylon Civil Procedure Act from bringing a fresh action for the remainder The object and meaning of s 34 of the Ceylon Civil Procedure Act (which is very similar to O II r 2 of the Indian Code) explained This section is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action different causes of action even though they arise from the same transactions The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in the action. The second portion makes it incumbent on him to ask for the whole of his remedies The final paragraph (*Explanation* in the Indian Code) is not intended to be an illustration of the foregoing provisions but a substantive enactment making what otherwise would be independent causes of action one cause of action for the purposes of the

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O I r 2 (1882 Code s 43)—contd

section SAMINATHAN CHETTY v PALANIAPPA CHETTY (1913) 18 C W N 617

4 ——— Omission to sue for right relief —*Maintainability of subsequent suit* Where plaintiff knew what relief he was entitled to and deliberately omitted to claim the right relief his subsequent suit in respect to the same cause of action for the right relief was held to be barred *by the provisions of O II r 2 of the Code of Civil Procedure* ABDUL HAKIM v KARAN SINGH (1915) I L R 37 All 646

5 ——— Specific performance—*of an agreement to sell previous suit for—Decree for specific performance—Deed of conveyance obtained in execution—Subsequent suit for recovery of possession omitted therein r—Suit not barred* Where the plaintiff who had obtained in a previous suit a decree against the defendants for specific performance of an agreement to sell certain immoveable property to the plaintiff and had got a sale deed in his favour in execution of the decree instituted the present suit for the recovery of possession of the lands from the defendants *Held* that the suit was not barred by O II r 2 of the Civil Procedure Code (Act V of 1908) At the time the plaintiff brought the previous suit the right to possession of the lands was not vested in *him as he acquired that right only on the execution of the deed of conveyance Narayana Kavirayan* v *Kandasami Goundan I L R 22 Mad 24* approved *Pungayya Goundan* v *Nanjappa Rao I L R 24 Mad 491* explained *Nathu valad Pand* v *L dhu valad Balia I L R 18 Bom 53* followed KRISHNAMMAL v SOUNDARARAJA AIYAR (1913) I L R 38 Mad 698

6 ——— *Specific Relief Act (I of 1877) s 42—Suit for declaration—Previous decree between third parties—Plaintiffs not parties—Suit to declare that the decree is collusive and not binding on plaintiffs if maintainable* The plaintiffs sued for a declaration (i) that they were the owners of the suit properties as the reversioners of one N who was the last male owner and (ii) that a decree obtained by the first defendant against the second in respect of the properties in another suit to which the plaintiffs were no parties was collusive and was not binding on the plaintiffs The plaintiffs had already brought a suit in the same Court against the present defendants to recover possession of some other *properties as the reversionary heirs of N* but did not include therein the properties claimed in the present suit though the defendants were in possession of them at the time of their previous suit The plaintiffs alleged that they came into possession of the properties subsequently to the previous suit The defendant contended that the suit was barred under O II r 2 of the Civil Procedure Code and that the suit for a declaration that the decree passed in the suit between the first and the second defendants was collusive and not binding on the plaintiffs was not maintainable *Held* that the present suit was not barred under O II r 2 of the Civil Procedure Code *Held* further that a suit for a declaration that a decree obtained by the first defendant against the second defendant was collusive and not binding on the plaintiffs was maintainable

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O II r 2 (1882 Code s 43)—contd

under s 42 of the Specific Relief Act NAGANNA v SIVANAPPA (1914) I L R 38 Mad 1162

7 ——— Mesne profits—*Subsequent suit for the same not barred—Cause of action for mesne profits different from that for possession of land* Claim for possession and claim for *mesne profits* are separate causes of action and have been always so treated under the Code of Civil Procedure Where a plaintiff sued for possession of lands only when he might have joined in the same action claims for *mesne* profits and damages it is open to him to bring a subsequent suit against the same defendants for the profits which became payable before the institution of the former suit and which might have been included in such suit *Monohur Lall* v *Court Sunkur I L R 9 Calc 283 Tirupati* v *Narasimha I L R 11 Mad 210 Lalessor Babui* v *Janki Bibi I L R 19 Calc 615* and *Gutta Saramma* v *Maganti Ramayadu I L R 31 Mad 405* followed PONNAMMAL v PAAMIRDA AIYAR (1914) I L R 38 Mad 829

8 ——— Causes of action different—On T's death his widow sold two of his survey numbers (403 and 404) to *D* and shortly afterwards sold survey No 324 to *Z* who was a brother of *D* joint in estate After the widow's death *B* a daughter of T sued *D* and *T* (another daughter of T) to recover possession of survey No 324 but the suit was at her request dismissed *B* then having sold the three survey numbers to the *plaintiff* the *present suit* was brought against the two daughters and *D* and *Z* to recover possession of the three survey numbers The lower Courts dismissed the suit on the preliminary ground that since *B* omitted to sue in respect of survey numbers 403 and 404 in the first suit the plaintiff was debarred from preferring his claim to *those numbers in the present suit* The plaintiff having appealed *Held* that the suit was not barred by the provisions of O II r 2 of the Civil Procedure Code inasmuch as the two sets of facts which required to be proved in both suits in order to enable the plaintiff to succeed were different sets of facts and the causes of action accordingly were different SONU VALAD KHUSHAL v BAHINIBAI (1915) I L R 40 Bom 351

9 ——— Partition—*Separate suits for property in different districts—Cause of action* The plaintiff as member of a joint Hindu family brought a suit for partition of certain property in the district of Sultanpur He admitted that he was not in possession of this property and paid an *ad valorem* court fee on his plaint This suit was settled by a compromise Subsequently the plaintiff brought a separate suit in *Allahabad* for partition of some of the joint family property situated in that district but in this suit he alleged that he was in joint and undivided possession and paid a court fee of Rs 10 as on ordinary partition suit *Held* that the omission of the Allahabad property from his suit in Sultanpur was not a bar to the plaintiff's second suit and that *the case* did not fall within O II r 2 of the Code of Civil Procedure *Mana Ram Chakravarty* v *Ganesh Chakravarty 16 Indian Cases 353 Ram* v *Daga I L R 7 Bom 159* and *Subba Rau* v *Rama Rau 3 Mad H C R 376* referred to RAM HARAKH v RAM LAL (1916) I L R 38 All 217

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O II r 2 (1882 Code s 43)—*contd*

10 ——— Mortgage-deed—*conferring option upon the mortgagee to sue for interest or for possession on the mortgagor s failure to pay interest at the stipulated time—first suit for interest for earlier default—second suit for possession on subsequent default—whether barred* Held that a mortgagee is not debarred by O II r 2 Civil Procedure Code from suing for possession of the mortgaged property on the strength of a stipulation conferring upon him the option to sue for interest or for possession in the event of the mortgagor s failure to pay interest at the stipulated time because on the occurrence of a previous default the mortgagee sued only for interest and not for possession O II r 2 requires the plaintiff to include in his suit the whole of the claim which he is entitled to make in respect of the cause of action upon which the suit is brought and if he omits to sue in respect of or intentionally relinquishes any portion of his claim he cannot afterwards sue in respect of the portion omitted or relinquished The object of the rule is to avoid the splitting of claims and to prevent further litigation Under the terms of the mortgage deed in the present case the mortgagee could when he brought the earlier suit have sued either for interest or for possession, he could not have claimed both the reliefs at one and the same time Consequently in suing for interest only he did not omit to sue in respect of or intentionally relinquish any portion of the claim which he was then entitled to make The law of procedure should not be interpreted so as to run counter to an express stipulation entered into by the parties *Ram Bhaj* v *Deva (120 P R 1881)* and *Badi Bibi Sahibal* v *Sami Pillai (I L R 18 Mad 257)* followed *Ganga Ram* v *Abdul Rahman (28 P R 1907)* distinguished PARMASHERI DAS v FAKIRIA I L R 1 Lah 457

11 ——— Omission to sue for a portion of claim—*Subsequent suit for that portion if lies* The plaintiff sued for the possession of a holding consisting of a homestead and arable lands attached thereto He had previously sued for *khas* possession of that portion of the holding only which included the homestead on the allegation that the defendant had dispossessed him of the homestead This suit was dismissed *Held* that as it appeared from the evidence in this case that plaintiff had been dispossessed of the arable land at the same time as the homestead the whole suit was barred The plaintiff having in the previous suit omitted to sue for a portion of his claim namely for the arable lands could not under O II r 2 of the Code of Civil Procedure be permitted to sue for them subsequently *Jiub Nath Khan* v *Shib Nath Chakraburty I L R 8 Cal 819* and *Pitapur Raja* v *Suriya Roy L R 12 I A 116 s c I L R 8 Mad 520* distinguished KALI KUMAR CHUCKERBUTTY v ASLAM (1914) 20 C W N 163

12 ——— Property different—*in the two suits and titles of defendants—One defendant only common to both* The plaintiff claimed possession of a considerable amount of property as having been the property of her father to which she became entitled on the death of her mother She brought two suits The first was for possession of a specific house and grove the defendants being two persons Ram Chandra and Kedar Nath as to whom she alleged that Ram Chandra had had his name recorded in respect of the grove in order that he might assist the plaintiff s mother and that Kedar Nath had been allowed to live in the house by the leave and licence of the the plaintiff s mother The second suit was for possession of various other items of property and with the exception of Ram Chandra the defendants also were different persons *Held* that the second suit was not barred by O II r 2 of the Code of Civil Procedure *Murti* v *Bhola Ram I L R 16 All 165* distinguished by RICHARDS C J *Balmakund* v *Sangari I L R 19 All 379* and *Govind Krishna Narain* v *Sirajunnisa 7 A L J 697* referred to by BANERJI J BINDO BIBI v RAM CHANDRA (1919) I L R 41 All 583

13 ——— Mahal—*alleged to be in part in possession of trespassers—Separate suits against the lambardar for profits of one part and against the alleged trespassers for mesne profits of the other part maintainable* The plaintiff having purchased at an auction sale the whole 20 biswas of a mahal was resisted in his attempts to obtain possession of a portion of it by certain persons who set up a right of possession in themselves In respect of such portion the plaintiff filed a suit against the persons in possession and ultimately obtained a decree against them but in that suit he made no claim for mesne profits He also filed a suit against the lambardar of the mahal for profits in respect of the remaining portion of the mahal The plaintiff subsequently filed a suit for mesne profits for a certain period against the three defendants in his former suit in ejectment *Held* that the suit was not barred by reason of the omission of the present claim from his former suit against the lambardar for profits SHEO BARAN SINGH v BHAGWAN SAHAI (1918) I L R 41 All 286

14 ——— Dekkhan Agriculturists Relief Act (XVII of 1879) ss 12 and 13—*Cause of action—Splitting up of—Two mortgages—Suit on one mortgage—Sale in execution of decree free from any incumbrance—Sale proceeds applied in paying off the mortgage in suit—Balance of sale proceeds—Second suit on another mortgage—Attachment of balance of sale proceeds* The defendant executed three mortgages as part of the same transaction over the same property The mortgagee sued to recover money due on one of the mortgages only under the provisions of the Dekkhan Agriculturists Relief Act 1879 He obtained a decree in execution of which the mortgaged property was sold free from any incumbrances The sale proceeds were applied in paying off the decretal amount and there remained a balance The mortgagee brought a second suit on the remaining two mortgages and prayed for a decree against the balance *Held* that the mortgagee having omitted to sue on the remaining two mortgages when he sued on the first mortgage bond he was barred by O II r 2 of the Civil Procedure Code coupled with the provisions of s 12 and 13 of the Dekkhan Agriculturists Relief Act 1879 from a ki[illegible] Court to pass a decree on the two [illegible] so as to be able to execute that [illegible] balance of the sale proceeds

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O II r 2 (1882 Code s 43)—*concld*

of the property which was sold in execution of the first decree DALUCHAND v APPI (1920) I L R 45 Bom 55

15 ——— SUIT FOR INTEREST ON BOND—*Decree satisfied—Subsequent suit for principal barred* A hypothecation bond contained a clause stipulating that if interest was not paid for six months the creditor might sue either for interest alone or for both principal and interest without waiting for the expiration of the period fixed for repayment (which was three years) and the debtor was to have no objection whatever More than three years after no interest having been paid the creditor brought a suit for interest alone and obtained a decree for sale of the mortgaged property The decreted amount was deposited in Court and satisfaction entered On a subsequent suit by the creditor for the principal sum and arrears of interest *Held* that the provisions of O II r 2 of the Civil Procedure Code were applicable and the subsequent suit was not maintainable the cause of action referred to in the rule is the cause of action which gives occasion for and forms the foundations of the suit and if that cause entitles a man to seek for larger and wider relief than that to which he limits his claim he cannot afterwards seek to recover the balance by independent proceedings MUHAMMAD HAFIZ v MIRZA MUHAMMAD ZAKARIYA 26 C W N 299

——— O II r 2 and 3—

See O II R 1 I L R 33 Mad 247

——— O II r 2 O XXXIV rr 2 and 4—*Mortgage—Suit for sale—Construction of document—Possibility of separate suits for interest and principal* A mortgage bond executed on the 14th of September 1910 provided that the mortgage debt should be repayable after the expiry of three years It also provided that if interest remained unpaid for more than a specified time the mortgagee might without waiting for the expiry of the term of the mortgage sue for either the unpaid interest or the whole amount of principal and interest then due It further provided that if the mortgage debt was not paid at due date the whole amount principal and interest might be recovered by suit After the expiry of the term of the bond the mortgagee sued to recover arrears of interest only and obtained a decree the defendant not entering an appearance In that suit the plaintiff did not allege that he had a right to sue for the principal separately at a subsequent date *Held* on a construction of the bond in suit and with reference to the former pleadings that the subsequent suit was barred by O II r 2 of the Code of Civil Procedure *Pead v Brown* 22 *Q B D* 128 and *Murti v Bhola Ram I L R 16 All 165* referred to *Vasant Narayan Kamat v Vithal Dinkar Parulkar I L R 21 Bom 267* and *Lambhaj v Devia Lunj Rec 1891 p 96* distinguished *Per* PIGGOTT J Rr 2 and 4 of O XXXIV of the Code of Civil Procedure do not contemplate that there should be more than one suit for sale on a mortgage Whether or not it might be possible so to draft a mortgage as to evade this statutory obligation this had not been done in the present case MUHAMMAD ZAKARIYA v MUHAMMAD HAFIZ (1917) I L R 39 All 606

CIVIL PROCEDURE CODE (ACT V OF 1908) —*concld*

——— O II r 2 O XXXIV r 14—*Procedure—Suit by mortgagee for simple money decree—Subsequent suit for sale on mortgage not barred—Res judicata—Limitation—Acknowledgment* Certain mortgagees sued for a simple money decree in respect of their mortgage debt stating that they had relinquished their claim under their mortgage and obtained a decree as prayed The decree in this suit stated that the plaintiff would not be entitled to bring to sale the property mortgaged in the bond sued on As however this decree was not satisfied the plaintiff mortgagees proceeded to put their mortgage into Court and prayed for a decree for sale on it *Held* that the former proceedings were no bar to the present suit INDARPAL SINGH v MEWA LAL (1914) I L R 36 All 264

——— O II r 3 (1882 Code s 45)—

See UNDER O I R 1 O I R 2

——— O II r 4 (1882 Code s 44)—

See ADMINISTRATOR 2 Pat L J 642

——— O II r 5 (1882 Code s 44)—*Misjoinder of causes of action—Hindu family position of surviving members of joint and undivided not heirs of deceased member—Joinder of claim by widow of deceased member of joint and undivided Hindu family for maintenance against the property in which the deceased member was a coparcener at the date of his death with claims against the surviving coparceners for her stridhan ornaments* Members of a joint and undivided Hindu family hold the family estate jointly and and are seized of it *per my et per tout* On the death of a coparcener of a joint Hindu family his share and interest in the family property is automatically absorbed and the surviving coparceners become the full owners of the whole estate Such coparceners are not the heirs of the deceased but inherit by survivorship and become the owners of the interest of the deceased in the family estate as co owners in their own right and by the legal extinction of the interest of the deceased co-parcener by reason of his death The claim of the widow of such a deceased coparcener for maintenance is clearly not against the estate of the deceased husband but is against the property of which he was a coparcener at the time of his death Accordingly there is no misjoinder of causes of action if the widow in one suit sues the coparceners of her deceased husband to recover her *stridhan* property improperly or illegally detained by them and also to enforce her right of maintenance of the estate of the joint family of which during his lifetime her husband was a member JANKIBAI v SHRINIVAS GANESH (1913) I L R 38 Bom 120

——— O III r 1 (1882 Code s 36)—

——— *Recognised agent if has right of audience* A recognised agent as such has no right of audience HUKMCHAND LAL v BENGAL NAGPUR RAILWAY Co (1914) 19 C W N 64

——— O III r 1 O IX rr 4 8 10 and 12—*Dismissal for default—Appeal to District Judge—Procedure* The defendant in a suit asserted that he wished to examine one of the three plaintiffs as a witness and the Court ordered such plaintiff to appear The plaintiff failed to appear and the suit was dismissed In appeal the District

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O III r 1 O IX rr 4 8 10 and 12—*contd*

Judge held that the order to the plaintiff to appear was not a good order and that in any ca e the suit should only have been di mis ed as again t the defaulter and not as against the remaining two plaintiffs *Held* (1) that the first Court had power under O III r 1 of the Code of Civil Procedure 1908 to order the plaintiff to appear in person and to di mi s his suit on failure to comply with the order (2) that the order dis mi ing the suit against the defau ting plaintiff was not appealable to the Di trict Judge and (3) that the order di mi sing the suit again t the remaining plaintiffs was in contravention of O IX r 10 SRI PROBHU v DWARKA PRASAD

4 Pat L J 152

———— O III, r 1 and O IX r 12—*Order of Court directing a party to appear in per on—Refusal of the party to c mply with the order—Order of Court declaring him* ex parte *legality of* A Court is empowered under O III r 1 of the Civil Procedure Code to direct the appearance in Court of a party in per on and if the party so directed refu es to appear the Court may declare him *ex parte* even though he had engaged a pleader who is prepared to appear for him in the ca e *Satu v Hanmantrao I L R 23 Bom 318* dis ented from VAIGUNTAHAMMAL v VALLAMMA (1917)

I L R 41 Mad 256

———— O III, r 2 (a) (1882 Cod s 37)—

See POWER OF ATTORNEY

I L R 41 Bom 40

———— O III, r 4 (1882 Code s 39)—

See VAKALATNAMA

I L R 43 Calc 884

———— Vakalatnamah *necessity of written acceptance of—withdrawal from s it whether verbal permission of court or consent of party is sufficient* A pleader should not be allowed to act upon a *vakalatnamah* which does not contain his written acceptance as required by the High Court rules When a pleader has been appointed by a party his employment cannot be determined except in the manner provid d by O III r 2 of the Code of Civil Procedure 1908 He cannot retire from a case on the mere verbal permission of the court nor upon the con ent of the party appointing him without any reference to the court *Pleaders* (IN THE MATTER OF TWO)

2 Pat L J 259

———— O V rr 1 2 (1882 Code ss 64 and 65)—Ex parte *decree— Appearance of defendant in answer to a preliminary appl ca ion not equivalent to appearance in a iswer to the plaint Held* that the fact that before the admi ion of a suit one of the propo ed defendants had appeared by pleader on a miscellaneous application for his appointment as guardian *ad litem* to a minor defendant did not ab olve the Court from the nece sity of serving such defendant when the suit was admitted with a copy of the plaint and notice of the date fixed for hearing GULAB CHAND v SHANKAR LAL (1913)

I L R 35 All. 163

———— O V r 3 (1882 Code s 66)—*Order for personal attendance of plaintiff—Non a tendance of plaintiff on adjourned da e—Dismi sal*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O V r 3 (1882 Code s 66)—*contd*

of suit An order made by a Court for the per onal appearance of a party to a suit on a particular date does not imply that the pa ty to whom it is i sued is bound to appear on any sub equent date to which the suit may be ad journed SUNDAR NATH v MALLU (191)

I L R 39 All 476

———— O V r 5 (1882 Code s 68)—*Suit on mortgage—First summons to be for settle ment of i sues and not for final d posal—Pract ce and Procedure* In 1910 a mortga e suit was filed The pla ntiff having died the name of h s son was substituted in p ace of his name on the 13th April 1912 On the same day the Court issued summons for the first time to the de en dants for final dispo al On the day fixed for hearing the Court rai ed is ue and as neither party had witnes es ready the Court found the claim not proved in ab ence of evidence The plaintiff having appealed *Held* reversing the decree that the e was a miscarriage of ju tice in the way the case had been disposed of The scheme of the Civil Procedure Code required in ca es like the pre ent that the parties shou d have the opportunity to produce evidence relevant to issues framed after ascertaining matters as to which the part es were in dispute *Held* further that the summons to the defendants should have been for settlement of issues and not for final disposal TULJARAM HARICHAND v SITARAM NARAYAN (1913)

I L R 38 Bom 377

———— O V r 12 (1882 Code s 75)—

See SUMMONS SERVICE OF

I L R 43 Calc 447

———— O V rr 12 17 O IX r 13—

See SUMMONS SERVICE OF

I L R 43 Calc 447

———— O V r 15 (1882 Code s 78)—*Summon —Question of suff ciency of service of summons* The summons in a suit was served on the paternal uncle of the defendant who was a member of the same joint family and lived in the same hou e with the d fendant *Held* that such service was insufficient in the ab ence of evidence that the defendant him elf could not be found MAKHAN DAS v MANNU LAL (1913)

I L R 35 All. 556

———— O V rr 15 to 23—*Pract ce—Is ue of summons—Summons transm tted for service to Court having jurisd ction in the place where defen dant resides—Quest on of suff ciency or insuff ciency of service to be determined by Court serving summons* Where a summons is sent by a Cou t in which a suit is filed to a Court within the jurisdiction of wh ch the defendant re ides for service on the defendant it is the serving Court and not the i suing Court with which ordinarily speaking re ts the deci ion whether such sum mons has been properly served or not though possibly there may be ca es in which the issuing Court may find it nece ary to re open the ques on of service and to decide thereon *P man h Barol v Guggodosandan Sen I L R 22 Cal 859* di ented from The prov s ons of O V rr 15 to 23 di cussed DWARKA PRASAD v BRIJ MOHAN LAL

I L R. 33 All. 619

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O II r 2 (1882 Code s 43)—*concld*

of the property which was sold in execution of the first decree DALLCHAND *v* APPI (1920) I L R 45 Bom 55

15 ——— SUIT FOR INTEREST ON BOND—*Decree satisfied—Subsequent suit for principal barred* A hypothecation bond contained a clause stipulating that if interest was not paid for six months the creditor might sue either for interest alone or for both principal and interest without waiting for the expiration of the period fixed for repayment (which was three years) and the debtor was to have no objection whatever More than three years after no interest having been paid the creditor brought a suit for interest alone and obtained a decree for sale of the mortgaged property The decreted amount was deposited in Court and satisfaction entered On a subsequent suit by the creditor for the principal sum and arrears of interest *Held* that the provisions of O II r 2 of the Civil Procedure Code were applicable and the subsequent suit was not maintainable The cause of action referred to in the rule is the cause of action which gives occasion for and forms the foundations of the suit and if that cause enables a man to seek for larger and wider relief than that to which he limits his claim he cannot afterwards seek to recover the balance by independent proceedings MUHAMMAD HAFIZ *v* MIRZA MUHAMMAD ZAKARIYA 26 C W N 299

——— O II r 2 and 3—

See O II R 1 I L R 33 Mad 247

——— O II r 2 O XXXIV rr 2 and 4—*Mortgage—Suit for sale—Construction of document—Possibility of separate suits for interest and principal* A mortgage bond executed on the 14th of September 1910 provided that the mortgage debt should be repayable after the expiry of three years It also provided that if interest remained unpaid for more than a specified time the mortgagee might without waiting for the expiry of the term of the mortgage sue for either the unpaid interest or the whole amount of principal and interest then due It further provided that if the mortgage debt was not paid at due date the whole amount principal and interest might be recovered by suit After the expiry of the term of the bond the mortgagee sued to recover arrears of interest only and obtained a decree the defendant not entering an appearance In that suit the plaintiff did not allege that he had a right to sue for the principal separately at a subsequent date *Held* on a construction of the bond in suit and with reference to the former pleadings that the subsequent suit was barred by O II r 2 of the Code of Civil Procedure *Pend v I own* 2 Q I D 138 and *Mart v Bhola Ram* I I P 16 All 165 referred to *Yashvant Narayan Kamat v Vithal Divakar Parulekar* I L R 20 Bom 267 and *Lambhaj v Deva Punj Lee* 1881 p 296 distinguished PER PIGGOTT J Rules 4 of O XXXIV of the Code of Civil Procedure do not contemplate that there should be more than one suit for sale on a mortgage Whether or not it might be possible so to draft a mortgage as to evade this statutory obligation this has not been done in the present case MUHAMMAD ZAKARIYA *v* MUHAMMAD HAFIZ (1917) I L R 39 All 506

CIVIL PROCEDURE CODE (ACT V OF 1908) —*concld*

——— O II r 2 O XXXIV r 14—*Procedure—Suit by mortgagee for simple money decree—Subsequent suit for sale on mortgage not barred—Res judicata—Limitation—Acknowledgment* Certain mortgagees sued for a simple money decree in respect of their mortgage debt stating that they had relinquished their claim under their mortgage and obtained a decree as prayed The decree in this suit stated that the plaintiff would not be entitled to bring to sale the property mortgaged in the bond sued on As however this decree was not satisfied the plaintiffs mortgagees proceeded to put their mortgage into Court and prayed for a decree for sale on it *Held* that the former proceedings were no bar to the present suit INDARPAL SINGH *v* MEWA LAL (1914) I L R 36 All 264

——— O II r 3 (1882 Code s 45)—

See UNDER O I R 1 O I R 2

——— O II r 4 (1882 Code s 44)—

See ADMINISTRATOR 2 Pat L J 642

——— O II r 5 (1882 Code s 44)—*Misjoinder of causes of action—Hindu family position of surviving members of joint and undivided not heirs of deceased member—Joinder of claim by widow of deceased member of joint and undivided Hindu family for maintenance against the property in which the deceased member was a co parcener at the date of his death with claims against the surviving co parceners for her stridhan ornaments* Members of a joint and undivided Hindu family hold the family estate jointly and and are seized of it *per my et per tout* On the death of a co parcener of a joint Hindu family his share and interest in the family property is automatically absorbed and the surviving co parceners become the full owners of the whole estate Such co parceners are not the heirs of the deceased but inherit by survivorship and become the owners of the interest of the deceased in the family estate as co owners in their own right and by the legal extinction of the interest of the deceased co parcener by reason of his death The claim of the widow of such a deceased co parcener for maintenance is clearly not against the estate of the deceased husband but is against the property of which he was a co parcener at the time of his death Accordingly there is no misjoinder of causes of action if the widow in one suit sues the co parceners of her deceased husband to recover her *stridhan* property improperly or illegally detained by them and also to enforce her right of maintenance of the estate of the joint family of which during his lifetime her husband was a member JANKIBAI *v* SHRINIVAS GANESH (1913) I L R 38 Bom 120

——— O III r 1 (1882 Code s 36)—

——— *Recognised agent if has right of audience* A recognised agent as such has no right of audience HURCHAND LAL *v* BENGAL NAGPUR RAILWAY CO (1914) 19 C W N 64

——— O III, r 1 O IX rr 4 8 10 and 12—*Dismissal for default—Appeal to District Judge—Revision* The defendant in a suit asserted that he wished to examine one of the three plaintiffs as a witness and the Court ordered such plaintiff to appear The plaintiff failed to appear and the suit was dismissed In appeal the District

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— **O III r 1 O IX rr 4 8 10 and 12**—*contd*

Judge held that the order to the plaintiff to appear was not a good order and that in any case the suit should only have been dismissed as against the defaulter and not as against the remaining two plaintiffs *Held* (1) that the first Court had power under O III r 1 of the Code of Civil Procedure 1908 to order the plaintiff to appear in person and to dismiss his suit on failure to comply with the order (2) that the order dismissing the suit against the defaulting plaintiff was not appealable to the District Judge and (3) that the order dismissing the suit against the remaining plaintiffs was in contravention of O IX r 10 SRI PROBHU *v* DWARKA PRASAD
4 Pat L J 152

——— **O III, r 1 and O IX r 12**—*Order of Court directing a party to appear in person —Refusal of the party to comply with the order— Order of Court declaring him* ex parte *legality of* A Court is empowered under O III r 1 of the Civil Procedure Code to direct the appearance in Court of a party in person and if the party so directed refuses to appear the Court may declare him *ex parte* even though he had engaged a pleader who is prepared to appear for him in the case *Satu v Hanmantrao I L R 23 Bom 318* dissented from VAIGUNTAHAMMAL *v* VALLAMJAN (1917)
I L R 41 Mad 256

——— **O III, r 2 (a) (1882 Code s 37)**—
See POWER OF ATTORNEY
I L R 41 Bom 40

——— **O III, r 4 (1882 Code s 39)**—
See VAKALATNAMA
I L R 43 Calc 884

——— Vakalatnamah *necessity of written acceptance of—withdrawal from suit whether verbal permission of court or consent of party is sufficient* A pleader should not be allowed to act upon a *vakalatnamah* which does not contain his written acceptance as required by the High Court rules When a pleader has been appointed by a party his employment cannot be determined except in the manner provided by O III r 2 of the Code of Civil Procedure 1908 He cannot retire from a case on the mere verbal permission of the court nor upon the consent of the party appointing him without any reference to the court *Pleaders* (IN THE MATTER OF TWO)
2 Pat L J 259

——— **O V rr 1 2 (1882 Code ss 64 and 65)**—Ex parte *decree— Appearance of defendant in answer to a preliminary application not equivalent to appearance in answer to the plaint* *Held* that the fact that before the admission of a suit one of the proposed defendants had appeared by pleader on a miscellaneous application for his appointment as guardian *ad litem* to a minor defendant did not absolve the Court from the necessity of serving such defendant when the suit was admitted with a copy of the plaint and notice of the date fixed for hearing GULAB CHAND *v* SHANKAR LAL (1913)
I L R 35 All 163

——— **O V r 3 (1882 Code s 66)**—*Order for personal attendance of plaintiff—Non attendance of plaintiff on adjourned date—Dismissal of suit* An order made by a Court for the personal appearance of a party to a suit on a particular date does not imply that the party to whom it is issued is bound to appear on any subsequent date to which the suit may be adjourned SUNDAR NATH *v* MALLU (1917)
I L R 39 All 476

——— **O V r 5 (1882 Code s 68)**—*Suit on mortgage—First summons to be for settlement of issues and not for final disposal—Practice and Procedure* In 1910 a mortgage suit was filed The plaintiff having died the name of his son was substituted in place of his name on the 13th April 1912 On the same day the Court issued summons for the first time to the defendants for final disposal On the day fixed for hearing the Court raised issues and as neither party had witnesses ready the Court found the claim not proved in absence of evidence The plaintiff having appealed *Held* reversing the decree that there was a miscarriage of justice in the way the case had been disposed of The scheme of the Civil Procedure Code required in cases like the present that the parties should have the opportunity to produce evidence relevant to issues framed after ascertaining matters as to which the parties were in dispute *Held* further that the summons to the defendants should have been for settlement of issues and not for final disposal TULJARAM HARICHAND *v* SITARAM NARAYAN (1913)
I L R 38 Bom 377

——— **O V r 12 (1882 Code s 75)**—
See SUMMONS SERVICE OF
I L R 43 Calc 447

——— **O V rr 12 17 O IX r 13**—
See SUMMONS SERVICE OF
I L R 43 Calc 447

——— **O V r 15 (1882 Code s 78)**—*Summons—Question of sufficiency of service of summons* The summons in a suit was served on the paternal uncle of the defendant who was a member of the same joint family and lived in the same house with the defendant *Held* that such service was insufficient in the absence of evidence that the defendant himself could not be found MAKHAN DAS *v* MANNU LAL (1913)
I L R 35 All 556

——— **O V rr 15 to 23**—*Practice—Issue of summons—Summons transmitted for service to Court having jurisdiction in the place where defendant resides—Question of sufficiency or insufficiency of service to be determined by Court serving summon* Where a summons is sent by a Court in which a suit is filed to a Court within the jurisdiction of which the defendant resides, for service on the defendant it is the serving Court and not the issuing Court with which ordinarily speaking rests the decision whether such summon has been properly served or not though possibly there may be cases in which the issuing Court may find it necessary to re open the question of service and to decide thereon *Ramana h Bural v G ggdorardan Sen I L R 22 Calc 859* dissented from The provisions of O V rr 15 to 23 discussed DWARKA PRASAD *v* BRIJ MOHAN LAL (**L. R. 33 All 619**

CIVIL PROCEDUPE CODE (ACT V OF 1908) —contd

———— O VI r 17 and O XXI r 103—concld

———— *Amendm nt of plaint ich u p rmissible—Limi ation Act (IX of 1908) Arts 49 and 1 0* Courts will allo v am ndment of pleadings subje t to three general condi ions (1) when the o is bond fides on the part of the applicant (2) whe e the am ndment d es not cause such preju li e to the o h r party as canno t o compensated by cos s (3) whe e it do s no convert a suit of one chara te a suit of another character Whe e the Plain iffs o i inally sued fo damages and injun tion agains th d fendant and then by an amen lme it prayed to de lara tion of title and then further by another amen l ment prayed for re overy of po session if in the opinion of the Court he was out of possession and it was found that the dispossession of the Plaintiffs w s more than six years b fo e the insti tution of the suit *H ld*—That the limitation applical le to the claim for damages bein, three years and that for d laration of title s x years the se on l amendm nt ou t not to h v e b en allowed t i s effe s to enlarge t p iod of limitatio to twe ve s from th d te of the dispos ession an l t take away from th D fen dant his right to l f it the suit as o iginally framed on th ground of limitation That the amendment altere l the nature of the suit and upon the evid n e it appeared that there was no bond fides on the part of the Plaintiffs GYANANDRA NATH CHAKRAVARTI v PARESH NATH LAL

23 C W N 70

———— O VII r 1 (1882 Code, s 50)—

See APPEAL JOINDER OF

I L R 40 Mad 1

———— O VII, r 2 (1882 Code s 50)—

S B NGAL A ... CIVIL COURTS ACT 188 4 P L J 447

———— O VII rr 4 5 (1882 Code s 50)—

See PARTIES I L R 46 Calc 877

———— O VII, r 6 (1882 Code s 50)—

Suit by mortgagee for poss ssion—Limitation—plaint s ng out one ground for extension of p riod o —wh ther plaintiff c n rely upon anoth r ground as w ll—a know edgm nt—Indian Limit on Act IX of 1908 s 19 and Art 132 On 17th D mber 189 a mortgage for Rs 600 was ex cuted b d ceased father in favour o the fath r o p a n iffs Under its t ns the m tgag r had to pay R 40 per annum a n an l in cas o d fault the mort g e w t be en led to realise in e es by a ... t am pos ssion of the mo ... principal and interest In ... e ught a sui for arrears of inter ... l obtain d a de ree on 18th Au ... e then further default in pa m nt was made an l on 6th Jan 1915 ... i ttuted the p esen ... the ... mortgaged land The ... two gr unds ... —(1) that ... O II r 2 Civil Procedure ... t was barred by limi a ion ... Indian Limitation Act The ... d the suit on bo h the e ... appeal ... High Court ... decree on the first plea.

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— O VII r 6 (1882 Code s 50)—concld

The plaintiffs appealed against this decision under s 10 of the Letters Patent and a Full Bench of the Court de ided that the suit was not barred under O II r 2 The case then went to a Division Bench for decision of the point of limita ion The plaintiffs in their plaint stated tha their suit was in time on a ount of certain paym nts alleged to have been made by defen dants The Lower Courts held that these payments we e no proved and that the plaintiffs could not be allowed to rely on an a knowledgment as they had no spe ified this in their plaint In thei r written s atement in the previous case dated 2 h June 1905 defendants admitted their liability under the mortgage *Held* that the plaintiffs having mentioned one ground of exemption in the r plaint was no debarred by the provisions of O VII r 6 of the Code of Civil Pro edure from taking another and an incon sis ent ground to get over the bar of limitation and could consequently rely upon the acknow ledgment made in the p eas of the previous case *H nga M an v Heramba Chandra (13 Cal L J 139) and Yakub E him Sayani v Bai Rahimat Bai (10 B m L R 31?) followed* *Ram Suk Das v Ghulam Muhammad (19 P R 1915)* approved *Joy shear Roy v Raj Narain (I L R 31 Calc 19) and Gobinda Mal v Santa (53 P R 1911)* dis inguished PARMESHRI DAS v FAKIRIA

I L R 1 Lah 13

———— O VII, r 7— *Oth r reli f —Suit for poss ssion by partition—Property incapable of being partitioned—Relief by declaratory decree or by d cree for joint possession* In a suit for partition of a define l share in certain immovable property the plaintiffs established their title to share in the property bu it was at the same time found that the prop rty was impartible *Held* that this was not a reason for dismissing the suit but the plaintiffs should have been given a d ree for join possession ac ording to th ir share *Sri Mahant Govind Ra v Si a Ram Kesho I L R 21 All 53* r ferred to RAZZAK SHAH v TAHIR SHAH

I L R 43 All. 318

———— O VII r 9 (2)—

See PARTIES I L R 46 Calc 877

———— O VII rr 9 and 11—There is a distinction between do um nts sued upon and do um n relied upon CHAND MULL COVESH MULL v DHAN ... CAVAPATHY

24 C W N 332

———— O VII r 9 and O XLVII r 1— *R sto a on of s it application for tim barred whether appl ation for review can b made* An application under r 9 of O IX of the Code of Civil Procedure 1908 for res oration of a suit must be mad with n 30 days from the order of di missal and this rule of limitation canno be evaded by making an application for review under r 1 of O XLVII *Per* SHARFUDDIN J r. 9 of O IX appli s only to original cases and no to cases in appeal DEORIE SINGH v GOPAL SINGH

1 Pat. L. J 547

———— O VII, r 10 (1882 Code s 57)—

See MESNE PROFITS 2 Pat. L. J 394

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O VII r 10 (1882 Code s 57)—*concld*

See O XXIII r 1(2) I L R 41 Mad 701

——— *Jurisdiction—can be considered by Court suo motu and plaint returned for presentation to proper Court—Contract made by telegram—place where contract completed* Plaintiffs carry on business at Khanna and they sent an order by telegram from Khanna to defendants at Khamgaun in the United Provinces to purchase cotton seeds on their behalf Defendants replied by telegram that the seeds would be purchased and sent to plaintiffs at Khanna Defendants failed to supply the whole quantity and plaintiffs sued them for return of *part* of the purchase money and damages and instituted their suit in the Senior Subordinate Judge s Court at Ludhiana. The Judge took up the question of jurisdiction *suo motu* and decided that his Court had not jurisdiction and returned the plaint for presentation to the proper Court This order was upheld by the Lower Appellate Court *Held* that the Subordinate Judge was competent to take up the question of jurisdiction *suo motu* *Held further* that the contract must be taken to have been made at Khamgaun where the defendants carried on business and where they received the telegram from the plaintiffs and where in the ordinary course of things the money for the cotton seeds would be paid and that consequently the Lower Courts were right in holding that the Ludhiana Court had no jurisdiction *Muhammad Shafi* v *Karamat Ali* (76 P R 1896) followed. *Premji Khetsey* v *Ghulam Sarwar Khan* (36 P R 1908) and *Boseck & Co* v *Mandlestan* (40 P R 1906) distinguished A A RAM KALU RAM v BAKHSHI RAM KANHIYA RAM I L R 1 Lah 203

——— *Plaint returned for presentation to proper Court—Court to which such plaint is represented bound to give credit for the fee levied by the Court to which the plaint was first presented* Where a Court after receiving a plaint and cancelling the stamp affixed thereto returns the plaint for presentation to the proper Court under O VII r 10 of the Civil Procedure Code of 1908 The latter Court to which the plaint is represented is bound to give credit to the fee already levied by the former Court This is the existing practice in this Presidency and there is nothing in the new Code of the Civil Procedure in the Presidency Small Cause Courts Act or in the City Civil Courts Act to indicate that the Legislature intended to interfere with such practice *Prabhakarbhat* v *Vishwambhar Pandit* *I L R 8 Bom 313* followed VISWESWARA SARMA v NAIR (1912) I L R 35 Mad 567

——— O VII, r 11 (1882 Code ss 53 and 54)—

See CIVIL PROCEDURE CODE 1908 S ess 110 102 4 Pat L J 57

See COURT FEE I L R 40 Calc 615
I L R 41 Calc 352

See COURT FEES ACT 4 Pat L J 703

——— *Objection by defendant that notice not duly served under s 80—Plaint if to be rejected or dismissed* Where it was stated in the plaint that notice under s. 80 Civil Procedure Code had been duly served but after defendant had entered appearance it was discovered that the notice had not been duly served *Held* that it was too late to reject the plaint under O VII r 11 and that there was also no statement in the plaint which suggested that the suit was barred PATAN CHAND DHARAM CHAND v SECRETARY OF STATE FOR INDIA (1914) 18 C W N 1340

——— O VII, r 14 (1882 Code s 59)—

See EVIDENCE I L R 41 All 63

——— *What documents should be mentioned in the list—Document upon which witness relies for refreshing memory if to be rejected because not specified in the list* Where in order to support the case of the plaintiff that he was born on a particular date a witness produced an almanack and horoscope and it was rejected on the ground that it had not been entered in the list of documents as required by O VII r 14 of the Civil Procedure Code *Held* that the order rejecting the document was erroneous It was not one to be relied upon as a probative document in itself but it was a record made by the witness at the time to which he was entitled to refer for the purpose of refreshing his memory BANWARI LAL v MAHESH (1918) 23 C W N 577

——— O VII rr 14 and 18—*Documents relied on by plaintiff should be produced in Court along with the plaint—Practice and procedure* It is desirable that a party who sues upon a certain document should produce it at the time he files the plaint and not spring it upon the opposite party a considerable time after when the suit comes on for hearing GANGADHAR MAHADEV v KRISHNAJI VISHRAM (1919) I L R 44 Bom 625

——— O VII r 22—(*Added by High Court under s 122*)—*Appeal—Notice—Duty of court as regards service of notice of appeal on the respondent* Under O VII r 22 of the Code of Civil Procedure 1908 if service has been effected on a party by means of affixing a copy to the outer door of the house named as the address for service of such party and he nevertheless does not appear at the date fixed for the hearing it is the duty of the court to fix a fresh date and direct additional service by registered post MATHURA PRASAD v BHUP NARAIN I L R 43 All 411

——— O VIII, rr 3 4 5—*Pleadings—Averment in the plaint not denied specifically or by necessary implication in written statement—Fact not necessary to be proved—Practice—Limitation.* The plaintiffs sued to recover a sum of money on an account stated. For the purpose of saving limitation they relied in their plaint upon a letter sent by the defendants firm. The defendants in their written statement stated — The plaintiff's suit is not in time The suit is not saved by the letter put in from the bar of limitation. The question being raised whether in this state of the pleadings the letter could be taken as having been admitted *Held* that under rr 3 4 5 of O VIII of the Civil Procedure Code 1908 the letter must be accepted as admitted between the

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd*

———— O VIII, rr 3 4 5—*concld*

parties and therefore unnecessary to be proved LAXMINARAYAN v CHIMNIRAM GIRDHARILAL (1916)
I L R 41 Bom 89

———— O VIII r 5—

See EX PARTE DECREE
I L R 43 Calc 1001

———— O VIII r 6 (1882 Code s 111)—

See HAND NOTE 2 Pat L J 451

———— *Claim barred by Lex fori but not Lex loci contractus* In a suit filed against him the defendant from U P claimed to set off debts which though barred in the U P was not barred by the Local Law (Punjab) *Held* that the set off was admissible BACHCHA LAL v BANARSI DAS I L R 35 All 238

———— *Suit by an Inamdar against a Khatedar for recovery of sums—Set off claimed in a capacity different from that in suit not allowable* In a suit brought by an Inamdar against a Khatedar for the recovery of dues in respect of certain immoveable property payable by the Khatedar the defendant as a *pujari* (worshipper) claimed to set off the stipend payable to him by the plaintiff *Held* that the defendant could not claim the set off which was due to him in a different capacity from that in which he held as tenant or Khatedar of the plaintiff MADHAVRAO MORESHVAR v RAMA KALU (1914)
I L R 39 Bom 131

———— *Set off—Plaintiffs claim based upon an account of goods supplied—Defendant pleaded by way of set off amount of ages due—Claims based upon a money demand—Capacities of parties not varied—Set off can be allowed* The plaintiffs claim was based upon an account of goods supplied to the defendant The defendant admitted the claim but urged by way of set off the amount of pay due to him by the plaintiff The Subordinate Judge allowed the set off and found that the plaintiffs claim was satisfied The District Judge was of opinion that it was not open to the defendant to urge by way of set off the claim which he did urge On application by the defendant to the High Court *Held* that under O VIII r 6 it was competent to the defendant to urge by way of set off the claim which he sought to urge as the capacity in both these cases was nothing but the personal capacity the claims being based upon a money demand. RAGHAVENDRA RAOJI v VALCURAD RAMCHANDRA (1916)
I L R 41 Bom 163

———— *Set off—Suit by clerk who had left employment without notice for arrears of wages—Counter claim for damages in lieu of notice* Held in a suit by a clerk, who had left his employers without notice to recover arrears of wages from his employers that it was not competent to the defendants to counter claim against the plaintiff for damages in lieu of notice VICTORIA MILLS COMPANY LIMITED v BRIJ MOHAN LAL (1917)
I L R 39 All 362

———— O VIII r 6 O XX r 19—*Set off under the Code essentials of—Equitable set off—Principal and agent—Suit by agent to recover money on accounts against principal—Claim of*

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd*

———— O VIII r 6 O XX, r 19—*concld*

defendant to set off—Defendant s claim not barred by limitation at date of suit but barred at date of written statement—Right of defendant to set off against plaintiff s claim—Right of defendant to get decree for amount found due to him in this suit An agent sued his principal on the 17th June 1912 to recover a sum of money that might be found due to him on the taking of accounts of his agency which terminated on the 31st May 1909 The defendant pleaded in his original written statement filed on the 26th February 1913 that no amount was due to the plaintiff but that a sum would be found due to himself on taking accounts and that the suit should be dismissed he subsequently filed an additional written statement with the leave of Court praying that a decree might be given to him in his suit for such amount as might be found due to him on the accounts The plaintiff contended that the defendant was not entitled to a set off or to a decree in this suit as his claim was barred by limitation *Held* that the set off claimed by the defendant did not fall within the terms of O VIII r 6 Civil Procedure Code, as it was not for an ascertained sum of money since the money was no legally recoverable on the date the claim was made and the written statement did not contain particulars of the debts sought to be set off *Held* further that since the defendant s claim was not barred *at the date of the suit* he was entitled to plead that there was a sum in the plaintiff s hands which the latter was bound to apply in satisfaction of his demand but that since a suit could *not* be brought by the defendant to enforce his claim which was barred at the date of his written statement he could not get a decree in this suit for the further sum that might be found due to him on the accounts Principal of equitable set off discussed and cases reviewed NARASIMHA RAO v ZAMINDAR OF TIRUVUR (1919) I L R 42 Mad 873

———— O VIII, rr 8 and 9 (1882 Code s 112)—

See O XXIII R 3
I L R 45 Bom 245

———— O IX—(1882 Code ss 96 to 109)

See EXECUTION OF DECREE
4 Pat L J 330

———— *Dismissal of suit—Appeal* *Held* that no appeal lies from an order dismissing a suit under O IX r 2 of the Code of Civil Procedure on the ground that summons had not been served on the defendants in consequence of the failure of the plaintiff to deposit the requisite court fee for such service *Lucky Charan Chowdhry v Budurrunnissa I L R 9 Calc 627 Parbati v Toolsi Kapri 20 I L R Calc 1* followed. LACHMI NARAIN v DARBARI LAL (1916) I L R 38 All 357

———— O IX rr 2 and 8—

See DISMISSAL FOR DEFAULT
4 Pat L J 712

———— O IX r 3 (1882 Code s 98)—

See O XVII R 2
I L R 44 Bom 767

See O XVII R 3
6 Pat. L J 850

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— **O IX r 8 (1882 Code s 98)**—*contd*

See DISMISSAL FOR DEFAULT
4 Pa L J 277

———— **O IX rr 3 6**—*One plaintiff out of six present—Appearing plaintiff general attorney for the others—D smissal of suit for want of pro e cu ion—Dismissal on m rits—Se on l suit on same cause of a tion barred* On th dat fixed for th hearing of a suit n ith r the def ndants nor their pleader appeared The plaintiffs plea.ler al o di l not appear but one of the plaintiffs was presen He was al o the general attorney o the oth r plaintiffs The Court dismis ed the suit for want of pro cution The plaintiffs applied to have the dismi sal set aside but their application was refu ed on the ground that their remedy was by mean of a separate suit They con equently brought a second suit claimin, the same relief as they had claimed in the former suit *Held* that inasmuch as all the plaintiffs must be deemed to have been pre ent th.ou.h the plaintiff who had appeared and was general attorney for the non app aring plaintiffs the suit mu.t b. regarded as having been dismi sed on the merits, and not under O IX r 3 of the Code of Civil Pro edure and a second suit on the same cause of action was therefore barred. HINGU SINGH *v* JHUPI SINGH (1918)
I L R 40 All 590

———— **O IX r 4 (1882 Code s 99)**—
S SMALL CAUSE COURT
I L P 44 Calc 950

———— **O IX rr 4 8 10 and 12**—
See O III R 1 **4 Pat L J 152**
See O XVII R 3 **I L R 34 All 123**

———— **O IX rr 4 and 9**—
See RESTORATION OF SUIT
2 Pat L J 720

———— **O IX rr 4 9 O XLVII r 1**—
See SMALL CAUSE COURT SUIT
I L R 44 Calc 950

———— **O IX r 5 (1882 Code s 99A)**—

———— **O IX r 5 O XXIII, r 1**—
See CONTRACT ACT (IX OF 18 .) ss 134 137 **I L R 39 Bom 52**

———— **O IX r 6 (1882 Code s 100)**—
See O IX R 3
I L R 40 All 590

———— **O IX rr 6 13**—*Failure of defendant o appear in the course of the hearing af er plaintiff has clos d—Court if may proceed to pa s judgm nt on the materials before it—Application to set aside judgment as ma le* ex parte—*App arance — Default* Where in the course of the hearing of a suit the plaintiffs having clo ed their ca e the defence be.an and the cros examination of one of its witnesses not having been finished at the end of a day it stood adjourned to the next day when neither the defendant nor his witnes es nor his pleader appeared and the Court treating the defence ca e as closed heard plaintiff's arguments and delivered jud men *Held* that the mere fact that the Court had materials before it upon which it could pronounce jud.ment was not enough to bring the ca e under r 3 O XVII as the other condition i that the adjournment must have been at the instance of a party was not fulfilled That the case fell under r 2 of O XVII and the Court must be taken to have proceeded to dispose of the suit in one of the modes directed by O IX so that an application to set aside the order under O IX r 13 shoul l have been entertained The provisions of O IX by themselves do not apply to a case in which the defendant has already appeared in an wer to the summons but has failed to appear at an adjourned hearing of the suit On such a case O XVII applies r 2 applying to a hearing adjourned by the Court r 3 to a hearing adjourned at the instance of a party in which last case if the party fails to appear on the adjourned date an l there are sufficient materials on the record to enable the Court to procee l to judgment the Court may dispose of the ca e under that rule Even in such a case if there are not sufficient materials on the record the proper procedure to follow would be that laid down in r . *Variannissa v Ramkalpa I L R 34 Calc 235* referred to The test of a defendant s appearance in obedience to a summons for the purpose of r 6 O IX is as indicated in the form of the summons in App B to Sch 1 of the Code whether the defendant has appeared *in person or by pleader duly instructed and able* to answer all material questions relating to the suit or who is accompanied by some person able to answer all such questions In the present ca e as the pleaders being furnished with the due instruction could not be doubted there was no non appearance within r 6 O IX PRAJUDIN BASUNIA *v* JIBAN MOHAN RAY (1914)
18 C W N 775

———— **O IX rr 6 13 O XVII, rr 2 3**—
See EX PARTE DECREE
I L R 41 Calc 958

———— **O IX r 8 (1882 Code s 102)**—
See s148 **4 Pat L J 428**
See O III R 1 **4 Pat L J 152**
See DISMISSAL FOR DEFAULT
4 Pat L J 712

———— *Plaintiff offering no evid nce if defendant may prove case in written s a em nt—Civil Procedure Code (Act V of 1908) O IX r 8* When the plaintiff offers no evid nce the Court can only dismi s the suit for want of prosecution In such a case if the defendant offers evidence in support of his ca e the Code of Civil Procedure does not provide for such evi dence being received When however the plain tiff has adduced evidence then notwithstanding that at the c o e of the plaintiff's ca e the Judge has formed an opinion in the defendant s favour the defendant can insi t on calling evid nce to prove the case made in his written statement *Ex parte Jacob or In re P ncoffe ? Ch D 31.* referred to KESRI CHAND KOTHARI *v* NATIONAL JUTE MILLS CO LD (1912)
16 C. W N 968

———— *Appeal—Dismissal for non apperance of app l an—Appellant pre ent but unrepre en ed and unable to arg e the appeal him elf—Proc d re* On the date fixed for the

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

———— O IX r 8 (1882 Code s 102)—contd

hearing of an appeal one of the two appellants the other being a woman) appeared before the Court and applied for an adjournment to enable him to procure the attendance of his pleaders He was called on to argue his appeal but he said he had nothing to say and thereupon the appeal was dismissed on the ground that it had not been supported *Held* that in these circumstances the Court was not justified in dismissing the appeal for want of prosecution but was bound to consider the grounds of appeal and to decide the case on the merits BALDEO PRASAD v KUNWAR BAHADUR (1912) I L R 35 All 105

———— O IX r 8 (1882 Code s 102)—
See O XVII r 3 6 Pat. L J 650

———— When plaintiff dies before the trial a Court has no right to dismiss for want of appearance BAKHSH SINGH v HABIB SHAH I L R 35 All. 331

———— O IX rr 8 and 9—
See DISMISSAL FOR DEFAULT
3 Pat L J 355
See APPEAL I L R 43 Calc 859

———— When the plaintiff and his pleader are both absent on the day fixed for the hearing of a case and the Court does not intend to give them another opportunity of appearing it ought not to decide the suit on the merits but should dismiss it for default of appearance PHUL KUAR v HASHMATULLAH KHAN (1915) I L R 37 All 460

———— *Dismissal of suit for plaintiff s non appearance—Inherent jurisdiction of Court to restore a suit for ends of justice—Defendant protected in the matter of costs on restoration of plaintiff s suit* On the 7th January 1919 a suit was called on for hearing when counsel for the plaintiff finding that his client was not in Court to give evidence asked for an adjournment The defendants appeared and opposed the application which was refused and the suit was dismissed under O IX r 8 Subsequently the plaintiff applied for the restoration of the suit stating in his affidavit that at about 11 A M. of the day of hearing he had gone to the premises of his principal witness to bring him to the Court that as the latter was away from the premises he waited for his return till about 12 30 noon and that soon after he came to the Court with the witness and found that the suit was called on and dismissed The plaintiff submitted that as the suit was fourteenth on the Board List for the day he did not expect it to be called before 1 P M but that he was ready and willing to pay the defendant s costs of the day on which the suit appeared on board for hearing The trial Judge dismissed the application on 23rd January 1919 holding that no sufficient cause under O IX r 9 of the Civil Procedure Code was shown by the plaintiff The plaintiff appealed *Held* (reversing the order of the trial Judge) that the case was one in which whether there was sufficient cause or not the Court should exercise its inherent jurisdiction to restore the suit for the ends of justice provided the defendant was amply protected in the matter of costs *Lalta Prasad v Ram Karan* (1912) 34 All 426 followed. BILAS RAI LAKSHMINARAYAN v CURSONDAS DAMODARDAS (1919) I L R 44 Bom. 82

———— O IX, rr 8 9 and 13—
See CIVIL PROCEDURE CODE ss 148 115
4 Pat L J 428

———— O IX rr 8 and 9 s 151—*Dismissal of suit for default—Restoration—Sufficient cause—Court s inherent power to restore* O IX r 9 of the Code of Civil Procedure, 1908 makes it compulsory on a Court to set aside a dismissal under r 8 where the plaintiff satisfies the Court that there was sufficient cause for non appearance It however cannot take away the Court s power to restore the case for any other valid reasons LALTA PRASAD v RAM KARAN (1912) I L R 34 All 426

———— O IX, rr 8 and 9 O XXII, rr 3 and 9—*Non appearance of plaintiff—Dismissal of suit—Order setting aside dismissal when plaintiff was found to have been dead at the time suit was dismissed—Orders and rules applicable only to defaulters wrongly applied in case of dead party* On the non appearance of the plaintiff in a suit against the respondent an order was made on the 4th of July 1911 dismissing the suit for default The plaintiff was in fact dead at the time order was made and his son the appellant was engaged in performing his father s funeral ceremonies and was unable to attend Court These facts were brought to the notice of the Deputy Commissioner in an application made under O XXII rr 3 and 9 of the Civil Procedure Code (Act V of 1908) by the appellant as the heir and legal representative of the plaintiff which was filed and accepted by the Deputy Commissioner within the time allowed by law and an order was made on the 11th of September setting aside the dismissal of the suit and substituting the name of the appellant on the record in place of the deceased plaintiff On an application for revision of the Deputy Commissioner s order of the 11th of September made by the respondent under s 115 of the Code to the Court of the Judicial Commissioner that Court reversed the order and confirmed that decision on review mainly on the grounds that the order of the 4th of July dismissing the suit was a proper order under O IX, r 8 of the Code that the appellant s application to set aside that order was not within time and was therefore barred and that O XXII r 3 of the Code applied only to a still pending suit and not to one that had been dismissed *Held* (reversing the decisions of the Court of the Judicial Commissioner) that these decisions were vitiated by applying to a dead man orders and rules applicable only to mere defaulters An abuse of the process of the Court within the meaning of s 151 of the Code had occurred by the course adopted in the Judicial Commissioner s Court Quite apart from that section any Court might rightly have considered itself to possess inherent power to rectify the mistake inadvertently made in dismissing the suit The order of the Deputy Commissioner setting aside the dismissal was manifestly sensible and correct and their Lordships restored it and remitted the case to India to be disposed of on the merits DEBI BAKSH SINGH v HABIB SHAH (1913) I L R 35 All. 331

CIVIL PROCEDURE CODE (ACT V OF 1908)
—cont d

——— O IX rr 8 10 and 12—
See NON APPEARANCE
I L R 48 Calc 57

——— O IX, r 9 (1882 Code s 103)—
See s 141 I L R 1 Lah 339
See s 148 4 Pat L J 428
See O XVII R 3 6 Pat L J 650
See APPEAL I L R 43 Calc 857

———*Dismissal for default application to set aside order of—dismissal of application whether application lies to set aside* No application lies under O IX to set aside and order made under O IX RAMGULAM SINGH v SHEO DEONARAIN SINGH 4 Pat L J 287

——— An application under this order for restoration of a suit must be made within 30 days from the order of dismissal and this rule of limitation cannot be evaded by making an application for review under O XLVII r 1 DEODIP SINGH v GOPAL SINGH
1 Pat L J 547

——— O IX, r 9 s 115—*Application to set aside order dismissing suit for default of appearance should be disposed of on evidence—Revision* Where an application by the plaintiff for postponement of a case fixed for peremptory disposal on the ground that the plaintiff was ill and unable to attend Court having been refused the suit was called on for disposal and dismissed for default and an application to set aside the order under O IX r 9 of the Civil Procedure Code was without recording evidence summarily dismissed the Judge observing that he would not go over the same grounds again *Held* in revision under s 115 of the Civil Procedure Code that an application under O IX r 9 must be disposed of on the evidence after it has been properly recorded whether the procedure of the Court be to take the evidence *viva voce* or by affidavit It could not be disposed of on the view of the Judge merely as to whether the application was *bonâ fide* or not DURGA KANTA SARMA v ANTO KOCH (1917)
22 C W N 671

——— O IX r 9 and O XXI r 90—*Application to set aside sale dismissal for default—application for restoration whether maintainable* O IX r 9 of the Code of Civil Procedure 1908 does not apply to an order dismissing for default an application to set aside under O XXI r 90 a sale held in execution of a decree BHUBANESWAR PRASAD SINGH v TILAKDHARI LALL
4 Pat L J 135

——— O IX, r 9 O XLIII, r 1 (c)—*Application by judgment debtor under O XXI r 90 to set aside sale—Dismissal for default—Application for restoration rejection of—Order if appealable—Application to set aside sale if suit* O IX r 9 of the Civil Procedure Code is applicable to applications for setting aside sales which have been dismissed for default *Dhan Nichha Bibee* v *Hemanta Kumar Ray 19 C W N 758* and *Safdar Ali* v *Kishun Lal 12 C L J 6* relied on An application to set aside a sale is a proceeding which may terminate in an adjudication such as is referred to in s 2 of the Civil Procedure Code and if the question had been *res integra* the Court would have held that it was a suit

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

——— O IX r 9 O XLIII r 1 (c)—
contd

within the meaning of O XLIII r 1 cl (c) *Charu Chandra Ghose* v *Chandi Charan Ray Chowdhury 19 C W N 25* referred to BHUBAN BEHARY NAG MAZUMDAR v DHIRENDRA NATH BANERJI (1916) 20 C W N 1203

——— O IX, r 10 (1882 Code s 105)—
See O III R 1 4 Pat L J 152

——— O IX rr 10 and 12—
See NON APPEARANCE
I L R 48 Calc 57

——— O IX r 12 (1882 Code s 107)—
See O III R 1 I L R 41 Mad 256
See O V R 3 I L R 39 All 476

——— O IX r 13 (1882 Code s 108)—
See O IX, R 6 18 C W N 775
See s 148 I L R 36 All 776
See s 151 I L R 393 All 8
See O V r 10? I L R 35 All 163
See O V RR 12 17
I L R 43 Calc 447
See EX PARTE DECREE
I L R 48 Calc 153
See EXECUTION PROCEEDINGS
I L R 41 Calc 1
See SUMMONS SERVICE OF
I L R 43 Calc 447

——— *Decree* ex parte *as against one of several defendants—Such defendant not a party to appeal—Appeal dismissed as against contesting defendants—Application by non appearing defendant to set aside* ex parte *decree against her—Merger* Where a person who was originally a party to a suit is not made a party to the appeal preferred against the decree passed in the suit either as appellant or respondent and the Appellate Court has not adjudicated upon his case the decree of the Court of first instance does not merge in that of the Court of Appeal It is therefore open to such a person if he is otherwise in a position to do so to apply under O IX r 13 of the Code of Civil Procedure 1908 to the Court which passed the decree for an order to set it aside as against him The following cases were referred to in the judgment of SUNDAR LAL, J *Ramanadhan Chetti* v *Narayanan Chetty I L R 27 Mad 602 Sankara Bhatta* v *Subraya Bhatta I L R 30 Mad 535 Damodar Manna* v *Sarat Chandra Dhal 13 C W N 846 3 Indian Cases 468 Kumud Nath Roy Chowdhury* v *Jotindra Nath Chowdhury I L R 38 Calc 394 Shajan Bibi* v *Safir ud din 26 Indian Cases 412 Dh…ai Sardar* v *Tarak Nath Chowdhury 12 C L J 53 Intu Miah* v *Dar Bakhsh Bhuiyan 15 C W N 798 Brij Lal Singh* v *Chowdhury Mahadeo Prasad 17 C W N 133 Hedlot Khasia* v *Karan Khasia 15 C L J 241 Manomohini Chowdhrani* v *Nara Narayan Rai 4 C W N 476 Palaldhari R…* v *Mankaran Rai 7 All L J 593* and *Mal… Prasad* v *Ram Charan Lal I L R 37 All …* GAJRAJ MATI TIWARIN v SWAMI NATH RAI (1917)
I L R 39 All …

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

——— *O IX r 13 (1882 Code s 108)—contd*

——— *Ex parte decree—applications for re hearing terms on which may be granted* In restoring a case for re hearing under O IX r 13 of the Code of Civil Procedure 1908 the court may make it a condition that the decretal amount or some portion thereof be paid into court In cases where there has been no default on the part of the party asking for re hearing *e g where he has not been duly served it is* inequitable for the court to impose conditions SHAM LAL SAHAI *v* RAM NARAYIN LAL SETH

5 Pat L J 420

——— *Compromise decree application to set aside by one not a party to it—Appeal Held per* CURIAM (RICHARDSON J *dubitante*) An application by a party to a suit to set aside a compromise decree on the ground that as against him the decree was *ex parte* comes under O 9 r 13 of the Civil Procedure Code and an appeal lies against the order refusing the application BASIRDUDDIN *v* SHEIKH SADHU (1918)

22 C W N 571

——— *O XVII rr 2 and 3 scope of—Decree* ex parte*—Defendant absent at adjourned hearing after taking adjournment for letting evidence* Where at the close of the plaintiff s case an adjournment was granted to the defendant to enable him to produce his evidence and he failed to appear at the adjourned hearing and the Court proceeded to pass a decree against him *Held* by the Full Bench that the case came within O XVII r 2 and the decree could be set aside under O IX r 13 *Per* SADASIVA AYYAR and KUMARASWAMI SASTRIYAR *JJ* Rr 2 and 3 of O XVII Civil Procedure Code are mutually exclusive r 2 applies to all cases of absence of parties whether time was granted or not to do any of the acts mentioned in r 3 of the Order while r 3 applies only to cases where parties are present and commit default of the kind mentioned in the rule *Per* WALLIS *C J* Rr 2 and 3 of O XVII are not mutually exclusive R 3 *may* be applied even in the absence of the defendant but the decree will none the less be *ex parte* and liable to be set aside *Chandramathi Ammal* v *Narayanasami Aiyar I L R 35 Mad 241* followed *Naganada Aiyar* v *Krishnamurti Aiyar I L R 31 Mad 97* overruled PICHAMMA *v* SREERAMULU (1917)

I L R 41 Mad 286

——— *Decree* ex parte*—Application to set aside decree—Appeal—Decree confirmed in appeal before hearing of application to set it aside* When the High Court has once confirmed a decree on appeal it is not open to the Court which passed the decree to entertain an application to set the decree aside and it makes no difference that the application to set the decree aside was filed before the appeal was disposed of MATHURA PRASAD *v* RAM CHARAN LAL (1915)

I L R 37 All 203

——— *Compromise petition purporting to be by all the defendants filed by those actually present in Court—Decree passed on such compromise petition—Subsequent repudiation by defendants not present at filing of petition—Jurisdiction of Court to set aside decree as* ex parte *decree under O IX r 13* The petitioners instituted a suit for declaration of their title to and for possession of certain lands Two of the defendants (Nos 4 and 5) filed a petition of compromise and asked for a decree so far as they were concerned on that compromise and an *ex parte* decree against the other defendants The Court however ordered fresh service on the other defendants and subsequent thereto defendants Nos 4 and 5 appeared in Court with a petition of compromise purporting to be executed by defendants Nos 1 to 3 as well as by themselves On this petition a decree was made in terms of the compromise Afterwards defendants Nos 1 to 3 put in a petition to the Court stating that defendants Nos 4 and 5 had no authority to present the petition of compromise on their behalf that no summons had been served on them and that the petition was fraudulently represented as being made by them The Court acting under O IX r 13 Civil Procedure Code set aside the decree and ordered a re trial of the case *Held* that the Judge when he made his order was under the impression that all the parties in the case were before him and that the petition was the petition of all the parties consequently in granting the petition he did not intend to make it *ex parte* and the decree could not be treated as an *ex parte* one and consequently O IX r 13 Civil Procedure Code did not apply DAMODAR MISRA *v* HRISHI NAIK (1914)

19 C W N 118

——— Ex parte *decree application to set aside to Original Court after appeal determined by Appellate Court if and when lies* Where the plaintiff sued D his four sons and two nephews on a mortgage executed by D and D s father (now dead) and the suit having been *contested by D s nephews only a decree* was made in plaintiff s favour in the presence of D s nephews but *ex parte* against D and his sons directing the sale of a two thirds of the mortgaged property (being the share of D and his father) and making all the 7 defendants personally liable for the unsatisfied balance if any of the mortgage debt and against the decree an appeal was preferred by plaintiff wherein he sought to have a decree for the sale of the share of D s nephews as well and the latter also preferred cross objection against the portion of the decree which made them personally liable and both appeal and cross objections were allowed by the High Court *Held* that though D and his sons had been joined as respondents in the appeal and a self contained decree was made therein as no relief was claimed in the appeal against them there was still as against D and his sons a subsisting *ex parte* decree over which the Subordinate Judge had control and he had jurisdiction to entertain an application by D and his sons to set aside the decree BRIJALALL SINGH *v* MAHADEO PROSAD (1911)

17 C W N 133

——— *Decree in favour of contesting defendants and against non appearing defendants if may be wholly set aside at the instance of latter—Refusal of Court to set aside—Plaintiff if may ask for the setting aside of whole decree in revision Semble* The proviso to r 13 O IX of the Civil Procedure Code (Act V of 1908) does

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

———— O IX r 13 (1882 Code s 108)—contd

not authorise the Court in setting aside a decree at the instance of defendants against whom it had been obtained *ex parte* to set it aside in so far as it is in favour of the contesting defendants ALI AHMED KHAN v C R BROWN (1912)
17 C W N 142

———— *Ex parte decree, power of court to set aside* A Court has no power apart from the provisions of O IX r 13 Civil Procedure Code to set aside an *ex parte* decree passed by itself *Somayya v Subbamma (1903) I L R 26 Mad 599* overruled NEELAVENI v NARAYANA REDDI (1920) I L R 43 Mad 94

———— *Ex parte decree against one of the defendants—Appeal by another defendant against the decree of Original Court—Ex parte defendant a party respondent in the appeal—Application to set aside ex parte decree made to the Appellate Court pending appeal whether competent* Where a decree was passed *ex parte* against one of the defendants and an appeal against the decree preferred by another defendant was pending in the Appellate Court an application by the former defendant to set aside the *ex parte* decree passed against him can be made only in the Original Court which passed the decree and not in the Appellate Court *Sankara Bhatta v Subroya Bhatta (1907) I L R 30 Mad 535* distinguished *Chenna Reddi v Peddaobi Reddi (1909) I L R 32 Mad 416 (F B)* applied PALANIAPPA CHETTY v SUBRAMANIA CHETTY (1921)
I L R 44 Mad 731

———— In restoring a case for rehearing under O IX r 13 the Court may make it a condition that the decretal amount be paid into Court but if the party applying has not made default it is inequitable to impose any conditions SHYAM LAL SAHAI v RAM NARAIN LAL SETH 5 Pat L J 421

———— O IX r 13 O V r 17—

See SUBSTITUTED SERVICE
I L R 38 Calc 394

———— O IX r 13 O XVII r 3—

See s 148 4 Pat L J 428

———— *Procedure—Non appearance of defendant—Decree passed on merits in absence of defendant—Appeal—Application for rehearing* On a date to which the hearing of a suit before a Munsif had been adjourned the plaintiff and his witnesses were present but the defendants were not The Munsif heard the plaintiff's witnesses and decreed his claim The defendants filed an application for a rehearing before the Munsif who however rejected it They then appealed against the decree to the District Judge who dismissed the appeal *Held* on second appeal by the defendants against the District Judge's decree that the defendants might and should have appealed against the rejection by the Munsif of their application for a rehearing but they had no right in their appeal from the decree to raise any question as to their non appearance in the Court of first instance HUMMI v AZIZ UD DIN (1916)
I L R 39 All 143

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

———— O IX r 13 O XXXII r 3—*Guardian ad litem—Illusory appointment of guardian—Competence minors to have a decree passed without their being represented set aside* A suit was brought against certain minor defendants naming as guardian *ad litem* their uncle who was also a defendant The uncle refused to act as guardian *ad litem* and stated that the minors lived with their mother No notice was served upon the mother but upon the application of the plaintiffs the Court Amin was appointed guardian *ad litem* of the minors The plaintiffs did not deposit any amount for the expenses of the guardian who did not take any steps to defend the suit or to inquire whether there was a defence A decree was passed *ex parte* against the minor and an application on their behalf through their mother to have the case restored was rejected The Courts below found that the decree was not void and dismissed the suit *Held* that in the circumstances above set forth the minors were entitled to a declaration that the decree was null and void as against them *Walian v Banke Behari Pershad Singh I L R 30 Calc 1021* and *Munnu Lal v Ghulam Abbas I L R 32 All 287* distinguished *Held* also that the minors were not debarred from bringing this suit by reason of their not having applied to have the *ex parte* decree set aside under O IX r 13 of the Code of Civil Procedure BHAGWAN DAYAL v TARAM SUKH (1915)
I L R 37 All 179

———— O X r 4 (1882 Code s 120)—*Order striking out defence for failure of defendant to appear—Appeal* Whether an order passed by a Court which is purporting to deal with one of the parties before it under the provisions of O X r 4 of the Code of Civil Procedure does or does not amount to pronouncing judgment against that party depends upon the particular facts of each case Where a Court struck off the defence of one defendant out of three but ultimately decided the case on the merits and passed a decree against all three defendants—their defences being similar it was *held* that no appeal lay from the order of the Court under O X r 4 MADHUBI SURENDRA SAHI v BITHAL DAS (1917)
I L R 39 All 450

———— O XI—(1882 Code s 121 to 136)

See DISCOVERY I L R 41 Calc 6
25 C W N 99

———— O XI r 2—

See INTERROGATORIES
I L R 43 Calc 300

———— O XI rr 12 to 15—

See s 3— 5 Pat L J 550

———— O XI r 13—*Affidavit of documents—Inspection—Discovery* When an affidavit of documents has been filed by one party under O XI r 13 of the Code the other party is not necessarily precluded from subsequently applying under r 18 paragraph 2 of the same Order for further inspection and discovery BASANTA COOMAR GOSWAMI v KUMUDINI DASI
16 C W N

———— O XI, rr 13 18 (2)—

See DISCOVERY I. L. R. 33

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O XI, r 14 (1882 Code s 130)—Discovery—*High Court—Power to interfere with interlocutory order under the Charter Act (24 and 25 Vict c 104) s 15—Order for discovery—Power of Court how to be exercised—Order before issues framed or written statement filed—Right of inspecting party to take copies and notes* Order for production of documents can be made under r 14 of O XI before the issues have been framed The order must no doubt be limited to such documents alone as relate to matters in question in the suit and the Court must consequently before it makes the order determine for the purpose thereof what are the matters in question in the suit and this may well be done even before the issues have been framed Provided this is done an order for production of the defendant s documents may be made at the instance of the plaintiff even before the written statements have been filed *Union Bank of London* v *Manby 13 Ch D 239 Augustinus* v *Nerricks 16 Ch D 13* referred to A party cannot obtain a commission for the inspection or production of books or papers in order that he may ransack them for evidence to make out his case A party cannot ask for discovery with a view to ascertain the evidence on which his opponent s action or defence rests But if the documents are material to the applicant s case it is no objection to their production or inspection that they relate to the case of his adversary The Court in ordering production should by its order specify the time and place of inspection and give direction as to the manner of inspection The Court cannot delegate the exercise of its power of requiring the production of any document under the rule to a Commissioner The party who has obtained an order to inspect documents may take notes of their content He has also the right to take copie but on application to the Court There is no possible ground for controversy that if the High Court is satisfied that an interlocutory order of the description now before us has been made without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants the High Court has ample power to set matters right under s 15 of the Charter Act *Dhape* v *Ram Pershad I L R 1 Calc 687* referred to GOBINDA MOHAN DAS *v* KUNJA BEHARY DASS (1909)
14 C W N 147

———— O XI r 15 (1882 Code s 131)—*Inspection of Plaintiffs documents before filing written statement when allowed—Civil Procedure Code (Act V of 1908) O VII rr 9 14 O XI r 15—Documents sued upon and documents relied on—Rules of English High Court O XXXI r 14* There is a distinction between documents sued upon and documents relied upon by the Plaintiffs. Under O XI r 15 of the Civil Procedure Code 1908 the Defendant is not entitled as of right to have inspection of the documents relied upon by the Plaintiff before filing his written statement *Ram Dyal Saligram* v *Kurhurry Ballrishna I L R 18 Bom 368 (1891)* not followed CHANDMULL GONESHMULL *v* DHANRAJ GANAPATROY 24 C W N 302

———— O XI, r 18 (2) (1882 Code s 134)—
See O XI R 13
I L R 38 Calc 428

———— O XI, r 21—
See s 32 5 Pat L J 550

———— *Procedure—Plaintiff under suspicion of suppressing documents relating to the matter at issue—Dismissal of suit* Where a plaintiff had given the Court strong grounds for believing that he was keeping out of the way documents which would throw light on the subject matter of the suit but there had been no order made for discovery or inspection of documents it was *held* that the Court was not justified in dismissing the suit purporting to act under O XI r 21 of the Code of Civil Procedure. KISHAN LALL *v* SULTAN SINGH (1915) I L R 38 All 5

———— O XII, r 6 (1882 Code ss 138 and 140)—
See COMMISSION AGENCY
I L R 45 Calc 138

———— *Held* in a case where the written statement taken as a whole could not be regarded as an unambiguous and unconditional admission that Rs 9 535 was due to the plaintiff that the same could not be recovered by the plaintiff by an application under O XII r 6 of the Code of Civil Procedure *Held* also that there must be a clear admission that the money is due and recoverable in the action in which the admission is made, *Landergan* v *Feast 34 W R (Eng) 691* followed KORAMALL RAM BALLAV *v* MONGILAL DALIMCHAND (1919)
23 C W N 1017

———— O XIII r 1—1882 Code ss 138 & 140
See MAHOMEDAN LAW—MARRIAGE
I L R 45 Calc 873

———— O XIII r 4 (1882 Code s 141)—
See MAHOMEDAN LAW—GIFT
I L R 38 All 627

———— O XIV r 2 (1882 Code, s 146) —*Scope and application of rule—Issues of law determination of in the beginning—r 4 O VII—Suit by plaint in representative capacity character of plaintiff if should be stated in cause title—Amendment of plaintiff by leave of Court effect of* On the 30th July 1886 the plaintiff was declared to be a disqualified proprietor and the Court of Wards took charge of her estate On the 7th June 1890 by a *Kobala* the Court of Wards sold to the father of the defendant all the properties in suit except two mauzas By a further *Kobala* dated 11th February 1901 the two mauzas were similarly conveyed On the 1st August 1911 the Court of Wards released the property of the plaintiff from its charge The plaintiff on 31st May 1913 sued for a declaration that the two *Kobalas* were invalid and for restoration of possession of the properties concerned As regards the two mauzas sold in 1901 the plaint originally did not show in the cause title the character in which the plaintiff sued although the body of the plaint and the prayers made it clear that she sued as the *shebait* of certain idols Subsequently with the leave of the Court the cause title was amended so as to show that the plaintiff sued on behalf of herself and as *shebait* and the necessary amendments in the body of the plaint were made On the application of the defendant the Trial Judge tried the issues of law first and

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

—————— **O XIV r 2 (1882 Code s 146)**—*contd*

dismissed the suit *Held* that the application of r 2 O XIV Civil Procedure Code is not confined only to cases in which the issues of fact had not been settled. The rule also applies to cases where the Court has not postponed the settlement of the issues of fact and the course adopted by the Trial Judge in disposing of the issues of law was not illegal That O VII r 4 does not require that when the plaintiff sues in a representative capacity that fact should be stated in the cause title of the plaint although that is a convenient place to state it The amendments made in the plaint by the leave of the Court could not in any view amount to an addition or substitution of a new plaintiff within the meaning of s 22 of the Limitation Act That Art 91 of the Limitation Act had no application to the suit in so far as it was instituted by the plaintiff as *shebait* of the idols KUARMONI SINGH v WASIF ALI MEERZA (1915) **19 C W N 1193**

—————— **O XIV r 5 (1882 Code s 149)**— —————— *Amendment—extent of court's power to alter frame of suit—suit for eviction on ground of wrongful possession—decree awarding rent legality of* The court's power to alter the frame of a suit is co extensive with the power that it has to make amendments under r 3 of O XIV of the Code of Civil Procedure 1908 The court cannot convert one cause of action into a different cause of action Where the plaintiff sued for a declaration of his title to the land in dispute and prayed (1) that he might be put into possession thereof by ousting the defendants and (2) that he might be awarded mesne profits by way of damages for use and occupation for the period during which the defendants had been in wrongful possession of the land *held* that the court was not competent to give a decree against the defendants on the basis that they were tenants of the plaintiff and liable to pay rent to him JHARI SINGH v PIRTHI NATH SAHU

2 Pat L J 69

—————— **O XIV r 6**—

See ADMINISTRATOR PENDENTE LITE

I L R 39 Calc 587

—————— The Court cannot where there is no agreement as is indicated in O XIV r 6 of the Civil Procedure Code go outside the allegations in the plaint in order to decide an issue as to whether the plaint discloses a cause of action KSHITISH CHANDRA ACHARYA CHOUDHURI v OSMOND BEEBEE (1912)

16 C W N 516

—————— **O XVI (1882 Code ss 59 78)**—

—————— **O XVI r 4**—*Sale of immoveable property in execution of an order for payment of expenses of witness legality of—S 36 scope and effect of* In a certain suit the plaintiff was ordered to pay a certain sum as expenses for one of his witnesses The order was executed and certain immoveable property of the plaintiff sold in execution The present suit was instituted for a declaration that the sale of the immoveable property was without jurisdiction and illegal *Held*—That the sale of the immoveable property in execution of the order was illegal O 16 r 4 is not to be treated as a short and summary procedure for realisation of the expenses of a witness in addition to other modes of execution of orders under the provisions of s 36 of the Code That section does not make any order capable of execution which was not so before The section only means that the procedure prescribed for execution of decrees shall apply to execution of such orders as can be executed under the Code There being a specific provision in that behalf in O 16 r 4 the amount ordered to be paid ought to have been levied in that manner and the immoveable property of the debtor could not have been put up to sale MD WARISH SADAIAR v RAHAMAN ALI MEATH **26 C W N 877**

—————— **O XVI rr 10 12**—*Fine for non production of documents conditions to be fulfilled before imposing fine—Duty of Courts and Settlement Officers to strictly follow the law relating to issue and service of summons* O XVI r 10 of the Civil Procedure Code does not apply where there has been no summons upon any body to produce the document and no order under r 12 can be made until the procedure laid down in r 10 has been followed where that rule applies The Civil Court and particularly the peripatetic Settlement Courts which cause a large amount of disturbance to local interests cannot be too careful to follow the provisions of law strictly as regards summoning persons and documents before them NABADIP CHANDRA NANDI v THE SECRETARY OF STATE FOR INDIA (1916) **20 C W N 511**

—————— **O XVI r 12 (1882 Code s 170)**—

See s 141 **23 C W N 560**

—————— **O XVII (1882 Code s 156)**—

See O XXI r 16 **5 Pat L J 390**

—————— **O XVII r 2 (1882 Code s 157)**—

See DISMISSAL FOR DEFAULT

4 Pat L J 712

—————— **O XVII rr 2 3**—

See CIVIL PROCEDURE CODE (1908) O IX r 13 **I L R 41 Mad 286**

See DISMISSAL FOR DEFAULT

4 Pat L J 277

See EX PARTE DECREE

I L R 41 Calc 956

—————— **O XVII r 2, O IX r 3 and O XXXII, r 3**—*Adjourned hearing—Plaintiffs default—Non appearance of defendant—Dismissal of suit—Fresh suit on the same cause of action* The plaintiffs filed a suit against several defendants, one of whom was a minor who was not represented in the suit as no guardian was appointed for him At an adjourned hearing the suit was dismissed for plaintiffs default The plaintiffs having again sued the minor defendant alone on the same cause of action —*Held* that the dismissal of the first suit did not operate as a bar to the maintainability of the second suit since the order passed in the first suit was a nullity as between the plaintiffs and the minor defendant DAMU v NAKEYA (1919) **I. L. R. 44 Bom 767**

—————— **O XVII, r 3 (1882 Code s 158)**—

See DISMISSAL FOR DEFAULT

4 Pat. L. J 431

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd*

——— **O XI r 14 (1882 Code, s 130)**—Discovery—*High Court—Power to interfere with interlocutory order under the Charter Act (24 and 25 Vict c 104) s 15—Order for discovery—Power of Court how to be exercised—Order before issues framed or written statement filed—Right of inspecting party to take copies and notes* Order for production of documents can be made under r 14 of O XI before the issues have been framed The order must no doubt be limited to such documents alone as relate to matters in question in the suit and the Court must consequently before it makes the order determine for the purpose thereof what are the matters in question in the suit and this may well be done even before the issues have been framed. Provided this is done an order for production of the defendant s documents may be made at the instance of the plaintiff even before the written statements have been filed. *Union Bank of London* v *Manby 13 Ch. D 239 Augustinus* v *Nerricks 16 Ch D 13* referred to A party cannot obtain a commission for the inspection or production of books or papers in order that he may ransack them for evidence to make out his case A party cannot ask for discovery with a view to a certain the evidence on which his opponent s action or defence rests But if the documents are material to the applicant s case it is no objection to their production or inspection that they relate to the case of his adversary The Court in ordering production should by its order specify the time and place of inspection and give direction as to the manner of inspection The Court cannot delegate the exercise of its power of requiring the production of any document under the rule to a Commissioner The party who has obtained an order to inspect documents may take notes of their content He has also the right to take copies but on application to the Court There is no possible ground for controversy that if the High Court is satisfied that an interlocutory order of the description now before us has been made without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants the High Court has ample power to set matters right under s 15 of the Charter Act *Dhape* v *Ram Pershad I L R 1 Calc 687* referred to GOBINDA MOHAN DAS v KUNJA BEHARI DASS (1909)

14 C W N 147

——— **O XI r 15 (1882 Code s 131)**—*Inspection of Plaintiffs documents before filing written statement when allowed—Civil Procedure Code (Act V of 1908) O VII rr 9 14 O XI r 15—Documents sued upon and documents relied on—Rules of English High Court O XXXI r 14* There is a distinction between documents sued upon and documents relied upon by the Plaintiffs. Under O XI r 15 of the Civil Procedure Code 1908 the Defendant is not entitled as of right to have inspection of the documents relied upon by the Plaintiff before filing his written statement *Ram Dyal Saligram* v *Nurhurry Balkrishna I L R 18 Bom. 368 (1894)* not followed CHANDMULL GONESHMULL v DHANRAJ GANAPATROY **24 C W N 302**

——— **O XI, r 18 (2) (1882 Code, s. 134)**—

See O XI r 13

I L R 38 Calc 428

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd*

——— **O XI r 21**—

See s 32 **5 Pat L J 550**

——— *Procedure—Plaintiff under suspicion of suppressing documents relating to the matter at issue—Dismissal of suit* Where a plaintiff had given the Court strong grounds for believing that he was keeping out of the way documents which would throw light on the subject matter of the suit but there had been no order made for discovery or inspection of documents it was *held* that the Court was not justified in dismissing the suit purporting to act under O XI r 21 of the Code of Civil Procedure. KISHAN LALL v SULTAN SINGH (1915) **I L R 38 All 5**

——— **O XII, r 6 (1882 Code ss 138 and 140)**—

See COMMISSION AGENCY

I L R 45 Calc 138

——— *Held* in a case where the written statement taken as a whole could not be regarded as an unambiguous and unconditional admission that Rs. 9 535 was due to the plaintiff that the same could not be recovered by the plaintiff by an application under O XII r 6 of the Code of Civil Procedure *Held* also that there must be a clear admission that the money is due and recoverable in the action in which the admission is made, *Landergan* v *Feast 34 W R (Eng) 691* followed KORAMALL RAMBALLAV v MONGILAL DALIMCHAND (1919)

23 C W N 1017

——— **O XIII r 1—1882 Code ss 138 & 140**

See MAHOMEDAN LAW—MARRIAGE.

I L R 45 Calc 873

——— **O XIII, r 4 (1882 Code s 141)**—

See MAHOMEDAN LAW—GIFT

I L R 38 All 627

——— **O XIV r 2 (1882 Code s 146)** —*Scope and application of rule—Issues of law determination of in the beginning—R O VII—Suit by plaint in representative capacity character of plaintiff if should be stated in cause title—Amendment of plaintiff by leave of Court effect of* On the 30th July 1880 the plaintiff was declared to be a disqualified proprietor and the Court of Wards took charge of her estate On the 7th June 1890 by a *kobala* the Court of Wards sold to the father of the defendant all the properties in suit except two mauzas By a further *kobala* dated 11th February 1901 the two mauzas were similarly conveyed On the 1st August 1911 the Court of Wards released the property of the plaintiff from its charge The plaintiff on 31st May 1912 sued for a declaration that the two *kobalas* were invalid and for restoration of possession of the properties concerned. As regards the two mauzas sold in 1901 the plaint originally did not show in the cause title the character in which the plaintiff sued although the body of the plaint and the prayers made it clear that she sued as the *shebait* of certain idols. Subsequently with the leave of the Court the cause title was amended so as to show that the plaintiff sued on behalf of herself and as *shebait* and the necessary amendments in the body of the plaint were made On the application of the defendant the Trial Judge tried the issues of law first and

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— **O XIV r 2 (1882 Code s 146)**— *contd*

dismissed the suit *Held* that the application of r 2 O XIV Civil Procedure Code is not confined only to cases in which the issues of fact had not been settled The rule also applies to cases where the Court has not postponed the settlement of the issues of fact and the course adopted by the Trial Judge in disposing of the issues of law was not illegal That O VII r 4 does not require that when the plaintiff sues in a representative capacity that fact should be stated in the cause title of the plaint although that is a convenient place to state it The amendments made in the plaint by the leave of the Court could not in any view amount to an addition or substitution of a new plaintiff within the meaning of s 22 of the Limitation Act That Art 91 of the Limitation Act had no application to the suit in so far as it was instituted by the plaintiff as *shebait* of the idols KUARMONI SINGH v WASIF ALI MEERZA (1915) **19 C W N 1193**

——— **O XIV r 5 (1882 Code s 149)**—

——— *Amendment—extent of court's power to alter frame of suit—suit for ejection on ground of wrongful possession—decree awarding rent l gality of* The court's power to alter the frame of a suit is co extensive with the power that it has to make amendments under r 3 of O XIV of the Code of Civil Procedure 1908 The court cannot convert one cause of action into a different cause of action Where the plaintiff sued for a declaration of his title to the land in dispute and prayed (1) that he might be put into possession thereof by ousting the defendants and (2) that he might be awarded me ne profits by way of damages for use and occupation for the period during which the defendants had been in wrongful possession of the land *held* that the court was not competent to give a decree against the defendants on the basis that they were tenants of the plaintiff and liable to pay rent to him JHARI SINGH v PIRTHI NATH SAHU **2 Pat L J 69**

——— **O XIV r 6**—

See ADMINISTRATOR PENDENTE LITE **I L R 39 Calc 587**

——— The Court cannot where there is no agreement as is indicated in O XIV r 6 of the Civil Procedure Code go outside the allegations in the plaint in order to decide an issue as to whether the plaint discloses a cause of action KSHITISH CHANDRA ACHARYA CHOUDHURI v OSMOND BEEBEE (1912) **16 C W N 516**

——— **O XVI (1882 Code ss 59 78)**—

——— **O XVI r 4**—*Sale of immoveable property in execution of an order for payment of expenses of witness legality of—S 36 scope and effect of* In a certain suit the plaintiff was ordered to pay a certain sum as expenses for one of his witnesses The order was executed and certain immoveable property of the plaintiff sold in execution The present suit was instituted for a declaration that the sale of the immoveable property was without jurisdiction and illegal *Held*—That the sale of the immoveable property in execution of the order was illegal. O 16 r 4 is not to be treated as a short and summary procedure for realisation of the expenses of a witness in addition to other modes of execution of orders under the provisions of s 36 of the Code That section does not make any order capable of execution which was not so before The section only means that the procedure prescribed for execution of decrees shall apply to execution of such orders as can be executed under the Code There being a specific provision in that behalf in O 16 r 4 the amount ordered to be paid ought to have been levied in that manner and the immoveable property of the debtor could not have been put up to sale MD WARISH SADAYAR v PAHAMAN ALI MEATH **26 C W N 877**

——— **O XVI rr 10 12**—*Fine for non production of documents conditions to be fulfilled before imposing fine—Duty of Courts and Settlement Officers to strictly follow the law relating to issue and service of summons* O XVI r 10 of the Civil Procedure Code does not apply where there has been no summons upon any body to produce the documents and no order under r 12 can be made until the procedure laid down in r 10 has been followed where that rule applies The Civil Courts and particularly the peripatetic Settlement Courts which cause a large amount of disturbance to local interests cannot be too careful to follow the provisions of law strictly as regards summoning persons and documents before them NABADIP CHANDRA NANDI v THE SECRETARY OF STATE FOR INDIA (1916) **20 C W N 511**

——— **O XVI r 12 (1882 Code s 170)**—

See s 141 **23 C W N 560**

——— **O XVII (1882 Code s 156)**—

See O XXI r 16 **5 Pat L J 390**

——— **O XVII, r 2 (1882 Code s 157)**—

See DISMISSAL FOR DEFAULT **4 Pat L J 712**

——— **O XVII rr 2 3**—

See CIVIL PROCEDURE CODE (1908) O IX R 13 **I L R 41 Mad 286**

See DISMISSAL FOR DEFAULT **4 Pat L J 277**

See EX PARTE DECREE **I L R 41 Calc 956**

——— **O XVII r 2 O IX r 3 and O XXXII, r 3**—*Adjourned hearing—Plaintiffs default—Non appearance of defendant—Dismissal of suit—Fresh suit on the same cause of action* The plaintiffs filed a suit against several defendants, one of whom was a minor who was not represented in the suit as no guardian was appointed for him At an adjourned hearing the suit was dismissed for plaintiffs default The plaintiffs having again sued the minor defendant alone on the same cause of action —*Held* that the dismissal of the first suit did not operate as a bar to the maintainability of the second suit since the order passed in the first suit was a nullity as between the plaintiffs and the minor defendant DAJU v VAKRYA (1919) **I L R 44 Bom 767**

——— **O XVII r 3 (1882 Code s 158)**—

See DISMISSAL FOR DEFAULT **4 Pat L J 481**

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O XVII, r 3 (1882 Code s 158)—contd

1. ——— *Procedure—Order for parties to appear with witnesses at adjourned hearing—Default of plaintiff's witnesses—Dismissal of suit* On the date fixed for the hearing of a suit the parties and their witnesses were present but as there was some prospect of a compromise the hearing was adjourned. On the adjourned date the plaintiffs were present, but their witnesses, though summoned, did not appear. The plaintiffs did not apply for an adjournment nor did they ask the Court to enforce the attendance of their witnesses under O XVI, r 10 of the Code of Civil Procedure 1908 and the Court, acting apparently under O XVII, r 3, of the Code dismissed the suit. The plaintiff appealed and the District Judge dealing with the case as if the plaintiffs had made default in appearing remitted the case to the first Court to be disposed of according to law. *Held* that the procedure of the District Judge was erroneous. He should have proceeded under O XLI r 27 to direct the admission of fresh evidence and under O XLI r 25 to refer the issues for trial to the Court of first instance. Per Curiam—"As we read the present Code we think it leaves the Court a discretion to proceed at once when witnesses have failed to attend if from any circumstances before it has reason to believe that the evidence of such defaulting witnesses is material and that the witnesses are defaulting. It would be for the witnesses to show that their absence rested on lawful excuse." RAM NARAIN DUBE v JAGDEO (1911) I L. R 33 All 600

2 ——— *Adjourned hearing—Suit dismissed on merits—Procedure* At an adjourned hearing of a suit in the Court of a Munsif the plaintiffs were not present and their pleader intimated to the Court that he had no instructions to go on with the case. This suit was thereupon dismissed under O XVII, r 3 of the Code of Civil Procedure 1908, on the ground that the claim was not proved. The plaintiff then made an application for restoration under O IX r 4. The Munsif dismissed the application and his order was affirmed by the District Judge. *Held* on application in revision by the plaintiff that no revision lay. The suit having been dismissed under O XVII r 3, of the Code on the merits the plaintiff's remedy was by way of appeal against the Munsif's decree *Lalta Prasad v Nand Kishore I L R 22 All 66* followed CATRA BIBI v CHATTA (1911) I L. R 34 All 123

3. ——— *Procedure—Suit partially heard but dismissed as for default because plaintiff was not in a position to continue it—Appeal—Inherent powers of High Court* A plaintiff whose case had been partly heard failed to continue the prosecution of it, not because he wished to do so, but because owing to various difficulties connected with the absence of his pleader and of some of his witnesses, he thought that he was unable to proceed further with it. Thereupon the Court passed an order dismissing the suit "for default." *Held*, that the Court should not have dismissed the suit "for default," but should have decided it as best it could on the merits and on the materials then before it. *Badam v Madhu Singh I L R 23 All 194* referred to. The circumstances of the case constituted a *casus omissus* so far as the Code of Civil Procedure was concerned but the High Court had inherent power to entertain an appeal against the decision of the Court below though none was specifically provided for. SUKHDEO KOERI v RAM LOCHAN KOERI (1919) I. L. R 41 All. 663

——— O XVII, r 3 O IX, r 3—After issues had been framed the 4th May was fixed for hearing. Subsequently plaintiff applied to add certain minor defendants. 6th June was fixed for appointment of guardian *ad litem*. Plaintiff having failed to file process for service on guardian suit was dismissed. *Held* that the court should have dealt with the suit under O XVII r 3 and therefore there was no *res judicata*. In a suit on a mortgage against the executants and members of joint family who had purchased the equity of redemption in execution the grandson *held* not barred for non joinder. A point of law not agreed in the Lower Court can be raised in 2nd appeal if it does not require consideration of the evidence and is based on the finding of the Lower Court. SHAIKH ABDUL RAHMAN v SHIB LAL SAHA 5 Pat. L. J 650

——— O XVII, r 3 Sch II, Cls. 18 and 22—*Parties to arbitration agreement—one of arbitrators unwilling to act—Suit not barred by agreement to refer—Power of Court to proceed with the suit* The plaintiff and defendant who were partners dissolved the partnership by an agreement one of the terms of which was that certain matters of account should be referred to the decision of two named persons. Thereafter in spite of this agreement the plaintiff filed a suit which was subsequently stayed under para 18 of the second schedule of the Civil Procedure Code 1908 to enable the parties to refer their dispute to the arbitration of the two agreed persons. One of these persons however having been found unwilling to act and the arbitration appearing impracticable the plaintiff eventually applied for removal of stay. The Court however without removing the stay proceeded to decide the suit upon the materials before it purporting to act under O XVII r 3 of the Civil Procedure Code 1908 and held that the suit was barred by the agreement to refer. The plaintiff having appealed to the High Court *Held* that the suit was not barred by the agreement to refer to arbitration by reason of the provisions of para 22 of the second schedule of the Civil Procedure Code and that the Court should have removed the stay and decided the suit on its merits. LAXMAN v MANJUNATH (1921) I. L. R 45 Bom. 1181

——— O XVIII, r 2 (1882 Code ss. 179 and 180)—

See HIGH COURT RULE. I L. R 42 All. 542

——— O XVIII, r 5 (1882 Code s. 182)—

See DEPOSITION I. L. R. 46 Calc. 895

See PENAL CODE, 1860, s. 193. I. L. R. 1 Lah. 361

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— **O XVIII, rr 5 6**—

See DEPOSITION **I L R 45 Calc 825**

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) ss 239 43 426 439 **I L R 42 Mad 561**

———— **O XVIII r 18**—

See CO OWNERS **I L R 39 Mad 501**

———— **O XIX, r 3 (1882 Code s 916)**—

See AFFIDAVIT **I L R 37 Calc 259** **14 C W N 153**

———— **O XX rr 1 2, 3 (1882 Code s 198)**—

See JUDGMENT **I L R 46 Calc 97**

———— *Judgment written signed and dated by trial Judge pronounced in his absence by Judge in charge—Act whether a nullity or irregularity—Waiver of irregularity—Prejudice proof of if necessary—Civil Procedure Code (Act V of 1908) s 99—Object of provisions relating to delivery of judgment* The provisions of the law relating to the delivery of judgments have been framed for the benefit of the parties litigant and their contravention is an irregularity curable by consent or waiver The first Subordinate Judge having heard a case reserved judgment on 6th May 1915 On 29th May 1915 he wrote signed and dated his judgment and on 31st May 1915 during his absence from headquarters the second Subordinate Judge who was in charge of the first Court delivered that judgment *Held*—That the judgment was not pronounced dated and signed in conformity with the requirements of the Code But the error did not constitute an illegality which nullified the proceedings It was an irregularity which could be waived and was waived no objection having been taken at the time the judgment was pronounced. If an act of the Court was without jurisdiction or infringed a rule prescribed on grounds of public policy the proceeding became a nullity if it was on the other hand only an irregular exercise of jurisdiction a contravention of rules framed by the legislature with a view to afford protection to the individual litigant he might waive the benefit thereof and would not be entitled to obtain a reversal of the decree except on proof that the merits had been affected The purpose of the rule which has been infringed has to be examined in order to determine whether the infringement is an irregularity only or an illegality nullifying the proceeding FORT GLOSTER JUTE MANUFACTURING CO *v* CHANDRA KUMAR DAS **24 C W N 791**

———— **O XX r 2 (1882 Code s. 199)**—*Judgment—Judgment written by the Judge who heard the case after he had ceased to be a Judge of the court in which the case was tried and pronounced by his successor in office* A judge may pronounce a judgment written but not pronounced by the predecessor in office and this not withstanding that at the time the judgment was written the judge who wrote it had ceased to be the Judge of the court in which the case was tried. *Basant Bihari Ghoshal v The Secretary of State for India in Council I L R 35 All 368* and *Satyendra Nath Roy Chaudhuri v Kastura Kumari Chatwalin I L R 35 Calc 756* followed LILAWATI KUNWAR *v* CHOTE SINGH **I L R 42 All 362**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— **O XX r 2 (1882 Code s 199)**—*contd*

———— *Judgment written but not delivered before transfer of Judge—Successor in office competent to pronounce his own judgment* Where a judge fixed a date for delivering judgment wrote it out and placed it upon the record but was transferred before the date fixed and his successor took a different view and delivered his own judgment *Held* that his successor in office was not obliged to deliver the judgment but was competent to pronounce a judgment of his own in the case *In the goods of Prem Chand Moonshi 14 Ch D 969* followed. *R Baker Nicholas v Baker I L R 21 Calc 39* referred to LACHMAN PRASAD *v* RAM KISHAN (1910) **I L R 33 All 236**

———— *Judgment—Judgment written by the judge who heard the case after his transfer from the division and pronounced by his successor in office* A judge may pronounce a judgment written but not pronounced by his predecessor in office and this notwithstanding that at the time the judgment was written the Judge who wrote it had ceased to be the Judge of the Court in which the case was tried. *Satyendra Nath Roy Chaudhuri v Kastura Kumari Ghatwalini I L R 35 Calc 756* followed BASANT BIHARI GHOSHAL *v* SECRETARY OF STATE FOR INDIA (1913) **I L R 35 All 368**

———— **O XX r 3 (1882 Code s 202)**—

See JUDGMENT **5 Pat L J 147**

———— **O XX r 7—(1882 Code s 205)**

See EXECUTION OF DECREE **5 Pat L J 490**

See LIMITATION **I L R 37 All 527**

———— **O XX r 11 (1882 Code s 210)**—*Civil Procedure Code (Act V of 1908) O XX r 11 and O XXXIV r 6—Personal decree against mortgagor—Court s discretion to direct payment by instalment—Judicial discretion—Second appeal* In making a decree under O 34 r 6 of the Civil Procedure Code against a mortgagor personally the Court may direct the payment of the decretal amount in instalments under O 20 r 11 of the Code Whether or not the Court exercised a sound judicial discretion in making the order cannot be reviewed in second appeal *Baljobi l a i Bhalal v Chhedilal Saha 11 C L J 431* distinguished. BIDHU SEKAR BANDAPADHYA *v* SUDHURY MAHATABUDDIN (1911) **15 C W N 1083**

———— **O XX r 12 (1882 Code ss 211 212)**—

See PARTITION **I. L. R 42 Mad. 295**

See RES JUDICATA **I. L. R 41 Mad 188**

———— The Court that passes a decree for possession can award mesne profits notwithstanding the amount thereof and s. 19 of the Bengal Agra and Assam Civil Courts Act does not limit the power conferred by this order on a Munsif DINANATH SAHAI *v* MUSAMMAT MATAWATI KUER **6 Pat. L. J 55**

———— Notice directly sent by judgment debtor ... to decree holders held sufficient in ... es and no mesne

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— **O XX, r 12 (1882 Code ss 211 212)**—*contd*

profits decreed. SHAMBHU NATH KHETTRI AND OTHERS *v* SATISH CHANDRA MITTRA
25 C W N 386

——— **O XX r 12 (2) XXI r 102 and XXII r 10 and s 2 (11)**—

See MESNE PROFITS
I L R 39 Calc 220

——— **O XX, r 14 (1882 Code s 214)**—

See s 148 — 1 Pat L J 92

See PRESUMPTION I L R 44 Calc 675

——— **O XX r 16 (1882 Code s 215A)**—

——— **O XX r 18**—

See PARTITION — I L R 41 All 207
I L R 42 Mad 296

——— *Partition—Appeal—Preliminary decree—Subsequent interlocutory order giving directions for preparation of final decree* In a suit for partition a preliminary decree was passed and confirmed on appeal When the case went back to the Court of first instance for the passing of a final decree that Court passed an order directing that actual partition should be made in accordance with certain directions then given by it *Held* that no appeal would lie against such an order but its property could be questioned in appeal from the final decree The Code of Civil Procedure contemplated the preparation of only one preliminary decree and the order in question could not be regarded as more than an interlocutory order containing directions as to the preparation of the final decree BHARAT INDU *v* YAKUB HASAN (1913)
I L R 35 All 159

——— *Agra Tenancy Act (II of 1901) s 32—Joint Hindu family—Partition—Occupancy holding—Existence of occupancy holding no bar to partition* *Held* that the presence of an occupancy holding as an item of joint family property is no reason for not effecting a partition of the property as a whole The Court can either give the occupancy holding to one party taking from that party an equivalent in value or if it be found impossible to do this the Court can leave the occupancy holding undivided merely making a declaration that the parties are entitled jointly to the holding DWARKA *v* RAM PAT (1914)
I L R 36 All 461

——— **O XX r 19—(1882 Code s 216)**

See O VIII r 6
I L R 42 Mad 873

——— **O XXI r 1 (1882 Code s 257)**—

See O XXI r 2 and p 90
4 Pat L J 336

See EXECUTION

——— *Decree—Payment of money ordered in a decree—Payment ordered on a fixed date—Delay in making payment into Court owing to closing of Court—Payment on the opening day—General Clauses Act (X of 1897) s 10—Facts* A decree provided as follows The plaintiff should pay by the 10th day of April 1909 to the defendant Rs 100 If the moneys

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— **O XXI r 1 (1882 Code s 257)**—*contd*

are not paid by the plaintiff as agreed upon the property in dispute will remain with the defendants by right of ownership and the plaintiff will have no right of ownership over the same The plaintiff chose to pay the money into Court and finding it closed on the 10th, she paid the money on the 14th April 1909 the day on which the Court re opened. A question having arisen whether the payment so made was within the terms of the decree —*Held* that the payment was properly made for O XXI r 1 of the Civil Procedure Code 1908 intended to enact and did enact that payment into Court was a valid compliance with the decree even though the decree directed payment to the decree holder WAMAN MAHADEV PAVJI *v* NATU WALAD MURHA (1910)
I L R 35 Bom 35

——— *Payment of decree amount into Court—Notice to decree holder—Cessation of interest whether from date of deposit or date of service of notice* Interest does not cease to run in respect of a decree debt deposited in Court until the decree holder gets notice of the deposit RAMARAYA SHANBOGUE *v* SHEFBOTT VENKATARAMANAYYA (1919) I L R 42 Mad 576

——— **O XXI r 2 (1882 Code s 258)**—

See CIVIL PROCEDURE CODE 1882 s 231
I L R 36 Mad 357

See CIVIL PROCEDURE CODE 1908 s 47
6 Pat L J 337

See DEKKHAN AGRICULTURAL RELIEF ACT 1879 s 71 I L R 45 Bom 1128

See EXECUTION
I L R 42 Mad 338

See EXECUTION OF DECREE
I L R 43 Calc 207

See EXECUTION PETITION
I L R 41 Mad 251

See EXECUTION PROCEEDINGS
I L R 40 Mad 233

See LIMITATION I L R 45 Calc 630

See REGISTRATION ACT 1908 s 17
I L R 43 Mad 688

1 ——— *Civil Procedure Code (Act XIV of 1882) ss 244 258—Decree—Execution—Satisfaction of the decree—Payment or adjustment not certified to the Court—Subsequent fraudulent execution* A decree was compromised by the parties out of Court The payment however was not certified to the Court The decree holder having fraudulently applied for the execution of the decree *Held* that the Court should not in the exercise of its duty under s 244 of the Civil Procedure Code 1882 allow a clear case of fraud to be covered and condoned by the provisions of s 258 of the Civil Procedure Code 1882 or O XXI r 2 Civil Procedure Code 1908 *Trimbak Ramkrishna v Hari Laxman I L R 21 Bom 575* followed HAMSA GODHAJI *v* BHAWA JOGAJI (1915) I L R 40 Bom 333

2 ——— *Execution of decree—Decree payable by instalments—Payment of instalments not certified—Limitation—Limitation Act (IX of 1908) Sch I Art 182 (7)* The effect

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXI r 2 (1882 Code s 258)—*contd*

of O XXI r 2 is that a payment made on account of a decree and not certified to the Court executing the decree cannot be recognized by that Court for any purpose. Where therefore payments had been made towards liquidation of an instalment decree but such payments were not certified to the Court executing the decree it was *held* that limitation ran against the decree holder from the date upon which the first instalment was due. Certified and recorded within the meaning of O XXI r 2 signify that the executing Court being satisfied by either the decree holder or judgment debtors that a certain payment has been made in respect of decree has recorded the fact on the execution file *Gokul Chand v Bhika 12 All L J 587* and *Bhajan Lal v Cheda Lal 12 All L J 825* referred to *Lakhi Narain Ganguli v Felamani Dasi 20 C L J 151* dissented from CHATTAR SINGH v AMIR SINGH (1916) I L R 38 All 204

3 ——— *Limitation Act (IX of 1908) ss 19 20—Payment extending limitation—Certification of payment by decree holders—Statement of payment in application for execution of decree if sufficient* A decree holder in his application for execution of his decree notified to the Court that he had received a certain sum from the judgment debtor and relied on this payment as saving limitation. It was found that the payment had in fact been made by the judgment debtor himself by way of interest. *Held* that the decree holder may either apply to certify payment before execution or may do so in his application for execution of the decree. That there was sufficient certification by the decree holder and under the circumstances it was not necessary for the Court to record the certification and O XXI r 2 did not stand in the way of the decree holder. That in the face of the finding the fact of the endorsement and the question as to who made it and the authority by which it was made were immaterial KHATIBANNESSA BIBI v SANCHIA LAL NAHATA (1915) 20 C W N 277

4 ——— *Payment not certified if may be taken to extend limitation* Under O XXI r 2 of the Civil Procedure Code an adjustment or payment of a decree which is not duly certified cannot be recognised by the Court for any purpose whatever *e g* for extending the time of limitation. KUTBULLAH SARKAR v DURGA CHARAN RUDRA (191) 16 C W N 396

5 ——— *Assignment of decree for benefit of judgment-debtor—Execution by assignee—Civil Procedure Code (Act XIV of 1882) s 258* A held a decree against C. It was arranged between C and B that B should advance the decree amount to C as a loan and that an assignment of the decree should be obtained in the name of B for the benefit of C. The decree was accordingly assigned to B who applied for execution. C set up the above arrangement as a bar to execution. B contended that such arrangement amounted to an adjustment of the decree and not being certified to the Court it could not be given effect to under O XXI r 2 of the Civil Procedure Code. *Held* (their Lordships differing) *per* ABDUR RAHIM J That the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXI r 2 (1882 Code s 258)—*contd*

arrangement amounted to an adjustment of the decree and not being certified could not be pleaded as a bar to execution. The prohibition contained in O XXI, r 2 is not confined to cases where the parties to the transaction adjusting the decree stood at the date of such transaction in the relation of judgment creditor and judgment debtor *Per* SUNDARA AYYAR J That O XXI r 2 does not make uncertified adjustments invalid but merely forbids effects being given to such adjustment when they are set up as a defence to the execution of a decree by one entitled to do so. The section will not disentitle the judgment debtor to prove facts which will show that the applicant is not the real transferee even if the facts he relies on show that the decree has been adjusted. The prohibition regarding uncertified adjustments will not apply where the adjustment is made with a third party PONNUSAMI NADAR v LETCHMANAN CHETTIAR (1912) I L R 35 Mad 659

6 ——— *Fraudulent decree obtained jointly by two brothers—Admission in partition suit between brothers by one that decree fraudulent and that debtor released upon payment of portion—Entry of satisfaction by the other of his share only of decree as discharged by payment—Application to execute for the balance—Executing Court if may act on the admission* S1 and S2 two brothers obtained a decree against B. Subsequently in a partition suit instituted by S2 against S1 S2 having complained that S1 had not entered in the assets of the family property the decree against B S1 filed a written statement in which he admitted that the decree had been obtained by fraud on account of enmity between the brothers and B and that B had been released of his liability under it upon payment of Rs 200 only out of the decretal amount. The payment however was certified in execution as made in part satisfaction only of the decree. Subsequently S1 died and S2 filed a certificate in execution admitting receipt of another Rs 200 from B and the full satisfaction of his half share of the decree and then applied on behalf of the minor sons of S1 for execution of the alleged unsatisfied balance of the decree. *Held* that the case really did not fall under the provisions of r 2 O XXI Civil Procedure Code as it was not a question of payment or adjustment of the decree and the *executing Court was justified in placing reliance* on an admission solemnly made by the decree-holder himself prior to the application for execution in a suit in which the genuineness of the decree was in issue and in dismissing the execution petition on its basis BABAR ALI BOSAK v SHISIR KUMAR BASU (191) 16 C W N 951

7 ——— *Adjustment of decree not certified through alleged fraud of decree holder—Remedy of judgment-debtor—Executing Court if may recognise adjustment* It is not open to the Court of execution to enquire into the fact of a payment or adjustment of a decree which has not been certified or recorded as provided in cl. (1) of r 2, of O XXI Civil Procedure Code even when the conduct of the decree holder is alleged to have been fraudulent. *Gadadhar Panda v Shyam Charn Nai 13 C W N 453* *Ramayyar*

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd.

———— O XXI, r 2 (1882 Code s. 258)—contd.

v *Perumal* I L R 21 Mad. [illegible] *Trimbak Pant Krishna Pandit v Hari Laxman Pandit* I L R 24 Bom 575 1. Bom L R 655 referred to. *Semble* It is open to the judgment-debtor to maintain a suit for damages for fraud [*Premanand Kharchhah v Khepoo Paroma* I L R 10 Cal 354 referred to] and the decree-holder also renders himself liable to proceedings under the criminal law [illegible] I L R 1 Calc 186 P v Byres I L R 10 Bom 2 R v Mahalinga I L R 4 Mad. 375 P v Pillai I L R 9 Mad 101 referred to. Where the judgment-debtor having appealed against the decree sought to be executed withdrew the appeal upon an adjustment come to with the decree-holder and the fact of such adjustment was stated before the Appellate Court and was recorded in its order *Held* that an application by the judgment-debtor to the Court in which execution was subsequently applied for by the decree-holder praying for an investigation as to the fact of the adjustment was in substance one in continuation of the application before the Appellate Court and the two applications together constituted a sufficient compliance with the provision of O XXI r 2, cl. (1) and the fact of the payment should have been enquired into by the Court. BIROO CHAMAN v JAMUNAR KOER (1911) 16 C W N 923

8 ———— [illegible] *of decree—Limitation Act (IX of 1908)* [illegible] If a judgment-debtor pays payment or adjustment he must [illegible] upon the decree-holder within 90 days of the payment or adjustment before he can certify payment within the meaning of the rule but there is no corresponding disability imposed upon the decree-holder. The latter may certify payment at any time under Art. [illegible] of the Sch. I of the Limitation Act 1908. The application for execution must be made within three years from the date on which payment becomes due and the decree-holder may certify payment or adjustment in his application for execution. In such a case the Court has power to hear evidence as to the payment. SHEIKH ELAHI BUX v NAWAB LALL [illegible] Pat L J 159

9 ———— *Adjustment of partition decree—Adjustment as to partition of immoveable property—*[illegible] *decree holder by one decree-holder to another of his share in some of the lands decreed—Subsequent* [illegible] *to Court*—[illegible] *application in execution by vendor for partition of lands* [illegible] *and for other relief—Bar of execution* O XXI r 2 Civil Procedure Code applies to partition decrees which provide for the payment of money as well as for other relief, such as a partition of immoveable property and to adjustments with regard to such property. Such an adjustment cannot be recognized, unless certified or recorded as required by the rule. [illegible] *Saheb v Ballu* [illegible] *Ammal (1914), 15 M L T* 238 and *Sellurama Saheb v Chota Pava Saheb* (191) 3 [illegible] 337 followed *Kelu Nair v* [illegible] *(1915), 25 M L J* 556 not followed. LAKSHMINARAYANA RAO v BALAKRISHNA RAO (1920) I L R 43 Mad. 476

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd.

———— O XXI, r 2 (1882 Code s. 258)—contd.

10 ———— *Adjustment of decree not certified if can be recognised by Court executing decree—Estoppel in a party [illegible] from decree-holder and judgment-debtor—Estoppel if can be invoked to nullify an express statutory provision—Limitation Act (IX of 1908) Sch I, Art 174—Application for an order on a decree-holder to show cause why adjustment should not be recorded, period of limitation for*. A decree-holder applied for execution on the 1 June 1912. On behalf of the judgment-debtors objection was taken on the 27th June 1912 to the effect that the decree could not be executed inasmuch as it had been adjusted on the 11th February 1912 and, under the adjustment, the decree-holder had agreed to accept the judgment-debt in certain periodical instalments. This adjustment was not recorded as prescribed in sub-r 1 and 2 of O XXI r 2. *Held* that as the adjustment had not been recorded, the Court executing the decree could not recognise it under O XXI, r 2, sub-r 3. That even if the application of the 27th June were treated as an application for the issue of notice to the decree-holder to show cause why the adjustment should not be recorded, it was barred by limitation under Art. 174 of the Second Schedule of the Limitation Act. *Held* (as to the contention that the decree-holder having subsequently to the alleged adjustment received payments in accordance therewith was estopped and the Court was bound to determine whether there had or had not been an adjustment) that the argument was clearly opposed to the provision of sub-r 3 and the doctrine of estoppel cannot be invoked to nullify an express statutory provision. JOGENDRA NATH SARKAR v PROSHAT NATH CHATTERJEE (1913) 19 C W N 650

10 a) ———— *Certification of payment out of Court to decree-holder—Limitation Act (IX of 1908), s. 21 and Art. 174 and 181—Period of limitation for certifying payment of money [illegible]—Such certification if can be made in the application for execution*. In a mortgage suit, the preliminary decree was made in May 1912 and the final decree in January 1916. In August 1919 the decree-holder applied for execution and sought to escape from the bar of limitation by reference to a payment alleged to have been made by the judgment-debtor in October 1917. The lower Courts dismissed the application for execution as the alleged payment had not been certified or recorded under O 21 r 2 of the Civil Procedure Code. *Held*—That Art. 174 of the Limitation Act is applicable only to cases under sub-r (2) of r 2 of O 21 i.e., where the judgment-debtor moves the Court for recording a payment as certified. The only article applicable in the case of a decree-holder certifying a payment to Court is Art. 181. The Court does not prescribe that such application must be distinct from an application for execution of the decree and there is obviously no objection to a combined application embodying a two-fold prayer namely first that the alleged payment be recorded, and secondly that the decree be executed for the balance of the judgment-debt. Therefore if the application for execution is made within three years from date of the said payment it is not

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— **O XXI r 2 (1882 Code s 258)**—*contd*

barred by limitation The decree holder is not bound by the same rule of limitation as a judgment debtor **26 C W N 528**

11 ———— *Payment or adjustment of decree—Certifying by Court—Limitation* There is no period of limitation for the certifying or recording of a payment or adjustment of a decree by the Court under O XXI r 2 cl. 3 of the Civil Procedure Code 1908 An application for execution certifying the payments already made amounts to a certifying under O XXI r 2 which the Court is bound to take notice of and if the payment is disputed the Court should take evidence and come to a conclusion whether the payment had actually been made or not *Eusuff man Sarkar* v *Sanchia Jat Nahata (1915) 43 Calc 07* followed. PANDURANG v JAGYA (1920) **I L R 45 Bom 91**

12 ———— *Transferee decree holder—Application to execute the decree—Transfer benami for one of the judgment debtors—Objection by another judgment-debtor—Competency of executing Court to inquire into title of transferee* O XXI r 2 (3) Civil Procedure Code (Act V of 1908) does not disentitle a judgment debtor from proving facts which will show that a transferee of a decree applying for execution is merely a benamidar of another judgment debtor even if the facts on which he relies show that there has been a payment which has not been certified and when the transferee is found to be such a benamidar the Court is bound by O XXI r 16 to refuse execution in his favour Per Curiam— We think that the Section merely forbids effect being given to an uncertified payment when it is set up as a defence to an application for the execution of a decree and when made by a person who is the legal owner of the decree rights The alleged transferee has first to prove his right under the transfer set up by him and it is only after he has done So that the question of adjustment of the decree arise RAMAYYA v KRISHNA MURTI (1916) **I L R 40 Mad 296**

13 ———— When no payment or adjustment of a decree has been certified under O XXI r 2 to the Court which passed the decree and when the verified application for execution does not state under O XXI r 11(c) that the payments have been made by the judgment debtor but under O XXI r 11(g) the decree holder applies for execution of the entire amount awarded by the decree the executing Court has to assume that there has been no adjustment of the decree either in whole or in part and cannot after the lapse of the period fixed by Art 1 4 of the Limitation Act permit the judgment debtor to plead any adjustment under O XXI r 2(?) When the rights have recorded a payment made in adjustment of a decree is barred by limitation the judgment debtor is not entitled to agitate the matter under s 47 RADHA KANT LAL v MUSAMMAT PARBATI KUER **6 Pat L J 337**

14 ———— *Uncertified adjustment of decree effect of* Omission on the part of the decree holder to cause an adjustment of the decree to be certified under O XXI r 2 (1) of the Code of Civil Procedure 1908 does not amount to fraud so as to give the judgment debtor a right to relief by suit or otherwise The provisions of r 2 (3) of that order are imperative that a court executing a decree is absolutely prohibited from entertaining directly or indirectly an uncertified adjustment of a decree IMAM UDDIN KHAN v BINDUBASINI PRASAD **5 Pat L J 70**

———— **O XXI rr 2 and 95**—Upon an application by the decree holder for delivery of possession the judgment debtor set up an agreement for setting aside the sale by which he alleged it had been stipulated that the judgment debtor would allow the sale to be confirmed but that the decree holder should not take possession for two years within which period if the judgment debtor made certain payments the decree holder was to reconvey the property to the judgment debtor and he prayed that the agreement should be certified under O XXI r 2 of the Civil Procedure Code and the Court rejected the judgment debtor s application on the ground that the agreement did not come within the scope of O XXI r 2 *Held* that the order was appealable as coming within s 47 of the Civil Procedure Code *Mutti* v *Appa* *I L R 13 Mad 504* *Madhusudan Das* v *Govinda Pria Choudhurani I L R 27 Calc 31* *Sanatoola Molla* v *Raj Kumar Roy I L R ? Calc 709* *Ram Narain Sahoo* v *Bandi Pershad I L R 31 Calc 737* *Bhagwati* v *Banwari Lal I L R 31 All 8?* relied on *Bimal Das* v *Ganesh Kuer 1 C W N 6?5* *Mohomed Masrif* v *Habia Mia 6 C L J 749* explained That the executing Court should entertain and enquire into the judgment debtor s objection and not relegate the parties to a fresh suit as the matter could be dealt with under s 47 Per COXE J—*Quære* Whether the agreement alleged was an adjustment within the meaning of O XXI r 2 HARI CHARAN DUTTA v ?ION MOHAN NANDI (1913) **18 C W N 27**

———— **O XXI r 2 and O XXXIV rr 4 and 5**——*Mortgage suit—compromise agreement to pay by instalment validity of—payment out of court whether court may give effect to in absence of certification* The provisions of O XXXIV of the Code of Civil Procedure 1908 relating to the preparation of a mortgage decree are not exhaustive The parties to the mortgage suit may arrange among themselves as to the terms and form of the mortgage decree and they will be bound by the terms agreed upon unless they are opposed to public policy A mortgage decree is not excluded from the operation of O XXI r 2 The holder of a mortgage decree or the judgment-debtor if he is within time under O XXI r 2 (?) is entitled to certify payments made out of court The court to which an application is made for a decree absolute is not a court executing the decree and therefore, O XXI

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— **O XXI r 2 and O XXIV, rr 4 and 5**—*contd*

r 2 (3) does not prevent the court from recognizing a payment or adjustment made out of court although such payment or adjustment has not been certified. MANGAL SAHU v BHATOO SINGH 5 Pat L J 672

———— *Preliminary decree—Decree ordering payment by instalments and in default of payment of any one instalment ordering execution for whole amount—Default made—Payment out of Court—Application for decree absolute—Limitation Act (IX of 1908) Sch I Art 181* Held that O XXI r 2 of the Code of Civil Procedure has no application to a decree for sale on a mortgage by which the mortgage money happens to be made payable by instalments RAMJI LAL v KAPAN SINGH (1917)

I L R 39 All 532

———— **O XXI r 5 (1882 Code s 223(6))**—

See CIVIL PROCEDURE CODE 1882 ss 263 264 318 319

I L R 36 Bom 373

See EXECUTION OF DECREE

I L R 35 All 178

I L R 43 All 520

———— *Agreement between one of the judgment debtors and the decree holder to enter up satisfaction of the decree—Agreement prior to decree—Application to enter up satisfaction if maintainable—Civil Procedure Code (Act XIV of 1882) s 244* An application was made to the executing Court by one of the judgment debtors to enter up satisfaction of the decree as against him, on the ground that there was an agreement to that effect entered into between himself and the decree holder prior to the passing of the decree The latter objected that such an application was not sustainable *Held* that the application was maintainable under O XXI r 5 of the Civil Procedure Code (Act V of 1908) *Rukmani Ammal* v *Krishnamachary 9 Mad L T 464* referred to *Laldas* v *Kishondas I L R 22 Bom 463* followed *Hassan Ali* v *Ganzi Alim I L R 31 Calc 179* dissented from. SUBRAMANIA PILLAI v KUMARAVELU AMBALAM (1915) I L R 39 Mad 541

———— **O XXI r 6 (1882 Code s 224)**—

See s 42 I L R 43 All 394

———— **O XXI rr 6 and 22**—*Application for transfer of decree and for issue of notice upon judgment debtor—Limitation Act (IX of 1908) Art 182(5) latter application to the Court which passed the decree whether an application in accordance with law or a step in aid of execution* An application for transfer of a decree was made on the 4th November 1910 in which there was also a prayer for issuing notice on the judgment debtor The notice having been twice returned unserved the decree holder applied on the 24th January 1911 for issue of another notice which was served and the decree was duly transferred On the 7th January 1914 an application for execution was made to the Court to which the decree was transferred *Held*—That the application for execution, dated the 7th January 1914 having been made more than three years after the application (for transfer of the decree dated the 4th November 1910 was barred by limitation A Court which transfers a decree *has no power to issue* a notice under O 21 r 22 therefore the application made on 24th January 1911 was not an application in accordance with the Law within Art 182 HAZARILAL v BAIDYA NATH SAHA

26 C W N 292

———— **O XXI, r 7**—(1882 Code s 225)—

See FOREIGN DECREE

I L R 40 Bom 551

———— *(Corresponding to Act XIV of 1882 s 225)—Court of Wards Act (Bom Act I of 1905) ss 31 and 32—Executing Court power of—Jurisdiction of the Court which passed the decree under execution—S 32 of the Court of Wards Act (Bom Act I of 1905) not retrospective* Under O XXI r 7 of the Civil Procedure Code (Act V of 1908) the executing Court has no power to question the jurisdiction of the Court which passed the decree under execution S 32 of the Court of Wards Act (Bom. Act I of 1905) was not intended to apply to pending suits. In terms it refers to suits brought by or against a Government ward. S 32 must be read with s. 31 which provides that before such a suit is brought notice shall be delivered to or left at the office of the Court of Wards Thus s 32 does not apply to suits pending at the time of the assumption of superintendence of the ward s estate by the Court of Wards HARI GOVIND v NARSINGRAO KONHERRAO (1913) I L R 38 Bom 194

———— *Execution of decree—Decree passed against a deceased person—Objection by alleged representatives of the deceased judgment debtor that the decree is a nullity and incapable of execution against them* It is a good answer to an application for execution against the alleged representatives of a judgment debtor to show that the judgment debtor was dead at the time that the decree was made and that such decree is void and incapable of a execution as against the person so dead. *Imdad Ali* v *Jagan Lal I L R 17 All 478* followed. SRIPAT NARAIN RAI v TIRBENI MISRA (1918) I L R 40 All 423

———— **O XXI r 10 (1882 Code s 230)**—

See CIVIL PROCEDURE CODE 1882 s 230

———— **O XXI r 11 (1882 Code ss 235 and 256)**—

See ATTACHMENT I L R 38 Calc 448

See LIMITATION ACT 1908 ART 182

I L R 40 Mad 949

———— **O XXI r 12 (1882 Code s 236)**—

See EXECUTION OF DECREE

I L R 37 All 527

———— **O XXI r 13 (1882 Code s 237)**—

See ADMINISTRATION SUIT

I L R 44 Calc 890

See MORTGAGE

I L R 47 Calc 447

———— **O XXI r 14 (1882 Code s 238)**—

See LIMITATION ACT 1877 SCH II ART 179 I L R 37 Bom 317

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— **O XXI r 15 (1882 Code 231)**—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 231
I L R 36 Mad 357

See EXECUTION OF DECREE
4 Pat L J 575

——— **O XXI r 16 (1882 Code s 232)**—

See EXECUTION
I L R 44 Mad 919

See EXECUTION OF DECREE
5 Pat L J 639

See MAINTENANCE
I L R 38 Calc 13

1 ——— *Decree—Assignment—Application for execution—Attachment before hearing judgment-debtor s objections—Notice to assignor and judgment-debtor—Attachment proceedings not merely irregular but illegal* The transferee of a decree having preferred a *darkhast* for execution the judgment debtor s property was attached in his shop by seizure before hearing his objections The next day an order was made on the application of the judgment debtor that the property should not be removed until his objections had been heard Subsequently the Court heard the judgment debtor s objections and held that the transferee was entitled to execution of the decree against the judgment debtor the omission to hear the judgment debtor s objections was a mere irregularity and proceedings in attachment should not be set aside *Held* reversing the order and dismissing the *darkhast* that Legislature having provided that the decree should not be executed until the objections had been heard the proceedings were unlawful and not merely irregular as the objections of the judgment debtor had not been heard KASSUM GOOLAM v DAYABHAI AMAR I (1911)
I L R 36 Bom 58

2 ——— *Execution of decree—Decree for money and costs of suit—Transfer of decree as to costs merely* *Held* that a decree for payment of a sum of money and for costs of the suit is one and indivisible and the decree holder cannot transfer the decree so far merely as it may be a decree for costs retaining the right to execute the decree for the main sum awarded RAM CHANDRA NAIK KALIA v ABDUL HAKIM (1913)
I L R 35 All 204

3 ——— *Execution of decree—Res judicata* On application by a person to have his name substituted as decree holder upon the ground that he was in fact the true owner of the decree an order was passed after notice to the judgment debtor permitting the applicant to execute the decree as its transferee *Held* on application for execution of the decree that the judgment debtor was not entitled again to raise the question of the validity of the transfer of the decree to the applicant *Oman Prasad* v *Durlab Shankar 12 All L J 406* followed. TAJ SINGH v JAGAN LAL (1916)
I L R 38 All 289

4 ——— *Assignment of decree—execution by assignee—notice not served on assignor effect of—Bengal Tenancy Act (VIII of 1885) s 158 B ( )—Adjournment whether court bound to grant* Where the interest of one of the decree holders in a decree has been transferred by assignment the decree cannot be executed until notice has been served upon the assignor in accordance with O XXI r 16 of the Code of Civil Procedure 1908 and the fact that a notice purporting to be under s 158 B (2) of the Bengal Tenancy Act 1885 has been shewn to the assignor will not dispense with the necessity of complying with the provisions of that rule Where a case has been definitely fixed for hearing and witnesses have been called and expenses has been incurred if it should turn out that owing to some default on the part of one of the parties the court has no power to hear the case the court has a discretion to adjourn or dismiss it but apart from an express provision of law is not bound to grant an adjournment MAHARAJA SIR RAMESHWAR SINGH v HARIHAR JHA **5 Pat L J 390**

5 ——— A mortgagee purchaser in a execution sale with all arrears of rent can execute a rent decree subsequently obtained by the mortgagors He should be treated as an assignee thereof ANANDA MOHAN ROY v PROMOTHO NATH GANGULI
25 C W N 863

——— *Execution of decree by assignee—whether non compliance with the provisions of the rule renders the execution proceedings void* *Held* that the provisions of O XXI r 16 of the Code of Civil Procedure are of a mandatory character and that non compliance with them renders all proceedings in execution void *Kassum Goolam Hoosein* v *Dayabhai (I L R 36 Bom 58)* *Sreenath Das* v *Achutananda 6 Indian Cases 262)* *Bonomali* v *Joy Kumar (29 Indian Cases 673)* *Gul Muhammad* v *Bandu (56 Indian Cases 461)* and *Gul ari Lal* v *Daya Ram (I L R 9 All 46)* followed *Harnam Singh* v *Hamira Mal (P L R 1908 page 157)* distinguished NOTAN DAS v LACHMAN SINGH **I L R 2 Lah 230**

——— **O XXI rr 16 and 11 and O XXII r 10**—In the case of a joint decree where there is an assignment of interest by one decree holder an application is not a fresh application for execution The Limitation Act 1908 s — does not apply to proceeding in execution of a decree. MUSAMMAT GULAB KUER v SYED MOHAMED ZAFFER HASSAN KHAN **6 Pat L J 358**

——— **O XXI, r 17 (1882 Code s 245)**—

See LIMITATION **I L R 316 Calc 168**

——— **O XXI, r 18 (1882 Code s 246)**—*Cross decrees—Set-off—Decree for sale on mortgage against purchaser of portion of the mortgaged property—Personal decree for money—Parties not filling the same character* A person against whom a decree foreclosing his right to redeem a property from sale is passed in his character as a puisne mortgagee or an attaching creditor is a judgment-debtor to that decree in a character different from the one in which he holds a decree made in his favour personally and which is enforceable against his judgment-debtor by the arrest of his person and the attachment of his property In the one case he has obtained his decree for costs in his individual and personal capacity In the

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

——— O XXI r 18 (1882 Code s 246)—*contd*

other he is not ordered to pay any sum of money in his individual and personal capacity but is only given an option to do so if he likes to save from sale some property in which he is interested In such circumstances therefore r 18 of O XXI of the Code of Civil Procedure will not be applicable *Nagar Mal* v *Ram Chand I L R 31 All 240* distinguished. SHEO SHANKAR v CHUNNI LAL (1916) I L R 38 All 669

——— O XXI rr 18 19 20—*Execution of decree—Cross decree—Set off—Money decree—Decree for enforcement of charge* *Held* that under the Code of Civil Procedure 1908 a Court is competent to set off a simple decree for recovery of money against a decree for recovery of money by enforcement of a charge NAGAR MAL v RAM CHAND (1913) I L R 33 All 240

——— O XXI r 19 (1882 Code 247)—*Execution of decree Cross claims under the same decree—Set off allowed even if one of the claims could not be recovered owing to bar of limitation* The applicant applied to execute a decree for recovering the amount Rs 44 8 0 which he was entitled to recover from the opponents as mesne profit Under the same decree the opponents were entitled to claim the sum of Rs 855 as costs from the applicant but they were prevented from recovering it as it was barred by limitation They however claimed to set off the amount against the amount sought to be recovered by the applicant The Subordinate Judge having allowed the set off the applicant appealed *Held* dismissing the appeal that the applicant could not be allowed to execute his decree for the smaller sum without reference to the larger sum which the decree awarded to the opponents. MADAPPA GANAPPA v JAKI GHOSAL (1915) I L R 40 Bom 60

——— *Execution of decree under which two parties are entitled to recover money from each other* Under O XXI r 19 C P C the execution of a decree under which two parties are entitled to recover sums of money from each other is to be taken out by the party entitled to the larger sum and for so much as remains after deducting the smaller amount for which satisfaction is to be entered upon the decree ANNADA MOHAN ROY v ATUL CHANDRA CHAKRABARTY 24 C W N 465

——— O XXI r 21 (1882 Code s 230 (2)—
See STEP IN AID OF EXECUTION
4 Pat L J 521

——— O XXI, r 22 (1882 Code s 248)—
See LIMITATION ACT 1908 ART 183
I L R 40 Mad 1127

——— *Execution proceeding without notice a nullity and without jurisdiction—Sale void* An order for execution made without notice under s 248 of the old Civil Procedure Code (O XXI r 22 of the new Code) is without jurisdiction and is a nullity and therefore the sale at such an execution cannot stand *Syam Mandal* v *Satinath Banerji 21 C W N 716 (1916)* *Maharaj Bahadur Singh* v *Indur Chand Pothra C W N 390 (1917)* *Raghunath Das* v *Sundar Das Khetri I L R 42 Calc 72 s c 18 C W N*

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

——— O XXI r 22 (1882 Code s 248)—*contd*

1058 (P C) (1914) and *Malkarjun* v *Narahari L R 27 I A 216 s c I L R 25 Bom. 337 5 C W N 10 (1900)* referred to A mere issue of the notice is not sufficient compliance with the section it must be served nor is the issue of such a notice only at a previous execution not followed by actual service sufficient for the purpose of the proviso to the section. GURUDAS BISWAS v BHOWANIPORE ZEMINDARY CO LD 25 C W N 972

——— O XXI, r 24 (1882 Code ss 250 and 251)—
See PENAL CODE (ACT XLV OF 1860) *s* 186 I L R 37 Calc 122
1 Pat L J 550

See WARRANT OF ATTACHMENT
3 Pat L J 636

——— O XXI r 25 (1882 Code s 343)—
See ATTACHMENT I L R 40 Calc 849

——— O XXI r 29 (1882 Code s 243)—
See CHOTA NAGPUR TENANCY ACT SS 212 AND 215 2 Pat L J 153

——— *Indian Arbitration Act (IX of 1899) ss 11 and 15— Award* An award filed in Court under s 11 of the Indian Arbitration Act (IX of 1899) is nothing more than an award although it is enforceable as if it were a decree Execution of such an award cannot be stayed under O XXI r 29 of the Civil Procedure Code (Act V of 1908) TRIBHUWANDAS KALLIANDAS GAJJAR v JIVANCHAND LALLUBHAI & Co (1910) I L R 35 Bom 196

——— O XXI r 31 (1882 Code s 259)—
See SPECIFIC MOVEABLE PROPERTY
I L R 39 Mad 1

——— O XXI r 32 (1882 Code s 260)—
See PENAL CODE ss 186 and 225
3 Pat L J 106

——— *Execution of decree —Decree declaring rights of certain parties and for bidding interference therewith by other parties to suit—Mode of enforcing such decree.* A decree was passed declaring the rights of certain parties to the suit to conduct certain religious ceremonies and enjoining on certain other parties to the suit to refrain from interfering with the celebration of the said ceremonies by the parties in whose favour the decree was passed. *Held* that it was not competent to the Court passing such decree to secure obedience thereto by directing the Superintendent of Police to see that the ceremonies were carried out and to prevent interference therewith nor was it competent to the Court to appoint a commissioner to see that the terms of the decree were given effect to GOSWAMI GORDHAN LALJI v GOSWAMI MAKSUDAN BALLABH (1918)
I L R 40 All 648

——— *Breach of prohibitory injunction—Remedy if by suit or application in execution* The remedy for a breach of a permanent injunction is by application for execution and not by suit *Per* RICHARDSON J (BEACHCROFT J not expressing any opinion)—O XXI

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

—— O XXI r 32 (1882 Code s 260)—*contd*

r 5 of the Civil Procedure Code applies to injunctions both mandatory and prohibitory SACHI PROSHAD MUKERJI v AMAR NATH ROY (1918) 22 C W N 851

—— O XXI, r 33—*Decree for restitution of conjugal rights—Decree should not be executed by wife s detention in prison—Husband protected against civil or criminal proceedings for maintenance if wife disobeys Court s order to live with husband* A decree for restitution of conjugal rights was passed in favour of the plaintiff the husband by the lower appellate Court It directed that the wife should go and live with the husband and in the event of wilful disobedience of the Court s order the wife should be asked to go to jail as she had suffered rigorous imprisonment for three years on a criminal charge and was quite accustomed to that life On appeal to the High Court *held* that under O XXI r 33 Civil Procedure Code 1908 the decree should not be executed by detention in Civil Prison although the Court had power to order the wife if she did not obey the decree to go to jail. The tendency of modern legislation is against sending women to jail in civil matters *It is a sufficient* consequence for the refusal to obey a decree for restitution if the wife has to maintain herself and cannot make any claim against her husband for maintenance BAI JARWATI v GHANCHI MANSUKH (1920) I L R 44 Bom 972

—— O XXI r 34—(1882 Code ss 261 and 262)—

See COMPROMISE DECREE 25 C W N 68

—— *Compromise decree—Subject matter of suit what is—Suit for declaration that property attached belonged to Plaintiff and not to judgment debtor—Compromise that Plaintiff do execute mortgage in favour of judgment creditor for amount due from the judgment debtor—Execution of mortgage bond if may be enforced in execution of the compromise decree—Civil Procedure Code (Act V of 1908) O XXI r 34* The Respondents brought a suit for declaration that certain property attached by the Appellant in execution of a money decree against another person belonged to them A compromise was arrived at to the effect that the Respondents would execute a mortgage bond for the amount due from the judgment debtor in favour of the Appellant A decree embodying the terms of the compromise was passed and the mortgage bond not being executed within the time specified in the decree the Appellant applied for execution of mortgage bond in execution of the decree *Held* that the question what is the subject matter of a suit must depend upon the facts of each case and in the present case the execution of the mortgage bond was a matter relating to the suit and having been directed by the decree was capable of being enforced in execution of the decree under the provisions of O XXI r 34 of the Civil Procedure Code SAUDAMINI DASI v BEHARI LAL BISWAS 25 C W N 68

—— O XXI r 35 (1882 Code s 263)—

See CRIMINAL PROCEDURE CODE 14 5 Pat L J 104

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

—— O XXI r 35 (1882 Code s 263)—*contd*

See BAILIFF I L R 42 Calc 313

Suit for recovery of joint possession—Form of decree—Practice Held that a plaintiff who is entitled to possession jointly with other persons can be granted a decree for joint possession whether the plaintiff was originally in joint possession and was subsequently dispossessed or whether he had never been in possession *Jhani Singh v Nawab Singh I L R 28 All 161* dissented from *Bhairon Rai v Saran Pai I L R 26 All 538 Jalman Chaudhri v Salamat Chaudhri All Weekly Notes 1901 p 48 Watson and Co v Ram Chand Dutt I L R 18 Calc 10* and *Bhola Nath v Buskin All Weekly Notes 1894 p 1?7* referred to Per Curiam— In the full Bench Case of *Bhairon Rai v Saran Pai I L R 26 All 538* it was held that where the plaintiff had been ousted from joint possession we fail to see that on principal there is any destinction between the case of a person who was in joint possession but was subsequently dispossessed and the case of a person who was entitled to joint possession JAGARNATH OJHA v 94 I AM I HAL (1911) I L R 34 All 150

—— *Execution of decree—Purchase of undivided share in a house—Resistance to possession by judgment-debtor—Remedy to which purchaser is entitled* In execution of a decree held by her the decree holder purchased an undivided share in a house which the judgment debtor owned jointly with one *S* On attempting to get possession the decree holder was resisted not by *S* but by the judgment debtor *Held* on a construction of rr 35 and 95 of O XXI of the Code of Civil Procedure that the decree holder was entitled to have the judgment debtor removed from the premises SAFVI BEGAM v TAJ BEGAM (1914) I L R 36 All 181

—— O XXI r 36—(1882 Code s 264)—

See CRIMINAL PROCEDURE CODE S 145 5 Pat L J 104

—— O XXI r 41—(1882 Code 268)—

See PRACTICE I L R 43 Calc 285

—— O XXI, r 46 (1882 Code 268)—

See DEPOSIT IN COURT I L R 43 Calc 267

See PROHIBITORY ORDER I L R 39 Calc 104

—— O XXI rr 46 52—[illegible] al merits not accrued due [illegible] attached [illegible] to annuity [illegible] may [illegible] attached— [illegible] of *A* executed a conveyance of all his properties in favour of his son for the payment of his debts it being provided therein that the purchaser would pay the vendor a monthly sum of Rs 400 the first payment to be made on the 1st October 1905 and the payment for every succeeding month

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— **O XXI rr 46 52**—*contd*

on the first day of the month following between the hours of 1 A M and 6 A M the deed further providing that the vendor would not by mortgage or otherwise sell or charge or alienate the allowance payable to him that on no account and in no circumstances was it to become payable to any person other than the vendor or his duly constituted attorney The allowance was further declared to be a first charge upon a specified share of the estate so far as the subsisting mortgages executed by the vendor would allow *Held* that the allowance payable as annuity could not be regarded as a debt or even as a portion of the consideration for the conveyance payment of which was deferred and no instalment of such allowance could be attached under r 46 of O XXI of the Civil Procedure Code until it should have actually fallen due A sum payable upon a contingency is not a debt and does not become one until the contingency has happened. Whether a claim is a debt or not is in no respect determined by a reference to the time of payment *Held* further that the allowance could not also be attached under r 52 of O XXI of the Code as that rule does not allow of an anticipatory attachment of money expected to reach the hand of a public officer and is restricted only to money actually in his hand *Quære* Whether notwithstanding the restrictions upon alienation embodied in the conveyance the right to receive the annuity is attachable in execution. PADMANAND SINGH *v* RAMAPRASAD MALVI (1911) **16 C W N 14**

———— **O XXI rr 46 54**—*Sale in execution of a hypothecation debt—Moveable property* For the purposes of execution a debt due to judgment debtor under a hypothecation bond is moveable property within the meaning of O XXI r 46 Civil Procedure Code and the procedure as to moveable property is applicable the language of r 46 which treats as moveable property a debt not secured by a negotiable instrument is undoubtedly wide enough to cover a debt secured by a hypothecation bond or a simple mortgage O XXI r 54 is not applicable to such cases though the General Clauses Act and Transfer of Property Act speak of such debt as an interest in immoveable property The security must follow the debt and if the debt is once attached the benefit of the security would accrue to the attaching creditor if his remedy against the property still exists *Tarvadi Bholanath* v *Bai Kashi I L R 26 Bom 305 Debendra Kumar Mandal* v *Rup Lall Dass I L R 12 Calc 546 Kashinath Das* v *Sadasiv Patnaik I L R 20 Calc 805 Karim un Nissa* v *Phul Chand I L R 15 All 134 Baij Nath Lohea* v *Binojendra Nath Palit 6 C W N 5 Balde Dhannrup* v *Ramchandra Balwant I L R 19 Bom 121* and *Muniyappa Naik* v *Subrahmania Ayyar I L R 18 Mad 437* followed *Sami* v *Krisanasami I L R 10 Mad 169* and the view of the majority in *Appasami* v *Scott I L R 9 Mad 5* not followed NATARAJA AYYAR *v* SOUTH INDIAN BANK OF TINNEVELLY (1914) **I L R 37 Mad. 51**

———— *Attachment of usufructuary mortgagee's right under O XXI r 54 and not under r 46 illegal—Sale consequent invalid* Attachment of the interest of a usufructuary mortgagee in a certain property should be in the manner provided by O XXI r 46 Civil Procedure Code for the attachment of a debt and not in the form provided for the attachment of immoveable property Where therefore there was an attachment of the usufructuary mortgagee's right in the manner prescribed for attachment of immoveable properties and the mortgagor who did not receive from Court any order prohibiting him from making payment of the usufructuary mortgage debt discharged the same by payment and obtained from the mortgagee a release of his rights some time prior to the actual sale thereof in Court auction. *Held* that the sale of the mortgagee's right in Court auction was invalid and that the purchaser acquired nothing by the purchase as against the mortgagor who had redeemed the mortgage by payment The fact that on the date of the payment the mortgagee could not have got a personal decree against the mortgagor for the payment of the mortgage debt on account of limitation is immaterial as limitation does not put an end to the debt and does not prevent the mortgagor and mortgagee from paying and receiving the mortgage amount RAMASAMI MOOPHAN *v* SRINIVASA IYENGAR (1915) **I L R 39 Mad 389**

———— **O XXI rr 46 58 and 63**—

See CONTRACT ACT 1872 s 72 **I L R 43 All 272**

———— **O XXI r 50**—

See FOREIGN JUDGMENT **I L R 36 Mad 415**

———— **O XXI r 52 (1882 Code s 272)**—

See DECREE **I L R 39 Bom 80**

See EXECUTION OF DECREE. **1 Pat L J 449** **I L R 44 Calc 1072**

See RATEABLE DISTRIBUTION **I L R 38 Mad 221**

See O XXI R 46 **16 C W N 14**

———— **O XXI, r 52**—*Scope of—Attachment of money in the custody of Court* One *S* mortgaged to the respondents his beneficial interest in his trade or business of a contractor Subsequently he executed a similar mortgage in favour of the appellant The respondents recovered judgment on their mortgage against the representatives of the estate of S and an order was made by the Court directing the registration and attachment of the money due to the estate of *S* from the Executive Engineer Lower Ganges Bridge and a letter was written by the Court to the Examiner of Accounts Lower Ganges Bridge stating that the money due to the heirs of *S* were attached by the Court at the instance of the *respondents and requesting the Examiner to hold* the moneys under attachment until further order of the Court Thereafter the appellant obtained a decree against the heirs of S on his mortgage and an order was made by the Court for the registration and attachment of the bills payable to *S* in the office of the said Executive Engineer and the Court requested this officer to send two specified sums to the Court for payment to the appellant After the money was sent to the

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— O XXI r 52—contd

Court the respondents filed a petition to the effect that the appellant was trying to take out the money but that it might be kept under attachment by an order of the Court. On this petition the Court ordered that the appellant was not to receive payment of the money unless and until the respondent s application was disposed of At the hearing of the execution cases the respondents contended that the question of title and priority in respec of the money in Court should be decided under O XXI r 52 *Held* that the order of the Court withholding payment of the money to the appellant virtually amounted to an attachment of the money af er it came into the cu tody of the Court That O XXI r 52 was clearly applicable to a ca e like the present and there was no rea on to narrow the words of the rule so as to make it applicable only to a case in which the property sought to be attached was in the custody of a Court other than the Court executing the decree That as regards the question of priorities neither party perfected their charge by giving notice to the persons who *were to make the payments to their mortgagor* and accordingly apart from any question of notice the respondent s charge which was prior in data must prevail. SURAJMALL AGARWALLAH v RAM CHANDRA MAINTRI (1915) 20 C W N 412

———— O XXI, r 52 s 73—*Attachment of property in custody of Court—Rat able distribution governed by s 73 and not by O XXI r 5 — Duty of attaching Court—Powers of custody Court—Several attachments—Priority of attachment—Where attaching Court and custody Court are same—Assets held by a Court* Where the property attached is in the custody of a Court it is the duty of such Court to hold it at the disposal of the attaching Court and it is the duty of the attaching Court if the property attached is money to call upon the custody Court to pay it into the attaching Court and in other cases to provide for the realization of the property and to divide the money or proceeds rateably between the attaching de ree holder and the other decree hol lers who are entitled to distribution under s 73 Civil Procedure Code i e those who have appl ed to it for execution before the receipt of such asset Where the property in the custody Court is the subject of several attachments in execution of several decrees the custody Court must award priority to the first in point of time If the other decree holders want to share in the rateably distribution they must apply in time to the first atta hing Court The power conferre l on the custody Court by the proviso to O XXI r 52 Civil Procedure Code to determine claims to priority etc does not entitle the custody Court itself to di tribute the assets rateably among the attaching decree holders *K[illegible] Sahib v Hajee B[illegible] Sahib (1915) I L R 38 Mad [illegible]* over ruled *Thakurdas Motilal v Jo p Iskander (1916) I L R 41 Calc 107* not followed Where the attaching Court and the cu tody Court are the same there is a rec ipt of as ets within the meaning of s 73 Civil Procedure Code only when so much of the money stan ling to the credit of the ju l ment debtor as is nece ary to sati fy the decree holders who hav applied to it for execution is ordered to b tran f rred to the credit of the first attaching creditor s suit VISVANADHAM CHETTY v ARUNACHALAM CHETTY (1921) I L R 44 Mad 100

———— O XXI r 53 (1882 Code s 273)—*Decree—Execution—Decree in favour of judgment debtor attached—Sale of decree—Wrong procedure* In execution of a decree for Rs 449 the decree holder attached a mortgage decree in favour of his judgment debtors made under O XXI r 53 Civil Procedure Code 1908 The Court put up the decree for sale and it was purcha ed by the decree holder for Rs 200 The decree hold r having applied for execution of the balance of the decretal debt the judgment debtor contended that under the attached decree the decree holder realized Rs 600 which was much more than what was due on the decree whi h was sought to be executed and prayed that the Darkhast b struck off *Held* dismissing the Darkhast (1) that the decree attached ought not to have been put up for sale, (2) that under O XXI r 53 the procedure to be followed when a decree either for the payment of money or for the sale in enforcement of a mortgage or charge *is attached the Court should* under sub r (2) on the application of the creditor who had attached the decree of the judgment debtor proceed to execute the attached decree and apply the net proceeds in sati faction of the decree sought to be executed VITHALDAS v SUBRAYA (1920) I L R 45 Bom. 343

———— O XXI, rr 53 and 90 and ss 47 and 60—*Immoveable property decree for redemption costs and mesne profits whether decree for costs and mesne profit after redemption is a money decree.* *C* obtained a decree on a mortgage giving him possession of the mortgage property unless it were redeemed by a certain date and awarding him costs and mesne profits The mortgage was accordingly redeemed but the costs and mesne profits remained unpaid. *L* attached *C's* decree in execution of a decree which he held against the latter *C* objected that his decree was one for immoveable property within the meaning of s 60 of the Code of Civil Procedure 1908 and that therefore it was not attachable in execution of *L's* decree *Held* that as the only part of *C's* decree which was out tanding was the award on account of costs and mesne profits this decree was a decree for money and that *L* was entitled to attach an l execute it under the provisions of O XXI, r 53 of the Code of Civil Procedure 1908 LACHMAN OJHA v CHARITAR OJHA 4 Pat L J 336

———— O XXI, r 54 (1882 Code 274)—

See s. 64 I L R 42 Mad 844

See O XXI r 46—I. L. R. 37 Mad. 51

———— O XXI, rr 54 (2) 66 67 and 90—*Non publication of proclamation of sale in the village—Announcement of wrong place as the place of sale—Sale held not in the place ordered by Court but in the wrong place—Sale illegal and null and void and not merely irregular* Where a proclamation of sale of lands in execution of a decree as framed by the Court was not published in the village where the lands were situate but the process server intimated a[illegible] village that the sale would be held at a place [illegible] an other

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— **O XXI, rr 54 (2) 66 67 and 90**—*contd*

different from those fixed by the proclamation a sale held at the place and by the official fixed by the proclamation is illegal and a nullity and not merely irregular within the meaning of O XXI r 90 Civil Procedure Code *Lasharu tulla* v *Uma Churn Dutt (1889) I L R 16 Calc 794* applied JAYARAMA AIYAR v VPIDHAGIRI AIYAR (1921) **I L R 44 Mad 35**

——— **O XXI, r 55 (1882 Code 276)**—

See ATTACHMENT **I L R 44 Calc 682**

——— **O XXI, r 57**—

See ATTACHMENT **3 Pat L J 310**

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXXVIII **I L R 42 Mad 1**

1 ——— *Execution of decree —Attachment—Application for execution dismissed but subsequently restored on review* By a mistake of the Court an application for execution against property which was under attachment was dismissed but the decree holder obtained a review of that order and the executing Court was directed to proceed. There was no order removing the attachment *Held* on application by the decree holder to sell the attached property that the attachment still subsisted and was valid as against a sale made by the judgment debtor previous to the review AZIZ BAKHSH v KANIZ FATIMA BIBI (1912) **I L R 34 All 490**

2 ——— *Attachment before judgment—Application for execution dismissed—Attachment if ceases—Second application for execution—Attachment if must be asked for* An order for attachment before judgment obtained at the instance of the decree holder subsists after the decree for the purpose not merely of the original application for execution but for purposes of subsequent applications for execution as well Where in such a case the original application for execution was dismissed *Held* that the decree holder might apply for sale of the properties without taking out fresh attachment The attachment referred to in the concluding portion of O XXI r 57 is an attachment made under the provisions of O XXI and not an attachment under the provisions of O XXXVIII GANESH CHANDRA ADAK v BANWARI LAL RAY (1912) **16 C W N 1097**

3 ——— *Strike off meaning of if amounts to dismissal of attachment—Limitation* Where a decree was passed on the 15th April 1897 and on the 22nd February 1909 execution was commenced and it was ordered that the land should be attached and proclamation should be issued the 15th April being fixed for the date of the proclamation and on the 15th April the proclamation not having been made owing to laches on the part of the decree holder an order was passed—"proclamation not filed struck off" *Held* that this amounted to a dismissal of the attachment and a fresh application for execution after the 15th April 1909 was out of time MANDHIAN SHIEKH v BADRAM DAUNI (191) **17 C W N 204**

CIVIL PROCEDURE CODE (ACT V OF 1908 —*contd*

——— **O XXI r 57**—*contd*

4 ——— *Execution of decree—Sale in execution—Sale set aside—Order purporting to maintain attachment— Default of decree holder* In execution of a decree the whole of a house was sold by auction instead of a share held or which alone was saleable in execution of the decree Various objections were raised and in the end the Court executing the decree passed the following order — The sale is set aside the application for execution is struck off The attachment will remain Further applications were made for the execution of the decree but they did not relate to the house in question As the result of these execution proceedings the decree was satisfied in part and the papers were sent back to the Court which passed the decree Later on the decree holder applied for the execution of the decree by sale of a part of the house In the interval between this application and the time when the decree was sent back to the Court which passed it the judgment debtor had sold the property to the plaintiffs The plaintiffs objected to the application for execution that they were the owners of the house and it was not saleable —*Held* that the attachment had come to an end on the decree holders application being struck off and that a good title had passed to the plaintiffs by the sale The word default used in O XXI r 57 of the Code of Civil Procedure is not restricted to default of appearance or matters of that description It means a failure to do what the decree holder was bound to do that is to go on with his application and have the property sold *Namuna Bibi* v *Rosha Miah, I L R 38 Calc 482* followed. *Valiakath Puthial* v *Manakkal Parameswaran 35 Indian Cases 240*, and *Karaturi Satyanarayana* v *Gopisetti Narayana Swami Naidu Garu 38 Indian Cases 300* dissented from DILDAR HUSAIN v SHEO NARAIN (1918) **I L R 41 All 157**

——— *Restoring a dismissed application for execution effect of—Attachment of property terminated by dismissal of application for default—Sale after dismissal of application purchaser if affected by restoration order* A property was attached in execution of a decree subsequently the application for execution was dismissed for default after the dismissal the judgment debtor sold the property The proceeding in execution was subsequently restored under O XXII r 60 and sale proclamation re issued On an objection by the purchaser to the sale *Held* that the attachment having under O XXII r 57 come to an end the revival of the execution proceedings did not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired an interest in the property *Zainulabdin* v *Mahomed A hgar I L R 15 I A 12* *Janukdhari Lal* v *Gossain Lal Baliya I L R 37 Calc 107 s c 11 C L J 251 13 C W N 710* *Chettiatil* v *Kumbi I L R 29 Mad 17*; *Nasirama Kumari* v *Meherban Khan 13 C L J 210* LATRINGA KOER v MADHAVA NAND RAM (1911) **16 C W N 332**

——— **O XXI, rr 57 66**—

See EXECUTION OF DECREE **I L R 38 Calc 482**
15 C W N 428

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXI r 58 (1882 Code s 278)—

See PROVINCIAL INSOLVENCY ACT (III OF 190) s 20 22 40

I L R 36 All 8

——— *Execution of decree—Limitation Act (IX of 1908) Sch I Art 11—Limitation—Objection to attachment dismissed—Subsequent suit for possession—Investigation of objection by Court* Art 11 (1) of the first schedule to the Indian Limitation Act 1908 applies only to those orders made under O XXI r 61 which are made after investigation of the claim or objection but it does not follow that merely because the claimant has not adduced evidence or has not appeared there has been no investigation within the meaning of the rule *Rahim Bux v Abdul Kader I L R 32 Calc 537 Shagun Chand v Shibbi 8 A L J 676 Chandi Prasad v Nand Kishore 20 Indian Cases 369 Jachmi Narain v Martindell I L R 19 All 253* and *Kunj Behari Lal v Kandh Prasad Narain Singh 6 C L J 562* referred to GOKUL *v* MOHRI BIBI (1918) **I L R 40 All 325**

——— *Execution of decree—Limitation Act (IX of 1908) Sch I Art 11—Limitation—Objection to attachment dismissed—Subsequent suit for possession— Investigation of objection by Court* Where an objection made to the attachment of property within the meaning under r 58 O XXI of the Code of Civil Procedure (1908) is disallowed because the objector did not appear on the date fixed the order disallowing the objection is an order against the objector within the meaning of r 63 GULAB *v* MUTSADDI LAL (1919) **I L R 41 All 623**

——— O XXI r 58 —*Mortgage decree for sale—Claim to mortgaged property if lies—Claim once allowed but disallowed upon fresh application for execution—Revision—Civil Procedure Code (Act V of 1908) s 115* A claim is not entertainable under O XXI r 58 of the Civil Procedure Code to property which has been ordered to be sold under a mortgage decree and where such a claim was once allowed but subsequently the decree holder having again applied for execution of the decree by sale of the property a further claim to the property by the successful claimant was disallowed by the executing Court *Held* on an application for revision under s 115 of the Civil Procedure Code that in view of the authority of the case DEEFHOLTS *v* PETERS (2) *the High Court could not interfere* MAHABIR PRASAD SINGH *v* JOGENDRA NATH MANDAL **26 C W N 50**

——— *Execution—Attachment—Purchaser from judgment debtor applying for removal of attachment—Order in attachment proceedings declaring the sale-deed ineffective—Suit to set aside the order—Attachment withdrawn pending suit—Suit by vendee against vendor to recover possession—Order in attachment proceeding not to operate to the prejudice of the vendee—Indian Limitation Act (IX of 1908) Sch I Art 11* The defendant executed a sale-deed in favour of the plaintiff After the date of the sale the property was attached by a creditor of the defendant The plaintiff applied for removal of the attachment under O XXI r 58 Civil Procedure Code 1908 In the attachment proceedings the Court by its order dated the 14th December 191 held that the sale deed was inoperative as it was effected to defraud creditors The plaintiff filed a suit to set aside the order but it was withdrawn because the defendant settled with the judgment creditor and attachment was raised The plaintiff thereupon filed a suit to recover possession The defendant contended that the suit not having been brought within a year of the order passed in attachment proceedings was barred by limitation *Held* that the suit was not barred as soon as the attachment was withdrawn there was no longer any attachment or any proceedings in execution in which the order against the plaintiff would operate to his prejudice *Gopal Purshottam v Pai Dizali (1895) 19 Bom 741* relied on *Krishna Prosad Roy v Bipin Behary Roy (1903) 31 Calc 228* referred to MANILAL GIRDHAR *v* NATHALAL MAHASUKHRAM (1920) **I L R 45 Bom 561**

——— O XXI r 58—60—

See CLAIM **15 C W N 817**

——— O XXI, rr 58 59 60—*Claim petition if may be determined after property attached is sold—Revision* The Court acted in excess of its authority and in violation of the express provisions of the Statute in allowing a claim petition preferred under O XXI r 58 after the property attached was sold and the order allowing the claim was liable to be set aside on revision GOPAL CHANDRA MUKERJEE *v* NOTOBAR KUNDU (191) **16 C W N 1029**

——— O XXI, rr 58 63 and 63 s 64—*Release of attachment and subsequent private transfer of the property effect of—O XXI r 63 regular suit to establish right to attach the property—Necessary parties to the suit—Lessee who took lease subsequent to release from attachment added as a Defendant after expiry of the period of limitation—Limitation Act (IX of 1908) Art 11 and ss 22 (1) and 22 (2) applicability of—Attachment before judgment difference in the rule—Property in the name of a female or other non coparcener presumption of ownership and burden of proof* P and K purchased certain immoveable property from one Tulmala Dasi the ostensible owner D who held a decree for money against Fulmala's father in law (P) and uncle in law (S) effected an attachment on the property on the allegation that though it stood in the name of Fulmala the beneficial owners thereof were P and S Thereupon P and K the purchasers preferred a claim under O XXI r 58 and the property was released from attachment after which L took lease of the property from P and K Thereafter D instituted a suit under O XXI r 63 to set aside the order in the claim case P K R S and Fulmala were all joined as Defendants and L was subsequently added as a Defendant more than a year after the date of the order in the claim case *Held*—That the order for release from attachment does not put an end to the attachment so as to leave the claimant free to deal with the property as he likes if a suit is brought by the decree holder to establish his right to attach the property and a decree is passed in his favour the effect of the decree is to set aside the order of release and to maintain uninterrupted the attachment originally

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O XXI rr 58 60 and 63 s 64—*contd*

made Therefore in such a case any private transfer of the property by the claimant though made after an order under r 60 releasing the property from attachment would be void under s 64 Civil Procedure Code *Sardhari Lal v Ambika Prosad L R 15 I A 123 s c I L R 15 Calc 521 (1888) Phulkumari v Gharashyam I L R 35 Calc 202 s c 12 C W N 160 (P C) (1907) Mahomed Warri v Pitambar 21 W R 435 (1874)* and *Bonomali v Prosonna I L R 23 Calc 829 (1896)* followed *Lalu Mulji v Kasi Bai I L R 10 Bom. 400 (407) (1886)* and other cases referred to In a case of attachment before judgment the revival of execution proceedings does not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired a title to the property *Patringa Kuer v Madhaiananda 14 C L J 476 (1911)* and *Mahabharat v Suryya Kanta (1918) Pat 343 3 P L J 310 (1918)* referred to Under the provisions of Art 11 and s 22 (1) the suit as against L was barred as she was not added as a party within one year from the date of the order in the claim case S 22 (2) did not save limitation as the assignment by the successful claimant took place after the order for release and as such the assignment was not during the pendency of a suit Though the general presumption is that all property acquired by or in the possession of a member of a joint Hindu family is joint property there can be no such presumption where the disputed property stands in the name of a non co parcener The onus lies on Plaintiff to prove that the ostensible owner is not the real owner PROTAP CHANDRA GOPE *v* SARAT CHANDRA GANGOPADHYAYA 25 C W N 544

———— O XXI, rr 58 61—*Claimant in possession under a collusive sale if in possession as trustee for judgment debtor* A judgment debtor with the object of defrauding his creditor executed a collusive sale of his property in favour of a third person who was put in possession and preferred a claim to the property under r 58 of O XXI of the Civil Procedure Code when the same was attached by the creditor in execution of his decree *Held* that the claim should be rejected on the ground that the property was in possession of the claimant in trust for the judgment debtor within the meaning of r 61 of O XXI of the Civil Procedure Code It was not necessary in order to defeat the claim to show that the trust was one capable of enforcement by law W C MCINTOSH *v* BIDHU BHUSAN SEN (1912) 16 C W N 959

———— O XXI, rr 58 63—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) ss 268 278 283
I L R 38 Bom 631

See COMPANIES ACT (VI OF 1882) s 169
I L R 38 All 537

See LIMITATION I L R 45 Calc 785

———— *Order refusing in effect to investigate claim whether an order against claimant within O XXI r 63 Civil Procedure Code and Art. 11 of Limitation Act (IX of 1908)*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O XXI rr 58 63—*contd*

Held by the Full Bench (1) that an order refus[ing] to investigate a claim to attached property [on] the ground that there was delay in filing it is [an] order passed against the claimant within [O] XXI r 63 Civil Procedure Code and Art 11 [of] the Limitation Act (IX of 1908) and (2) that [an] order on a claim petition merely stating that it was filed late it will be notified to the bidd[ers] is in effect an order rejecting the claim to whi[ch] the provisions of O XXI r 63 will apply *Na[ra]simha Chetty v Vijayapala Naicker 2 L W 2[..]* and *Ponusami Pillai v Samu Ammal 31 M[..] L J 247* followed *Thithikutti Umma v Tha[..]kodi Chekkammutti (Second Appeal No 1986 [of] 1916)* overruled VENKATARATNAM *v* RANG[A]NAYAKAMMA (1918) I L R 41 Mad 9[..]

———— *Property attached [in] execution proceedings—Claim preferred under [O] XXI r 58 rejected under O XXI r 63 witho[ut] investigation—Suit brought by claimant more th[an] one year after the order of rejection—Indian Limit[a]tion Act (IX of 1908) Art 11—Suit whether barre[d]* In the course of certain execution proceedin[gs] the property in dispute was attached Th[e] present plaintiff preferred a claim to the propert[y] under O XXI r 58 C C P which was rejecte[d] under O XXI r 63 and the plaintiff then brough[t] this suit to establish his title to the propert[y] and for consequential reliefs more than a yea[r] after the claim was rejected *Held* that th[e] language of Art 11 of the Indian Limitation Ac[t] of 1908 is more comprehensive than the languag[e] of the preceding Act and the article cannot b[e] restricted to those cases in which an investiga[tion] had taken place NAGENDRO LAL CHOW[DHURY] *v* FANI BHUSAN DAS (1918)
23 C W N 37[..]

———— O XXI r 58 O XXXVIII, rr [..] to 12—

See PROVINCIAL INSOLVENCY ACT III O[F] 1907 ss 13 (3) 47
I L R 36 All 65

———— O XXI, r 59 (1882 Code 279)—

See CIVIL PROCEDURE CODE 1882 ss 278 283
I L R 34 All 365

———— O XXI, r 60 (1882 Code s 280)—*Execution of decree—Attachment of property—Claim by a person in possession of maintenance charge on the property—Sale of the property in execution subject to the charge—Suit to recover possession of the property after the death of charge holder—Parties to appeal—Practice and procedure* Certain property in which a judgment debtor was interested as a sharer was attached in execution of a decree against him His mother applied to raise the attachment on the ground that she was in possession of the property that she was entitled to retain it during her life time and that it was subject to a charge for her funeral ceremonies The property was sold subject to her charge and purchased by the plaintiff at the Court sale After the mother's death the plaintiff sued to recover the judgment debtor's share in the property by partition when the judgment debtor and a brother of his, defendants Nos [..] and 1 respectively contended that there was no attachment of the property at the time of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O XXI r 60 (1882 Code s 280)—*contd*

sale and that the sale was therefore invalid. The trial Court decreed the claim on the ground that the sale was valid even though there was no attachment Defendant No 1 alone appealed and the lower appellate Court held that absence of attachment vitiated the sale and dismissed the suit The plaintiff having appealed *Held* that the property was sufficiently attached that all the subsequent proceedings including the sale of the right title and interest of the judgment debtor were in order and that there was no real basis for the objection that the sale was void in consequence of the absence of attachment *Held* also that defendant No 2 ought to have appealed from the decree of the trial Court and that in his absence the decree could not be reversed by the lower appellate Court on the appeal of defendant No 1 alone The Court however ordered defendant No 2 to be joined as party to the appeal VAIKUNT SHRIDHAR v MANJUNATH MADHAV (1920) **I L R 44 Bom 860**

——— O XXI r 61 (1882 Code 281)—
See r 58 **16 C W N 959**

——— O XXI rr 61 62 (1882 Code 281 282)—
See CIVIL PROCEDURE ACT 1880 ss 278 283

——— O XXI, r 62 (1882 Code s 282)
See MORTGAGE **I L R 47 Calc 447**

——— O XXI, rr 62 and 63—
See CIVIL PROCEDURE CODE 1882 s 278 **I L R 41 Bom 64**

——— O XXI r 63 (1882 Code s 283)—
See O XXI r 58
I L R 41 Mad 985

See LIMITATION ACT (IX OF 1908) SCH I ARTS 11 13
I L R 39 Mad 1196
I L R 40 Mad 733
I L R 45 Calc 785

See RES JUDICATA
I L R 44 Calc 698

See TRANSFER OF PROPERTY ACT (IV of 1882) s 53 **I L R 42 Mad 143**
I L R 43 Mad 730

——— *Order in favour of the claimant—Alienation by the claimant subsequently—Suit by decree holder subsequent to the alienation to set aside the order—Lis pendens doctrine of if applicable—Pendency of proceedings—Suit a form of appeal—Alienee joined as party after one year from the date of order not a necessary party—No bar of limitation—Limitation Act (IX of 1908) s 22 cls 1 and 2* A purchaser of property from a claimant after an order has been passed in his (claimant's) favour but before a suit under O XXI r 63 was instituted is an alienee *pendente lite* and is therefore not a necessary party to the suit and if the necessary parties had been brought within one year the alienee cannot advance the plea of limitation as s 22 cl (2) of the Indian Limitation Act expressly excluded the operation of cl (1) in such cases A suit brought under O XXI r 63 of the Code of Civil Procedure (Act V of 1908) is a mere continuation of the proceedings in a claim petition and all alienations during the continuance of the proceedings originated by the claim petition to the disposal of the suit brought to set aside the order passed on the claim petition are affected by the doctrine of *lis pendens* formulated in s 52 of the Transfer of Property Act Suits of this class though called original suits are not in the essence original actions but merely forms of appeal allowed by the Civil Procedure Code to be brought in the guise of original suits *Phul Kumari* v *Ghanshyam Misra I L R 35 Calc 202* followed *Veera Pannadi* v *Karuppa Pannadi Mad L T 154 Harishankar Jeabhi* v *Naran Karsan I L R 18 Bom 260 Keshori Mohun Rai* v *Hursook Dass I L R 12 Calc 696* and *Settappa Goundan* v *Muthia Goundan, I L R 31 Mad 68* referred to KRISHNAPPA CHETTY v ABDUL KHADER SAHIB (1913)
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2 ——— *Execution of decree—Suit for declaration that property is not liable to attachment and sale—Valuation of suit* *Held* that in a suit for a declaration that property is not liable to attachment and sale in execution of a decree where the value of the property is in excess of the amount claimed in execution of the decree the proper valuation of the suit for the purpose of jurisdiction is not the value of the property but the amount for which the decree may be executed *Dwarka Das* v *Kameshar Prasad I L R 17 All 69* and *Dhan Devi* v *Zamurrad Begam I L R 27 All 440* followed *Phul Kumari* v *Ghanshyam Misra I L R 35 Calc 202* referred to KHETRA v MUMTAZ BEGAM (1915) **I L R 38 All 72**

3 ——— *Applicability to claims to property attached before judgment—O XXXVIII r 5* *Held* by the Full Bench that O XXI r 63 Civil Procedure Code applies also to orders on claims preferred to property attached before judgment *Ramanamma* v *Bathula Kamaraju I L R 41 Mad 93* overruled PRASADA NAYUDU v VIRAYYA (1918) **I L R 41 Mad. 849**

4 ——— *Mortgagee filing claim petition—Petition dismissed—Suit to establish right dismissed—Subsequent suit by mortgagee to enforce his mortgage—Suit against mortgagor and purchasers in execution of a decree in another suit by the same creditor—Order on claim petition whether conclusive* An order on a claim petition which has not been set aside in a suit by the claimant under O XXI r 63 Civil Procedure Code becomes conclusive not only for the purpose of the execution of the decree in connection with which the claim was preferred but also of the execution of other decrees between the same parties The establishment of the decree holder's right to bring property to sale free from a claimant's alleged right involves the right of the purchaser at the sale to get a title to the property free from such right *Ramasamy Chetty* v *Alagiri Chetty (1915) 27 I C 800* followed *Umesh Chunder Roy* v *Raj Bullubh Sen (188) I L R 8 Calc 279* dissented from SINGARIAH CHETTY v CHINNAPPA (19 1) **I L R. 44 Mad. 268**

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O XXI rr 58 60 and 63 s 64—contd

made Therefore in such a case any private transfer of the property by the claimant though made after an order under r 60 releasing the property from attachment would be void under s 64 Civil Procedure Code *Sardhari Lal v Ambika Prosad L R 15 I A 123 s c I L R 15 Calc 521 (1888) Phulkumari v Ghanashyam I L R 35 Calc 202 s c 12 C W N 160 (P C) (1907) Mahomed Warri v Pitambar 21 W R 435 (1874)* and *Bonomali v Prosonna I L R 23 Calc 829 (1896)* followed *Lala Mulji v Kasi Bai I L R 10 Bom 400 (407) (1886)* and other cases referred to In a case of attachment before judgment the revival of execution proceedings does not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired a title to the property *Patringa Kuer v Madhavananda 14 C L J 476 (1911)* and *Mahabharat v Surjya Kanta (1918) Pat 343 3 P L J 310 (1918)* referred to Under the provisions of Art 11 and s 22 (1) the suit as against L was barred as she was not added as a party within one year from the date of the order in the claim case S 22 (2) did not save limitation as the assignment by the successful claimant took place after the order for release and as such the assignment was not during the pendency of a suit Though the general presumption is that all property acquired by or in the possession of a member of a joint Hindu family is joint property there can be no such presumption where the disputed property stands in the name of a non co parcener The onus lies on Plaintiff to prove that the ostensible owner is not the real owner PROTAP CHANDRA GOPE *v* SARAT CHANDRA GANGOPADHYAYA 25 C W N 544

——— O XXI, rr 58 61—*Claimant in possession under a collusive sale if in possession as trustee for judgment debtor* A judgment debtor with the object of defrauding his creditor executed a collusive sale of his property in favour of a third person who was put in possession and preferred a claim to the property under r 58 of O XXI of the Civil Procedure Code when the same was attached by the creditor in execution of his decree *Held* that the claim should be rejected on the ground that the property was in possession of the claimant in trust for the judgment debtor within the meaning of r 61 of O XXI of the Civil Procedure Code It was not necessary in order to defeat the claim to show that the trust was one capable of enforcement by law W C MCINTOSH *v* BIDHU BHUSAN SEN (1912) 16 C W N 959

——— O XXI, rr 58, 63—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) ss. 268 278 283
I L R 38 Bom 631

See COMPANIES ACT (VI OF 1882) s 169
I. L. R 38 All 537

See LIMITATION I L R 45 Calc 785

——— *Order refusing in effect to investigate claim whether an order against claimant within O XXI r 63 Civil Procedure Code and Art. 11 of Limitation Act (IX of 1908)*

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O XXI rr 58 63—contd

Held by the Full Bench (1) that an order refusing to investigate a claim to attached property on the ground that there was delay in filing it is an order passed against the claimant within O XXI r 63 Civil Procedure Code and Art 11 of the Limitation Act (IX of 1908) and (2) that an order on a claim petition merely stating that as it was filed late it will be notified to the bidders is in effect an order rejecting the claim to which the provisions of O XXI r 63 will apply *Narasimha Chetty v Vijiapala Nainar 2 L W 9*[illegible] and *Ponusami Pillai v Samu Ammal 3[illegible] M L J 247* followed *Thithikutti Umma v Tha*[illegible] *kodi Chekkammutti (Second Appeal No 1986 of 1916)* overruled VENKATARATNAM *v* RANGANAYAKAMMA (1918) I L R 41 Mad 9[illegible]

——— *Property attached in execution proceedings—Claim preferred under O XXI r 58 rejected under O XXI r 63 without investigation—Suit brought by claimant more than one year after the order of rejection—Indian Limitation Act (IX of 1908) Art 11—Suit whether barred* In the course of certain execution proceedings the property in dispute was attached The present plaintiff preferred a claim to the property under O XXI r 58 C C P which was rejected under O XXI r 63 and the plaintiff then brought this suit to establish his title to the property and for consequential reliefs more than a year after the claim was rejected *Held* that the language of Art 11 of the Indian Limitation Act of 1908 is more comprehensive than the language of the proceeding Act and the article cannot be restricted to those cases in which an investigation had taken place. NAGENDRO LAL CHOWDHURY *v* FANI BHUSAN DAS (1918)
23 C W N 37[illegible]

——— O XXI r 58 O XXXVIII rr [illegible] to 12—

See PROVINCIAL INSOLVENCY ACT III OF 1907 ss 13 (3) 47
I L R 36 All 65

——— O XXI, r 59 (1882 Code 279)—

See CIVIL PROCEDURE CODE 1882 ss 278 283
I L R 34 All 365

——— O XXI, r 60 (1882 Code s 280)—*Execution of decree—Attachment of property—Claim by a person in possession of maintenance charge on the property—Sale of the property in execution subject to the charge—Suit to recover possession of the property after the death of charge holder—Parties to appeal—Practice and procedure* Certain property in which a judgment debtor was interested as a sharer was attached in execution of a decree against him His mother applied to raise the attachment on the ground that she was in possession of the property that she was entitled to retain it during her life time and that it was subject to a charge for her funeral ceremonies The property was sold subject to her charge and purchased by the plaintiff at the Court sale After the mother's death the plaintiff sued to recover the judgment debtor's share in the property by partition when the judgment debtor and a brother of his, defendants Nos. [illegible] and 1 respectively contended that there was no attachment of the property at the time of

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd.

——— O XXI r 60 (1882 Code s 280)—contd

sale and that the sale was therefore invalid. The trial Court decreed the claim on the ground that the sale was valid even though there was no attachment Defendant No 1 alone appealed and the lower appellate Court held that absence of attachment vitiated the sale and dismissed the suit The plaintiff having appealed *Held* that the property was sufficiently attached that all the subsequent proceedings including the sale of the right title and interest of the judgment debtor were in order and that there was no real basis for the objection that the sale was void in consequence of the absence of attachment *Held* also that defendant No 2 ought to have appealed from the decree of the trial Court and that in his absence the decree could not be reversed by the lower appellate Court on the appeal of defendant No 1 alone The Court however ordered defendant No 2 to be joined as party to the appeal VAIKUNT SHRIDHAR v MANJUNATH MADHAV (1920) **I L R 44 Bom 860**

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——— *Order in favour of the claimant—Alienation by the claimant subsequently—Suit by decree holder subsequent to the alienation to set aside the order—Lis pendens doctrine of if applicable—Pendency of proceedings—Suit a form of appeal—Alienee joined as party after one year from the date of order not a necessary party—No bar of limitation—Limitation Act (IX of 1908) s 22 cls 1 and 2* A purchaser of property from a claimant after an order has been passed in his (claimant's) favour but before a suit under O XXI r 63 was instituted is an alienee *pendente lite* and is therefore not a necessary party to the suit and if the necessary parties had been brought within one year the alienee cannot advance the plea of limitation as s 22 cl (2) of the Indian Limitation Act expressly excluded the operation of cl (1) in such cases A suit brought under O XXI r 63 of the Code of Civil Procedure (Act V of 1908) is a mere continuation of the proceedings in a claim petition and all alienations during the continuance of the proceedings originated by the claim petition to the disposal of the suit brought to set aside the order passed on the claim petition are affected by the doctrine of *lis pendens* formulated in s 52 of the Transfer of Property Act Suits of this class though called original suits are not in their essence original actions but merely forms of appeal allowed by the Civil Procedure Code to be brought in the guise of original suits *Phul Kumari v Ghanshyam Misra I L R 35 Calc 202* followed *Veera Panradi v Karuppa Pannadi Mad L T 154 Harishankar Jeabhi v Naran Karsan I L R 18 Bom 260 Keshori Mohun Rai v Hur ook Das I L R 12 Calc 696* and *Settappa Goundan v Muthia Goundan, I L R 31 Mad 68* referred to KRISHNAPPA CHETTY v ABDUL KHADER SAHIB (1913)
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2 ——— *Execution of decree—Suit for declaration that property is not liable to attachment and sale—Valuation of suit* *Held* that in a suit for a declaration that property is not liable to attachment and sale in execution of a decree where the value of the property is in excess of the amount claimed in execution of the decree the proper valuation of the suit for the purpose of jurisdiction is not the value of the property but the amount for which the decree may be executed *Dwarka Das v Kameshar Prasad I L R 17 All 69* and *Dhan Devi v Zamurrad Begam I L R 27 All 440* followed. *Phul Kumari v Ghanshyam Misra I L R 35 Calc 202* referred to KHETRA v MUMTAZ BEGAM (1915) **I L R 38 All 72**

3 ——— *Applicability to claims to property attached before judgment—O XXXVIII r 5* *Held* by the Full Bench that O XXI, r 63 Civil Procedure Code applies also to orders on claims preferred to property attached before judgment *Ramanamma v Bathula Kamaraju I L R 41 Mad 23* overruled PRASADA NAYUDU v VIRAYYA (1918) **I L R 41 Mad. 849**

4 ——— *Mortgagee filing claim petition—Petition dismissed—Suit to establish right dismissed—Subsequent suit by mortgagee to enforce his mortgage—Suit against mortgagor and purchasers in execution of a decree in another suit by the same creditor—Order on claim petition whether conclusive* An order on a claim petition which has not been set aside in a suit by the claimant under O XXI r 63 Civil Procedure Code becomes conclusive not only for the purpose of the execution of the decree in connection with which the claim was preferred but also of the execution of other decrees between the same parties The establishment of the decree holder's right to bring property to sale free from a claimant's alleged right involves the right of the purchaser at the sale to get a title to the property free from such right *Ramasamy Chetty v Alagiri Chetty (1915) 27 I C 800* followed *Umesh Chunder Roy v Raj Bullubh Sen (1882) I L R 8 Calc 279* dissented from. SINGARIAH CHETTY v CHINNABBI (1921) **I L R. 44 Mad. 268**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O XXI r 65 (1882 Code 286)—

See PERISHABLE DISTRIBUTION
I L R 44 Calc 789

———— O XXI r 66 (1882 Code s 287)—

See EXECUTION OF DECREE
I L R 38 Calc 482

See LIMITATION ACT 1908 ART 182
I L R 40 Mad 949

See MORTGAGE I L R 47 Calc 447

1 ———— Ancestral property—*General rules of practice for Civil Courts Ch IV r 5* Property to which title is made out by gift is not property *inherited* within the meaning of r 4 Ch IV of the General Rules of Practice for the Civil Courts and such property is consequently not *ancestral* FAZAL AHMAD *v* WESAL-UD DIN 1916) L R 38 All 481

2 ———— Sale proclamation—*Valuation of property to be sold—Appeal Held* that no appeal will lie from a statement made in a sale proclamation as to the value of the property advertised for sale *Sivagami Achi* v *Subrahmania Ayyar I L R 27 Mad 259* followed AJUDHIA PRASAD *v* GOPI NATH (1917)
I L R 39 All 415

3 ———— Suit for declaration that property is not liable to attachment—*And sale—Valuation of suit* In a suit for a declaration that property is not liable to attachment and sale in execution of a decree where the value of the property in question is in excess of the amount claimed in execution of the decree the proper valuation of the suit for the purpose of jurisdiction is not the value of the property but the amount for which the decree may be executed *Khetra Pal* v *Munmtaz Begam I L R 38 All 12* followed *Radha Kunwar* v *Reoti Singh I L R 38 All 488* referred to ANANDI KUNWAR *v* RAM NIRANJAN DAS (1918)
I L R 40 All 595

4 ———— Setting aside a sale—*Material irregularity in publication of sale proclamation—Under statement of revenue due on the land—Undervaluation of property—Statement of the same by the decree holder—No objection by the judgment debtor to the amount of Government revenue or valuation—Mistake of the judgment debtor as to interest in the property sought to be brought to sale—Duty of Courts in India in conducting sales in execution—Mistake of judgment debtor due to action of decree holder—Rule of estoppel of judgment debtor no application—Right of auction purchaser before and after confirmation of sale—No absolute right for confirmation of sale* Though it was not incumbent upon the Court to state the value of the property in a proclamation for sale a materially incorrect statement of the revenue or of the value of the property where the value is stated would constitute an irregularity which if it caused substantial injury to the judgment debtors would entitle him to have the sale set aside Where the judgment-debtor s act in not objecting to the statement of the peshkash and in stating the value on the footing of the peshkash being correctly stated by the decree holder was due to a mistake of fact regarding what the Court intended to sell the judgment-debtor should not be held to be estopped from objecting to the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O XXI r 66 (1882 Code s 287)—*contd*

sale on the ground of material irregularity A party who does not raise an objection to the proclamation which he ought to have raised is estopped from complaining of an irregularity resulting from an erroneous statement which he should have corrected *Gridhari Singh* v *Hurdeo Narain Singh L R 3 I A 230* and *Olpherts* v *Mahabir Pershad Singh L R 10 I A 25* referred to *Arunachellam* v *Arunachellam I L R 12 Mad 19* and *Behari Singh* v *Mukhat Singh I L R 28 All 273* referred to In India an execution sale is an act of the Court Where an act of a Court is induced by the mistake of parties it may be set aside But the Court will not apply the rule of estoppel to cases where the judgment debtor was not aware of the facts to which he was bound to object KALAHASTI RAJA OF *v* MAHARAJA OF VENKATAGIRI (1913)
I L R 38 Mad 387

5 ———— Order of court fixing valuation—An order of a court fixing a valuation of the judgment debtor s property under r 66 of O XXI of the Code of Civil Procedure 1908 is not a decree and no appeal lies from such an order DEOKINANDAN SINGH RAJAH DHAKESWAR PRASAD NARAIN SINGH 2 P L J 13

6 ———— *Sale proclamation order is a judicial act—Duty of court in settling value of property to be sold* The action of a court in settling the terms of a sale proclamation under O XXI r 66 is a judicial act and the value of the property should be stated as fairly as possible MUNSHI RAGHUNATH SINGH *v* HAZARI SAHU
2 Pat L J 130

7 ———— *Sale in execution of simple money decree—Notification of a mortgage in the proclamation of sale—Auction purchaser not precluded from challenging the validity of the mortgage Held* that the notification of an incumbrance on the property about to be sold in a proclamation of sale made under O XXI r 66 of the Code of Civil Procedure (1908) will not preclude the auction purchaser from subsequently questioning the validity of the incumbrance In this respect the Code of 1908 has made no difference in the law as it stood under the former Code *Shib Kunwar Singh* v *Sheo Prasad Singh I L R 28 All 418* and *Jairaj Mal* v *Radha Kishan I L R 35 All 257* followed AGHA SULTAN KHAN *v* MOHABBAT KHAN
I L R 43 All 489

———— O XXI, rr 66 and 70 (1882 Code s 287)—

See BENGAL TENANCY ACT ss 158 163 AND 167 2 Pat L J 176

See HINDU LAW—JOINT FAMILY
I L R 43 All 703

———— O XXI rr 68 69 (1882 Code 290 and 291)—

See SALE IN EXECUTION OF DECREE
I L R 39 Calc 26

———— O XXI, r 70 (1882 Code 287)—

See BENGAL TENANCY ACT ss 158 163 AND 167 2 Pat L J 177

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— **O XXI r 71 (1882 Code s 293)**—

See Provincial Insolvency Act (III of 1907) s 47 **I L R 39 All 267**

See Second Appeal **I L R 45 Bom 223**

——— **O XXI rr 71 and 84 to 87**—*Purchase in a Court sale of judgment debtor's right to get a reconveyance of certain lands—Default in payment of balance of purchase money within fifteen days of Court sale—Liability of purchaser for deficiency on resale* A purchaser in a Court auction of a judgment debtor's right to get a reconveyance of certain lands on payment of a specified sum is on default in payment of the purchased money within fifteen days of the Court sale liable to pay under summary process under O XXI r 71 Civil Procedure Code any deficiency in the price on a resale though the date stipulated for payment to get the reconveyance happens to be shortly after the Court sale and before the expiry of the fifteen days allowed for the payment of the balance The loss of the right to get a reconveyance which is a substantial right occasioned by the neglect of the purchaser to exercise his right to pay at the stipulated time does not make the property resold any the less the same property as the one sold before provided all the then existing rights of the judgment debtor therein are correctly stated in the proclamation for the resale Cases in which an existing encumbrance on the property is omitted to be mentioned at the time of the first sale but finds a place in the proclamation for the resale stand on a different footing *Baijnath Sahai* v *Moheep Narain Singh I L R 16 Calc 535* and *Kali Kishore Deb Sarkar* v *Guru Prosad Sukal I L R 25 Calc 99* distinguished Venkatachellamayya v Nilakanta Girjee (1917) **I L R 41 Mad 474**

——— **O XXI r 72 (1882 Code s 294)**—

See Mortgagor and Mortgagee **I L R 41 Bom 357**

——— *Decree—Execution—Collector—Decree holder allowed permission to bid by the Collector—Set off—Power of the Court to allow set off* A decree holder having received from the Collector permission to bid and having been declared to be the highest bidder can apply to the Court for permission to set off the decretal amount against the purchase money Martand Trimbak v Daya bin Abaji (1919) **I L R 44 Bom 346**

——— **O XXI rr 73 and 83**—*Several decree holders—Execution—Attachment in each decree—Applications for sale—Permission to judgment debtor to raise money by private alienation to pay off one of the decrees—Money paid into Court by alienee—Rateable distribution—Assets held by a Court meaning of* Where several decree holders in different suits had attached the same property of their judgment-debtor and applied for sale in execution of their respective decrees but the judgment debtor obtained permission of the Court under O XXI r 83 to raise money by private alienation of the property to pay the decree amount due in one of the decrees and the amount was paid into Court by the alienee *Held* that the money having been paid into Court under a pending execution application was assets held by the Court under O XXI r 73 of the Code and was liable to rateable distribution among the several decree holders who had applied for execution *Sorabji Coovarji* v *Kala Raghunath I L R 26 Bom 136* dissented from *Kathum Sahiba* v *Hajee Badsha Sahib I L R 38 Mad 921 924* referred to *Galstaun* v *Woomes Chundra Bonnerjee I L R 41 Calc 789* distinguished Thirayiyam Pillai v Lakshmana Pillai (1917) **I L R 41 Mad 616**

——— **O XXI rr 84 89 92 (1882 Code ss 306 310A 312)**—*Execution of decree—Sale of immoveable property—Acceptance of final bid deferred—Application to set aside sale—Limitation* *Held* that a sale of immoveable property in execution of a decree is not complete until the sale officer has accepted the final bid and the purchaser has paid in the deposit of 25 per cent of the purchase money required by r 84 of O XXI of the Code of Civil Procedure 1908 The period of thirty days prescribed by r 92 will not therefore begin to run against a person applying under r 89 if for any reason the final bid remains for a time unaccepted by the sale officer Munshi Lal v Ram Narain (1912) **I L R 35 All 65**

——— **O XXI r 88 (1882 Code 310)**—*Execution of decree—Sale in execution—Pre emption—Title of pre emptor defeasible* *Held* that a title to a share in undivided immoveable property sold in execution of a decree which is still defeasible at the date of a sale in execution is not sufficient to support a claim for pre emption under O XXI r 88 of the Code of Civil Procedure 1908 *Kamta Prasad* v *Mohan Bhagat I L R 32 All 45* and *Nabiban Bibi* v *Kauleshar Rai 4 All L J 351* followed Abdul Ghafur v Ghulam Husain (1913) **I L R 35 All 296**

——— **O XXI r 89 (1882 Code s 310A)**—

See s 73 **I L R 40 Calc 619**

See s 115 **I L R 44 Mad 554**

See Bengal Tenancy Act 1885 **4 Pat L J 55**

See Contract Act s 0 **I L R 42 Bom 556**

See Sale **I L R 43 Calc. 69**

1 ——— *Execution of decree—Application to set aside the sale within limitation—Money tendered but not received through Treasury Officer's action* The judgment-debtor made an application under O XXI r 89 of the Code of Civil Procedure to set aside a sale held in execution of a decree on the last day of limitation The money required to be paid was tendered to the Treasury Officer shortly before 3 p m but he refused to take it because there was not sufficient time to count it and also because he thought that it could be paid at any time within three days of the tender The judgment-debtor paid it the next day which was beyond thirty days after the sale *Held* that the judgment-debtor having done all that lay in his power to deposit the money in time and having been prevented by the action of the Treasury Officer should be taken to have made the payment within the time allowed by law *Mahomed Akbar Zaman Khan*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXI r 89 (1882 Code s 310A)—*contd*

v *Sukhdeo Pande 13 C L J 467* referred to MUNNA LAL v PADHA KISHAN (1915) I L R 37 All 591

2 ——— *Sale of immoveable property in Court auction—Subsequent private sale by judgment-debtor—Application by judgment debtor to set aside auction sale—No locus standi to apply—Order rejecting application—Revision petition to High Court under Civil Procedure Code (Act V of 1908) s 115—Not maintainable though order erroneous* Where after a sale in Court auction of certain immoveable property the judgment debtor sold away all his rights in the same property to a stranger by a private sale and subsequently applied under O XXI r 89 of the Code of Civil Procedure (Act V of 1908) to set aside the auction sale *Held* that the judgment debtor had no *locus standi* to apply under O XXI r 89 to have the sale set aside *Anantha Lakshmi Ammall v Kunnanchankarath Sankaran Nair (1913) Mad W N 101* referred to *Ishar Das v Asaf Ali Khan I L R 34 All 186* followed *Per* SADASIVA AYYAR J —A Civil Revision Petition under s 115 of the Code of Civil Procedure does not lie against an order of the Lower Court rejecting an application under O XXI r 89 though the order was erroneous in law as the lower Court did not act illegally or beyond its jurisdiction or with material irregularity in arriving at the decision *Per* SPENCER J —Neither an amendment of the petition nor the presentation of a fresh petition by the private purchaser could be allowed by the High Court to be made as he was not a party to the proceedings in the lower Court and more than one year had expired after the time allowed by Art 166 of the Limitation Act (IX of 1908) for filing a petition in the lower Court SUBBARAYUDU v LAKSHMINARASAMMA (1913) I L R 38 Mad 775

3 ——— *Sale in execution of decree—Judgment debtor privately selling the property so sold—Application by judgment debtor to set aside Court sale* A judgment debtor whose property has been sold at a Court sale in execution of the decree against him has a right to apply to have the sale set aside as a person owning the property sold in execution of the decree within the meaning of r 89 of O XXI of the Civil Procedure Code of 1908 in spite of the fact that he has transferred his interest in the property after the Court sale PANDURANG LAXMAN v GOVIND DADA (1916) I L R 40 Bom 557

4 ——— *Non transferable occupancy holding—Purchase at mortgage sale—Subsequent rent sale and purchase by landlord—Right of first purchaser to set aside sale by deposit—Bengal Tenancy Act (VIII of 1885 as amended by E B and A C Act (I of 1907) s 170 (3)* Where (in a case governed by Act I of 1907 E B and A C) the landlord himself purchases a non transferable occupancy holding at a sale held in execution of a decree for rent obtained against the registered tenant of the holding a person who had within 12 years purchased the whole holding at a sale in execution of a mortgage decree is not entitled to set aside the sale by making a deposit under O XXI r 89 of the Civil Procedure Code *Toral Das Lal v Harish Chandra Banerjee 17 C W N 163 s c 16 C L J 548 Dyamayi Dasi v Ananda Mohan Roy 18 C W N 971* and *Ahmadulla Choudhry v Prayagsahu 20 C W N 39* referred to ABDUR RAHAMAN SARKAR v PROMODE BEHARY DUTT (1915) 20 C W N 40

5 ——— *Application by judgment debtor to set aside sale in execution of a decree—Execution of sale deed by judgment debtor not registered—Subsequent application whether competent—Fresh sale deed executed by him after application and registered before final order—Sustainability of application—Rights of parties to suit or application whether affected by subsequent events* Where a judgment debtor applied under O XXI r 89 of the Civil Procedure Code to set aside a sale of certain lands held in execution of a decree and it appeared that he had previous to his application executed a sale deed therefor which was not however registered and that he had subsequent to his application executed a fresh sale deed in respect of the same lands to the same vendee which was registered before final order was passed on the application and the auction purchaser objected to the competency of the judgment debtor to make or sustain the application *Held* that the judgment debtor had *locus standi* to make the application as he had not ceased to be owner of the lands at the time of his making the application and that he did not lose the right to sustain the application by the subsequent execution and registration of a sale deed as it is a well recognized rule of law that the rights of the parties should be adjudicated as on the date of suit or application and not with reference to what transpires subsequently *Kurri Verreddi v Kurri Bapireddi I L R 29 Mad 336* and *Ramanathan v Ranganathan I L R 40 Mad 1134* referred to *Subbarayadu v Lakshminarasamma I L R 38 Mad 775* distinguished and *Karalia Manuhai v Mansukhram I L R 24 Bom 400* dissented from SETHURARAMASAMI NAYANIVARU v SYED MIR HUSSAIN SAHIB (1918) I L R 42 Mad. 508

6 ——— *Auction sale Application made to the Mamlatdar to set aside sale—Mamlatdar not a Court within the meaning of O XXI r 89—Application must be made to Civil Court—Limitation Act (IX of 1908) Sch I Art 166* An application by a judgment debtor to have an auction sale held by the Mamlatdar set aside under O XXI rr 89 Civil Procedure Code 1908 must be made to the Civil Court A Collector or other Revenue Officer cannot be considered as a Court within the meaning of O XXI rr 89 and therefore the judgment debtor who presents his application to the Collector cannot stop limitation running against him TIPPANGAVDA v RAMANGAVDA (1919) I. L R 44 Bom 50

" ——— *Civil Procedure Code (1882) s 308—Execution of decree—Sale in execution—Forfeiture of auction purchaser's deposit* An auction purchaser deposited in Court Rs 1 000 out of a total sum of Rs 2,200 Owing to the judgment debtor making an application to have the sale set aside the auction purchaser did not deposit the remainder of the purchase

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXI r 89 (1882 Code s 310A)—*contd*

money The judgment debtor s application was not accompanied as it should have been by court fee stamps in payment of the expenses of the sale *Held* on application by the auction purchaser for refund of the money deposited by him that the Court would have exercised a proper *di cretion in* allowing a refund as prayed and it was allowed subject to payment by the *appli cant of the expen es of the sale* MATHURA PRASAD PANDE v GAURI SHANKAR DAS (1910) I L R 32 All 380

8 ——— *Execution of decree—Sale in execution of simple money decree—the decree holder also holding a decree upon a mort gage of the property sold—Application by decree holder to have sale set aside* A decree holder held two decrees against the same judgment debtor the one being a decree for sale on two mortgage and the other a simple money decree In execution of the latter decree the decree holder caused part of the mortgaged property to be sold by auction and it was purchased by a stranger *Held* that the decree holder was not competent to apply under O XXI r 89 of the Code of Civil Procedure 1908 to get this sale set aside MUHAMMAD AHMADULLAH KHAN v AHMAD SAID KHAN (1911) I L R 33 All 481

9 ——— *Execution of decree—Property sold by judgment debtor to a third person after execution sale—Judgment debtor not competent to apply to have auction sale set aside* Where a judgment debtor after the sale in execu tion of his immoveable property sold such proper ty to a third party it was *held* that the judgment debtor was not competent thereafter to apply under O XXI r 89 of the Code of Civil Proce dure 1908 to have the execution sale set aside *Debi Pra ad Pandit v Muhammad Lnis Arabi 14 Oudh Cases 33* approved ISHAR DAS v ASAF ALI KHAN (1911) I L R 34 All 186

10 ——— *Payment into Court of portion of a judgment debt by persons other than the applicant no right to take credit for— Receipt mea ing of* O XXI r 89 Civil Procedure Code is in the nature of an indul ence to judgment debtors and a judgment debtor who wi hes to take advantage of its provisions mu t strictly comply with the same by paying all the amounts as directed by the rule less any amount that may have been paid by *himself* and he cannot take credit for any amount paid by a co judgment debtor who has not joined him in the application and according to the rule credit can be taken only for any amount that may have been actually or con tructively *received* by the decree holder and not for one which having been deposi ted could have been received by him had he been *minded* to do so *Trimbak v Ramchandra I L R 23 Bom 723* and *Kripa Nath Pal v Ram Lakshmi Dasya 1 C W N 603* followed *Anantha Lakshmi Ammal v Sankaran Nar 21 Mad L J 905* and *Vedala Lakshminarasimha Charyulu v Pacha Lakshmiamma (191) Mad W N 456* distinguished KARUNAKARA v KRISHNA (1915) I L R 39 Mad 429

11 ——— *Civil Procedure Code (Act XIV of 1882) s 310 A— Decree holder*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXI r 89 (1882 Code s 310A)—*contd*

—Execution of decree—Auction sale—Applica tion by judgment debtor to set aside sale—Deposit within thirty days—Auction purcha er not a neces sary party to the application—Notice to all parties—Rateable distribution claimed by other decree holders —Satisfaction of the decree under which the pro perty was sold The deposit under O XXI r 89 of the Civil Procedure Code (Act V of 1908) must be made within thirty days from the date of sale It is not neces ary that the notice required to be given under r 92 of the said order should be given within thirty days of the date of sale Once notice has been given under r 89 to all persons affected thereby the Court has full authority to set aside the sale A decree holder having applied for execution of his decree the proceed ings in execution were transferred to the Collector He i sued a proclamation and proceeded with the sale but before the auction sale took place he received from the Court intimation of applica tions made by other decree holders against the same judgment debtor for rateable distribution The Collector inserted references to the applica tions in his proclamation of sale and the property was sub equently sold Then within thirty days the judgment debtor applied to have the sale set a ide under O XXI r 89 of the Civil Procedure Code (Act V of 1908) on depositing in Court for payment to the purcha er a sum equal to five per cent of the purchase money and for payment to the decree holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered Although the deposit was sufficient to satisfy the judgment debt of the creditor he objected to the judgment debtor s application on the ground that the deposit was insufficient because the amount deposited should have been sufficient to satisfy not only his decree but al o the claims of those decree holders whose applications for rateable distribution had been brought to the notice of the Collector before the sale *Held* setting aside the sale that the term decree holder in O XXI r 89 of the Civil Procedure Code (Act V of 1908) meant that person alone for sati faction of who e decree the sale had been ordered and did not include other persons who would have a ri ht to claim rateable distribution out of the sale proceeds under s 73 of the Civil Procedure Code (Act V of 1908) GANE H BAB NAIK v VITHAL VAMAN (1912) I L R 37 Bom 387

12 ——— A person who is out of po session of certain immoveable pro perty but is litigating to es abl sh his title thereto is not entitled to make a depo it in court to set aside a sale of such property held in execution of a decree If such a person does make a deposit and eventually loses the suit in which he was endeavouring to establi h his title to the property put up for sale he cannot recover the amount of such deposit from the person found to be entitled to the property NANDKI HORE JHA v LAKAOO MIAN 2 Pat L J 676

13. ——— *Under tenure holder if may apply to set aside rent sal of taluk in East Bengal* The words of O XXI r 89 of the Civil Procedure Code are more comprehensive than the words of s 310A of the Code of 1882

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXI, r 90 (1882 Code, s 311)—*contd*

judgment debtors had applied on the 13th March 1912 for execution of his decree but his application was dismissed for non prosecution on the 13th May 1912 and on the 20th May 1912 the petitioner applied to the Court to have the sale set aside under r 90 O XXI Civil Procedure Code, on the ground of fraud and material irregularity The lower Court rejected this application holding that he was not entitled to make it. *Held* that the dismissal of the petitioner s application for execution of his decree on the 13th May for non prosecution did not affect the right of the petitioner to a share in a rateable distribution of the assets and on the date on which the application to set aside the sale was made under r 90 it was made by a person entitled to a share in the rateable distribution of the assets and consequently should have been entertained by the Court BYOMKESH CHACKRABARTTY v. JATINDRA NATH ROY (1913) **18 C W N 1311**

5 ——— *Application to set aside sale dismissed for default—Dismissal of application for restoration—Appeal if lies* An application to set aside a sale under r 90 of O XXI of the Civil Procedure Code having been dismissed for default the applicant applied for restoration of the case but this application was refused. *Held* that no appeal lay against the order refusing to restore the case Cl. (c) to r 1 of O XLIII of the Code did not apply to this order S 141 of the Code which replaces s 647 of Act XIV of 1882 has not effected any alteration in the law On the date fixed for hearing of appellant s application to set aside a sale the appellant came to Court and finding the Judge engaged in the trial of another suit left the Court and went on another business leaving no instructions to his pleader Returning later he found that his case had been called on in the meanwhile and dismissed for non prosecution *Held* that there were no grounds for restoring the case *Manilal Dhunji* v *Gulam Hosain I L R 13 Bom 12* and *Ismail Ibrahim* v *Jan Mahmed 10 Bom L R 904* relied on. *Somayya* v *Subbamma I L R 26 Mad 599* and *Lalta Prasad* v *Ram Karan I L R 34 All 426* not followed CHARU CHANDRA GHOSH v. CHANDI CHARAN RAY CHOUDHURY (1914) **19 C W N 25**

6 ——— *Step in execution of decree for arrears of rent—Non transferable occupancy holding transferee of a portion of if entitled to apply for reversal of sale.* A transferee of a portion of a non transferable occupancy holding is entitled to apply for reversal of a sale in execution of a decree for arrears of rent obtained by the entire body of landlords The rule formulated in r 90 of O XXI of the Civil Procedure Code of 1908 has a wider scope and is of a more comprehensive character than the rule laid down in s. 311 of the Code of 1882. ABDUL AZIZ v. TAFAZUDDIN SHEIKH (1914) **19 C W N 326**

——— O XXI, r 90—

7 ——— *Sale in execution* [illegible] *Application to set aside a sale by person* [illegible] *to be the real owner* Where immoveable property has been sold in execution of a decree against the ostensible owner a person claiming to be the real owner is not competent to ask the Court to set aside the sale under O XXI r 90 of the Code of Civil Procedure *Abdul Aziz* v *Tafazuddin 23 Indian Cases 339* referred to HARDWARI LAL v. SALAMAT ULLAH KHAN **I L R 38 All 358**

8 ——— *Persons entitled to apply for setting aside sale—' Persons whose interests are affected by the sale —Purchaser of holding sold in execution of mortgage decree if can apply for setting aside sale subsequently held by landlord in execution of rent decree.* A holding was sold in execution of a mortgage decree against the tenant and purchased by the mortgagee it was subsequently sold at the instance of the landlord in execution of a rent decree and the mortgagee applied under O XXI r 90 Civil Procedure Code to have the sale set aside on the ground of material irregularity and fraud in conducting the sale *Held* that the words of r 90 whose interests are affected by the sale are very wide and the mortgagee had *locus standi* to make the application for setting aside the sale as his interests were clearly affected by the sale SAILABALA DEBI v. NITYA GOPAL SEN (1915) **22 C W N 143**

9 ——— *Co sharer landlord whether entitled to apply under—Application after sale in execution of a decree in a suit under s 148A of the Bengal Tenancy Act whether proviso to s 169 (1) of the Bengal Tenancy Act or s 73 of the Code of Civil Procedure applies to such a case —S 115 of the Code of Civil Procedure, case if for revision under* In a suit framed under s 148A of the Bengal Tenancy Act the five sixth co sharer landlords obtained a decree against the tenants of a tenure for arrears of rent due in respect thereof and in execution of that decree in proceeding taken under Chap XIV of the Bengal Tenancy Act the said decree holders (*five sixth co sharer landlords*) brought the tenure to sale and themselves purchased the same. Then the remaining one sixth co sharer landlord, who also had a rent decree in his favour against the tenure in arrear but which decree was time barred applied for setting aside the sale under O XXI r 90 of the Code of Civil Procedure whereupon the five sixth co sharer landlords contended amongst other matters that the decree which was executed was in the nature of a money decree and as such the applicant the one sixth co-sharer landlord had no *locus standi* to make the application under O XXI r 90 of the Code of Civil Procedure as he was not entitled to the rateable distribution of assets under s 73 of the Code of Civil Procedure his decree being time barred and he having made no application for execution thereof and both the lower Courts so decided *Held* that as the decree has the force and effect of a rent decree the suit being framed in the manner provided for in s 148A the applicant was interested in the results of the sale under s 158B and the proviso to s. 169 (1) of the Bengal Tenancy Act and as such he was entitled to make the application under O XXI r 90 of the Code of Civil Procedure. *Held* further that in dealing with the case merely under the provision of the Code of Civil Procedure and without a reference to the Bengal Tenancy Act the Court below had

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O XXI r 90**—*contd*

seriously erred. *Per* CUMING J It is doubtful whether the present motion falls within the scope of s. 115 of the Code of Civil Procedure KHAGENDRA BHUSAN ROY v JATINDRA NATH ROY (1918) **23 C W N 619**

———— **O XXI rr 90 91 and 93**—

See LIMITATION ACT (IX OF 1908) s 22 **I L R 38 Mad 837**

———— **O XXI, r 90 and 92**—

See s 104 **I L R 40 All 122**

See MADRAS ESTATES ACT 1908 ss 111 AND 118 **I L R 43 Mad 351**

———— *Application to set aside sale for material irregularity or fraud dismissed as barred—Sale confirmed prior to application—Suit to set aside sale on same ground whether maintainable.* Where a judgment debtor failed to file an application to set-aside the sale under O XXI r 90 Civil Procedure Code within the time allowed by law and the sale was confirmed he cannot institute a suit to set aside the sale on the ground of material irregularity or fraud in the publication or conduct of the sale Dictum of SADASIVA AYYAR, J in *Pajdanna v Lakshmina asamma (1915) I L R 38 Mad 1076* dissented from BRAHMAYYA v APPAYYA SASTRI (1921) **I L R 44 Mad 351**

———— *Application to set aside sale made before the new Code came into force—Fraud general allegation of—Second appeal* The fact that the execution sale took place and the application to set it aside on the ground of fraud was made before the new Code of Civil Procedure came into operation does not make the order passed on the application after the new Code came into force subject to a second appeal under the provisions of the old Code General allegations of fraud unaccompanied by particulars are insufficient even to amount to an averment of fraud of which any Court ought to take notice *Walling ford v The Mutual Society I P 5 A C 685 697* followed RAJ MOHAN PAL v GOVINDA CHANDRA PAL (1912) **17 C W N 524**

See ALSO BHADRESWAR GOLOI v BISHNU CHARAN SEN (1910) **17 C W N 525**

———— **O XXI, r 91 (1882 Code s 313)**—

See BENGAL TENANCY ACT s 6 **14 C W N 1096**

See LIMITATION ACT 1908 s 2 **I L R 38 Mad 837**

1. ———— *Contract Act (IX of 18 ?) s 18 cl (3)—Stamp Act (II of 1899) s 35—Court-sale—Discovery that the judgment-debtor had no saleable interest—Failure of consideration—Suit by auction purchaser for possession or return of purchase money—Relations of the judgment-creditor and auction purchaser—Suit not cognizable by Small Causes Court—Unstamped document regarded as non-existent* A Court sale purchaser having discovered that the judgment-debtor had no saleable interest in the property sold brought a suit against the judgment-creditor for recovery of possession of the property or in the alternative return of the purchase money on the footing of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— **O XXI r 91 (1888 Code s 313)**—*contd*

total failure of consideration A question having arisen as to whether the suit was maintainable *Held* that the suit was maintainable inasmuch as under the Civil Procedure Code (Act V of 1908) there was an implied warranty of some saleable interest when the right title and interest of a judgment debtor was put up for sale and the purchaser s right based on such implied warranty to a return under certain conditions of the purchase money which had been received by the judgment creditor was recognized The relations of the parties namely the judgment creditor and the Court sale purchaser were in the nature of contract *Held* further that such a suit though the subject matter was less than R500 was not cognizable by a Court of Small Causes there being a prayer for possession of immoveable property An unstamped document being inadmissible in evidence must be taken as non existent PUSTOMJI ARDESHIR IRANI v VINAYAK GANGADHAR BHAT (1910) **I L R 35 Bom 29**

2. ———— *Auction purchaser induced to buy property of small value by misrepresentation—Remedy* Where it appeared that it was known to the decree holder that 1 anna out of a 1 anna 16 krants share put up by him for sale in execution of his decree had been previously sold in execution of a mortgage decree *Held* that it was not open to the purchaser at the sale who got 16 krants at least of the property purported to be sold to apply under O XXI r 91 of the Civil Procedure Code on the ground that the judgment debtor had no saleable interest in the property though if he was induced to make the purchase by fraud he might not be without other remedies *Naharmul Marwari v Sadut Ali 8 C L P 468 Protap Chandra Chakrabartty v Panioty I L P 9 Calc. 506 Ram Coomar Dey v Shushee Bhooshan Ghose I L P 9 Calc 6?6 Sonaram Das v Mohiram Das I L P ?8 Calc. ?35 Durga Sunda v Gobinda Chandra I L R. 10 Calc 363 Sant Lal v Pimju Das I L P 9 All 167* and *Brij Mohan Thakur v Pai Umanath Chaudhu I L R ?0 Calc ? L P 19 I A 151* referred to SHEOGOBINDA SINGH v DHANUK DHARI SINGH (191?) **19 C W N 1291**

———— **O XXI, rr 91 and 93**—

———— When in a pending application to set aside execution sale under this order decree holders were allowed to withdraw a portion of the purchase money on executing a bond which did not contain any provision for interest *Held* that the Court had power under r 93 to order refund of the money with interest. MAHARAJ BAHADUR SINGH v A. H. FORBES **25 C W N 366**

———— *Execution of decree—Auction purchaser deprived of property purchased—Suit for refund of purchase money—Sale not set aside.* When, after a sale in execution of a decree has been confirmed, it is found that the judgment-debtor had no saleable interest in the property put up to auction, and the auction purchaser is in consequence deprived of the property no suit will lie on the part of the auction purchaser for the recovery of the purchase money or to get the sale set aside His right is limited to an application for an order for ren [illegible] after the sale

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

—— O XXI, rr 91 and 93—contd

has been set aside Nanni Lal v Bhagwan Das I L R 39 All 114 followed. The following cases were also referred to in the judgments. Hira Lal v Karim un nisa I L R 2 All 780 Ram Narain Singh v Mahtab Bibi I L R 2 All 828 Dorab Ally Khan v Abdool Azee L R 5 I A 116 Munna Singh v Gajadhar Singh I L R 5 All 577 Kishun Lal v Muhammad Safdar Ali Khan I L R 13 All 383 Shanto Chandar Mukerji v Nain Sukh I L R 22 All 33 Sidheswari Prasad Narayan Singh v Goshain Mayanand I L R 33 All 419 Mohideen Imbrahim v Mahomed Mura Levai 23 M L J 487 Kumar Shaha Poddar v Ram Gour Shaha Chaudhari I L R 37 Calc 67 Muhammad Najib ullah v Jai Narain I L R 36 All 29 Dost Mahomed Khan v Prosunnonath Roy S D A (L P) 519 Pugloonath Suhay v Brijbeharee Lal S D A (L P) 486 Greesh Chunder Pottar v Lookhoodа Moyee Dabee 1 W R C R 35 Brajendra Roy Chaudhry v Jugurnath Roy 1 W R C R 11 and Sheikh Mahomed Basir ulla v Sheikh Abdulla 4 I L R (App) 35 referred to RAM SARUP v DALPAT RAI

I L R 43 All 60

—— O XXI, r 92 (1882 Code s 312)

See s 60 I L R 40 All 680

See s 144 2 Pat L J 206

See O XXI r 89

I L R 45 Bom 1094
I L R 40 All 425
17 C W N 476

See O XXI rr 89 AND 90
4 Pat L J 645

See BOMBAY HIGH COURT CIVIL CIRCULAR P 100 r 17 I L R 45 Bom 1132

See MADRAS ESTATES ACT 1908 s 111 118 I L R 43 Mad 351

—— O XXI, rr 92 93—Execution of decree—Auction purchaser deprived of property purchased—Suit for refund of purchase money—Sale not set aside—Procedure Held that under the present Code of Civil Procedure an auction purchaser who has been deprived by means of a suit against the judgment debtor of the property purchased by him cannot obtain a refund of the purchase money without getting the auction sale set aside Munna Singh v Gajadhar Singh I L R 5 All 577 distinguished Muhammad Najib ullah v Jai Narain I L R 36 All 29 Shanto Chandar Mukerji v Nain Sukh I L R 22 All 33 and Dorab Ally Khan v Abdool Azee L R 5 I A 116 referred to NANNI LAL v BHAGWAN DAS (1916) I L R 39 All 114

—— O XXI, rr 92 and 94—Sale certificate—Application for duty of court to grant The provisions of r 94 of O XXI of the Code of Civil Procedure are mandatory Where the mortgagee of a tenant s interest in a house purchased such interest in execution of a decree under the mortgage Held that the court was bound to grant the purchaser a sale certificate and was not justified in requiring him to produce a money order receipt for the purpose of showing that he (the purchaser) had paid a mutation fee to the landlord in order to have his name entered in the landlord s books as transferee of the tenant s interest BAIKUNTH MISSIR v NARENDA SUNDARI DEBI

1 Pat L J 446

—— O XXI, r 93 (1882 Code s 315)—

See O XXI r 91 25 C W N 366

See EXECUTION SALE.
I L R 39 Mad. 803

See LIMITATION ACT 1908 s 22
I L R 38 Mad. 837

1 —— Civil Procedure Code (Act XIV of 1882) ss 313 315—Auction sale under the Code 1882—Sale of property in which judgment-debtor had no saleable interest—Right of purchaser to refund of purchase money—Suit—Application—Suit for possession—Cause of action—Right of suit accrued before new Code—Effect of new Code on such right—General Clauses Act (X of 1897) s 6 (c) and (e)—Pending suit—the construction of Where the plaintiff who purchased some lands in court auction in 1907 brought a suit to recover possession thereof in 1908 and failed in the suit in 1909 and in the Second Appeal therefrom in 1911 on the ground that the judgment debtor had no saleable interest in the property subsequently instituted a suit in 1914 for the recovery of the purchase money from the decree holder and the latter contended that the suit was not maintainable Held that the suit was maintainable notwithstanding the provisions of O XXI r 93 of the Civil Procedure Code (Act V of 1908) The plaintiff had a right of suit under the old Civil Procedure Code (Act XIV of 1882) and such right having accrued to him while such Code was in force it could not be affected by the provisions of the new Code of Civil Procedure (Act V of 1908) by virtue of the provisions of s. 6 (c) and ( ) of the General Clauses Act (X of 1897) As the right of the plaintiff to make an application under O XXI rr 91 and 93 would have been barred before the new Code came into force the new Code should not be so construed as to apply to the present case Mohideen Ibrahim v Mahomed Mura Levai 23 Mad L J 487 Parvathi Ammal v Govindasami Pillai I L R 39 Mad 803 followed Pestonji Ardeshir Irani v Manekjal Ganeshlal Bhat, I L R 35 Bom 29 dissented from Colonial Sugar Refining Company v Irving [1905], A C 369 applied Abbott v Minister for Lands [1895] A C 425 distinguished. Gopeshwar Pal v Jiban Chandra Chandra I L R 41 Calc 1125 followed. TIRUMALAISAMI NAIDU v SUBRAMANIAN CHETTIAR (1916) I L R 40 Mad 1009

2 —— Suit by purchaser of occupancy holding erect in execution of landlord s decree to recover purchase money if maintainable The plaintiff purchased an occupancy holding in execution of a decree obtained by the mortgagee of the property and took possession of it. He was sued in ejectment by the landlords in whose favour a decree was subsequently made. The plaintiff sued to recover the purchase money with interest. Held that under the present Code of Civil Procedure the suit was incompetent JURANT MAHAMAD v JATHI MAHAMAD (1917)

22 C W N 760

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O XXI r 94 (1882 Code 316)—

See EXECUTION SALE

I L R 43 Mad 309

——— The person who is declared to be the purchaser after the bids are concluded is the person in whose name the certificate is to be granted under O XXI r 94 Civil Procedure Code. BABURAM MANDAL v DOKHINA SUNDARI NAMA UDPANI 24 C W N 27

——— O XXI, r 95 (1882 Code s 318)—

See EXECUTION OF DECREE

I L R 43 All 520

1 ——— *Execution sale—Purchase by decree holder—Delivery of possession—Order whether appealable—S 47 Civil Procedure Code whether applicabl* Where on a decree holder auction purchaser applying for delivery of possession of the properties purchased and obtaining possession by order of Court notwithstanding the objection by the judgment debtor that the properties did not pass by the sale the judgment debtor preferred an appeal. *Held* on a review of the authorities of all the Indian High Courts (which are conflicting) that the Patna High Court should not without very good reason depart from a long course of decisions in the Calcutta High Court where the balance of opinion has been since 1883 strongly in favour of the view that an appeal does not lie ABDUL GANI v RAJA RAM (1916)

20 C W N 829

2 ——— *Execution of decree—Transferee from auction purchaser—Order for delivery of possession—Appeal—Revision* A purchased certain immovable property at an auction sale held in execution of a decree and thereafter transferred the property so purchased to B the decree holder B applied under O XXI r 95 of the Code of Civil Procedure for an order for delivery of possession of the property purchased from A and an order was passed *Held* that no appeal lay from the order for delivery of possession *Bhagwati* v *Bunwari Lal I L R 31 All 82* referred to BUDDHU MISIR v BHAGIRATHI KUNWAR (1917)

I L R 40 All 216

3 ——— *Whether appeal lies from order under r 95* No appeal lies from an order under r 95 of O XXI of the Code of Civil Procedure 1908 HAJI ABDUL GANI v RAJA RAM 1 Pat L J 232

——— O XXI, r 95 and s 47—*Rent decree against tenants obtained by co sharer landlords—Partition proceedings in which tenant s holding falls into share of some of the landlords—Suit by latter against tenant for possession whether maintainable—Limitation—Chota Nagpur Tenancy Act (Beng of 1908) ss 139 and 231—Whether s 139 is retrospective—Suit for recovery of possession from tenants whose holding has been sold whether is a suit for ejectment* Certain co sharer landlords in a mouza obtained in a rent decree in respect of a holding in the mouza but did not apply for possession As a result of partition proceedings the holding in suit fell to the share of some of the landlords. *Held* that a suit by the latter against the tenants to recover possession was not barred by s. 47 of the Code of Civil Procedure 1908 S 139 of the Chota Nagpur Tenancy Act 1908 is no retrospective and therefore where a rent decree was obtained against certain tenants in Manbhum prior to the 22nd November 1909 on which date the Act was extended to that district a suit by the decree holders against the judgment debtors for recovery of possession was held not to be barred by ss 139 and 231 merely by reason of it not having been brought in the Court of the Deputy Commissioner within one year from the date when the cause of action accrued S 139 (4) does not include a suit to recover possession from tenants whose holding has been sold in execution of a decree inasmuch as such a suit is not a suit to eject a tenant or cancel a lease and the tenants cease to be tenants at the time their holding is sold and their rights in the holding pass to the purchaser *Per Jwala Prasad J* In the case of a decree awarding rent or money no title to any property is created by the decree but if the decree holder purchases property in execution of a rent decree he is entitled either to apply for delivery of possession under O XXI r 95 or to institute a suit for recovery of possession Where however title to property and the right to recover possession are declared by the decree and the decree itself directs delivery of possession the procedure for the decree holder to obtain possession is by execution of the decree and not by suit SARDAR SIRDHAR v JAGESHWAR SINGH MAHAPATRA 4 Pat L J 716

——— O XXI rr 95 96—

See O XXI r 35 I L R 36 All 181

——— *Court sale—Symbolical possession—Judgment debtor in actual possession—Adverse possession—Limitation* In execution of a decree in a suit of 1890 the plaintiff purchased the plaint property at a Court sale and a receipt for possession was given by the plaintiff to the bailiff on the 3rd July 1901 The defendants, judgment debtors who had been previously in possession of the property were however not disturbed in their possession at the date of the receipt The plaintiff having sued to recover possession on the 3rd July 1913 *Held* that the plaintiff was not entitled to succeed as the provisions of O XXI r 95 Civil Procedure Code 1908 under which the case fell were not complied with a formal receipt for possession would not help the plaintiff to dispossess the defendants *Radha Krishna v Ram Bahadur 0 Bom I R 502* distinguished SHRIDHAR MADHAVRAO v GANPATI [illegible] (1918)

I L R 43 Bom 559

——— O XXI r 96 (1882 Code s 319)—

See O XXI r 35 I L R 36 All 181

——— O XXI, r 97 (1882 Code s 328)—

See BAILIFF I L R 42 Calc 313

——— O XXI rr 97 and 99—

See POSSESSION I L R 47 Calc. 907

——— O XXI rr 97 to 103 (1882 Code 335)—*Effect of order under 99 in favour of a party in possession—suit by party against whom the order is made—Limitation—Indian Limitation Act IX of 1908 articles 11 and 151* The property in suit belonged to one B. L. who died in 1903 leaving a widow Musammat M. who on 5th March 1903 sold it to R. M. a [illegible] On 29th September 1904 Musammat M. [illegible] and on 8th March

CIVIL PROCEDURE CODE (ACT V OF 1908)
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——— O XXI rr 91 and 93—cont

has been set aside Nanni Lal v Phagwan Das I L R 35 All 114 followed. The following cases were also referred to in the judgments. Hira Lal v Karim Bakhsh I L R 2 All 780 Ram Narain Singh v Mahtab Bibi I L R 2 All 828 Dorab Ally Khan v Khaleel-ud-deen L R 5 I A 116 Munna Singh v Gajadhar Singh I L R 5 All 577 Kishen Lal v Muhammad Safdar Ali Khan I L R 13 All 383 Shanto Chundar Mukerji v Nain Sukh I L R 3 All 355 Nilleswari Prasad Narain Singh v Golam Mahomed I L R 25 All 413 Mohideen Ibrahim v Mahomed Musa Levai 23 M L J 487 Kumar Shaha Peddar v Ram Coomar Shaha Chaudhuri I L R 3 Calc 67 Muhammad Najib ullah v Jai Narain I L R 36 All 579 Dost Mahomed Khan v Prosunnonath Roy S D A (L P) 519 Raghoonath Suhay v Brijebaree Lal S D A (L P) 456 Greesh Chunder Lahiri v Lootfoola Moyee Dabee 1 W R C R 65 Prasendra Roy Chowdhry v Jugurnath Roy 1 W R (F R) 11 and Shaikh Mahomed Jaffer Ali v Shaikh Altaf Ali I L R (All) 35 referred to Ram Saker v Dallat Lal

I L R 43 All 60

——— O XXI, r 92, (1882 Code s 312)

See s 60 I L R 40 All 680

See s 144 2 Pat L J 206

See O XXI r 89
I L R 45 Bom 1094
I L R 40 All 425
17 C W N 476

See O XLI r 23 and 2
4 Pat L J 645

See Bombay High Court Civil Circular 1 100, r 17 I L R 45 Bom 1132

See Madras Estates Act 1908 ss 111 118 I L R 43 Mad 351

——— O XXI rr 92 93——Execution of decree—Auction purchaser deprived of property purchased—Suit for refund of purchase money—Sale not set aside—Procedure Held that under the present Code of Civil Procedure an auction purchaser who has been deprived by means of a suit against the judgment debtor of the property purchased by him cannot obtain a refund of the purchase money without getting the auction sale set aside Munna Singh v Gajadhar Singh I L R 5 All 577 distinguished Muhammad Najib ullah v Jai Narain I L R 36 All 579 Shanto Chandar Mukerji v Nain Sukh I L R 23 All 355 and Dorab Ally Khan v Abdool Azeez L R 5 I A 116 referred to Nanni Lal v Bhagwan Das (1916) I L R 39 All 114

——— O XXI, rr 92 and 94—Sale certificate application for duty of court to grant The provisions of r 94 of O XXI of the Code of Civil Procedure are mandatory Where the mortgagee of a tenant s interest in a house purchased such interest in execution of a decree under the mortgage held that the court was bound to grant the purchaser a sale certificate and was not justified in requiring him to produce a money order receipt for the purpose of showing that he (the purchaser) had paid a mutation fee to the landlord in order to have his name entered in the landlord s books as transferee of the tenant s interest Baikunth Missir v Narinda Sundari Debi

1 Pat L J 445

——— O XXI, r 93 (1882 Code s 315)—

See O XXI r 91 25 C W N 568

See Execution Sale
I L R 39 Mad 803

See Limitation Act 1908 s 13
I L R 38 Mad 837

1 ——— Civil Procedure Code (Act XIV of 1882) ss 313 315—Auction sale under the Code 1882—Sale of property in which judgment-debtor had no saleable interest—Right of purchaser to refund of purchase money—Suit—Application—Suit for possession—Cause of action—Right of suit accrued before new Code—Effect of new Code on such right—General Clauses Act (X of 1897) s 6 (c) and (e)—Repealing statute construction of Where the plaintiff who purchased some lands in court auction in 190 brought a suit to recover possession thereof in 1908 and failed in the suit in 1909 and in the Second Appeal therefrom in 1911 on the ground that the judgment debtor had no saleable interest in the property subsequently instituted a suit in 1914 for the recovery of the purchase money from the decree holder and the latter contended that the suit was not maintainable Held that the suit was maintainable notwithstanding the provisions of O XXI r 93 of the Civil Procedure Code (Act V of 1908) The plaintiff had a right of suit under the old Civil Procedure Code (Act XIV of 1882) and such right having accrued to him while such Code was in force it could not be affected by the provisions of the new Code of Civil Procedure (Act V of 1908) by virtue of the provisions of s. 6 (c) and (e) of the General Clauses Act (X of 1897) As the right of the plaintiff to make an application under O XXI rr 91 and 93 would have been barred before the new Code came into force the new Code should not be so construed as to apply to the present case Mohideen Ibrahim v Mahomed Mura Levai 23 Mad L J 487 Parvathi Ammal v Govindasami Pillai I L R 39 Mad 803 followed Purtemji Ardeshir Irani v Vinayak Gangadhar Iat I L R 35 Bom 79 dissented from Colonial Sugar Refining Company v Irving [1905] A C 369 applied Abbott v Minister for Lands [1895] A C 425 distinguished Gopeshwar Pal v Jiban Chandra Chandra I L R 41 Calc 1125 followed The Chettiar Malaisami Naidu v Subramanian Chettiar (1916) I L R 40 Mad. 1009

2 ——— Suit by purchaser of occupancy holding evicted in execution of landlord s decree to recover purchase money if maintainable The plaintiff purchased an occupancy holding in execution of a decree obtained by the mortgagee of the property and took possession of it He was sued in ejectment by the landlords in whose favour a decree was subsequently made The plaintiff sued to recover the purchase money with interest Held that under the present Code of Civil Procedure the suit was incompetent Jurawan Mahammad v Jatir Mahamud (191)
22 C W N 760

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXI r 94 (1882 Code 316)—

See EXECUTION SALE.

I L R 43 Mad 309

——— The person who is declared to be the purchaser after the bids are concluded is the person in whose name the certificate is to be granted under O XXI r 94 Civil Procedure Code. BABURAM MANDAL v DOKHINA SUNDARI NAMASUDRANI 24 C W N 27

——— O XXI, r 95 (1882 Code s 318)—

See EXECUTION OF DECREE

I L R 43 All 520

1 ——— *Execution sale—Purchase by decree holder—Delivery of possession—Order whether appealable—S 47 Civil Procedure Code whether applicable* Where on a decree holder auction purchaser applying for delivery of possession of the properties purchased and obtaining possession by order of Court notwithstanding the objection by the judgment debtor that the properties did not pass by the sale the judgment debtor preferred an appeal. *Held* on a review of the authorities of all the Indian High Courts (which are conflicting) that the Patna High Court should not without very good reason depart from a long course of decisions in the Calcutta High Court where the balance of opinion has been since 1883 strongly in favour of the view that an appeal does not lie ABDUL GANI v RAJA RAM (1916)

20 C W N 829

2 ——— *Execution of decree—Transferee from auction purchaser—Order for delivery of possession—Appeal—Revision* A purchased certain immovable property at an auction sale held in execution of a decree and thereafter transferred the property so purchased to B the decree holder B applied under O XXI r 95 of the Code of Civil Procedure for an order for delivery of possession of the property purchased from A and an order was passed *Held* that no appeal lay from the order for delivery of possession *Bhagwati v Banwari Lal I L R 31 All 82* referred to BUDDHU MISIR v BHAGIRATHI KUNWAR (1917)

I L R 40 All 216

3 ——— *Whether appeal lies from order under r 95* No appeal lies from an order under r 95 of O XXI of the Code of Civil Procedure 1908 HAJI ABDUL GANI v RAJA RAM 1 Pat L J 232

——— O XXI, r 95 and s 47—*Rent decree against tenants obtained by co-sharer landlords—Partition proceedings in which tenants holding falls into share of some of the landlords—Suit by latter against tenant for possession whether maintainable—Limitation—Chota Nagpur Tenancy Act (Beng of 1908) ss 139 and 231—Whether s 139 is retrospective—Suit for recovery of possession from tenants whose holding has been sold whether is a suit for ejectment* Certain co sharer landlords in a mouza obtained in a rent decree in respect of a holding in the mouza but did not apply for possession As a result of partition proceedings the holding in suit fell to the share of some of the landlords. *Held* that a suit by the latter against the tenants to recover possession was not barred by s. 47 of the Code of Civil Procedure 1908 S 139 of the Chota Nagpur Tenancy Act, 1908 is not retrospective

CIVIL PROCEDURE CODE (ACT V OF 1908) —*concld*

——— O XXI r 95 and s 47—*concld*

and therefore where a rent decree was obtained against certain tenants in Manbhum prior to the 22nd November 1909 on which date the Act was extended to that district a suit by the decree holders against the judgment debtors for recovery of possession was held not to be barred by ss 139 and 231 merely by reason of it not having been brought in the Court of the Deputy Commissioner within one year from the date when the cause of action accrued S 139 (4) does not include a suit to recover possession from tenants whose holding has been sold in execution of a decree inasmuch as such a suit is not a suit to eject a tenant or cancel a lease and the tenants cease to be tenants at the time their holding is sold and their rights in the holding pass to the purchaser *Per Jwala Prasad J* In the case of a decree awarding rent or money no title to any property is created by the decree but if the decree holder purchases property in execution of a rent decree he is entitled either to apply for delivery of possession under O XXI r 95 or to institute a suit for recovery of possession Where however title to property and the right to recover possession are declared by the decree and the decree itself directs delivery of possession the procedure for the decree holder to obtain possession is by execution of the decree and not by suit SARDAR SIPDHAR v JAGESHWAR SINGH MAHAPATRA 4 Pat L J 716

——— O XXI rr 95 96—

See O XXI R 35 I L R 36 All 181

——— *Court sale—Symbolical possession—Judgment-debtor in actual possession—Adverse possession—Limitation* In execution of a decree in a suit of 1890 the plaintiff purchased the plaint property at a Court sale and a receipt for possession was given by the plaintiff to the bailiff on the 3rd July 1901 The defendant judgment debtors who had been previously in possession of the property were however not disturbed in their possession at the date of the receipt The plaintiff having sued to recover possession on the 3rd July 1913 *Held that the plaintiff was not entitled to succeed as the provisions of O XXI r 95 Civil Procedure Code 1908 under which the case fell were not complied with a formal receipt for possession would not help the plaintiff to dispossess the defendant Radha Krishna v Ram Bahadur 9 Bom I R 50* distinguished SHRIDHAR MADHAVRAO v GANPATI [illegible] (1919)

I L R 43 Bom 5 9

——— O XXI, r 96 (1882 Code s 319)—

See O XXI R 35 I L R 36 All. 181

——— O XXI r 97 (1882 Code s 328)—

See BAILIFF I L R 42 Calc 313

——— O XXI rr 97 and 99—

See POSSESSION I L R 47 Calc. 907

——— O XXI, rr 97 to 103, (1882 Code, 335)—*Effect of order under r 99 in favour of a party in possession—suit by party against whom order is made—Limitation—Indian Limitation [illegible] IX of 1908 a[illegible] [illegible] and 151* The [illegible] in suit belong[illegible] L. who died [illegible] leaving a widow [illegible] M. who on [illegible] sold it to [illegible] On [illegible]tember 1904 M [illegible] [illegible] and on

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXI, rr 97 to 103 (1882 Code 335)—*concld*

1905 M M plaintiff as daughter's son of B L sued for possession of the property making K N the adopted son of R M the sole defendant *Mussammat* Ambo was the widow of R M The claim was decreed by the Chief Court on 7th July 1906 subject to payment of Rs 1 400 for improvements to *Mussammat* Ambo M M tried in execution of this decree to get possession of the property decreed to him but was obstructed by *Mussammat* Ambo who alleged that she was in possession in her own right under a will by her husband, R M The decree holder complained of the obstruction and *Mussammat* Ambo also applied to the Executing Court which found under O XXI r 99 Civil Procedure Code that *Mussammat* Ambo was in possession of the property on her own account and was claiming in good faith That order was passed on the 18th June 1909 The Court definitely refrained from going into the question of title On 20th October 1909 M M applied to the Chief Court for revision but that application was rejected on 22nd April 1911 on the ground that he had another remedy available to him by suit under O XXI r 103 On the 2nd March 1914 M M filed the present suit *Held* that the effect of the order of 18th June 1909 under O XXI r 99 Civil Procedure Code was to hold *Mussammat* Ambo entitled to possession as against the decree holder unless and until a regular suit was brought against her *vide* r 103 and the plaintiff had to establish by that suit his own right to present possession as well as his own title and he could not succeed merely by showing that the finding under r 99 was erroneous *Sardari Lal* v *Ambika Pershad (I L R 15 Calc 521) (P C)* and *Khub Lal* v *Ram Lochun (I L R 17 Calc 260 262)* referred to *Sarat Chandra* v *Tarini Prasad (I L R 34 Calc 491) Raghunath Jha* v *Brijnanda Singh (31 Indian Cases 441)* and *Bhagwanti* v *Goman (42 P R 1909)* distinguished. *Held* also that the present suit for possession of the property against *Mussammat* Ambo having been brought more than a year after the date of the order under r 99 was barred by time under article 11 A of the Limitation Act and was not governed by art 141 *Mahadei Ram* v *Bibi Chimnaji (I L R 26 Bom 730) Bhimappa* v *Irappa (I L R 26 Bom 146) Shagun Chand* v *Shibbi (8 All L J 626)* and *Clardi Prasad* v *Nand Kishore (20 Indian Cases 369)* referred to CHAIL BEHARI LAL v KIDAR NATH I L R 1 Lah 57

——— A fresh writ for possession can in certain cases be obtained even outside the period of the Limitation Act without making an application under order O XXI r 97 within the period RAGHUNANDAN PRASAD MISSRA v RAM CHARAN MANDA 4 Pat L J 95

——— O XXI rr 98 99 101—*Scope of suit under r 103* The scope of a suit under r 103 of O XXI Civil Procedure Code, filed to contest an order made under either r 98 or r 99 or r 101 is not the determination of the mere question of possession of the parties concerned but the establishment of the *right or title* by which the plaintiff claims the present possession of the property *Nabadwipendra Mookerjee* v *Madhu Sudan Mandal (1912) 16 I C 741 (Calc)* followed UNNI MOIDIN v POCKER (1921) I L R 44 Mad 227

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXI rr 98 to 103—Art 11A of the Limitation Act will only apply to an order under rr 98 to 103 which has been made upon investigation SREEMATI NIRODE BARANI DASI v MANINDRA NARAYAN CHANDRA 21 C W N 853

——— O XXI r 99 (1882 Code s 331 335)—*Civil Procedure Code (Act V of 1908) O XXI rr 58 63 99—Claim dismissed for non prosecution—Obstruction by claimant to taking of possession by purchaser—Court if bound to investigate into bona fides of claim* Where a claim preferred under O XXI r 58 to immoveable property attached in execution of a money decree was dismissed for non prosecution and the property was sold but the purchaser on proceeding to take possession was obstructed by the claimant *Held* that the only remedy of the claimant after his claim was dismissed under O XXI r 63 though for default was by a fresh suit and he could not ask the Court to hold an investigation of the claim under O XXI r 99 JUGAL KISHORE MARWARI v AMBIKA DEVI (1912) 16 C W N 882

——— O XXI rr 100 and 101 (1882 s 332)—*Judgment debtor—Meaning of* The words judgment debtor in O XXI r 100 and 101 of the Code of Civil Procedure 1908 include the representative of the judgment debtor and all persons who are bound by a decree against the judgment debtor and by a sale in execution of such decree A person who has purchased a portion of a holding prior to the institution of a suit for rent under s 148A of the Bengal Tenancy Act 1885 is so far as his interest is concerned bound by a decree obtained under that section and by a sale in execution of such decree Such a purchaser is not entitled to make an application under O XXI, rr 100 and 101 BHIKHIA JHA v BRIJ BIHARI SINGH 2 Pat L J 478

——— O XXI rr 100 and 101—*Limitation Act (IX of 1908) art 11* Where an application under O XXI r 100 of the Code of Civil Procedure 1908 has been dismissed for default a suit under r 103 is governed by art 11 of the Limitation Act 1908 SAIYID RAZIUDDIN HUSSAIN v BINDESRI PRASAD SINGH 5 Pat L J 652

——— O XXI rr 100 101 and 103 (1882 Code 332)—*Application made under r 100—Order dismissing the application under r 101—Whether such an order is an order made under r 101 within the meaning of those words in R 103—Conclusive nature of the order* An order made against an applicant refusing him relief under r 101 of O XXI of the Civil Procedure Code 1908 is as much an order under that Rule as an order granting him relief would be and the order would be conclusive under r 103 subject to the result of a separate suit ZIPRU v HARI SUPDUSHET (1917) I L R 42 Bom 10

——— O XXI, r 101 (1882 Code 332)—

See O XXI R 98 I L R 44 Mad. 224

See O XXI R 100 2 Pat L J 478

——— *Joint possession with judgment-debtor if possession in one's own interest—Scope of section* A claimant who has an interest in the land of which possession has been deli

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O XXI r 101 (1882 Code s 332) —*concld*

vered in execution of a decree either as a member of the family of the judgment debtor or otherwise and who is affected by the delivery of possession is a person who is in possession in respect of his own interest though jointly with the judgment debtor and he can claim to be in possession of the property on his own account within the meaning of r 101 O XXI of the Civil Procedure Code RADHA GOBINDA MISRA v RAGHU NATH MISRA (1913) 18 C W N 695

———— O XXI r 103 (1882 Code s 332)—

See O VI R 17 I L R 44 Bom 515

See O XXI R 97 I L R 1 Lah 57

See O XXI R 100

I L R 42 Bom 10

———— O XXI r 103 and O XXXIV r 1 —*Transfer of Property Act (IV of 1882) ss 52 and 91 cl (f)*—Lis pendens—*Sale in execution of a money decree pending a suit on mortgage of the property sold—Possession obtained by purchaser—Sale in execution of mortgage decree—Right of the latter purchaser to oust the former from possession—Order as to possession—Appeal—Suit* Where lands were attached in execution of a money decree and afterwards a suit for sale on a mortgage of the same lands was filed but the attaching creditor was not made a party thereto the purchaser of the lands in execution of the money decree is not entitled to retain possession of them as against the subsequent purchaser in execution of the mortgage decree Where claim proceedings under O XXI Civil Procedure Code fall also under s 47 of the Code O XXI r 103 does not prevent an appeal against an order therein as it falls under s 47 of the Code VEYINDRAMUTHU PILLAI v MAYA NADAN (1920)

I L R 43 Mad 696

———— O XXII (1882 Code 361 to 372)—

See PARTIES I L R 45 Calc 862

———— O XXII r 1 (1882 Code s 361)— *Probate and Administration Act (V of 1881) s 89*— *Personal injuries not causing the death of the party meaning of—Suit for malicious prosecution —Death of defendant more than a year after prosecution—Whether right to sue survives* Where in a suit for malicious prosecution the defendant dies more than a year after the prosecution in question and before judgment is given in the suit the right to sue does not survive within the meaning of O XXII r 1 of the Code of Civil Procedure The expression personal injuries not causing the death of the party in s 89 of the Probate and Administration Act does not mean injuries to the body merely but all injuries which do not necessarily cause damage to the estate of the person wronged *Punjab Singh v Ramautar Singh (1919) 4 Patna L J 6 6* followed *Krishna Behari Sen v The Corporation of Calcutta (1904) I L R 31 Calc 993* dissented from The Legal Representatives Suits Act (XII of 1855) makes no provision for the continuation of suits already begun by the wronged against the wrong-doer in the event of the death of either party *Haridas Ramdas v Ramdas Mathuradas (1889) I L R 13 Bom 66* and *Ramchode Doss v Rulmany Bhoy (1905) I L R 29 Mad 45* followed RUSTOMJI DORABJI v NURSE (1921) I L R 44 Mad. (F B), 357

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O XXII rr 2 and 4—

See SUBSTITUTION OF HEIRS

25 C W N 595

———— O XXII r 3 (1882 Code 363)—

See O XXII R 2

I L R 44 Bom 767

———— *Death of appellant—application by some of the legal representatives under belief that they are the sole heirs—Arbitration—award—not signed by all arbitrators at the same time and place—whether valid* The plaintiffs and defendant in this case referred their dispute in respect of a contract to arbitration The arbitrators gave their award and plaintiffs applied to have it filed in Court The Lower Court rejected the application saying It is I think quite clear that Ali Ahmad arbitrator did not sign the award on the same date or at the same place as Ram Din and this is in itself sufficient to invalidate the award The plaintiffs appealed to the High Court At the hearing it was objected that appeal had abated as the appellant had died and only his sons and not his daughters and the widow had been brought on the record as his legal representatives although the latter were also his heirs by Muhammadan law For the appellants it was urged that the parties were governed by custom and they therefore *bona fide* believed that the sons were the sole heirs and legal representatives of their father *Held* that as the applicants (present appellants) *bona fide* believed that they were the sole heirs and legal representatives of the deceased appellant and had made their application for substitution on that belief the appeal did not abate notwithstanding that by Muhammadan Law other persons would also be co heirs of the deceased *Musala Peddi v Ramaiya (I L R 23 Mad 125)* followed *Ghumandi Lal v Amir Begum (I L R 16 All 211)* and *Haidar Hussain v Abdul Ahad (I L R 30 All 115)* referred to *Held also* that an award cannot be invalidated at least in this country simply on the ground that it had not been signed on the same day and at the same place by both the arbitrators The concurrence of the arbitrators is the judicial act and the signing is merely ministerial All that is *necessary is that there must be combined action* of the arbitrators and judicial exercise of their minds upon the matter to be decided. Banerji s Law of Arbitration in India second edition pages 230 and 231 *Bhabasundari Dasi v Makhunlal Dey (8 Beng L R 128)* *Muthukutti Nayakan v Acha Nayakan (I L R 18 Mad ?)* and in *re Hopper (? Q B 361)* approved. *Thammiraju v Bapiraju (I L R 1? Mad 113)* and *Nand Ram v Fakir Chand (I L R ? All 5?3)* distinguished. *Bhagwan Das v Shiv Dial (9? P R 1913)* not followed ABDUL RAHMAN v SHAHAB UD DIN

I L R 1 Lah 481

———— O XXII, rr 3 and 5—*Death of plaintiff—Order made to bring the legal representatives on record—Subsequent application by other persons to alter the order—Power of the Court to correct the order* A suit was filed by five persons one of whom P died while the suit was pending Thereupon an application was made on behalf of the minor G son of the 1st plaintiff that he should be brought on the record as heir and legal representative of the deceased P relying upon an alleged adoption of G to P The Subordinate

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O XXII rr 3 and 5—*concld*

Judge granted the application and amended the record by substituting G s name for that of R Subsequently the petitioners (minor daughters of R) having learnt of the application applied that G's name should be deleted and that their names should be brought upon the record in his place and G's adoption to R was fictitious The Sub ordinate Judge held that he could not alter his previous order in view of r 3 of O XXII Civil Procedure Code 1908 *Held* that under r 5 of O XXII Civil Procedure Code 1908 the Sub ordinate Judge had the power to correct the order previously made and to determine who were the real legal representatives of the deceased plaintiff VATSALABAI v SAMBHAJI PANDURANG (1918)

I L R 43 Bom 168

———— O XXII rr 3 5 9—*Order dismissing application to be brought on the record as representative of the deceased plaintiff—whether appealable—O XXII r 3—order of abatement of suit—whether a decree and whether a person not a party to the suit can appeal—O XXII r 9—whether applicable when abatement is not due to application not having been made within time* Ram Kanwar brought a suit against Narsing Das While the suit was pending Ram Kanwar died and the present appel lant Ram Sarup made an application to be brought on the record as being the legal representative of the deceased plaintiff The Court finding that the applicant was not the legal representative dismissed his application The Court also passed separate order under O XXII r 3 recording that the suit had abated inasmuch as no application by any legal representative had been made within six months of plaintiff s death Ram Sarup next applied to have this Order of abatement set aside but his application was dismissed under O XXII r 9 Ram Sarup then appealed to the High Court against all three orders *Held* that the present Civil Procedure Code provides *no* appeal from an order dismissing the application of a person to be brought on the record as the legal representative of a deceased plaintiff (*vide* O XXII r 5) and that such an order is not a decree *Paklas* v *Fathumma (1913 Mad W N 673)* *Balabai* v *Ganesh (I L R 27 Bom 162)* and *Parsotam Rao* v *Janki Bai (I L R 28 All 109)* followed *Held also* that an order of abatement of the suit amounts to a decree but that appellant in this case not being a party to the suit has no *status* to appeal therefrom *Lalabai* v *Ganesh (I L R 2 Bom 162)* and *Niranjan Nath* v *Afzal Husain (128 P R 1916) (F B)* referred to *Held further* that an order under O XXII r 9 can only be passed in cases in which an abatement takes place by reason of an application not having been made within the time permitted by law to implead the legal representative of the deceased plaintiff and has no applicability to cases in which the suit has abated on account of some other cause as in the present case Although therefore an appeal is allowed from an order under r 9 (*vide* O XLIII (1) (k)) this rule has no application to the circum stances of the present case and the appeal must be dismissed on this ground alone *Niranjan Nath* v *Afzal Hussain (1 S P R 1916) (F B)* followed RAM SARUP v MOTI RAM I L R 1 Lah 493

———— O XXII, rr 3 and 8—

See O IX, rr 8 and 9

I L R 35 All 331

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O XXII r 4 (1882 Code s 368)—

See LIMITATION ACT 1908 ART 44 AND 144 I L R 43 Mad 842

See MUHAMMADAN LAW WILL

I L R 42 All 497

See ABATEMENT I L R 1 Lah 225

1 ———— *Partnership—Suit for dissolution—Death of defendant after preliminary decree—Application for substitution—Limitation* In a suit for dissolution of partnership after the preliminary decree was passed one of the defend ants died Some two years after his death the plaintiff applied for substitution of the name of the heir of the deceased defendant and asked the Court to proceed with the suit *Held* that in the circumstances O XXII r 4 of the Code of Civil Procedure applied and the application was too late *Jamnadas Chhabildas* v *Sorabji Kharsedji I L R 16 Bom 27* followed MOTI LAL v RAM NARAYAN (1917) I L R 39 All 551

2 ———— *Abatement of suit—Death of plaintiff respondent after decree in her favour and pending an appeal—Application in appeal to declare the suit to have abated* An appel late Court has no power under O XXII r 4 of the Code of Civil Procedure to declare that a suit as distinct from an appeal has abated in a case in which there has been a decree already made before the death in consequence of which the suit is alleged to have abated took place SUNDAR PANDE v MUSAMMAT KUMARI (1918)

I L R 41 All 283

3 ———— B obtained a pre liminary decree against T in a mortgage suit and applied subsequently more than 6 months after the death of T for an order absolute and substitution of the heirs of T and preferred an appeal on refusal This was dismissed and a second appeal was prefer red *Held* that the appeal to the Lower Appellate Court was not an appeal from an order The original order was an order rejecting the application to make the mortgage decree absolute and had the effect of finally dismissing the mortgage suit and was a decree and therefore a second appeal lay *Held further* that the suit had abated as the application had not been made within 6 months of the death. An application following on a preliminary decree for sale is not an application for execution Until the final decree is passed the proceedings following the preliminary decree in a mortgage suit must be looked on as a proceeding in a pending suit BHUTNATH JANA v TARA CHAND JANA

25 C W N 597

4 ———— In a suit for dis solution of partnership after the preliminary decree was passed one of the defendants died Some 2 years later plaintiff applied for substitution of the name of the heir of the deceased defendant *Held* that O XXII r 4 applied and the application was too late I L R 39 All. 551

———— O XXII rr 4 6 and 9—

See EXECUTION OF DECREE.

4 Pat L J 240

———— O XXII, r 4 and O XLI, rr 20 and 33—*Suit by several Plaintiffs jointly for recovery of possession—Joint decree in their favour—Death of one pending Defendant's appeal—Failure to bring his representatives on the record—Defect of parties*

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— O XXII r 4 and O XLI rr 20 and 33—concld

due to abatement of appeal against some—Appeal if may proceed—Court s power to add party suo motu —Common manager if may represent parties in suits —Bengal Tenancy Act (VIII of 1885) s 95 The Plaintiffs jointly sued for a declaration that certain lands attached under s 146 Criminal Procedure Code in a proceeding under s 145 Criminal Procedure Code were included within their estate and obtained a decree in the trial Court The Defendants appealed but on the death of one of the Plaintiffs pending the appeal leaving three sons and two grandsons by a predeceased son as his heirs the Appellants more than six months after his death got his sons only substituted in his place on a false representation that the deceased had died within six months At the hearing of the appeal they tried to bring the deceased s grandsons also on the record but failed to make out sufficient cause for their substitution after time and on the Respondents objection the order substituting the deceased s sons was vacated *Held* that though under O XXII r 4 Civil Procedure Code the appeal abated as against the heirs of the deceased Plaintiff only the result of such abatement was that the appeal was imperfectly constituted and in the absence of necessary parties the Court could not proceed to decide the appeal on the merits *Bejoy Gopal* v *Umesh Chandra 6 C W N 196 (1901) Tarif* v *Khatijannessa 10 C W N 981 (1906) Dharanjit* v *Chandeshwar 11 C W N 504 (1907) Basir* v *Fazel 19 C W N 290 (1914) Aminuddin* v *Tara Sankar 28 C L J 201 (1918) Sriram* v *Hridoy 29 C L J 461 (1917) Chundarsang* v *Khimabai I L R 22 Bom 718 (1897)* and *Upendra Nath* v *Sham Lal I L R 34 Calc 10 0 (1907)* referred to That assuming that the Court had power under O XLI rr 20 and 33 to add the representatives of the deceased Plaintiff as parties to the appeal this was not a case in which the power should be exercised *Upendra* v *Girindra I L R 25 Calc 565 (1898) Hudson* v *Basdeo I L R 26 Calc 109 s c 3 C W N 76 (1898)* and *Rupjaun* v *Abdul I L R 31 Calc 643 s c 8 C W N 496 (F B) (1904)* referred to *Quære* Whether the decisions in *Sibo Sundari* v *Raj Mohun 8 C W N 214 (1903)* and *Kirtibas Das* v *Umesh Chandra 14 C L J 61 (1911)* did not take an unduly comprehensive view of the powers of the common manager KALI DAYAL BHATTACHARJEE v NAGENDRA NATH PAKRASHI

24 C W N 44

———— O XXII rr 4 and 9—

See LIMITATION ACT 1908 s 5

I L R 36 All 235

———— O XXII r 5 (1882 Code s 367)—

See HINDU LAW—PARTITION

I L R 42 Bom 535

See s 115 I L R 42 Mad 76

———— O XXII, rr 5 and 6—

See O XXII R 3

I L R 1 Lah 493

———— O XXII, r 6 (1882 Code s 461)—

See DEFENDANT DEATH OF

I L R 38 Mad. 682

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— O XXII r 6 (1882 Code s 461)—concld

See EXECUTION OF DECREE

4 Pat L J 240

———— O XXII, r 7 (1882 Code ss 369 and 462)—*Compromise by guardian of a minor without leave of the Court followed by a decree—whether such decree is a nullity or only voidable—Limitation for a suit to set aside such a decree—Indian Limitation Act IX of 1908 Arts 44 91 95 120 Held* that if a compromise is entered into by a guardian on behalf of a minor without the leave of the Court and a decree is passed in accordance with the terms of the compromise such a decree is not a nullity but is voidable at the instance of the minor *Virupakshappa* v *Shidappa (I L R 26 Bom 109) Ganesha* v *Mul Chand (95 P R 1912 F B) and Muhammad Ibrahim* v *Allah Bakhsh (145 P R 1919)* followed *Hanuman Prasad* v *Muhammad Ishaq (I L R 28 All 137) and Partab Singh* v *Bhabuti Singh (I L R 35 All 487 P C)* distinguished *Held also* that a suit by the minor to set aside such a decree is governed by art 1 0 of the Limitation Act JITA SINGH v MAN SINGH

I L R 2 Lah 164

———— O XXII r 8—*Appeal—Insolvency of one appellant and death of the other—Abatement of appeal—Substitution of names—Limitation* Of two appellants in a civil appeal one died and the other became an insolvent Neither the representatives of the deceased appellant nor the official assignee applied within the time limited by the Court for substitution in place of the deceased appellant nor did the insolvent himself who was said to have compounded with his creditors apply The defendant on the other hand asked for the dismissal of the suit *Held* that there being no limitation provided for the Official Assignee to appear and apply for the restoration of his name on the record after the adjudication is annulled until an order is obtained under O XXI r 8 of the Code of Civil Procedure the proceedings cannot abate and must be deemed to continue KHUNNI LAL v LAL MESHAR

I L R 43 All. 621

———— O XXII, r 9 (1882 Code ss 371 and 372)—

See EXECUTION OF DECREE

4 Pat L J 240

See LIMITATION ACT 1908

I L R 36 All. 235

———— *Abatement of appeal—Application for substitution presented after time—Act No IX of 1908 (Indian Limitation Act) s 5* Whether or not a formal order to that effect is passed, a suit or appeal abates automatically when no application is made within time to bring upon the record the representative of a deceased plaintiff or appellant If no formal order has been made an application for substitution must be considered as an application under O XXII r 9 (2) of the Code of Civil Procedure Under the rule above mentioned a court is competent to decide whether in the circumstances of the case there is reason for allowing the application although presented beyond time without being confined to the circumstances given in s. 5 of the Indian Limitation Act 1908 LACHMI NARAIN v MUHAMMAD YUSUF I. L. R. 42 All. 540

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— **O XXII r 10 (1882 Code s 372)**—

See O I r 10 — 2 Pat L J 199

See O XXI r 16 — 6 Pat L J 358

See PARTIES — I L R 40 Calc 328

1 ——— *Assignee's application to be substituted for plaintiff and to add plaintiff's son as defendant—Ex parte order upon unsworn petition—Ex parte order if may be recalled—Notice to parties interested necessity of* A judicial order which may possibly affect or prejudice any party cannot be finally made unless he has been afforded an opportunity to be heard When a person alleging to be the assignee of the interests of the plaintiff applied to be substituted in his place and prayed that the plaintiff and his son who was no party to the suit be made defendants and the Court made the order as prayed *ex parte* and without notice to the plaintiff *Held* that all orders of this character made *ex parte* are subject to the implication that they may be revoked at the instance of any party prejudicially effected thereby and the Court has inherent power to give such directions as the justice of the case may require That it was incumbent on the Court to reconsider the order in so far as it directed the substitution of the applicant in the place of the plaintiff when the latter preferred objections to the order That the addition of the plaintiff's son who was no party to the suit (though he himself had consented to be so added) could not be made without hearing the defendant as the applicant appeared by that means to be really seeking a relief not included in the plaint as originally framed *Semble* Applications of this character should be supported by an affidavit AJANT SINGH *v* F T CHRISTIAN (1912)

17 C W N 86

2 ——— *Lease forfeiture of—Insolvency of a defendant—Vesting of his estate and effects in the Official Assignee—Refusal of Official Assignee to defend the suit—Inability of defendant to defend independently of the Official Assignee—Practice* In a suit by the lessor against the lessee for forfeiture of a lease by reason of breaches of covenant no cause of action survives against a defendant who has become insolvent and whose estate has vested in the Official Assignee If in such a case the Official Assignee refuses to defend a suit affecting the estate of the insolvent the latter cannot defend independently of the Official Assignee TRIBHOVANDAS NAROTAMDAS *v* ABDULALLY HAKIMJI (1914)

I L R 39 Bom 568

3 ——— *Preliminary decree—Sale of mortgaged property—Right of purchaser to be made a party to the suit* A preliminary decree for redemption of a usufructuary mortgage was passed in 1908 but there was an appeal and the decree of the High Court which confirmed the decree of the Court below was passed in 1910 and the time for payment of the mortgage money was extended After the time fixed for payment had expired but before the final decree was passed the plaintiff decree holder sold the mortgaged pro[illegible] ... ing with the purchasers a sum sufficient [illegible] *Held* that the suit was still pend[illegible] ... f the sale and the purchasers [illegible] ... th r names entered in the record [illegible] ... *Kh... v ...ilkanta* Ganguli 9 C W N 171 referred to MUHAMMED MASIH ULLAH *v* JARAO BAI (1915)

I L R 37 All 226

——— **O XXII r 10 (1882 Code s 372)** —*contd*

4 ——— *Whether r 10 includes leases granted pendente lite—addition of lessees pendente lite to the proceedings* The language of r 10 of O XXII of the Code of Civil Procedure 1908 is sufficiently wide to cover the case of leases granted by defendants during the pendency of a case Where the defendants during the pendency of the litigation had leased several mica mines included in the property in suit for a period of 20 years to one person and for a shorter period to another person *held* that interests were created in the property in suit within the meaning of r 10 of O XXII in favour of the lessees and that the plaintiffs were entitled to have the lessees added as parties to proceedings taken to ascertain the mesne profits due to the plaintiffs under the decree in the suit and to compel the lessees to account for any profits which they had received from the land RAM KUMAR LAL BHAGAT *v* RAJA MAKUND SAHI — 1 Pat L J 596

——— **O XXII rr 10 and 13**—

See s 47 — 4 Pat L J 166

——— **O XXII r 11 (1882 Code s 582)**—

See LIMITATION ACT 1908 ART 182 — 5 Pat L J 731

——— **O XXII, r 12**—

See O XXII r 4 — 25 C W N 595

——— **O XXIII r 1 (1882 Code s 373)**—

See s 115 — I L R 44 Calc 454

1 R J

See CONTRACT ACT IX OF 1872 ss 131 137 — I L R 39 Bom 52

See JURISDICTION (MEANING OF) — I L R 48 Calc 138

See LETTERS PATENT 1865 CL. 15 — I L R 45 Bom 377

See LIMITATION — I L R 46 Calc 168

See PROBATE — 2 Pat. L J 535

See WITHDRAWAL OF SUIT — 3 Pat L J 651

——— *Withdrawal without permission—Suit for ejectment—Insufficiency of notice to quit—Withdrawal of the suit without permission of the Court—Fresh suit after proper notice—Whether the previous suit a suit for the same subject matter—Res Judicata—Subject matter meaning of* A suit was brought by the plaintiff to eject the defendant Finding however that there was no sufficient notice to quit he withdrew the suit without obtaining the leave of the Court Subsequently the plaintiff having given a formal notice to quit brought a fresh suit for ejectment The defendant contended that the withdrawal of the former suit without permission operated as a bar to the second suit under O XXIII r 1 of the Civil Procedure Code 1908 *Held* that the withdrawal did not operate as a bar as the previous suit was not a suit for the same subject matter as the second suit within the meaning of O XXIII r 1 of the Civil

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

—— O XXIII r 1 1882 Code s 373) —*contd*

Procedure Code 1908 Subject matter means the series of acts or transactions alleged to exist giving rise the relief claimed RAKHMABAI v MAHADEO NARAYAN (1917) I L R 42 Bom 155

—— *Withdrawal of suit when to be allowed* Courts in India have no general power of dismissing a suit with liberty to the plaintiff to bring a fresh suit on the same matter The only power they have in this respect is that given by O XXIII r 1 sub r (2) Civil Procedure Code It is not the object of that Rule to enable the plaintiff after he has failed to conduct his suit with proper care and diligence and after his witnesses have failed to support his case to obtain the opportunity of commencing the trial fresh in order to avoid the result of his previous misconduct of the case and so to prejudice the opposite Party HIRA LAL MITRA v UDOY CHANDRA DEY (1912) 16 C W N 1027

—— *Trial of a suit—Close of the trial after recording all evidence produced by both parties—Time given to the plaintiff to produce more documents—Plaintiff s application to withdraw the suit with permission to bring a fresh one—Grant of the permission for fresh suit—Material irregularity in the exercise of jurisdiction* After the case for both the plaintiff and the defendant had been closed and all their witnesses had been examined the Court gave time to the plaintiff to adduce documents to counteract the effect of the documents already produced by the defendant On the plaintiff s inability to adduce the documents on the appointed day he applied for leave to withdraw from the suit with permission to file a fresh one on the same cause of action and the Court having passed an order granting the leave *Held* setting aside the order that the Court acted with material irregularity in the exercise of its jurisdiction The hearing was finished and it was improper to allow plaintiff to try and produce documents to counteract the defendant s documents The plaintiff s failure to produce the documents was not a sufficient ground to put the defendant to the trouble and annoyance of a fresh suit BAI KASHIBAI v SHIDAPA ANNAPA (1913) I L R 37 Bom 682

—— *Appellate Court powers of—Withdrawal of suit* *Held* that an Appellate Court can under O XXIII r 1 of the Code of Civil Procedure (1908) give a plaintiff whose suit has been dismissed by the Court of first instance permission to withdraw his suit and give him leave to institute a fresh one *Ganga Ram v Data Ram I L R 8 All 8* followed *Choragudi Chinna Kotayya v Raja Varada Raja Appa Row 27 Mad L J 244* and *Eknath v Ranoji I L R 35 Bom 261* dissented from AFZAL BEGAM v AKBARI KHANUM (1915) I L R 37 All 326

—— *Withdrawal of a suit in Appellate Court—Power of the Court to allow permission to withdraw with liberty to file a fresh suit—Jurisdiction* An Appellate Court can when an appeal has been admitted and when both parties are represented before it allow the plaintiff to withdraw his case on proper terms and allow him to start afresh *Eknath v Ranoji (1911) 35 Bom 261* distinguished CHHANUBHAI MANSUKH v DAHYABHAI GOVIND (1919) I L R 44 Bom 598

CIVIL PROCEDURE CODE (ACT V OF 19[08]) —*contd*

—— O XXIII r 1 (1882 Code s 3[73]) —*concld*

—— *Order for withdrawal of a suit with liberty to bring a fresh suit made without jurisdiction when passed under circumstances not contemplated by the rule* An order [for] withdrawal of a suit with leave to institute a fr[esh] *suit made under O XXIII r 1 (2) Civil Proced[ure]* Code but in circumstances not within the sc[ope] of the Rule cannot be treated as an order m[ade] *without jurisdiction* such an order is consequen[tly] not null and void A fresh suit instituted u[pon] leave so granted is not incompetent The Co[urt] *trying the subsequent suit is not competent* [to] enter into the question whether the Court wh[ich] granted the Plaintiff permission to withdraw [the] first suit with liberty to bring a fresh suit had p[ro]perly made such order HRIDAY NATH ROY v P[...] CHANDRA BARNA SHARMA 24 C W N [...]

—— *Inability to produce important evidence is not sufficient ground [for] granting permission to withdraw a suit with libe[rty] to file a fresh one on the same subject matt[er]* UCHANT AHIR v BASAWAN AHIR 6 Pat L J 1[...]

—— *Application to withdraw from suit with liberty to sue again—Court may grant application but without liberty* Wh[ere] the trial Court being of opinion that no suffic[ient] ground had been made out for allowing the plain[tiff] to withdraw from the suit with liberty to institu[te] *a fresh suit in the same cause of action* pa[ssed] order allowing him to withdraw without su[ch] leave *Held* that the suit was not disposed of [by] the order Where a plaintiff does not desire [to] withdraw from the suit unless with liberty to bri[ng] a fresh suit and the Court considers that su[ch] liberty ought not to be granted the proper cou[rse] is simply to dismiss the application *Mol[...] Bılarıda jı Guru Govinda jı v Parshotama[...] Ramdas I L R 32 Bom 345* followed SUR[...] DHANI DEBYA v CHANDRA NATH PRAMANIK (191[...]) 20 C W N 10[...]

—— *Suit dismissed by tri[al] Court on evidence allowed to be withdrawn w[ith] liberty to sue again by appeal Court though no form[al] defect by reason of which suit might fail was ma[de] out—Fresh suit if barred—Res judicata* Where [a] contested suit in which evidence was called [on] both sides having been dismissed by the tr[ial] Court the plaintiff was allowed by the Appella[te] Court to withdraw from the suit with liberty [to] bring a fresh suit though no formal defect [by] reason of which the suit would fail was made o[ut] and really because the plaintiff was unable to pr[o]duce the necessary evidence in time *Held* th[at] the order of the Appellate Court was made witho[ut] jurisdiction and a subsequent suit in respect [of] the same property and in which the same rel[ief] was prayed for was barred by the rule of *[res] judicata* The sufficient grounds for permi[tting] withdrawal with liberty to bring a fresh suit [on] the same cause of action referred to in cl (b) [of] r 1 O XXIII of the Civil Procedure Code mu[st] be something of the same nature as the "form[al] defect" mentioned in cl (a) *Kha da Co., Ld [v] Durga Charan Cha dra 11 C L J 45* and *Mabul[...] Sardar v Hemangini Dei 11 C L J 51* follow[ed] KALI PRASANNA SIL v PUNCHANAN NANDI CHO[W]DHURY (1916) 20 C W N [...]

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— O XXIII, r 1 (2) (a) and (b) O VII, r 10 and s. 115—*Withdrawal of suit—Suit grossly under valued in the plaint—Real valuation beyond the jurisdiction of the District Munsif's Court—Application by plaintiff for leave to withdraw portion of the suit with liberty to bring fresh suit—Leave whether properly can be granted—Judicial discretion—Jurisdiction—Ejusdem—generis—Material irregularity in exercise of jurisdiction—Other sufficient grounds in O XXIII r 1 (2) (b) construction of* The plaintiffs instituted a suit in a District Munsif's Court for recovery of possession of several items of immoveable property including a house valuing the house at Rs 200 and other items at Rs 1 917 and odd for purposes of jurisdiction The defendant objected that the house was grossly under valued and that the suit was on proper valuation beyond the jurisdiction of the District Munsif A commissioner appointed to ascertain its value reported that the house alone was worth Rs 6,000 The plaintiff thereupon applied to the Court for leave to withdraw the suit in respect of the house with liberty to bring a fresh suit therefor the Court granted the application notwithstanding the objection of the defendant The latter preferred a Civil Revision Petition to the High Court against the order *Held* that assuming that the lower Court had jurisdiction to act under O XXIII r 1 (2) (b) it acted with material irregularity in the exercise of its jurisdiction as it did not exercise a *judicial discretion* in passing the order that the plaintiff ought not to have been permitted to withdraw his claim for the house as the undervaluation in the plaint was so gross that he could not have acted honestly in doing so and did not deserve any indulgence from the Court and that consequently the High Court should interfere under s 115 of the Civil Procedure Code and set aside the order *Per* SADASIVA AYYAR J The words other sufficient grounds O XXIII r 1 (2) (b) should not be interpreted *ejusdem generis* with formal defect in r 1 (2) (a) Limits of the doctrine of *ejusdem generis* discussed. After a Court of first instance has come to the conclusion that the suit as brought is beyond its jurisdiction, it has no power to pass any other judicial order in the suit except those which the statute expressly empowers it to pass such as an order returning the plaint for presentation to the proper Court under O VII r 10 or an order awarding costs under s 35 of the Code KANNUSWAMI PILLAI v JAGATHAMBAL (1918)

I. L. R 41 Mad. 701

———— O XXIII, r 1 (3)—*Suit by reversioners to declare an alienation invalid during widow's lifetime without avowal of—Subsequent suit after widow's death for possession—Defence the same as in the first suit—Suit not barred by Civil Procedure Code O XXIII r 1 (3)* The next presumptive reversioners of a deceased Hindu instituted a suit against his widow and her alienee for a declaration that an alienation by her was invalid and not binding on them Pending the suit the widow died and the reversioners withdrew the suit but did not ask for permission to bring a fresh suit. They subsequently brought a suit against the alienee for the recovery of possession of properties [illegible] set up the very same defences on the [illegible] which he had set up in the first suit.

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— O XXIII r 1 (3)—*concld*

Held that the subsequent suit was not barred by the provision of O XXIII r 1 (3) Civil Procedure Code (Act V of 1908) Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit the second suit cannot be considered to have been brought in respect of the same subject matter as the first suit and the plaintiff in the second suit is not debarred from contesting the allegations made by the defence in the first suit *Gopal Chandra Banerjee v Purna Chandra Banerjee 4 C W N 110* followed. *Achuta Menon v Achutan Nair I L R 21 Mad 55 Machana Uajhala Dikshatulu v Goruvantulu Yagamma (1910) Mad W N 782* and *Senrava Peddiar v Venkatachala Peddiar 2 M L W 1*, overruled. SINGA PEDDI v SUBBA PEDDI (1915)

I L R 39 Mad 987

———— O XXIII, r 1 and s 107 (2)—*Whether an Appellate Court has power to allow the withdrawal of the suit with liberty to file a fresh suit* *Held* by the Full Bench that it is open to an Appellate Court in proper cases when reversing the decree of the lower Court to give the plaintiff leave to withdraw the suit with liberty to file a fresh suit *Chorugudi Chira Kolayya v Raja Varadaraja Appa Row 27 Mad L J 244* over ruled KALAYYA v PAPAYYA (1916)

I. L R 40 Mad. 259

———— O XXIII, r 1 s 115—*Application by plaintiff to withdraw suit with leave to bring a fresh one made when hearing of suit was nearly concluded—Leave granted to bring a fresh suit—Exercise of discretion—Revision* A suit was instituted in the Court of the Munsif After the evidence had concluded and either during or after the argument the plaintiffs applied for leave to withdraw with liberty to bring a fresh suit They based their application upon the fact that they had failed to give formal proof of a plan which was essential to their success The Court granted leave to bring a fresh suit Upon an application in revision against this order *Held* that the Court had jurisdiction to grant leave to the plaintiffs to bring a fresh suit and the fact that the Court may have exercised and probably did exercise a wrong discretion in granting the plaintiffs application was not sufficient to bring the case within the purview of s 115 of the Code of Civil Procedure JHUNKU LAL v BISHESHAR DAS (1918)

I. L. R. 40 All. 612

———— O XXIII, r 2—
See HINDU LAW —PARTITION
I. L. R 48 Calc. 1050

———— O XXIII, r 3, (1882 Code, s. 375)—
See ARBITRATION 25 C W N 127

See COMPROMISE.
3 Pat. L. J 43 and 255

See DEKKHAN AGRICULTURISTS RELIEF ACT s 15 B I. L. R. 37 Bom. 614

See HINDU LAW—PARTITION
25 C. W N 99.

See PROBATE AND ADMINISTRATION ACT s 83 1 Pat. L. J 377

1. ———— *Compromise—Terms outside the scope of the suit, recorded in the*

CIVIL PROCEDURE CODE (ACT V OF 1908) *contd*

—— O XXIII, r 3 (1882 Code s 375)—*contd*

decree—Decree so far as it relates to the suit effect of—Terms forming consideration for those relating to the subject matter of the suit—Decree not ultra vires —Objection in execution maintainability of—Contract Act (IX of 1872) ss 38 and 54—Reciprocal promises—Non performance by one party wrongfully —Consequent non performance by the other rightfully effect of—Contract at end—Compensation—Offer of performance essentials of—Conditional offer—Offer to release without executing release deed insufficient The plaintiff sued to recover a sum of money on a simple money bond executed by the first defendant and the father of the second and third defendants The parties entered into a compromise by which the disputes between them including the claim in the suit were adjusted and a decree was passed in the suit in accordance with the compromise so far as it related to the suit Under the compromise the defendants agreed to get a release of certain properties which had fallen to the share of the plaintiff in a partition between the plaintiff and the first defendant and some other properties purchased by the former from the latter from the claims of a mortgagee (decree holder) of the same on the plaintiff depositing in Court within a certain time a sum of money for payment to the mortgagee towards his decree The plaintiff failed to deposit the amount The defendants gave notice to the plaintiff by a posted letter offering to get a release of the properties if the plaintiff paid the amount in one week but the plaintiff did not pay the amount The third defendant took an assignment of the mortgage decree brought the properties to sale in execution and purchased them in auction The defendants applied in execution of the compromise decree to recover a sum of money as due to them under the compromise alleging that they had performed or offered to perform the conditions laid on them under the compromise The plaintiff contended that the defendants could not recover the amount as the claim for it could not be deemed to have been included in the decree and if it were included the decree was *ultra vires* and further that the defendants having failed to fulfil their part of the agreement were not entitled to enforce the other terms of the compromise *Held* that all the terms recorded in the compromise decree which formed part of the consideration for the adjustment of the subject matter in the suit must be deemed to be part of the decree and can be enforced in execution proceedings A compromise decree even if it includes matters beyond the scope of the suit is not *ultra vire* and no objection can be taken to the enforcement of the same in execution proceedings. When the parties to a contract fail to perform their reciprocal promises the one wilfully and the other because he was not bound to fulfil his part unless the former had fulfilled his preliminary part the contract itself come to an end by the acts of both the parties except for the purpose of enabling the innocent party to claim compensation from the other An offer of performance must be unconditional, if it is to have the same effect as performance A mere offer by a posted letter that the party liable was ready to execute a release without having a document of release ready is not a valid offer under s. 38 of the Contract Act. *Held* (on the facts of the case) that though the plaintiff failed to pay the money into Court as the defendants failed to fulfil their part of the agreement to make a valid unconditional offer to perform the same and as the defendants disabled themselves from performing their part by reason of the purchase of the properties by the third defendant the defendants were not entitled to enforce the other terms included in the compromise decree SABAPATHY *v* VANMAHALINGA (1914) **I L R 38 Mad 959**

2 —————— *Lawful com promise—Hindu Law—Office of archaka alienation of—Custom validity of—Disqualification of females to perform duties of—Right of females to inherit—Performance of duties by proxy—Public policy—Undue influence—Low price effect of—Contract Act (IX of 1872) s 16 cl (?)* Where the parties to a suit instituted in respect of a half share in the *archaka* miras in a Saivite temple entered into a compromise during the pendency of a Second Appeal in the case by which one of the parties alienated for a pecuniary benefit a portion of his right to the office in favour of the other party (who was a female) and the latter applied by a petition to the High Court to pass a decree in accordance with the compromise *Held* that the compromise was not lawful and that no decree could be passed in accordance therewith under O XXIII r 3 of the Civil Procedure Code *Per* SADASIVA AYYAR *J* An alienation of a religious office by which the alienor gets a pecuniary benefit cannot be upheld, even if a custom is set up sanctioning such an alienation It is the settled custom that females by reason of their sex are permanently disqualified from performing the duties of an *archaka* in a Saivite temple A person who is permanently disqualified to do the duties of an office cannot inherit the office while at the same time delegating the duties to other whether the permanent disqualification is the result of conversion to any other religion or insanity or sex A trusteeship for secular purposes can be held by a female The fact that a person is obliged to part with his property for what he considers an unduly low price owing to his pressing necessities is no a ground for holding that the contract is vitiated by undue influence SUNDARAMBAL AMMAL *v* YOGAVANAGURUKKAL (1914) **I L R 38 Mad. 850**

3 —————— *Compromise —Petition of compromise filed in suit's question of—Registration—Registration Act (XVI of 1908) s 17* In a suit for a declaration of title to certain immovable property the plaintiff applied to the Court stating that the suit had been compromised and asking that a decree might be made under O XXIII r 3 of the Code of Civil Procedure In support of this application he filed a copy of a petition which had been presented shortly before by both parties to the Revenue Court in proceedings for mutation of names in respect of the same property as was in the dispute in the Civil Court, and which set forth that the matter before the Revenue Court had been compromised in the manner therein stated. The petition had been accepted and acted upon by the Revenue Court *H* [illegible] petition was evid ence in the Civil C[illegible] matter in dispute between the part[illegible] [illegible]ed out of Court,

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXXII r 7, (1882 Code 462)— *concld*

proceedings there seems to be a distinction between a case where minor s liability has been determined by a decree in his father s life time and a case where the minor s liability in the first instance is in dispute For in the former case there is a debt which the guardian is clearly entitled to pay off in full and the fact that the judgment creditor has issued execution against the minor making an outsider his guardian *ad litem* does not alter the situation *Per* HEATON J O XXXII r 7 Civil Procedure Code 1908 implies that during the *continuance of the proceedings in Court the dispute* between the minor and another party which the Court had to decide could not be compromised except by the guardian *ad litem* of the minor and by him only with the leave of the Court GURMALLAPPA v MALLAPPA MARTANDAPPA (1919)

I L R 44 Bom 574

——— *Held* whether or not the order applies to execution proceedings its principle applies and in this case when minors were concerned in a compromise recorded in proceedings to set aside the execution proceedings the omission to record the Court s sanction did not render the compromise void especially as the minors were not prejudiced PANGULAM SAHU v SAM SARAI DAS 5 Pat L J 379

——— It cannot be inferred that the Court has sanctioned a compromise within the meaning of this order merely because the petition of compromise gave notice to the Court that interests of minors were going to be *effected and that the Court passed a decree in* accordance with the compromise PANCHULAM SAHU v DURGA PERSHAD (1921) 6 Pat L J 190

——— *Minor—Next friend—Compromise in suits—Necessity for order of Court specially permitting next friend to enter into compromise on behalf of minor* Where a compromise in a suit is entered into on behalf of minors appearing by a next friend it is necessary to the validity of such compromise that there should be on the record a specific order of the Court giving leave to the next friend to enter into the compromise on behalf of the minors *Manohar Lal v Jadunath Singh I L R 28 All 58* distinguished BADRI PRASAD v GOPAL BIHARI LAL (1919)

I L R 41 All 553

——— O XXXII r 7 Sch II (20)—*Minor—Arbitration—Reference to arbitration out of Court by minor s guardian—Award—Application by the guardian to have the award filed—Application not an agreement with reference to suit—Minor not entitled to protection of O XXXII r 7* A dispute to which a minor was a party was submitted to arbitration out of Court by the minor s mother After the award was published the mother on behalf of her minor son applied to the Court under cl 20 of the Second Schedule of the Civil Procedure Code 1908 to have the award filed in order that a decree might be passed on such award The other party did not object to such filing and the award was accordingly filed and a decree passed thereon Subsequently the minor through his mother sued to set aside the decree The trial Court dismissed the suit In appeal as the Court was of the opinion that there was a conflict between the case of *Mahadev Balkrishna*

CIVIL PROCEDURE CODE (ACT V OF 1908) *contd*

——— O XXXII, r 7 Sch II (20)—*contd*

Kelkar v Krishnabai (1896) P J 609 and the case of *Vithaldas v Dalaram I L R 26 Bom 298* the following question was referred to a Full Bench When a dispute to which a minor is a party has been submitted to arbitration out of Court and the award made upon such submission has been brought into Court under cl. 20 of the Second Schedule Civil Procedure Code and the Court has been asked to file it and thereafter pass a decree upon it neither party objecting is not the Court bound to sanction this agreement to have the award filed and a decree passed upon *it as for the benefit of the minor* and so also to certify the decree ? and if the Court fails to do so is not the minor entitled to the protection of O XXXII r 7 of the Civil Procedure Code ? *Held* the question must be answered *in the negative* *Held* further that there was no conflict between the cases of *Mahadev Balkrishna Kelkar v Krishnabai (1896) P J 609* and *Vithaldas v Daltiram I L R 26 Bom 298* HANMANTRAM PADHAKISON v SHIVNARAYAN (1918)

I L R 43 Bom 258

——— O XXII r 8—*Appeal—Insolvency of one appellant and death of the other—Abatement of appeal—Substitution of names—Limitation* Of two appellants in a civil appeal one died and the other became an insolvent Neither the representatives of the deceased appellant nor the official *assignee applied within the time limited by the* Court for substitution in place of the deceased appellant nor did the insolvent himself who was said to have compounded with his creditors apply The defendant on the other hand asked for the dismissal of the suit *Held* that there being no limitation provided for the Official Assignee to appear and apply for the restoration of his name on the record after the adjudication is annulled until an order is obtained under O XXI r 8 of the Code of Civil Procedure the proceedings cannot abate and must be deemed to continue KHUNI LAL v RAMESHAR

I L R 43 All 621

——— O XXXIII, r 1 (1882 Codes 401)—

See O I r 3 I L R 24 Bom 358

See O XXI r 1

I L R 36 Bom 415

1 ——— Company—*Official liquidator right of to apply for leave to sue in forma pauperis—Person definition of —General Clauses Act (X of 1897) whether applicable to O XXXIII—Explanation to r 1 and r 3 of O XXXIII construction of* An official liquidator of a company is competent to apply for leave to sue *in forma pauperis* on behalf of the company under O XXXIII of the Civil Procedure Code if the company is a pauper within r 1 thereof The reference to necessary wearing apparel in the explanation to *r 1 and the provisions of r 3 requiring present*ation of petition by applicant in person in O XXXIII do not necessarily exclude the application of the Order to a company and the definition of person as including a company under the General Clauses Act (X of 1897) applies to O XXXIII of the Code as there is nothing in the definition which is repugnant to the subject or context of the Order The fact that the liquidator in his personal capacity is not a pauper does not

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O XXXIII r 1, (1882 Code s 401)—concld

affect the question nor does the fact that the liquidator receives a commission on collections realized make him a person interested in the subject matter of the suit within cl (e) r 5 of O XXXIII *Cortes* v *Kent Water Works Company* 7 *B & C 314* and *Venkatanarasayya* v *Achemma I L R 3 Mad 3* followed *In the matter of the will of D mubai I L R 18 Bom 93* and *Manaji Rajuji* v *Kandoo Baloo I L R 36 Bom 279* distinguished PERUMAL GOUNDAN v THIRUMALARAYAPURAM JANANUKOOLA DHANA SEKHARA SANGHA NIDHI (1917)

I L R 41 Mad 624

2 ——— Inquiry—*into pauperism—Claim for redemption of mortgage—Applicant able to raise money upon security of equity of redemption* *Held* that a plaintiff seeking to sue for redemption in *forma pauperis* cannot claim to sue as a pauper so long as he can raise money on his equity of redemption and that in so doing he will not in effect be mortgaging his claim *Vedanta D sikacharyulu* v *Perundevamma I L R 3 Mad 249* distinguished KAPIL DEO SINGH v RAM PIKHA SINGH (1910)

I L R 33 All 237

3 ——— Death of plaintiff—*Right of executor who is not a pauper to continue the suit in* forma pauperis The privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation and there seems to be no authority whatever for holding that the representative of a pauper is entitled to continue the suit of his testator or testatrix even though admittedly he is not a pauper simply because his testator or testatrix was a pauper MANAJI RAJUJI (RAO SAHEB) v KAHANDOO BALOO (1911)

I L R 36 Bom 279

——— O XXXIII rr 1 2 and 5—*Application to sue as pauper—Disqualification—Subject matter of suit—Cause of action—Civil Procedure Code (Act V of 1908) O XXXIII rr 1 2 and 5* A mortgagor applied for permission to institute a suit as a pauper for the setting aside of a sale of the mortgaged property by the mortgagee with an alternative claim for damages The mortgagee admitting there was a surplus due to the applicant after the mortgage debt had been satisfied paid Rs. 101 into Court and contended that the applicant was not a pauper and further that the applicant disclosed no cause of action *Held* that the applicant was a pauper within the meaning of the Explanation to O XXXIII r 1 of the Civil Procedure Code (Act V of 1908) but that the allegations contained in the application did not disclose a cause of action *Dwarkanath* v *Madhavrao I L R 10 Bom. 0* not followed FATMABAI v DOSSABHOY RUSTOMJEE UMRIGAR (1909)

I L R 34 Bom 638

——— O XXXIII, rr 2, 5 (a) and 15—*Pauper suit—application for permission deemed because not accompanied by schedule of property—whether second applicat on is barred* The petitioners applied for permission to sue as paupers. This application was rejected because it was not accompanied by a schedule of moveable and immoveable property belonging to the applicants—*vide* rr 2 and 5 of O XXXIII of the Code of Civil Procedure. They then presented a second application for permission which was rejected as barred under r 15 of the same order *Held* that r 15 of O XXXIII of the Code does not bar a second application where the first application was rejected under r 5 (a) *Hoon v Sit Shein (4 Indian cases 803 F B)* referred to *Hul Chandra Sen* v *Raj Peary Mohon Mookerji (33 Indian Cases 81)* distinguished MUSSAMMAT BAI KAUR v SHIB DAS

I L R 1 Lah 151

——— O XXXIII rr 4 5 7 (1882 Code ss 403 407 and 409)—

See PAUPER SUIT I L R 46 Calc 851

——— O XXXIII r 5 (1882 Code 405 and 407)—*Application for leave to sue in forma pauperis—Question to be decided by Court before granting leave—Limitation—Doubtful question—Difference of judicial opinion—Duty of Court* Upon an application for leave to sue in *forma pauperis* the Court is not justified in determining at the stage contemplated by O XXXIII r 5 of the Civil Procedure Code a question of limitation as to which there has been considerable difference of judicial opinion O XXXIII r 5 (d) applies only to cases where the allegations of the petitioner do not show a cause of action and this should appear *clearly upon the face* of the petition COVINDASAMI IYER v MUNICIPAL COUNCIL KUMBAKONAM (1917) I L R 41 Mad 620

——— O XXXIII rr 5 6—*Whether next friend of pauper minor plaintiff should prove his own pauperism* The father as next friend of a girl of about two years of age applied for leave to sue in *forma pauperis* for damages for serious bodily injuries received by her The Court rejected the application under O XXXIII r 5 Civil Procedure Code on the ground that the next friend the father of the applicant was not a pauper *Held* that the order should be set aside and the matter inquired into under O XXXIII r 6 of the Civil Procedure Code AMIRMONI v SECRETARY OF STATE FOR INDIA (1910)

23 C W N 955

——— O XXXIII r 7 (1882 Code s 409)—*Shebait personally indigent and not possessed of idol's properties may apply for leave to sue in* forma pauperis *to recover idol's property in hands of co shebaits contesting suit* A *shebait* applied for leave to sue in *forma pauperis* to recover certain endowed properties which he alleged some of the defendants who were his *co shebaits* had illegally alienated in favour of the other defendant Neither in his personal capacity nor as *shebait* was he possessed of sufficient means to enable him to pay the court fees prescribed for the plaint *Held* in revision, that the application could not be rejected merely because the *shebait* defendants held properties of the idol sufficient to pay the requisite court fees. NANDA LAL CHATTERJEE v DWARKA NATH DAS (1911)

16 C W N 93

——— O XXXIII, r 8 (1882 Code s 410)—*Application to sue in forma pauperis not determined—Attachment before judgment if may issue* No order of attachment before judgment can be made at the instance of a person who has applied for leave to sue in *forma pauperis* before his application been judicially

CIVIL PROCEDURE CODE (ACT V OF 1908) —concld

——— O XXXIII r 8 (1882 Code, s 410) —concld

determined in his favour O XXXIII, r 8 clearly shows that there is no suit in existence until the application to sue *in formâ pauperis* has been granted PURNA CHANDRA CHABRI v TARA PRASAD MAITY (1916) 21 C W N 870

——— O XXXIII rr 10 11 (1882 Code s 411)—*Stamp duty on a pauper's plaint—Decree for less than the amount claimed* In a suit brought *in formâ pauperis* the plaintiff succeeded only in part and failed as to the rest of the claim the lower Court ordered the defendant to pay the entire costs incurred by the plaintiff including the amount of court fees which would have been payable on the plaint *Held* that the court fees payable on the plaint should be apportioned under the provisions of rr 10 and 11 of O XXXIII of the Code of Civil Procedure *Chandrabai v Secretary of State for India I L R 14 Mad 163* followed CANGA DAHAL RAI v MUSAMMAT GAURA (1916)

I L R 38 All 469

——— O XXXIII rr 10 and 13—

See s 47 4 Pat L J 168

——— O XXXIII, r 13—*Civil Procedure Code (Act XIV of 1882) s 412—Suit in formâ pauperis—Settlement of suit out of Court—Court passing no order for payment of Court fees—Government applying for the payment—Practice and procedure.* A suit for partition brought *in formâ pauperis* was settled out of Court On the 7th October 1908 the Court dismissed the suit but made no order for the payment of Court fees under s 412 of the Civil Procedure Code of 1882 At that date Government had ninety days time within which to apply to the High Court under its extraordinary jurisdiction Before the expiry of the period the new Civil Procedure Code came into force The Government thereupon applied to the Court under O XXXIII r 12 for an order as to payment of Court fees but the Court declined to make the order On appeal *Held* (i) that the order passed by the Court under O XXXIII r 12 was an order within the meaning of s 47 and it was therefore appealable (ii) that before the expiry of the period within which the Government could have applied to the High Court under the old Code the new Code had come into force and by it the Government were enabled to apply to the Court for an order under r 12 of O XXXIII (iii) that the suit having been dismissed there was a failure of it and the right accrued to Government to have the Court fee from the party defeated SECRETARY OF STATE FOR INDIA v NARAYAN (1911) I L R 35 Bom 448

——— O XXXIII r 15—*Application to sue in formâ pauperis effect of rejection under r 5—Distinction of way between orders under r 5 and r 6* On the rejection of an application for leave to sue as pauper the only course open to the applicant is to institute a suit in the ordinary way There is no distinction between rejection under r 5 and an order of refusal under r 7 ATUL CHANDRA SEN v RAJA PEARY MOHAN MOOKERJEE (1915)

20 C W N 663

——— O XXXIV (Transfer of Property Act 1882, s 85 to 90)—

See MORTGAGE 37 Calc 907

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O XXXIV (Transfer of Property Act 1882 ss 85 to 90)—concld

See PALAS OR TURNS OF WORSHIP I L R 42 Calc 455

See TRANSFER OF PROPERTY ACT, 1882 s 88 I L R 34 All 72

——— *Mortgage suit application for decree absolute in—Limitation—Scope and effect of Order* The decree in a mortgage suit was made when the Civil Procedure Code of 1882 was in force The application for making the decree absolute was made more than 12 years after the date of the decree and after the Civil Procedure Code of 1908 came into operation *Held* that prior to the Code of 1908 there was no period of limitation within which a plaintiff was bound to apply for the order absolute for sale in a suit brought for sale of the mortgaged property and the provisions of O XXXIV of the First Schedule to the Code of Civil Procedure 1908 which repealed ss 85 to 90 of the Transfer of Property Act do not apply so as to take away a vested right which the plaintiff had of applying to have the decree for sale made absolute and the application filed by him was not barred by limitation *Gopeshur Pal v Jiban Chandra 18 C W N 804* followed KISTA BAR v BANAMOYI DEBIA (1914)

19 C W N 470

——— *Limitation Act (IX of 1908) Sch I Art 181—Consent decree—Instalments—Application for decree absolute for sale—Limitation* An application for a decree absolute for sale of a mortgage charge under the terms of a consent decree which provided for satisfaction of the decretal debt by instalments is an application under the Civil Procedure Code (Act V of 1908) O XXXIV and is governed by Article 181 Sch. I of the Limitation Act (IX of 1908) Such application must be made within three years from the time the right to apply accrues. DATTO ATMARAM v SHANKAR DATTATRAYA (1913)

I L R 38 Bom 32

——— O XXXIV r 1 (Transfer of Property Act, 1882 s 85)—

See O I r 9 1 Pat L J 468

See O I r 10(2) I L R 45 Bom 1009

See O XXI r 103 I L R 43 Mad 898

See HINDU LAW—JOINT FAMILY

I L R 34 All. 549 572

2 Pat L J 305

See HINDU LAW MORTGAGE

I L R 42 Calc 1068

See MORTGAGE I L R 37 Calc. 907

See TRANSFER OF PROPERTY ACT 1882 ss 88 AND 89 I L R 40 Bom 331

———— *Mortgage suit—All persons interested in the mortgage to be parties to the suit—Some only of the heirs of mortgagor joined as parties—Suit not bad for non joinder of parties* The plaintiff a mortgagee sued to recover the mortgage debt by sale of mortgaged properties The original mortgagor who was a Mahomedan having died before the suit only his widow and daughters were made defendants. It was contended that the suit was bad for non joinder of other heirs of the mortgagor viz his brother and

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd*

——— **O XXXIV r 1 (Transfer of Property Act 188? s 85)**—*contd*

sister s children *Held* that the non joinder of parties was not fatal to the suit ina much as the suit was properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded SHAHASAHEB v SADASHIV SUPDU (1918)

I L R 43 Bom 575

2 ——— *Mortgage suit—non joinder of partie —joinder of parties after expiration of period of limitation* r 1 of O 1 of the Code of Civil Procedure 1908 is subordinate to r 1 of O XXXIV A mortgage is indivisible and if all the parties entitled to a share in the money due on the mortgage are not upon the record the suit must be dismissed in its entirety When a necessary party has not been impleaded at the time of the institution of the suit but has been brought on the record after the period of limitation has expired the whole suit must be dismissed When it is intended to sue in the name of a managing member of a joint Hindu family governed by the *Mitakshara* on account of a breach of contract made by a former managing member of the family it must be clearly stated in the plaint that the suit is by that managing member It is not sufficient that he should be accidentally on the record as one out of many members of the family of whom several have been omitted CHEWAR NARAIN MAHTON v MUSSAMMAT MAKBUNESSA 1 Pat L J 408

3 ——— *Mortgage—redemption—parties in possession claiming independently of the mortgage whether necessary parties* The plaintiff as a purchaser of the equity of redemption filed a suit for redemption of a mortgage in favour of defendant No 1 To this suit defendants Nos 2 and 3 were added as parties in possession under O XXIV R 1 Civil Procedure Code 1908 These defendants were not in possession through defendant No 1 and they claimed independently of the mortgage A question being raised whether defendants Nos 2 and 3 were necessary parties *Held* that as these defendants claimed independently of the mortgage and against both the mortgagor and the mortgagee they could not be proper parties to the suit which was a redemption suit SATAGAUDA APPANNA v SATAPA (1919)

I L R 44 Bom 698

4 ——— *Mortgage—Suit for sale—Intentional non joinder of subsequent mortgagee—Effect of such non joinder* Subsequently to the execution of a mortgage of a 4 biswa zamindari share in favour of A S the mortgagor executed a further (usufructuary) mortgage of a portion of the same share in favour of L S and his brother N S A S brought a suit for sale on the earlier mortgage but without making N S a party thereto *Held* that the effect of the non joinder of N S would not be the total dismissal of the suit but only of so much of it as related to that portion of the property which was covered by the subsequent mortgage ... SINGH v ... SINGH (1913) I L R 35 All 484

——— **O XXXIV r 1 O 1 r 9**—*... to sue—Mort... —joint ... of ... pro... perties —... as ... main ... property ...* The ... properties of two mortgagors were jointly mortgaged to secure one debt The mortgagee ... for sale just within limitation making one of the heirs of one mortgagor a party defendant and stating that nothing had been heard of the other for twenty five years In the written statement it was pleaded that this heir was alive but by that time the suit as against him was time barred *Held* that the unimpleaded heir of the mortgagor was not a necessary party to the suit and that the suit might be proceeded with against the other representative of the mortgagor and his separate property for the whole amount due on the mortgage *Jai Govind v Jas Ram* ... (1898) ... followed *Gauri an Lal v Paltu Ram 9 All L J 86* distinguished *Imam Ali v Baij Nath Ram Sahu I L R 33 Cal 613 Hakim Lal v Ram Lal 6 C L J 46 Krishna Ayyar v Muthu Kumarasami ... Pillai I L R 29 Mad 217 Haro Kumari v East rn Mortgage Co ... C L J 274* and *Devendra Nath ... v Mir a Abdul Samad 10 C L J 150* referred to SANWAL SINGH v GANE SH LAL (1913)

I L R 35 All 4?1

——— A suit by the Karta of a joint family to enforce a mortgage is valid even though the other members of the family are not impleaded and the plaintiff has not expressly stated he is suing as Karta provided it is obvious for the pleading JAG SAH v RAM CHANDRA PRASAD

6 Pat L J 640

——— **O XXXIV rr 1 2 3**—*Execution of decree—Payment of part of decretal amount into Court—Effect of payment as regards running of interest on the decree.* Where money is paid into Court by the judgment-debtor in satisfaction of a decree interest on the decree will cease from the date of payment in proportion to the amount paid although such amount may not in fact be the whole amount due under the decree AMTUL HABIB v MUHAMMAD YUSUF (1917)

I L R 40 All 125

——— **O XXXIV rr 1 14**—

See MORTGAGE I L R 41 Calc ?27

See TRANSFER OF PROPERTY ACT (IV OF 1882) ss. 61 85 AND 99

I L R. 38 Mad 9??

——— **O XXXIV r 2 (Act IV of 1882 s 86)**—

See O 2, R. 2 I. L. R. 39 All. 506

——— *Decree of first Court allowing redemption within six months of the date of the decree—Appeal by the judgment-debtor against the decree and cross-objection by the decree holder both dismissed— Six months time ... to run from the date of the original decree or of the appellate decree* A decree declared the right of the decree holder to recover possession of certain property subject to the right of the judgment debtor to redeem on payment of a certain sum within six months of the date of the decree ... that decree the judgment debtor appealed and the decree holder filed a petition of cross objection but both were dismissed and the decree of the first Court confirmed. Then within six months of the decree of the appellate decree but more than six months after the date of the original ... the judgment-debtor paid

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd*

——— O XXXIV, r 2 (Act IV of 1882 s 86)—*contd*

into Court the sum necessary for the redemption The decree holder applied for execution of the decree *Held*—That where in a suit on a mortgage the decree of the Appellate Court simply dismisses the appeal leaving the decree of the first Court untouched the time for redemption runs from the date of the decree of the first Court PASANTA KUMAR ADAK *v* SRIMATI RADHA RANI DASI 26 C W N 440

——— O XXXIV rr 2 3 4 and 5—*Lessee to mortgagee—Transfer of equity of redemption—Preliminary decree on mortgage—Suit by transferee for rent due subsequently to due date maintainability of* In a suit on a mortgage the amount due is calculated only up to the due date fixed in the preliminary decree and a suit to recover the amount which becomes due after the due date is not barred Where the mortgagee took a lease of the mortgaged property from the mortgagor and subsequently obtained a preliminary decree on the mortgage *held* that a suit by the transferee of the equity of redemption for rent accruing due subsequently to the due date fixed in the preliminary decree was maintainable TARA CHAND MARWARI *v* BROJA GOPAL MUKHERJI 5 Pat L J 595

——— O XXXIV rr 2 and 4—

See O II r 2 I L R 39 All 5 6

——— O XXXIV rr 2 and 4 and appendix D Forms 4 7 8 9—*Mortgage suit—Decree for sale—Default of payment—Subsequent interest after date fixed in decree—Right of mortgagee—Subsequent interest which is payable on aggregate sum of principal interest and costs—Rate of interest—Discretion of Court—Mortgage bond—Stipulation for enhanced interest after default at twelve per cent whether penal* In a decree for sale on a mortgage the decree holder is on default of payment by the mortgagor on the date fixed in the decree entitled to subsequent interest on the aggregate amount of principal interest and cost declared or found to be payable on that date and such further interest should ordinarily be at the rate of six per cent per annum but the Court has a discretion in the matter *Sunder Koer* v *Rai Sham Krishen I L R 34 Calc 150* and *Subbaraya Pa utham nla Nainan* v *Ponnusami Nadar I L R 21 Mad 261* referred to Where in a mortgage bond there was a stipulation to pay enhanced interest at twelve per cent on principal and interest on default of payment of the principal with interest at nine per cent on a day fixed therein and where it appeared that the debts to discharge which the mortgage was executed carried interest at twelve per cent and more *Held* that the stipulation for such enhanced interest was not penal and could be enforced VENKATACHELAPATHY AYYAR *v* THAMASI SERVAI (1918) I L R 42 Mad 435

——— O XXXIV r 3 (Act IV of 1882 s 87)—

See MORTGAGE DECREE 4 Pat L J 347

——— *Mortgagor s right to redeem by offering payment after the date fixed for the same but before the final decree for foreclosure is passed* A preliminary decree for foreclosure was passed on 5th October 1917 and six months time was allowed *i e* up to 5th April 1918 On the 9th April 1918 the decree holder applied to make the decree in the foreclosure suit final and notices were issued on the mortgagors fixing the 1st May 1918 as the date for passing the final decree Before the final decree was passed the mortgagors on the 17th April made an application to the Court to pay off the decretal amount On the 1st May 1918 the Court rejected this application and passed the final decree *Held*—That the mortgagors were entitled to redeem at any time before the final decree was passed The right of the mortgagors to redeem was not extinguished until the final decree was passed YSAF ALI *v* KASIM ALI 26 C W N 532

——— O XXXIV rr 3 and 5—

See MORTGAGE I L R 43 All 469

——— *Mortgage—Conditional decree for sale—Application for final decree—Limitation Act (IX of 1908) Sch I Art 181*—An application is necessary for a final decree for foreclosure or sale Plaintiff obtained a conditional decree for sale of certain property on the 6th July 1908 In March 1913 he applied for a final decree *Held* that the application was barred by Art 181 of Sch I to the Limitation Act 1908 An application for such a final decree presented after the passing of the Code of Civil Procedure 1908 and the Limitation Act 1908 is governed by Art 181 of the latter Act BALA RAM NAIK *v* KANHAI CHARAN MAHAPATRA 1 Pat L J 364

——— O XXXIV rr 3 6—

See LIMITATION I L R 42 Calc 294

——— O XXXIV rr 3 8—*Extension of time for paying mortgage amount only upon good cause—Non passing of a foreclosure decree not a good cause for extension—Civil Procedure Code (Act V of 1908) s 115—No interference even with an order passed without jurisdiction if justice does not require* Extension of time for payment of the mortgage amount due under a decree in suits instituted either by the mortgagor or the mortgagee can be given only where good cause is shown therefor and a party is not entitled to it as a matter of right under O XXXIV rr 3 and 8 of the Code of Civil Procedure An extension of time cannot be granted on the sole ground that no order for foreclosure absolute has been passed. The High Court is not bound to interfere in revision with an order for extension of time wrongly passed English practice referred to MURUGESA MUDALY *v* RAMASAMI CHETTY (1915) I L R 39 Mad 882

——— O XXXIV r 4 (Act IV of 1882 s 88)—

See O XXI r 2 5 Pat L J 672
See EQUITY OF REDEMPTION 2 Pat L J 587
See MORTGAGE DECREE 4 Pat L J 207

——— O XXXIV rr 4 5—

See LIMITATION I L R 42 Calc 776
See O XXI r 2 5 Pat L J 672

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

——— O XXXIV rr 4 5 — Mortg —Preliminary decree in favour of puisne mortgagee—allowing redemption of prior mortgage —Right of puisne mortgagee on redemption to decree for sale of the property comprised in both —In suit for sale by puisne mortgagee the preliminary decree gave the plaintiff a right to redeem a prior mortgage covering other property as well as that included in the mortgage in suit The preliminary decree did not however specify this property as property which the mortgagees plaintiffs were entitled in the event of non payment to bring to sale *Held* that the plaintiffs mortgagees having paid the amount due on the prior mortgage were entitled notwithstanding this omission to a final decree for sale of the property comprised in both mortgages UDHISHTER SINGH v KAUSILLA (1916)
I L R 38 All 398

——— O XXXIV rr 4 5 10—*Suit for sale on a mortgage—Form of decree—Construction of decree—Costs—Appeal* A suit for sale on a mortgage was decreed by the Court of first instance dismissed by the Court of first appeal and again decreed by the High Court In the judgment of the High Court it was stated We must allow the appeal set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts. The decree of the High Court was drawn up on one of the High Court forms It stated that the appeal had been allowed the decree of the lower Appellate Court set aside and the decree of the Court of first instance restored It went on to state And it is further ordered that the respondent do pay to the appellant Rs ..4 6 9 the amount of costs incurred by the latter in this Court and in the lower Appellate Court *Held* that in construing this decree it was open to the Court to consider first the nature of the suit secondly the judgment of the High Court upon which the decree was founded and the general practice of the Court and that considering these matters the intention was that there should be the ordinary mortgage decree awarding the costs incurred in the suit and up to the time of the final decree to be realized by sale of the mortgaged property *Maqbul Fatima* v *Lalta Prasad* I L R 30 All 513 and *Sri Sabu* v *Shamsher Nath* F A No 8 of 1910 followed. DAMBAR SINGH v KALYAN SINGH (191)
I L R 40 All 109

——— *Mortgage—Decree for sale—Appeal by mortgagor—Appeal—Costs—Decree on 3l—Limitation* (IX of 1908) ss 6 and —*Interpretation—Minority—Mortgage—Its liability* ... *Held* that the question whether costs in a mortgage suit under final appeal against a decree in a suit for sale are recoverable from the mortgagor personally or only as part of the mortgage money out of the property mortgaged is a question in each case of the interpretation of the decree *Dambar Singh* v *Kalyan Singh* I L R 40 All 109 and *Moti Ram Ojha* v *Jan Lal* ... referred to. *Held* also that a Mahomedan mother cannot as *de facto* guardian of her minor son give a valid discharge for a payment made to the minors. *Imambandi* v *Mutsaddi* I L R 45 Cal 878 referred to Nor can she as guardian of her son give such a discharge without the leave of the Court

——— O XXXIV rr 4 5 10—*contd*
Court ABINASH LIBI v RAM SUNDAR MISRA (1910)
I L R 41 All 473

——— O XXXIV rr 4 5 14 and 15—*Where a decree has been obtained to the effect that the plaintiff do get maintenance at a certain rate and that the allowance decreed will be a charge on certain properties named* the properties may be brought to sale in execution of the decree There need not be a suit for sale RAJA BRAJASUNDAR DEB v SURAT KUMARI 2 Pat L J 55

——— O XXXIV rr 4 5 O XLI r 20—
See MORTGAGE I L R 38 Calc 913

——— O XXXIV r 5 (Act IV of 1882 s 89)—
See O XXIII R 3 2 Pat L J 533
See O XXXIV r 4 2 Pat L J 55
I L R 38 All 398
I L R 40 All 109
See CIVIL PROCEDURE CODE 1908 O XXI r 2 5 Pat L J 672
See COURT FEES ACT (VII OF 1870) SCH I ART 1 SCH II ART 11
I L R 3_ All 476
See DEKKHAN AGRICULTURISTS RELIEF ACT (XVII OF 1879) s 1 B
I L R 43 B..
See LIMITATION ACT (IX OF 1908) SCH I ARTS 181 18
I L R 42 Bom 333
See MORTGAGE DECREE
See REDEMPTION 4 Pat L J 213
3 Pat L J 400
See TRANSFER OF PROPERTY ACT 188 8_ AND 89 I L R 43 All 201
ss 88 AND 89 I L R 40 Bom 221

——— *Limitation Act* (IX of 1908) Sch I Art 181 *application under* O XXXIV r 5 *.. for ..—Mortgage ... application for decree absolute ...—..* s 5 ... *application of*— ... A decree on a mortgage on the ... the date fixed for payment ... January 19.. On 21st May 1909 he applied for the decree to be made absolute and that application was ... Against this the ... and ... the case was remanded on the ..th March 1910 Against the order of remand there was an appeal to the High Court but the proceedings continued in the first Court and ... on the 19th September 1910 the Court held that the application for decree absolute was barred by limitation On the 21st April 1911 the High Court dismissed the appeal against the order of remand and on the 10th May 1911 the plaintiff appealed to the lower Appellate Court against the order of the 19th September 1910 *Held* that an application under O XXXIV r ..(..) comes within the scope of Art 181 That the application ... was barred by limitation under Art 181 of the Limitation Act That ... the lower Appellate Court ... of the 19th

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd*

———— **O XXXIV r 5 (Act IV of 1882 s 89)**—*contd*

September 1910 was also barred by limitation That s 14 of the Limitation Act has no application to appeals and the present case does not come within s 5 BENI SINGH v BRIJNANDEO SINGH (1915) **19 C W N 473**

2 ———— *Application for decree absolute for sale on a mortgage—Limitation—Terminus a quo—Limitation Act (IX of 1908) Sch I Art 181* An application under O XXXIV r 5 (2) of the Code of Civil Procedure (1908) is an application in the suit and not an application in execution and is governed as regards limitation by Art 181 of the first schedule to the Indian Limitation Act 1908 *Datto Waman Hardikar v Shankar Dattatraya I L R 38 Bom 3 Amolak Chand Parrack v Sarat Chandra Mukerjee I L R 38 Calc 913 Ali Ahmad v Naziran Bibi I L R 24 All 51* and *Lal Narain v Jagan Nath I All L J 15* referred to The right to make such an application accrues on the date when the time limited by the preliminary decree expires unless such time has been extended by a Court of Appeal The principle of the decision in *Gaya Din v Jhumman Lal I L R 37 All 400* applied MADHO RAM v NIHAL SINGH (1915)

I L R 38 All 21

3 ———— *Limitation Act (IX of 1908) Sch I Art 181—Limitation—Decree for sale on mortgage—Appeal from preliminary decree—Application for decree absolute* *Held* that in a suit for sale on a mortgage if an appeal has been preferred from the preliminary decree the decree which is to be made absolute is the decree of the final Court of Appeal In such a case therefore limitation for an application for a decree absolute runs not from the expiry of the term fixed for payment by the original decree but from the date of the decree of the final Court of Appeal *Shohrat Singh v Bridgman I L R 4 All 376 Muhammad Sulaiman Khan v Muhammad Yar Khan I L R 11 All 267* and *Abdul Majid v Jawahir Lal I L R 36 All 350* referred to *Madho Ram v Nihal Singh I L R 38 All 21* overruled *quoad hoc* GAJADHAR SINGH v KISHAN JIWAN LAL (1917) **I L R 39 All 641**

4 ———— *Suit for sale on a mortgage—Application for final decree—Limitation—Limitation Act (IX of 1908) Sch I Art 181* An application for a final decree under O XXXIV r 5 of the Code of Civil Procedure is an application in the suit and not an application in execution the limitation applicable is that prescribed by art 181 of sch I to the Indian Limitation Act 1908 and time begins to run, if there has been an appeal in the suit from the date of the decree of the final Court of Appeal. *Gajadhar Singh v Kishan Jiwan Lal I L R 39 All 641* referred to NIZAM UD DIN SHAH v BOHSA BHIM SEN (1918) **I L R 40 All 203**

5 ———— *Preliminary mortgage decree for sale—Non payment into Court of decree amount within the time limited—Obligation on Court to pass a final decree for sale* O XXXIV r 5 Civil Procedure Code recognizes only one method of payment viz payment *into Court* of the amount fixed by a preliminary mortgage decree hence on default of payment *into Court* within the time fixed by the decree the Court is bound on the application of the decree holder to pass a final decree for sale. *Jogendra Prasad Narain Singh v Gouri Shankar Prasad Sahu 2 Pat L J 533* followed *Semble* If any payment had been made *to the decree holder* in the interval and *certified* by Court under O XXI r 2 Civil Procedure Code credit may be given for the same at the time of passing the final decree SINGA RAJA v PITHU RAJA (1918)

I L R 42 Mad 61

6 ———— *Act No IV of 1882 (Transfer of Property Act) s 89—Mortgage—Final decree for sale—Mortgagor's right not absolutely extinguished until sale* Under the present Code of Civil Procedure which repeals s 89 of the Transfer of Property Act 1882 the mere passing of a final decree for sale under O XXXIV r 5 does not extinguish the mortgagor's right until a sale has actually taken place in pursuance of the decree SHAH MEHDI HASAN v ISMAIL HASAN

I L R 42 All 517

7 ———— *Application for final decree—objection by defendants—objection not entertained and decrees made absolute—whether application in revision lies against the order* Where in two suits on two mortgages the plaintiff applied for a decree absolute under O XXXIV r 5 (2) of the Code of Civil Procedure 1908 and the defendants filed objections *held* that an application in revision did not lie to the High Court against an order declining to entertain the objections and making the decrees absolute KUMAR GANGANAND SINGH v RAI PITHI CHAND BAHADUR

5 Pat L J 342

8 ———— *Application for order absolute—Limitation Act (IX of 1908) Art 181 such application after three years if barred when there was an interim suspension of right to apply* A third mortgagee obtained a preliminary decree and the last date for payment was 31st July 1911 The payment not having been made he made an application on the 2nd October 1915 to make the decree absolute Prior to this the second mortgagee had instituted a suit to enforce his security in which the High Court in its appellate judgment dated the 10th March 1914 expressed the opinion that the third mortgagee could not sell the property before he had paid up the second mortgagee and a payment was made by him to the second mortgagee on the 22nd May 1915 *Held*—That as the third mortgagee could not have made an application to have his decree made absolute between the 10th March 1914 and the 22nd May 1915 his right to apply for order absolute was temporarily suspended and was not revived till the 22nd May 1915 Therefore assuming that Art 181 of the Limitation Act applied his application dated the 2nd October 1915 was not barred by limitation for not having been made within three years from the last date fixed for payment *i e* from 31st July 1911 *Pulteney v Warren 6 Ves 73 (92) (1801)* and *East India Company v Campion 11 Bli (N S) 158 (1837)* referred to *Lakhan Chandra v Madhu Sudan I L R 35 Calc 209 (213) (1907)* *Krishnamoni v Lakhan Chandra I L R 43 Calc 660 (1916)* *Ranee Sarnamoyee v Sooshee Mookhee 12 M I A 244 (1868)* and *Prannath v Rookea Begum*

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O XXXIV r 5 (Act IV of 1882 s. 89)—contd

M I A 3 3 (1859) followed HEMENDRA MOHAN KHASNOBIS v DHARANINATH CHANDA ROY 25 C W N 376

——— O XXXIV r 6 (Act IV of 1882 s 90)—

See CIVIL COURTS ACT (XIII OF 1887) s 21 I L R 41 All 381

See DECREE HOLDER. I L R. 38 Mad 677

See HINDU LAW (ALIENATION) I L R 43 Mad 421

See LIMITATION I L R 42 Calc 294

See MORTGAGE I L R 40 Calc 342; I L R 45 Calc 702; 2 Pat L J 51

See MORTGAGE DECREE 3 Pat L J 649

See PROVINCIAL INSOLVENCY ACT (III OF 1907) ss. 16 AND 31 I L R 31 All. 106

1. ——— *Application for decree over against the mortgagor—Limitation—Limitation Act (IX of 1908) Sch I Art 181* An application for a decree under the provisions of O XXXIV r 6 of the Code of Civil Procedure is not an application for the execution of the original decree for sale but is an application in the original suit for a new decree. Such an application is governed as to limitation by art 181 of sch. I to the Indian Limitation Act 1908 and must be made within three years from the date when the right to apply accrued. *Bihari Lal v Bisheshar Dayal 9 A L J 569* referred to MUHAMMAD ILTIFAT HUSAIN v ALIM UN NISA BIBI (1918) I L R 40 All 553

2 ——— *Indian Limitation Act (IX of 1908) Sch I Art 66—Mortgage—Application for personal decree against mortgagor—Limitation* A mortgage bond executed in 1902 provided that the money advanced on it was to be paid after the lapse of seven years and the interest was to be paid yearly The mortgagee was given the option of suing either on default in the payment of interest or after the expiry of the term He brought his suit in 1914 and obtained a decree under which he brought the mortgaged property to sale. The sale proceeds proving insufficient to satisfy the decree he then applied under O XXXIV r 6 for a personal decree against the mortgagors. *Held* that the application was not time barred. *Gaya Prasad v Sher Ali 14 A L J 313* followed. MAKRAND SINGH v KALLU SINGH (1919) I L R 41 All 581

3 ——— If a mortgage decree holder is unable to realise enough to pay off the amount due owing to some of the properties being in a Native State he is entitled to a personal decree. SAMANTA GAGARNATH MAHAPATRA v LOKENATH SUKUL (1921) 6 Pat L J 106

4 ——— *Mortgage—Decree over—Sale of mortgaged property but not in execution of applicant s decree* A second mortgagee sued on his mortgage and obtained a final decree for sale of the mortgaged property He did not put his decree into execution and made no attempt to get the property sold Subsequently the first mortgagee obtained a decree for sale of the property and the property was sold in satisfaction of that decree. The second mortgagee then applied for a decree over under O XXXIV r 6 of the Code of Civil Procedure *Held* that he was not entitled to a decree over as the mortgaged property had not been put to sale in execution of his decree *Kamta Prasad v Saiyid Ahmad I L R 31 All 343 Muhammad Akbar v Munshi Ram Weekly Notes 1899 p 208* and *Badri Das v Inayat Khan I L R 22 All 404* followed *Kedar Nath v Chandu Mal I L R 26 All 25 Pirbhu Narain Singh v Amir Singh I L R 29 All 369* and *Jeuna Bahu v Parmeshwar Narain Mahtha I L R 47 Calc 370* distinguished. DARBARI MAL v MULA SINGH I L R 42 All 519

5 ——— *Mortgage suit—small portion of property omitted from plaint* The omission to include in the plaint a portion of the mortgaged property does not debar the plaintiff in a mortgage suit from applying for an order under O XXXIV r 6 of the Code of Civil Procedure 1908 provided that the omission was not intended to and has not prejudiced the Judgment debtor GOPAL PANDA v BAIKUNTHA MAHAPATRA 2 Pat L J 538

——— O XXXIV, r 7—

See USUFRUCTUARY MORTGAGE 26 C W N 123

——— O XXXIV r 8 (Act IV of 1882 s 93)—

See O XXXIV R 3 I L R 39 Mad 882

See s 148 I L R 34 All 388

1 ——— *Decree for sale on a mortgage conditioned on redemption of prior mortgages—Power of Court to extend time for payment of redemption money* When a suit for sale by a subsequent mortgagee became by reason of the intervention of a prior mortgagee also a suit for redemption of the prior mortgage and a decree was passed accordingly it was *held* that the Court had power under O XXXIV r 8 to extend the time for payment of the sum found necessary to redeem the prior mortgage the plaintiffs having through a *bona fide* mistake paid into Court an insufficient amount KALIAN v SADHO LAL (1912) I L R 35 All 116

2. ——— *Proviso—Preliminary mortgage-decree by Appellate Court—Power to extend time for payment only for first Court—Order of extension by Appellate Court—Appeal against non maintainability of—Civil Procedure Code (Act V of 1908) s 148 no power to extend time under* No appeal lies from an order extending time for payment of the mortgage amount due under a decree such an order is not a decree within s. 2 cl. (2) of the Code of Civil Procedure. Even in cases where the preliminary mortgage-decree is passed by the Appellate Court it is only the Court of first instance that can extend time for payment under O XXXIV r 8 proviso of the Civil Procedure Code (Act V of 1908) *Venkatakrishna Iyyar v Thiagaraja Chetti I L R 23 Mad 521* St

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXXIV r 8 (Act IV of 1882 s 93)—*contd*

narain v Chunni Lal I L R 23 All 38 and *Ramdhani Sahu v Lalit Singh I L R 31 All 328* followed S 148 of the Civil Procedure Code (Act V of 1908) does not enable a Court to extend time for doing acts allowed by a decree *Het Singh v Tika Ram 9 All L J 351* and *Suranjan Singh v Rama Sahai Lal 17 Ind C 917* followed DHARMARAJA AYYAR v SRINIVASA MUDALIAR (1915) I L R 39 Mad 876

3 ——— *Suit for redemption—Decree modified in appeal—Application to postpone day fixed for payment* *Held* that the power given by the proviso to O XXXIV r 8 of the Code of Civil Procedure 1908 is a power exercisable by the Court which has to execute the decree Hence in the case of a decree passed by an Appellate Court an application for postponement of the day fixed for payment must be made to the Court of first instance and not to the Court which passed the decree *Ram Dhani Sahu v Lalit Singh I L R 31 All 328* and *Dharmaraja Ayyar v K G Srinivasa Mudaliar I L R 39 Mad 876* followed BENI PRASAD v HARNAM DAS (1917) I L R 39 All 396

4 ——— *Prior and subsequent mortgages—Suit and sale of mortgaged property by prior mortgagee—Subsequent suit for sale by puisne mortgagee not impleaded in former suit—Court not competent to extend time limited for payment of purchase money to auction purchaser* *Held* that a suit by a puisne mortgagee who had not been made a party to the prior mortgagee s suit in the course of which the mortgaged property had been sold by auction to pay off the auction purchaser and bring the mortgaged property to sale is not *quoad* the auction purchaser a suit for redemption and the Court has no power under O XXXIV r 8 to extend the time limited for payment of whatever may have been found due to the auction purchaser *Kalian v Sadho Lal I L R 35 All 116* distinguished *Idumba Parayan v Pethi Reddi I L R 43 Mad 35* dissented from NAND KUNWAR v SUJAN SINGH I L R 43 All 25

5 ——— *Partition suit decree for recovery of plaintiff's share on payment to alienees on a certain date—Payment on subsequent date—Jurisdiction of Court to extend time for payment—Construction of decree.* A decree in a suit for partition provided *inter alia* that the plaintiffs could recover certain properties from the alienees on payment of a sum of money into Court by a certain date without any provision as to effect of non payment Plaintiffs however paid the money on a subsequent date. *Held* that the decree was in terms and in effect one for redemption and that the Court had jurisdiction under O XXXIV r 8 to extend the time for payment IDUMBA PARAYAN v PETHI REDDI (1920) I L R 43 Mad 357

——— O XXXIV r 10—

See O XXXIV r 4 I L R 40 All 109

——— O XXXIV r 14 (Act IV of 1882 s 100)—

See O XI r 2 I L R 36 All 264

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XXXIV, r 14 (Act IV of 1882 s 100)—*contd*

See EXECUTION OF DECREE 2 Pat L J 197

See MADRAS ESTATES LAND ACT 1908 s 5 I L R 42 Mad 114

See MORTGAGE I L R 42 Calc 780
I L R 47 Calc 377

See s 145 I L R 38 All 327

See O II r 2 I L R 36 All 264

See TRANSFER OF PROPERTY ACT s 99 I L R 36 All 516

1 ——— *Execution of decree—Usufructuary mortgage—Suit for possession of mortgaged property—Decree for possession and costs—Execution for costs by attachment of part of the mortgaged property* Certain usufructuary mortgagees suing for possession of the mortgaged property which had not been delivered to them obtained a decree for possession and for costs In execution of their decree for costs the mortgagees applied for attachment of part of the mortgage property *Held* that this application was not barred by the provisions of O XXXIV r 14 of the Code of Civil Procedure 1908 *Khiarajmal v Daim I L R 32 Calc 296* distinguished *Muhammad Abdul Rashid Khan v Dilsukh Rai I L R 27 All 517* referred to HARIBANS RAI v SRI NIWAS NAIK (1913) I L R 35 All 518

2 ——— *Transfer of Property Act (Act IV of 1882) s 68—Execution of decree—Decree against heirs of deceased debtor—Execution sought against property once subject to a mortgage which had become time-barred* *Held* that a decree in a suit under s 68 of the Transfer of Property Act 1882 against the heirs of a deceased mortgagee as such heirs for payment of money originally due under a mortgage which however had become unenforceable by lapse of time could be executed against any property of the deceased in the hands of the heirs including the property once the subject of the mortgage and that the bar of O XXXIV r 14 of the Code of Civil Procedure did not apply *Madho Prasad v Debi Dial All W N 1891 page 168 Arunachalam Chetti v Ayyavayyan I L R 21 Mad 476 Khub Chand v Kalian Das I L R 1 All 240 Ponnappa Pillai v Pappuvayyangar I L R 4 Mad 1 Ganesh Singh v Debi Singh I L R 32 All 377 Madho Prasad Singh v Baij Nath All W N 1905 page 152 Kishan Lal v Umrao Singh I L R 30 All 146* and *Indarpal Singh v Mewa Lal I L R 36 All 264* referred to CHEDI LAL v SAADAT UN NISSA BIBI (1916) I L R 39 All 38

2(a) ——— Under s 145 of the Civil Procedure Code a party who has obtained a decree for costs in Privy Council can proceed by application to realise the amount of costs decreed against the surety (for the judgment debtor) personally but not against the property which he had charged under s 602 of the old Civil Procedure Code Even under O 34 r 14 of the Civil Procedure Code which has replaced s 99 of the Transfer of Property Act the properties charged cannot be sold except by instituting a a mortgage suit MUSSAMMAT CHANDRABATI v MADHO PROSAD 19 C W N 17

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O XXXIV r 14 (Act IV of 1882 s. 100)—*contd*

3 ———————— *Usufructuary mortgage—Possession not given to mortgagee—Suit for possession compromised out of Court, taking a simple money decree—Sale of mortgaged property* A usufructuary mortgagee who had not obtained possession of the mortgaged property brought a suit for possession. The suit was compromised and by consent a simple money decree was passed in favour of the mortgagee. *Held* that the decree being a decree passed on a compromise the mortgagee was not precluded from bringing the mortgaged property to sale in execution thereof. *Matho Prasad Singh v Jaiji Nath All Weekly Notes (1905) 157 Hem Lan v Dhara Giri I L R 28 All 58* and *Narsingh Das v Munna 6 A L J 731* distinguished. *Pat Kachi Pershad Singh v Balu Duleep Narain Sahu S C W N 261* followed. CANE R SINGH v DEBI SINGH (1910)

I L R 32 All 377

4 ———————— *Transfer of Property Act (IV of 1882) s 99—Repeal—Decree on mortgage—Execution sale—Proceeds insufficient to satisfy decree—Attachment of mortgagor's other property comprised in redemption decree for the recovery of the balance—Property attached to be sold* H and G mortgaged their property B to R who also held in mortgage from the same mortgagors their other property B. P obtained a decree on the mortgage of property A for the recovery of the mortgage deed by sale of that property and the balance if any to be paid by the mortgagors. Subsequently the mortgagor G H having died in the meanwhile got a redemption decree against P with respect to property B. In execution of P's decree property A was sold but the sale proceeds were not sufficient to satisfy the decretal debt. R thereupon sought to recover the balance by execution against property B and the said property was attached. After attachment a question having arisen as to whether R could recover the balance of his decree by sale of property B in execution without instituting a suit for the sale of that property *held* that the Civil Procedure Code (Act V of 1908) in so far as it repealed s 99 of the Transfer of Property Act (IV of 1882) and substituted in its place O XXXIV r 14 merely effected a change of procedure in the manner in which mortgaged property has to be realized in execution of money decrees and therefore the statutory rule in force for the purpose of the execution of the unsatisfied portion of the decree on mortgage was the rule contained in O XXXIV of the Civil Procedure Code (Act V of 1908). *R* was therefore entitled to an order that the attached property B be sold in execution of his decree with respect to property A. RAI GANGA v RAJARAM ATMARAM (1911)

I L R 35 Bom 243

5 ———————— *Charge on immoveable property credited by a money decree—Execution proceedings of the decree—Charged property can be sold in execution—No separate suit for bringing the property to sale necessary* A decree for money directed the defendant to pay a sum of money to plaintiffs and further declared a first charge and a lien on certain immoveable property of the defendant. In execution of the decree the plaintiffs applied to sell the property charged. *Held* by SHAH J agreeing with HEATON J (PRATT J dissenting) that the plaintiffs had the right to bring the property charged to sale in execution proceedings and that no separate suit for the sale of the property was necessary. AMBALAL BAPUBHAI v NARAYAN TATYABA (1919)

I L R 43 Bom 631

6 ———————— *Usufructuary mortgage comprising (1) a fixed rate holding and (2) a right to receive offerings at a temple Subsequent agreement between mortgagor and mortgagee for payment by former of a fixed sum instead of the offering—Decree for arrears—Execution of decree—Claim arising under the mortgage* The property comprised in a usufructuary mortgage consisted of (i) a fixed rate holding and (ii) of the right to receive certain offerings at a temple. Inasmuch however as the mortgagee was a Mahomedan a subsequent agreement was entered into between the parties whereby the mortgagor bound herself to pay annually a fixed sum of money in lieu of the offerings and also in case of default to pay interest thereon. Default having been made the mortgagee sued on this agreement and obtained a decree for money against the mortgagor. In execution of this decree he attached the mortgaged property and sought to have it sold. Upon objection by the mortgagor judgment-debtor *Held* that the mortgagee could not bring the mortgaged property to sale in execution of the decree as the claim under the subsequent agreement was one arising under the original contract of mortgage within the meaning of O XXXIV r 14 of the Code of Civil Procedure. *Haribans Rai v Sri Niwas Naik I L R 33 All 518* distinguished. RADHA PASIN v MUHAMMAD ALI (1919)

I L R 41 All 269

7 ———————— *Instalment decree—Failure to pay one instalment—Darkhast to recover amount of the instalment by sale of a portion of the property mortgaged—Premature darkhast* A decree passed on a mortgage was made payable in instalments and provided that if any two instalments remained unpaid till six months after the date of the second instalment the whole amount of the decree then remaining due became payable at once. The first instalment was paid up but the second instalment which fell due on the 1st August 1917 was not paid. The decree holder applied in July 1918 to recover the amount of the second instalment by sale of a part of the mortgaged property —*Held* that the application was premature in view of the precise terms of the decree itself and of the principles underlying O XXXIV r 14 of the Civil Procedure Code which showed that where a mortgagee had obtained a decree for payment of money in satisfaction of a claim arising under the mortgage he would not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. HANMANT TIMAJI v RAGHAVENDRA GURURAO (1920)

I L R 44 Bom 981

8 ———————— *Mortgage—Property mortgaged with possession—Simultaneous execution of rent note by mortgagor—Decree obtained by mortgagee on the rent note—Execution of the decree by sale of mortgaged property—Claim arising out of mortgage transaction—Mortgagee's right to bring the mortgaged property to sale otherwise than by suit*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— **O XLI r 10 (1882 Code s 549)**—*contd*

XLI r 10 of the Code of Civil Procedure for security for the costs of the appeal and of the original suit in view of the fact that the defendants appellants have no immovable property and are in impecunious circumstances and that somebody else who is not a party to the suit but has an interest in it have been defraying the costs of the litigation *Held* that it was a case where the Court should exercise its discretion in directing security for the costs to be given D WESTON v PEARY MOHAN DAS (1911) **10 C W N 119**

2 ——— *Bombay High Court Rule 72—Deposit of security by appellant residing outside British India in an appeal from the original civil jurisdiction of the Bombay High Court rule governing* The Bombay High Court in its original civil jurisdiction is not bound to demand security from an appellant residing outside British India for the costs of the appeal or of the original suit or [illegible] as provided in O XLI r 10 of the Civil Procedure Code The provisions contained in r 72 [illegible] Bombay High Court Rules [illegible] with [illegible] appeals from [illegible] original jurisdiction of the High Court [illegible] inconsistent with the provisions of O XLI r 10 of the Civil Procedure Code and accordingly by virtue of s 129 of the Civil Procedure Code O XLI r 10 does not apply *Semb* It is not clear whether it is imperative on the Bombay High Court in cases where O XLI r 10 does apply to demand security from an appellant residing outside British India for the costs of both the appeal and the original suit LEHRAM JUNG v HAJI SULTAN ALI SHUSTRY (1911) *I L R 37 Bom 572*

3 ——— [illegible] *vakalatnama*—[illegible] Where by an oversight the name of a valid who had filed an appeal was omitted from the body of the vakalatnama it was *held* on objection taken by the respondent that the document was invalid and the appeal consequently had not been properly presented The force of this objection to the validity of the appeal was not lessened by the fact that it was raised at a very late stage of the proceedings in fact after two orders of remand had been made by the Court of first appeal MUHAMMAD ALI KHAN v JAS RAM (1913) **I L R 36 All 46**

4 ——— *Security for costs —pauper appellant—Jurisdiction of Court to order a pauper appellant to furnish security for costs of respondent* The Court has jurisdiction to order an appellant who has been given leave to appeal in forma pauperis to furnish security for the costs of the respondent under O XLI r 10 Civil Procedure Code *Subbaraya v Jain laradan* (1880) I L R 3 Mad [illegible] followed *Khemraj Shrikrishnadas v Kisanlila Surajmal* (1918) I L R 42 Bom [illegible] dissented from SALDANHA v HENRY HART (1920) **I L R 43 Mad 902**

5 ——— O XLI r 10 (2) O XXV r 2 (2) O XLIII r (w) O XLVII r 7—*Security for costs of appeal—Rejection of appeal on failure to furnish security—Subsequent restoration of appeal on application for review—Appeal—Revision* A Subordinate Judge sitting as an appellate court directed the appellants to furnish security for costs but gave them only one week in which to do so The Judge who passed this order having been transferred the appellants attempted to show cause against it but the Court *considering it elf bound* by the order made by the previous incumbent rejected the application and also rejected the appeal under O XLI r 10 (2) of the Code of Civil Procedure The appellants then applied for a *review of the order rejecting their appeal and for* extension of time to file security for costs The application was granted the security was given and the appeal restored to the list of pending appeals *Held* on this order being attacked both by way of appeal and also by way of revision that no appeal lay and as regards revision the lower court could not be said not to have jurisdiction to pass the order complained of *Balwant Singh v Daulat Singh I L R 8 All 315 Firoz Begam v Abdul Latif Khan I L R 30 All 143* and *Sankaralinga Chetti v Annamalai Chetti 19 M L J 511* referred to SUNDAR v HABIB CAIT

I L R 42 All 626

——— **O XLI r 11 (1882 Code s 551)**—

See O XXIII **18 C W N 772**

1 ——— *Appeal—Summary dismissal—Judgment not necessary—Lower Appellate Court* In dismissing an appeal under O XLI r 11 of the Civil Procedure Code (Act V of 1908) it is not obligatory upon the lower Appellate Court to write a judgment TANAJI DAGDE v SHANKAR SAKHARAM (1911)

I L R 36 Bom 116

2 ——— *Civil Circular issued by the Bombay High Court No 51—Summary dismissal of appeal—Necessity of writing a judgment* A lower Court of Appeal must write a judgment when it dismisses an appeal under O XLI r 11 of the Civil Procedure Code (Act V of 1908) as provided by Civil Circular 51 issued by the High Court Bombay *Tanaji Dagde v Shankar Sakharam I L R 36 Bom 116* overruled HANMANT v ANNAJI HANMANTA (1913) **I L R 37 Bom 610**

——— **O XLI r 11 and O XLVII r 4**—

See APPEAL **I L R 43 Calc 178**

See REVIEW **I L R 41 Calc 809**

——— **O XLI r 12 (1882 Code s 552)**—

It is not competent to a Court of appeal under O 41 r 12 of the Code to restrict an appeal to one specified grounds in admitting the appeal and when an appeal is admitted the whole appeal and not any selected ground is open to discussion LUKHI NARAIN SEROWJI v SRI RAM CHUNDRA BHUIYA. **15 C W N 991**

——— **O XLI r 17 (1882 Code s 556)**—

See DISMISSAL FOR DEFAULT

5 Pat L J 17

——— **O XLI rr 17 19**—

See APPEAL **I L R 45 Calc 638**

——— **O XLI r 19 (1882 Code 558)**—

See O XLVII r 1 **19 C W N 419**

See APPEAL **6 Pat L J 625**

See S 151 **I L R 45 Bom 648**

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

———— O XLI r 19 (1882 Code 558)—contd

See TRANSFER OF APPEAL
Pat L J 918

———— O XLI r 20 XLI r 20 O I r 10—
See I L R 38 Calc 913
See I L R 40 Calc 3

———— O XLI r 21 (1882 Code 560)—

1 ———— *Application of defendant when ex parte decree set aside.* When a decree is passed against several defendants and in one of which it was ex parte and a defendant who appeals and successfully appeals and the Court setting aside the decree has jurisdiction to set aside the entire decree as against the defendants who had not appealed. *Damodar M ... v ... Jotindra Nath ... 13 C W N 56 ... C L J 21* referred to. *... Sirdar v Taral Nath 17 C L J 53* distinguished and in so far as it lays down the contrary disapproved. INDU MUKHI v DAR BAISI LILLIAN (1911)
15 C W N 798

2 ———— *Appeal decided ex parte — Application by respondent for re-hearing — Non-appearance of counsel for respondent due to conduct of respondent agent.* The respondent to a second appeal pending in the High Court appointed one Nathu Ram as his agent for the purpose of instructing counsel and of seeing that the appeal was properly prosecuted. Nathu Ram did instruct counsel but after a time took away the papers so that counsel was unable to appear and the consequence was that the appeal was decreed *ex parte*. *Held* that this misconduct on the part of the agent afforded his principal no ground for applying for rehearing of the appeal. *Har Prasad v Abid Rahman All W N 1905 page 14* referred to. BAJI LAL v NAWAL SINGH (1917)
I L R 39 All 338

———— O XLI rr 20 and 33—
See O XXII r 4 24 C W N 44

———— O XLI r 22 (1882 Code 561)—

See CROSS OBJECTION 4 Pat L J 164

See PROVINCIAL INSOLVENCY ACT 1907 ss 46 AND 47 I L R 41 Mad 904

1 ———— *Death of an appellant who had sued for damages for malicious prosecution abatement of appeal by—Jurisdiction to hear memorandum of objections.* Where a person sued for damages for malicious prosecution and obtained a decree but preferred an appeal claiming more damages than he had been awarded and died pending the appeal the appeal abates. *Pustomji Dorabji v Nurse (1911) I L R 41 Mad 557 (F B)* and *Jonam Iruttumalacharian v Sawmi Iyengar (1911) I L R 34 Mad 76* followed. After such abatement any Memorandum of Objections filed by the respondent cannot be heard. *Alagappa Chettiar v Chockalingam Chettiar (1918) I L R 41 Mad 907 (F B)* followed. MURUGAPPA CHETTIAR v PONNUSAMI PILLAI (1921)
I L R 44 Mad 828

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

———— O XLI r 22 (1882 Code 561)—contd

2 ———— *Cross objections against co-respondent when may be entertained—Registration Act III of 1877 s 17—Mortgage execution—Collateral agreement postponing operation till fulfilment of conditions—Fulfilment of conditions—Operation from date of execution—Delivery if essential.* The language of O XLI r 22 sub r (1) of the Civil Procedure Code is comprehensive enough to admit of a cross objection being preferred by one respondent against another. As a general rule the right of any respondent to urge a cross objection should be limited to his urging it only against the appellant and it is only by way of exception to this general rule that one respondent may urge a cross objection as against another respondent but as to this no exhaustive rule can be formulated and the entertainment of cross objections against co-respondents cannot be limited to those cases only where the appeal opens up questions which cannot be disposed of completely without matters being allowed to be re-opened as between the co-respondents. The true test ought to be whether for the ends of justice it is necessary upon the appeal of one party that the matter should be re-opened so far only as he is concerned or whether the whole case should be reviewed and some of the respondents allowed to urge a cross objection against their co-respondents. JADUNANDAN PROSAD SINGH v DEO NARAIN SINGH (1911)
16 C W N 612

3 ———— *Procedure—Cross objections entertainable though appeal was not so—Specific Relief Act (I of 1877) ss 39 and 42—Separate suits for cancellation of a document and for possession—Practice.* A respondent may file cross objections and the Appellate Court may act upon them notwithstanding that the appeal in which such objections are filed is not maintainable. Ordinarily where a plaintiff is out of possession and he is in a position to claim a decree for possession he should not be permitted to obtain merely a decree for the cancellation of an instrument according to which if genuine he has no title. SHANKAR LAL v SARUP LAL (1911) I L R 34 All 140

4 ———— *Cross objections who may file and against whom—Co-respondent cross objections not ordinarily allowed as against.* The ordinary rule is that the cross objections provided for by O XLI r 22 of the Code of Civil Procedure are cross objections which are aimed against an appellant from a decree of a lower Court and are not cross objections against a co-respondent. In any case such cross objections will not be allowed as against a co-respondent where the respondent could have preferred them by way of appeal. NURSEY VIRJI v ALFRED H HARLISON (1913)
I L R 37 Bom 511

5 ———— *Suit for dissolution of partnership—Appeal—Cross-objections—Cross objections filed by one respondent against another.* *Held* that on an appeal in suit for dissolution of partnership it is competent to the Court to allow a respondent to take cross objections against another respondent. *Jadunandan Prosad Singh v Deo Narain Singh ... 16 C W N 612* and *Abdul Ghani v Muhammad ... I L R 28 All 9...* referred to. BALU ... SARUP (1914)
I L R 36 All, 505

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

———— O XLI r 22 (1882 Code 561)—
contd

6 ———————— *Respondent* *may support decree on ground decided against him without filing cross objections* The respondent in an appeal can urge in support of the judgment a point not decided in his favour without presenting a cross appeal IMAM ALI PATWARI v AFFATUNNESSA (1913) 18 C W N C93

7 ———————— *Cross-objections memorandum of by one respondent against another maintainability of* Under O XLI r 22 Civil Procedure Code one respondent can file a memorandum of cross objections against another *Jadunardan Prosad Singh v Koer Kallyan Singh 15 C L J 61* not followed MUNISAMI MUDALY v ABDU REDDY (1915) I L R 38 Mad 705

8 ———————— *Appeal—Cross objection—Objection taken by respondent against co respondent* In a suit for sale on a mortgage the deed upon which the suit was based purported to have been executed by six persons In the Court of first instance however execution was held to have been proved as against four only of the alleged executants These four appealed making the other two alleged executants respondents along with the plaintiffs The plaintiffs also filed cross objections in which they sought to fix the two defendants respondents with liability for the mortgage deed *Held* that the plaintiffs were not precluded from filing objections against their co respondents *Abdul Ghani v Muhammad Fasih I L R 28 All 35* followed *Kallu v Manni I L R 23 All 93* referred to MUSLEHA BIBI v JAM NARAIN SAHU (1918)
I L R 40 All 526

9 ———————— Held that when an appeal is dismissed as filed out of time a memorandum of objections filed by a respondent cannot be heard ALAGAPPA CHETTIAR v CHOCKALINGAM CHETTIAR (1918) I L R 41 Mad 901

10 ———————— Held that this order is not applicable to Letters Patent appeals and therefore cross objection not maintainable in these appeals BROJENDRO CHANDRA SARMA v PROSANNA KUMAR DHAR 24 C W N 1016

———— O XLI rr 22 (3) 33—

See SALE I L R 43 Calc 790

———————— *Claim decreed against one of two defendants—appeal by judgment debtor—Cross objections by plaintiff—whether Appellate Court can decree claim against the other defendant* Plaintiffs sued the 2 defendants for recovery of the amount due on a *bahi* account the last balance was struck in 1915 and was signed by defendant No 2 alone while a previous balance in 1911 was signed by both Defendant No 1 pleaded that he was not liable at all and that the debt was incurred only by defendant No 2 which was admitted by the latter The first Court decreed part of the claim against defendant No 2 only Defendant No 2 appealed and plaintiff filed cross objections in which they impleaded defendant No 1 as a respondent but no notice was given to the latter [illegible] Appellate Court held both defendants were [illegible] the extent of part of the debt and decreed [illegible] that extent against both defendants [illegible] then preferred this second appeal

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

———— O XLI rr 22 (3) 33—contd

to the High Court *Held* that the ground of defence in the present case being in no sense common the Lower Appellate Court had no power to decree the claim against defendant No 1 on the mere cross objection of the plaintiffs to the appeal of defendant No 2 either under the provision of O XLI r 22 or of O XLI r 33 of the Code of Civil Procedure *Aga Tin v Aga Saw (29 Indian Cases 610)* *Bakshi Lindeswari Prasad v Dhanindar Das (33 Indian Cases 662)* and *Khsum Chand Bhuturia v Ghane Muhammad Saha (38 Indian Cases 361)* followed ILAHI BAKHSH v JIWANDA MAL I L P 1 Lah 396

———— O XLI r 22 (4)—The death of appellant who has sued for malicious prosecution and obtained a decree but preferred an appeal claiming more damages than he had been awarded caused the appeal to abate MURUGAPPA CHETTIER v PONNUSAMI PILLAI I L R 44 Mad 828

———— O XLI, r 23 (1882 Code s 562)—

See XLI r. 1 2 Pat L J 393

See O XLIII r 1 (4) 23 C W N 1049

See AGRA TENANCY ACT 1901 s 182 I L R 38 All 181

See PENSIONS ACT 1871 s 6
I L R 39 Bom 352

See REMAND
I L R 43 Calc 148 and 938

———————— *Remand not on preliminary point—Whether an appeal lies—How can Appellate Court direct further investigation* Where the Court of first instance after considering the evidence adduced by the parties decided the suits, but the lower Appellate Court remanded them to the Court of the first instance with directions to re admit the suits and determine them after getting a local investigation made according to the directions given in the judgment and allowing the parties to adduce additional evidence if they wished to do so upon a preliminary objection taken in second appeal on the ground that as the Court of first instance did not decide the cases on a preliminary point no appeal under O XLI r 23 lay against the order of remand *Held* that the order made by the lower Appellate Court purported to be and was in form and substance an order under O XLI r 23 although the Court ought not to have remanded the case under the provisions of that rule and that therefore an appeal lay *Held* also that the order remanding the case to the trial Court was erroneous If the lower Appellate Court thought that the investigation was wrong and that there should be further investigation or that it was necessary to take additional evidence in order to enable it to pronounce judgment it might direct such investigation or take such additional evidence retaining the appeals on its file PROSANNO CH CHATTOPADHYA v BAIDYA NATH MISTRY
24 C W N 708

———————— It is not a good ground for passing an order of remand to say that the preliminary issue has been decided by the Court of first instance on a wrong view of the burden of proof unless the appellate Court also finds that decision is wrong HABIBULLAH KHAN v JALTA IBA AD I L R 34 All 612

CIVIL PROCEDURE CODE (ACT V OF 1908) — *contd*

——— — **O XLI r 23 (1882 Code s 562)**— *contd*

1 ——————— *Decision of first Court not on a preliminary point—Power of Appellate Court to remand* There are cases in which an order of remand may be made even where the disposal has not gone on a point which can strictly be called a preliminary point *Kunjpalan v Kunju rulli 9 Mad L T 3* followed A case in which there was no regular hearing of a matter by the first Court and the evidence on which the disposal of the case was made by that Court was not placed on record is a fit one for remand JAMBULAYYA v RAJAMMAL (1913) **I L R 36 Mad 492**

2 ——————————— *Suit dismissed for default of appearance but restored by Appellate Court—Remand—Appeal* Held that no appeal would lie from an appellate order directing that a suit which had been dismissed because neither party had appeared should be restored to the file of pending cases and heard. WAHID UN NISSA v KUNDAN LAL (1917) **I L R 35 All 427**

3 ——————————— *Remand—Preliminary point—Issues framed and evidence taken but suit decided upon one issue only* Held that it is competent to an Appellate Court to remand a case under O XLI r 23 of the Code of Civil Procedure 1908 where the Court of first instance having framed issues and recorded all the evidence has decided the suit with reference to its finding upon one of the issues framed by it leaving the other issues undecided *Mata Din v Jamna Das I L R 27 All 691* followed KAMTA v PARBHU DAYAL (1916) **I L R 39 All 165**

4 ——————— ——— *Whether Appellate Court on remanding a case is empowered to direct first Court to pass another decree* A subordinate Appellate Court is not competent to remand a case for further evidence to the Court of first instance and to require that Court to pass another decree All that the Appellate Court is empowered to do is to frame an issue and to send that issue to the Court below for the return of a finding and it is the duty of the Appellate Court after receiving that finding to dispose of the appeal on the evidence before it A plaintiff who has omitted to sue under s 9 of the Specific Relief Act 1877 when first dispossessed is not debarred when the summary relief under that section has become barred by limitation from relying in a suit for ejectment on s 110 of the Evidence Act 1872 As soon as he has proved that the defendant has dispossessed him the onus is thrown upon the latter to prove his title HARADHAN MANDAL MODAK v ISWAR DASS MARWARI **2 Pat L J 61**

——————— **O XLI rr 23 25**—*Remand—Preliminary point or point involving merits of the case* A suit principally involved the consideration of two issues viz (i) whether the plaintiff had title to the lands in suit and (ii) whether they were entitled to *khas* possession The first Court finding against the plaintiff on the first point did not decide the second issue The lower Appellate Court reversed the finding of the first Court and remanded the suit for decision on the second issue The High Court directed the lower Appellate Court to keep the case on his own file and if he thought it necessary to refer the second issue for trial to the first Court under O XLI r 25 *Per* CHITTY J The decision of the Munsif was not on a preliminary point within the meaning of O XLI r 23 The law as to remands under O XLI r 23 has not changed the old law *Per* COXE J When there are two points to be decided and it is necessary for the decision of the second point that the first point must be first decided the decision of the first point is necessarily preliminary to the decision of the second The question whether a point is connected with the merits of the case or only with considerations of law does not affect the question whether it is or is not a preliminary point *Salim Sheikh v Nasir Khan 8 C L J 159* referred to ABDUL KARIM v FAYEZ BUX (1911) **15 C W N 575**

——————— There is no reason why there cannot be an order under rr 23 and 25 at the same time An execution sale is a nullity if held without jurisdiction BHADAI SAHU v SHAIKH MANOWAR ALI **4 Pat L J 645**

——————— **O XLI rr 23 25 and s 115**—

See REMAND **5 Pat L J 146**

——————— **O XLI r 25 (1882 Code s 566)**—

See APPELLATE COURT **24 C W N 145**

1 ——————————— *Failure by Appellate Court to frame material issue not raised and tried—Material irregularity—Revision by High Court* A suit for damages against a Steamer Company for loss due to short delivery was decreed by the Munsif who did not frame and try the issue whether notice under s 10 of the Carriers Act had been served on the Company that issue not having been presented to him by the parties The Subordinate Judge on appeal reversed that decree and dismissed the suit on the ground that service of notice under the said section had not been made out *Held* that the failure of the Subordinate Judge to frame and try the requisite issue under r 25 O XLI Civil Procedure Code was in the circumstances a material irregularity which might have led to a failure of justice RAMJAS AGARWALLA v INDIA GENERAL NAVIGATION AND RAILWAY COMPANY LD (1911) **16 C W N 424**

2 ——————————— *High Court if bound by opinion of Bench expressed in remanding a case* Where a Bench of the High Court in remanding an appeal for a finding under s 566 of the Civil Procedure Code of 1882 had expressed an opinion as to the way in which the case should be decided upon the finding the Bench before which the appeal comes up for final disposal after the finding of the Court below has arrived will not be bound by that opinion. *Bonclars Gloob v Ainuddin Biswa 24 W R 1o7 Lachman Prasad v Jamna Prasad I L R 10 All 162 Bhuaral Hossain v Bihari I L R 16 All 306* referred to GANENDRA NATH RAY CHOUDHURY v SURYA KANT RAY CHOUDHURY (1912) **17 C W N 462**

——————— **O XLI r 27 (1882 Code s 568)**—

See O XVII r 3 **I L R 3 All 610**

See APPEAL **I L R 42 Calc. 6"5**

See MUNICIPAL ELECTION **I L R 46 Calc 119**

1 ——————————— *Evidence admission of by lower Court* r 27 (b) of O XLI of the Code of Civil Procedure 1908 does not mean that, in order to e[illegible] [illegible]ellate Court to [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— O XLI, r 27 (1882 Code, s 568)—*contd*

nounce judgment in favour of a particular party additional evidence should be admitted in appeal it means only that where it is impossible to pronounce judgment at all on the evidence the Court may call for a document KALIKA DUTT MANDAR v TULSI MANDAR 1 Pat L J 435

2 ——— *Additional evidence on appeal—Powers of the Appellate Court—Test to be applied for admitting—State of mind of the Judge after hearing the appeal—No external standard—Any other substantial cause meaning of* Where a Subordinate Judge first heard an appeal and then passed an order for the admission of some additional documents in evidence on the ground that it was necessary to have the documents before the Court to enable it satisfactorily to pronounce its judgments. *Held* that the admission of the documents as additional evidence was permissible under O XLI r 27 of the Code of Civil Procedure (Act V of 1908) The test laid down under cl (b) of O XLI r 27 is not whether any tribunal would be unable to pronounce any judgment without production of the additional evidence in question but whether the mind of the Appellate Judge is in such a condition on the evidence on record that he requires any documents to be examined to enable him to pronounce judgment The expression any other substantial clause added in O XLI r 27 confers a wide discretion on the Appellate Court to admit additional evidence when the ends of justice require it to be done *Kessowji Issur v G I P Railway Company I L R 31 Bom 381* explained and distinguished *Krishnama Chariar v Narasimha Chariar I L R 31 Mad 114* referred to *Andiappal Pillai v Muthukumara Thevan (1912) Mad W N 450* followed *Subba Naidu v Ethirajammal 22 Mad L J 14* dissented from AMBUJA AMMAL v APPADURAI MUDALI (1912) I L R 38 Mad. 414

3 ——— *Appellate Court—Admission of fresh evidence—Practice regarding admission* Where an Appellate Court desires to admit fresh papers in evidence under r 27 of O XLI of the Civil Procedure Code (Act V of 1908) it must record its reasons in writing for doing so and admit them formally in evidence DAJI BABAJI v SAKHARAM KRISHNA (1914) I L R 38 Bom 665

4 ——— *Additional evidence called for by Appellate Court—Re summoning of witness already examined before the Court of first instance* *Held* that O XLI r 27 of the Code of Civil Procedure 1908 is not intended to enable an Appellate Court to recall and re examine before it a witness who has already been examined and cross examined before the Court of first instance MUHAMMAD SIDDIQ v MAHMUD UN NISSA BIBI (1916) I L R 38 All 391

5 ——— *Additional evidence—Refusal by the lower Appellate Court to admit—Second Appeal—Power of High Court to interfere and I ect admission—Jurisdiction—Exercise of discretion whether revisable* *Held* (by WALLIS C J and AYLING J SADASIVA AYYAR, J dissenting) that where a lower Appellate Court refuses to admit a certain material document as additional evidence in the appeal under O XLI r 27 Civil Procedure Code the High Court cannot interfere in second appeal and hold that such additional evidence ought to have been admitted by the lower Appellate Court *Per* WALLIS *C J* —It has long been the practice of all the High Courts not to entertain second appeals from refusals of the lower Appellate Court to admit fresh evidence under O XLI r 27 Civil Procedure Code and such practice should not be departed from *Per* SADASIVA AYYAR *J* *contra*—The High Court has power in second appeal to consider the propriety of the exercise of discretion by the lower Appellate Court as regards the admission of additional evidence VAITHINATHA PILLAI v KUPPU THEVAR (1919) I L R 42 Mad 737

——— O XLI r 27 and s 115—*Appellate Court—Additional evidence* A mistake in law on the part of the Appellate Court in directing evidence to be tendered which it is not competent to receive in accordance with the provisions of the Code of Civil Procedure, 1908 is not revisable by the High Court. *Semble* that an Appellate Court is not competent to examine an attesting witness who by inadvertence has not been called in the first Court GAYA SINGH v NAMB SINGH 5 Pat L J 263

——— O XLI, rr 22 33 (1882 Code s 577)—

See CROSS OBJECTIONS 5 Pat L J 328

——— O XLI r 33—

See ARBITRATION I L R 43 Calc 1059

See HINDU LAW—GIFT I L R 40 Mad 818

See HINDU LAW—LEGAL NECESSITY I L R 38 Calc 721

See LIMITATION ACT SCH I ART 181 I L R 43 All 320

See MORTGAGE I L R 43 Mad 803

See REMAND I L R 46 Calc 738

See SALE I L R 43 Calc 790

See O XLI R 4 1 Pat L J 143

1 ——— *Appeal—Procedure—Power of Appellate Court to interfere with portion of decree not challenged by either party* Plaintiff sued defendant for rent and obtained a decree for a portion of his claim Plaintiff then appealed against the disallowance of the balance of the amount claimed but defendant submitted to the decree and neither filed a cross appeal nor took objections under O XLI r 22 of the Code of Civil Procedure 1908 *Held* that it was not competent to the Appellate Court acting under O XLI r 33 to interfere with the decree obtained by plaintiff in so far as it had not been challenged by defendant *Attorney General v Simpson [1901] 2 Ch 671* referred to RANGAM LAL v JHANDU (1911) I L R 34 All 32

2 ——— *Civil Procedure Code (Act XIV of 1882) ss 562 564—Repeal of s 561 in the new Code—Effect of repeal—Remand order by the Court of appeal* In a suit to redeem a mortgage the first Court took accounts between the parties and decreed redemption The lower Appellate Court having found that there were

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

———— O XLI r 33—contd

some errors in the taking of accounts and that a piece of land wrongly taken to be in the mortgagee's possession reversed the decree and remanded the suit for trial to the first Court On appeal from the order of remand *Held* setting aside the order of remand that an Appellate Court could remand a case to the trial Court only when the latter had disposed of the suit upon a preliminary point and the decree was reversed in appeal. *Held* further there was no reason why the first Court's decree as such should have been reversed for according to both Courts, the possession was to be restored to the plaintiffs and the only difference between the two was in small particulars of accounts which could have been met by a slight re adjustment of the decree *Per* CURIAM The removal of s. 564 of the Civil Procedure Code of 1882 has apparently no other object but to withdraw those restrictive provisions of the section which in practice had been found embarrassing such restrictions occurring for instance in cases where the Appellate Court has allowed an amendment of the pleading or has added a party to the record NAROTTAM RAJARAM v MOHANLAL KAHANDAS (1912) I L R 37 Bom 289

3. ———————— *Plaintiff claiming alternative reliefs obtaining a decree—Right of appeal* A plaintiff who claims for alternative reliefs in his plaint can prefer an appeal although he obtained a decree O XLI r 33 confers on the Appellate Court the power to pass such decree as ought to have been passed. BISWANATH GORAIN v SURENDRA MOHAN GHOSH (1913) 19 C W N 102

4. ———————— *Appellate Court power of to allow withdrawal of suit with liberty to bring fresh suit when part only of decree is appealed against* The plaintiff's suit for recovery of possession of land on declaration of title was decreed in part and the defendants appealed against the decree in so far as it was against them. The plaintiff did not prefer any cross appeal or cross objection *Held* that under r 33 of O XLI it was competent to the High Court in appeal to allow the plaintiff to withdraw from the entire suit with liberty to bring a fresh suit upon the same cause of action but this power must be cautiously exercised and should not be permitted to be invoked in favour of a litigant so as to enable him to evade the provisions of other statutes, *e g* the Limitation Act and the Court Fees Act In the circumstances of the case the High Court allowed the plaintiff on terms as to costs to withdraw from the suit with liberty to bring subject to the law of limitation, a fresh suit in respect of the same cause of action only with regard to the lands which had been decreed in his favour by the lower Court. AKIMUNNESSA BIBI v BEPIN BEHARY MITTER (1915) 20 C W N 544

5 ———————— *Scope and effect of as to powers of Appellate Courts—Dismissing entire suit on plaintiff's appeal when part of claim admitted by defendant who prefers no appeal* In a suit for arrears of rent the plaintiff claimed rent at a particular rate The defendants admitted a lower rate and the Court of first instance decreed the suit at this admitted rate The plaintiff having appealed, the District Judge dismissed the entire suit although the defendants did not prefer an appeal nor file any cross objection. *Held* that r 33 of O XLI is very widely expressed but it should not be applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of statutes like those which relate to limitation or payment of court fees That ordinarily r 33 should be limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the appellant further interference is required in order to adjust the rights of the parties in accordance with justice equity and good conscience. That in the present case the lower Appellate Court allowed the defendants in substance to evade the provisions of the Civil Procedure Code the Limitation Act and the Court Fees Act and even assuming that r 33 is applicable to a case of this description that judicial discretion vested in the Court of Appeal below was not properly exercised ABJAL MAJHI v INTOO BEPARI (1915) 20 C W N 512

6 ———————— *Powers of the Appellate Court to reverse a finding of the lower Court in the appellants favour against which no cross objection was preferred by the respondent under O XLI r 22—Construction of document* Plaintiff had sold his share in some lands and the buildings thereon along with a passage to defendants by a *Kobala* He subsequently sued for recovery of a portion of the passage alleging that it had not passed by the *Kobala* The Munsif gave a partial decree and the Subordinate Judge partially allowed the defendants appeal, but reversed a portion of the Munsif's decree which was in favour of the defendants and against which the plaintiff had not preferred any cross objection. *Held* that in the appeal by the defendants the lower Appellate Court under the circumstances of the case was not justified under O XLI r 33 in interfering with the portion of the Munsif's decree which was in favour of the defendants, as the plaintiff had not filed any cross appeal or taken cross objection under O XLI r 22 *Held* further on a construction of the *Kobala* with reference to the pleadings and other documentary evidence that the whole passage was sold as there were statements in the deed which were inconsistent with the plaintiff having reserved any portion of the passage GOPAL CHANDRA DAS v NADIAR CHAND DAS (1917) 22 C W N 526

7 ———————— *Decree against three defendants—Appeal by two only the third not being made a party to the appeal—Jurisdiction of Appellate Court to modify decree in favour of the non appealing defendant* A decree was passed for varying amounts against three defendants of whom two only appealed the third not being made a party to the appeal. *Held* that it was competent to the Appellate Court to modify the decree in favour of the defendant who had not appealed by decreeing the whole sum due to the plaintiffs against the defendants who had. *Pangam Lal* v *Jhandu* I L R 34 All 37 distinguished. JAWAHAR BANO v SHUJAAT HUSAIN I. L. R 43 All. 85

————O XLI, r 35 (1882 Ccd s 579)—

See BENGAL TENANCY ACT 1885 s 105 5 Pat L. J 472

———— O XLII, r 1—

See O XL [illegible] 4 Pat L J 6[illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— O XLII r 1—*contd*

See Res Judicata I L R 1 Lah 83

See Restoration of Suit 2 Pat L J 720

———— O XLIII r 1 (1882 Code s 588)—

See s. 47 2 Pat L J 361

See s 115 151 4 Pat L J 51

See O IX r 9 20 C W N 1203

See O X r 4 I L R 39 All 450

See O XXXIX r 1 I L R 35 All 425

See O XL r 1 I L R 40 Mad 18

See O XLI r 23 I L R 35 All 427

See Sch II Para 21 I L R 38 All 297

See Madras Civil Courts Act (III of 1873) s 14 I L R 41 Mad 721

See Receiver I L R 41 Calc 746
I L R 40 Mad 18
14 C W N 183

1 ———— cl (a)—*Valuation of claim for purposes of jurisdiction—Decision if final and bars appeal* Where a suit for the declaration of the plaintiff's right to an easement and for a permanent injunction to restrain the defendant from interfering with such right was valued at Rs 1 100 but the Court having found the value to be Rs 790 returned the plaint for presentation to the proper Court *Held* that an appeal lay against the order under cl (a) of r 1 of O XLIII of the Civil Procedure Code S 12 of the Court Fees Act has no application to a case where the valuation though it may indirectly affect the amount of Court fees payable on the plaint is necessary for the purpose of determining the jurisdiction of the Court to entertain the suit *Brojo Kumar v Eshan Chandra 3 C L R 79* referred to Peari Sha v Surujmal Marwari (1912) 17 C W N 503

2 ———— A case against the order of an Appellate Court returning a memorandum of appeal to be presented to the proper Court Nur ud din Khan v Pran Krishan Chakravarti (1918) I L R 40 All 659

3 ———— cl (i)—*Suit by Hindu widow—Adoption pending suit—Widow allowed to prosecute suit though divested on strength of ante adoption agreement—Order if appealable* Where during the pendency of a suit brought by a Hindu widow the defendant objected that by an adoption made since the institution of the suit the plaintiff had divested herself of the estate of her husband and so could no longer prosecute the suit but the Court overruled the objection in the view that plaintiff was entitled to prosecute the suit under an *ante* adoption agreement with the natural father of the adopted son *Held* that the order was not one under r 10 of O XXII of the Civil Procedure Code and was not appealable under O XLIII r 1 cl (*l*) Promotha Nath Roy Chowdhury v Dinamoni Chowdharani (1916) 20 C W N 552

4 ———— cl (k) and (l)—*Appeal—O[illegible] di[illegible] ng an application to be substituted in an appeal in place of the original plaintiff Held* that an order dismissing an application to be brought upon the record as a plaintiff is not a decree and no appeal lies against such an order Dumi Chand v Arja Nand (1915) I L R 37 All 272

5 ———— cl (r)—*Temporary injunction—Order refusing injunction if appealable* An appeal lies against an order refusing a temporary injunction *Reasut Hussain v Hadjee Abdullah I L R 2 Calc 131* referred to Hari Lal v Prayag Ram (1913) 17 C W N 996

6 ———— cl (s)—*Mortgage suit—Appointment of Receiver at mortgagee's instance under terms of mortgage deed—Court's order on Receiver to pay money to mortgagor to enable him to appeal if appealable—Interest non payment of ground for appointing Receiver* When a mortgage deed provided for the appointment at the instance of the mortgagees of a Receiver in circumstances specified in the deed and laid down the mode in which the rents and profits were to be distributed by the Receiver and in pursuance of these provisions a Receiver was appointed with powers to dispose of the rents and profits in a certain manner in the course of a suit brought by the mortgagees to enforce the mortgage but after a preliminary decree for sale had been passed in the suit the Court upon the application of the judgment debtor passed an order directing the Receiver to pay certain sums to the judgment debtor in order to enable him to prefer an appeal against the decree *Held* that an appeal lay against the order under O XLIII r 1 cl (*s*) of the Civil Procedure Code *Mohunt Anand Das v Ram Perkash Das 14 C W N 183* relied on That the Receiver not having had power to make the payments in question either under the mortgage deed or the terms of his appointment the Subordinate Judge was wrong in making the order The power given by Court to the Receiver to institute or defend suits regarding the properties whether for collection of rents or for any other purpose, or the provision in the mortgage deed that pecuniary grants might be allowed for law expenses did not justify the orders of the Subordinate Judge for payment to the judgment debtor until after sums had been deposited in Court sufficient to recover interest due on the mortgage debt as required by the mortgage deed and the terms of appointment of the Receiver The mortgagee in this case not having had any payment as interest since the loan was made was entitled under the provisions of the law to apply for the appointment of a Receiver pending the disposal of the suit Eastern Mortgage and Agency Company Ld v Fakeruddin Mohamed Choudhury (1912) 17 C W N 16

———— *Appeal from order directing submission of account Ser Receiver*

5 Pat L J 97

7 ———— *Order expressing merely an intention to appoint a Receiver—Appeal* An appeal lies only from an order actually appointing a Receiver and not from an order by which the Court expresses an intention to appoint a receiver

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

——— O XLIII r 1 (1882 Code s 588)—contd

and calls upon the plaintiff to suggest names with particulars regarding security remuneration etc *Pamji* v *Koman Di 13 I L J 19* followed MUHAMMAD ASKARI v NISAR HUSAIN
I L R 42 All 227

8 ——— *Appeal from order —Order granting leave to sue Receiver for negligence —Appeal.* An appeal does not lie from an order granting leave to sue a Receiver for damages arising from his negligent discharge of duty SHRINIWAS v M C WAZ (1920) I L R 45 Bom 99

9 ——— (u)— *Remand— Appeal —Suit of the nature cognizable by a Court of Small Causes* A mahal having been divided by perfect partition into two thereafter the owner of one of the new mahals was made to pay a sum of Rs 1 7 as Government revenue which was in fact payable by the owner of the other mahal. He then sued the owner of the other mahal to recover the sum so paid The suit was filed in the Court of a Munsif who held that the suit did not lie and dismissed it The plaintiff thereupon appealed to the Subordinate Judge who reversed the finding of the Munsif and remanded the suit for disposal on the merits. *Held* that no appeal lay from the order of remand, inasmuch as the suit was one of the nature cognizable by a Court of Small Causes. Since however the plaintiff had paid the money which he was seeking to recover and it had not been refunded, the High Court declined to treat the appeal as an application in revision. *Nath Prasad* v *Baij Nath I L R All 66 Qutub Husain* v *Abul Hasan I L R 4 All 134* and *Tulsa Kunwar* v *Jageshar Prasad I L R 28 All 563* referred to AMBA PRASAD v MUSHTAQ HUSAIN
I L R 42 All 200

10 ——— *Execution of decree —Appeal—No appeal from order in execution proceeding if an appeal would not lie in the suit itself* *Held* that a second appeal will not lie from an order passed in proceedings in execution of a decree where no second appeal could have lain in the suit itself in which the decree was passed *Sri Bullov Bhattacharji* v *Baburam Chattopadhya I L R 11 Calc 169 Shyama Charan Mitter* v *Debendra Nath Mukerjee I L R 27 Calc 481 Mavula Ammal* v *Mavula Maracoir I L R 30 Mad 212* and *Narayan Parmanand* v *Naginda Bhavdas I L R 30 Bom 113* followed. SANT PRASAD v BHAWANI PRASAD
I L R 43 All 403

11 ——— *Appeal from order of remand—Whether findings of fact can be questioned* *Held* that an appellant coming to the High Court in appeal under O XLIII r 1 (u) of the Code of Civil Procedure from an order of remand under O XLI r 23 cannot question findings of facts arrived at by the Lower Appellate Court *Sawan Singh* v *Methu (85 P R 1914)* followed HONDA RAM v HOTU RAM
I L R 2 Lah 25

——— O XLIII r 1 (a) and s 115—*Suit for rent in a Revenue Court Service inam—Discontinuance of service—Ryoti land—Decree in Revenue Court—Appeal—Jurisdiction of Revenue Court—Plaint ordered by District Judge to be returned for presentation to Civil Court—Appeal to the High Court against order of District Judge if competent*

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd

——— O XLIII r 1 (a) and s 115—contd

—Order whether a decree—Estates Land Act (Madras Act I of 1908) s 192 cl (a)—Prohibition of appeals—Conversion of appeal into civil revision petition A landholder sued for arrears of rent in a Revenue Court from the defendants who originally held the lands on service tenure but had ceased to perform the services prior to the suit The Revenue Court passed a decree in favour of the plaintiff On appeal the District Judge set aside the decree holding that the Revenue Court had no jurisdiction to entertain the suit and ordered that the plaint should be returned to the plaintiff for presentation to a proper Court On plaintiff preferring an appeal to the High Court the respondent raised a preliminary objection that the appeal did not lie *Held* that no appeal lay against the order of the District Judge because s 192 cl (a) of the Estates Land Act prohibited the applicability of O XLIII of the Civil Procedure Code to proceedings under the Act and the order was not a decree under the Civil Procedure Code *Held* also that the appeal should be converted into a civil revision petition under s 115 of the Civil Procedure Code as the latter section was not excluded by s 192 of the Act and that the Revenue Court had jurisdiction to entertain the suit as the lands were ryoti lands and did not fall within the exception to ryoti land in s. 3 of the Act inasmuch as the services were not performed at the date of the suit *The Secretary of State for India* v *Chelekani Rama Rao I L R 39 Mad 617* distinguished. RAJAH VENKATA RAMAYYA v VEERASWAMI (1917
I L R 41 Mad 554

——— O XLIII r 1 (r) and O XXXIX r 2 cl (3)—*Interlocutory injunction disobedience of—Order declining to arrest or attach property—Appealability—Petition to commit while suit pending —Order thereon after dismissal of suit legality of—Imprisonment order of without first ordering attachment illegal* An appeal lies under O XLIII r 1 cl (r) of the Civil Procedure Code (Act V of 1908) from an order declining to order arrest or attachment of property for disobedience of an interlocutory injunction and the Appellate Court can on appeal pass the order which the Lower Court should have passed. Where the injunction was disobeyed and the application to commit was put in while the suit was pending the fact that the order on the application was made after the suit was dismissed does not affect the powers of the Court to take action for the breach The Court can in its discretion order either arrest or attachment of property and is not bound in the first instance to attach and then only order imprisonment SUPPI v KUNHI KOYA (1916)
I L R 39 Mad 907

——— O XLIII r 1 (u) O XLI, r 23—*Remand order passed otherwise than under O XLI r 23 if appealable* No appeal lies against an order passed by an Appellate Court remanding a case otherwise than under O XLI r 23 of the Civil Procedure Code MOHENDRA NATH CHAKRAVARTY v RAMTARAN BANDOPADHYA (1919)
23 C W N 1049

——— O XLIII r 1 (w) O XLVII rr 1 4, 8—
See O XLI r 10 (-)
I L R 42 All. 626

See REVIEW I L R 45 Calc. 60

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd*

———— O XLIII, r 1 (w) and O XLVII r 7 ———— *Review appeal from order granting grounds for* An order granting a review merely for sufficient ground is not appealable An appeal under O XLIII r 1 (w) against an order granting a review is subject to the provisions of O XLVII r 7 SUNDAR MAL *v* UPENDRA NATH SEAL 1 Pat L J 193

———— *Appeal against order granting review—Scope of jurisdiction.* An application for review was filed within one month of the date of the order sought to be reviewed and was allowed An appeal was preferred against the order granting review and the Appellate Court set it aside on the ground that the order sought to be reviewed was really on earlier order *Held* that although O XLIII r 1 (w) allows an appeal against an order granting a review that clause must be read with O XLVII r 7 by which the grounds on which an order granting a review can be set aside on appeal are limited. The Lower Appellate Court therefore had no jurisdiction to set aside the order granting the review SURYA NARAIN CHOWDHRY *v* RANGA BEHARY MAL 25 C W N 884

———— O XLIV r 1 (1882 Code s 592)— *Application for leave to appeal in forma pauperis—Application rejected—Further application for leave to pay the full court fee also rejected—Revision* The rejection of an application made under O XLIV r 1 of the Code of Civil Procedure for leave to appeal as a pauper is not the rejection of the appeal. *It is therefore no ground for rejecting* a subsequent application for permission to pay the full court fee on the appeal MUHAMMAD FARZAND ALI *v* RAHAT ALI (1918) I. L R 40 All. 331

———— O XLV rr 2, 3 and 8—

See s 109 3 Pat L J 179

See APPEAL TO PRIVY COUNCIL. I. L. R 42 Mad. 32

———— O XLV rr 4, 7 and 8—

See CIVIL PROCEDURE CODE 1908 s 110 AND O XLV 4 Pat L. J 193

———— O XLV r 5 (1882 Code s 627)—

See VALUATION OF SUIT I. L. R. 43 Calc 225

———— Where a single Judge of the High Court sitting as Vacation Judge granted a stay of execution of a decree passed by a subordinate Court before any appeal has been filed but on the vakil's assurance it would be filed the order was without jurisdiction PURSHOTTAM SARAN *v* HARGU LAL I L. R. 43 All. 198

———— O XLV r 7 (1882 Code s. 601)

See PRIVY COUNCIL. 14 C W N 420

———— O XLV rr 10 11 (1882 Code 605 and 606).

See LIMITATION ACT 1908 ART 1 5 Pat L. J 39

———— O XLV r 13 (1882 Code, s 608)—

See PRIVY COUNCIL, PRACTICE OF I. L. R. 28 Calc. 335

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd*

———— O XLV r 13 (1882 Code s. 608)—*contd*

———— *Partition—Appeal from preliminary decree—Application for stay of further proceedings in the suit* O XLV r 13 of the Code of Civil Procedure does not authorize the staying of proceedings in a suit for partition where a preliminary decree has been passed and it remains to pass the final decree because an appeal from the preliminary decree has been filed and is pending *Lakheswar Singh* v *Bhabeswar Singh* 9 *C L J* 561 referred to RAM NARAIN *v* HARNAM DAS I. L. R. 42 All. 170

———— *Appeal to His Majesty in Council—Special leave to appeal—Receiver whether High Court has power to appoint* It is competent to the High Court to appoint a Receiver to an estate which is the subject matter of an appeal for which special leave has been granted by the Privy Council RAJA WUZIR NARAIN SINGH *v* RANI JAGDAMBA KUER 4 Pat L. J 482

———— O XLV rr 13 and 14—

See STAY OF EXECUTION 3 Pat. L. J 40

———— O XLV r 15 (1882 Code s. 10)—

See LETTERS PATENT (PAT) CL. 39 2 Pat. L J 684

———— *Privy Council—Restoration of property pending appeal to the Privy Council—Procedure* The word execution as used in O XLV r 15 was intended to cover case of restitution as well as a case of enforcement of a decree for possession of the like passed for the first time in the case on an appeal to His Majesty in Council and a person who desires to obtain execution of any kind whether by way of restitution or otherwise must apply in the first instance to the Court indicated by r 15 A decree was passed by the High Court against *B who* appealed to the Privy Council. During the pendency of the appeal *D* and others obtained possession of the property in suit from *B* The Privy Council reversed the decree and *B* applied to the Subordinate Judge to restore him to possession of the property and filed a copy of the printed judgment of their Lordships of the Privy Council in proof of the fact that the judgment of the High Court had been reversed *Held* that the application should have been made to the High Court and the Subordinate Judge could not entertain it *Held further* that the Subordinate Judge was not entitled to take any action on the printed copy of the judgment of their Lordships of the Privy Council without proof that an Order in Council had followed thereon DAMODAR DAS *v* BRIJ LAL (1915) I. L. R. 37 All. 567

———— *Order in Council execution of—Only those persons (or their representatives) who have made an application under r 15 are entitled to apply for execution of an order in Council* Where several persons sued together to recover possession of separate specific shares of an *ijmali* share which had been wrongly sold for arrears of Government revenue and the suit was eventually decided in their favour by an Order in Council. *Held* that an application under Order

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— O XLV r 15 (1882 Code s 10)—contd

XLV rule 15 made by some of the plaintiffs did not entitle all of them to apply for execution to the Court to which the Order in Council was sent for execution Prior to the passing of the Order in Council proceedings for the partition of the *ijmali* share were completed by the Collector This fact was not brought to the notice of the Privy Council and the order declared the plaintiffs right to recover the specific separate shares claimed in the plaint *Held* that the plaintiffs were nevertheless entitled to execute the order with reference to the estates or interest substituted by the partition for the shares originally claimed in the suit MAHARAJA SIR RAMESHWAR PRASAD SINGH v RAI BAIJNATH GOENKA 2 Pat L J 496

2 ———— *Order in Council execution of—Limitation Act (IX of 1908) Sch I Art 183— Revivor* After several attempts to enforce an Order in Council dated the 28th November 1899 the decree holder applied to the High Court on the 2nd December 1907 under s 610 of the Code of Civil Procedure 1882 The High Court ordered notices to be issued but there was nothing to show that this order was complied with On the 15th August 1910 the High Court passed a formal order transmitting the Order in-Council to the Lower Court for execution This application was dismissed and on the 22nd January 1915 another application was made *Held* that the order of the High Court dated the 15th August 1910 did not revive the Order in Council within the meaning of Art 183 of Sch I of the Limitation Act 1908 and that the application was therefore time barred TRIBKRAM DEO NARAYAN SINGH v BADRI MISSER 1 Pat L J 385

———— O XLV rr 15 and 16 O XXI r 16 ss 37 38 and 50—*Privy Council order of transmitted to the original Court—Execution—Application to the original Court—Application by transferee of the decree—Competency of the original Court to entertain application—Power of Attorney construction of* Where an order of His Majesty in Council was transmitted under O XLV r 15 of the Civil Procedure Code by the High Court to the District Court as the Court which passed the first decree the latter Court has jurisdiction to entertain an application made by an assignee of the decree under O XXI r 16 of the Civil Procedure Code to recognize the assignment and to allow him to execute the decree It is established law that a Power of Attorney must be construed strictly When an agent has a general Power of Attorney to act in some business or series of transactions he may be assumed to have all usual powers including the power to transfer decrees *Palaniappa Chettiar* v *Arunachella Chettiar 23 Mad L J 595* distinguished KRISHNA BHOOPATHI DEO v RAJA OF VIZIANAGRAM (1914) I L R. 38 Mad 832

———— O XLVI, r 1 (1882 Code s 617)—
See s 141— I. L. R 38 Mad. 353

———— O XLVI, r 7—*Court of Small Causes institution of suit in before Judge not having Small Cause jurisdiction—Disposal of such suit as a small cause by successor in office having jurisdiction to try such suits—Reference under O XLVI r 7 jurisdiction and powers of High Court in* A suit valued at Rs 90 was instituted in the Court of a Munsif having Small Cause Court power up to Rs 50 and was registered as an ordinary suit Before the suit came on for hearing the Munsif was succeeded by another Munsif who had Small Cause Court power up to Rs 100 He tried the suit as a Small Cause Court suit and dismissed it The defendant moved the District Judge who made a reference to the High Court under O XLVI r 7 on the ground that the Munsif had no jurisdiction to try the suit as a Small Cause Court suit *Held* that on such a reference the High Court has full power to consider the matter on the merits in each case and may in the exercise of its discretion discharge such a reference even though in strict law the suit should have been tried under a different procedure PARMESWARI DASSI v JAGAT CHANDRA DASS (1914) 19 C W N 900

———— O XLVII r 1 (1882 Code s 623)—
See APPEAL I L R 42 Calc 675
See APPEAL TO PRIVY COUNCIL I L R 41 Calc 734
See CIVIL PROCEDURE CODE 1908—
O XLI R. 27 I L R 42 Calc 675
O IX R 9 1 Pat L J 547
See LAND ACQUISITION ACT s 53 5 Pat L J 253
See PRACTICE I L R 44 Calc 28
See RECEIVER 14 C W N 183 I L R 41 Calc 809
See RES JUDICATA 2 Pat L J 313
See REVIEW 5 Pat L J 34- I L R 44 Calc 1011
See SMALL CAUSE COURT SUIT I L R. 44 Calc 590

1. ———— Ex parte *decree if may be reviewed on the ground that defendant had sufficient cause for not appearing—Limitation* The fact that a defendant against whom an *ex parte* decree was passed did not apply within time under O IX r 13 Civil Procedure Code for a revival of the case is no bar to his applying for a review of the decree under O XLVII r 1 of the Code on the ground that he was prevented by sufficient cause from appearing at the hearing *Raj Narain Purkait* v *Ananga Mohan Bhandari I L R 26 Calc 598* relied on. CHET NARAIN SAHI v RAMPAL MANJHI (1911) 16 C W N 643

2 ———— *Order setting aside sale alleged to be made by consent of parties—Decree holder alleging that order made in his absence—Review if may be granted* Where a sale in execution of a decree was set aside upon the strength of a petition of compromise to which the decree holder was alleged to be a consenting party and the decree holder subsequently applied for a review alleging that he was not present at the time when the order was made and that as a matter of fact what appears to be a consent order was in essence an *ex parte* order *Held* that it was open to the decree holder under these circumstances to apply for review under r 1 O XLVII of the Civil Procedure Code HARIHOIR v BASDEO SAHI (1911) 17 C W N 631

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— O XLVII r 1 (1882 Code s 623)— contd

3 ———— *Review of judgment—Suit dismissed for want of necessary notice as well as on the merits—Ground of review touching the merits only* A suit against the Court of Wards was dismissed on two grounds (i) that the notice given by the plaintiff under the Court of Wards Act was defective and (ii) that the plaintiff was illegitimate An application was made for review of judgment on the ground of discovery of new and important evidence on the question of legitimacy *Held* that the application was properly dismissed, inasmuch as the decision on the question of legitimacy on the reception of new evidence would not lead to the modification or setting aside of the original decree MAHABIR PRASAD v THE COLLECTOR OF ALLAHABAD (1914)
I L R 36 All 277

4 ———— *Review petition—Subsequent filing of appeal—Jurisdiction of Court to hear review petition is not taken away by appeal subsequently filed—Practice* An application for review of judgment was filed in a District Court and a rule nisi was granted The party subsequently filed an appeal in the High Court The District Court rejected the review application on the ground that it could not proceed with the application as an appeal was *already filed* The applicant having applied to the High Court *Held* setting aside the order and directing the District Court to dispose of the application on the merits that there was no express provision in the Civil Procedure Code which rendered the application for review incompetent on the mere presentation of an appeal by the same party at any subsequent time *Chenna Reddi v Peddaobi Reddi I L R 32 Mad 416* followed NARAYAN PURUSHOTTAM v LAXMIBAI (1914) I L R 38 Bom 416

5 ———— *Review of judgment—Adducing of further evidence not sufficient ground* An application was made to a District Judge for a review of his order that a certain property was not the property of an insolvent The ground upon which the application was in substance made was that if another opportunity was given to the applicants they would satisfy the Court that its former order was wrong *Held* that this was not a sufficient reason for entertaining the application within the meaning of O XLVII r 1 of the Civil Procedure Code BINDA PRASAD v RAGHUBIR SARAN (1915) I L R 37 All 449

6 ———— *Application for review—Limitation—Jurisdiction to entertain* Where the Judge having decided to modify the decision of the first Court erroneously passed a decree dismissing the appeal, but later on on the application of the landlord modified the decree and brought it in conformity with his judgment without notice to the tenants and on the latter's appeal the High Court directed the Judge to restore his previous decree leaving it open to the landlord to apply by way of review and in pursuance of the High Court's order the successor in office of the Judge restored the previous decree of his predecessor and later on entertained an application for review made by the landlord and purporting to act under s. 151 of the Civil Procedure Code passed a decree disallowing the custom [illegible] it permitted the tenants to appropriate the timber trees *Held* that the order to be reviewed was the order passed by the Judge in pursuance of the High Court's directions both in regard to the limitation applicable to and the jurisdiction to entertain the application for review GURAI LAL v RANI KUARMONI SINGHA MANDHATA (1915) 19 C W N 1188

7 ———— *Review of decree not appealed against* On a proper construction of O XLVII r 1 (1) the decree mentioned therein means a decree from which no appeal has been preferred by the applicant for review himself That there is no implied reference to O XLI r 4 in O XLVII r 1 (2) the effect of which is to restrict the right which would otherwise be possessed by one defendant to apply to review of judgment notwithstanding an appeal by a co defendant The law in effect is that a defendant who has not himself appealed may apply for a review of judgment notwithstanding the pendency of an appeal by a co defendant except in two contingencies namely first where the ground for review is identical with the ground of appeal and secondly when as respondent in the appeal he can present to the Appellate Court the case on which he seeks review CHANDRA KANTO BHATTACHARJA v LAKSHMAN CHANDRA CHAKRAVARTY (1916) 21 C W N 430

8 ———— *Appeal and application for review filed by same party—Appeal withdrawn—Jurisdiction of Court to entertain application for review not ousted* An appeal which has been withdrawn must be treated as if it had never been presented within the meaning of O XLVII r 1 of the Code of Civil Procedure *Ramappa v Bharma I L R 30 Bom 625* referred to A party to a suit filed an appeal against the decree and thereafter an application for review of judgment After the review had been filed the applicant withdrew his appeal *Held* that the fact of an appeal having been filed and withdrawn was no bar to the hearing of the application for review *Partab Singh v Jaswant Singh I L R 42 All 79* *In the matter of the petition of Nand Kishore, I L R 32 All 71* and *Pandu v Devji I L R 7 Bom. 287* referred to RAM PRASAD v ASA RAM
I L R 43 All 283

9 ———— *Must be read as in itself definitive of the limits within which review is permitted and reference to practice under former and different statutes is misleading* The words any other sufficient reason in O 47 r 1 mean a reason sufficient on grounds at least analogous to those specified immediately previously that is to say to excusable failure to bring to the notice of the Court new and important matters or error on the face of the record Upon an application for review the Court cannot proceed to deal with the case on the merits as if on an appeal CHHAJJU RAM v NEKI (P C) 28 C W N 698

10 ———— *Review of judgment—Decisions after judgment sought to be reviewed—New and important matter* The plaintiff instituted a suit for ejectment The defendants pleaded that they were tenants of the plaintiff The Munsif ordered the defendants to get a declaration of their tenancy The Assistant Collector declared them to be tenants and the Munsif thereupon dis

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O XLVII r 1 (1882 Code s 623)—contd

mi ed the suit. On appeal however the Com missioner set a ide th order of the As istant Collector and this decision was upheld by the Board of Revenue. The plaintiff then applied within 90 days of the deci ion of the Board of Revenue for review of the Mun iff's jud m nt. *Held* that the judgments of the Commissioner and the Board were new and important matters within the meaning of O XLVII r 1 of the Code of Civil Procedure. *Bapu's Pu anju Shi angu* v *Shaik Ma lud n I L R 13 Bom. 339* and *Waman Hari* v *Hari Vithal I L R 31 Bom 128* referred to. RAM LAL v KALKA PRASAD (1911)
I L R 33 All 563

——— O XLVII, rr 1 4—*Review of judgment upon fresh evidence—Sufficient reasons not shown why the evid nce was not p oduced at trial.* Where no sufficient reasons appeared on the affidavit upon which an application was made after judgment, for a re hearing upon additional evidence to show why the proposed new evidence was not timeou ly submitted *Held* that the application was properly rejected. SHIVALINGAPPA BASAPPA SHINTRE v REVAPPA (1915) 19 C W N 762

See REVIEW I L R 47 Calc 568

——— O XLVII r 1 O XLI, r 19—*Consent decree obtained by fraud setting aside of—Inherent jurisdiction of Court—Such decree if can be set asid on review—Court fee.* A decree passed by consent in an appeal was set aside on an application by the respondent under O XLI r 19, Civil Procedure Code the Court finding that the appellant got the service of the notice of the appeal suppressed and had a false fraudulent *valalatnama* and a petition of compromise filed and that the respondent came to know about the compromise decree only after process in execution of the decree was taken out. *Held* that O XLI r 19 had no application to the case but the decree could be set aside on review under O XLVII r 1 and the Court had also inherent jurisdiction to set aside the decree. That it is an inherent power of every Court to correct its own proceedings when it has been misled and the order of the lower Court should not be s t aside merely because it was passed under a wrong section. That as the order could be summarily set aside by the Court no court fee as on an application for review need have been paid on the application. *Annoda Debi* v *Stevenson 22 W R 290 Basan Gowda* v *Churchigiri Gowda I L R 34 Bom 408* relied on *Gulab Koer* v *Badshah Buhadur 13 C W N 1197 s c 10 C L J 420* referred to. PEARY CHOUDHURY v SONOO DASS (1914)
19 C W N 419

——— O XLVII, r 2 (1882 Code s 623)—*Judge who did not decide case but signed the decree if may entertain review application under r 2— Judge who passed decree meaning of—Review granted without notice by Judge who decided case if authorises Judge who signed decree to entertain review application.* An application under O XLVII r 2 of the Civil Procedure Code for a review of a decree upon some grounds other than the discovery of new and important matter or evidence or the existence of a clerical or arithmetical mistake cannot be made to Judge who signed the decree but did not write or deliver the jud ment in a cordance with

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

——— O XLVII, r 2 (1882 Code s 623)—contd

which the decree was drawn up. The expression the Judge who passed the decree in r 2 O XLVII Civil Procedure Code means the Judge who decided the case and not the Judge who merely signed a decree after satisfying himself that it has been drawn up in accordance with the judgment delivered by his predecessor and the fact that the former had granted an application for review which was set aside on the ground of the order having been pas ed without notice to the other side did not authorise the latter to entertain the application. TAMIJUDDI SHEIKH v SATYA SANKAR GHOSHAL (1915) 20 C W N 391

——— Where an order of remand by the High Court directed the Lower Court to ascertain the rate of rent payable for the years in suit *Held* that the decision of the rate of rent by the Lower Court did not operate as *Resjudicata* as regards rent payable in other years. KISHEN DEYAL PAL v MUSSAMAT KULPATI KUER 3 Pat L J 372

——— O XLVII rr 2 7 sub r 1 cl (1) —*Review of order setting aside sale by another officer —Appeal after confirmation of sale if lies where final order not appealable.* Where an application for review of an order of a District Judge upon a ground other than the discovery of new or important matter or evidence or the existence of a clerical or arithmetical error was owing to the absence of the District Judge received by the Subordinate Judge who also directed notices to issue to the opposite party and the District Judge himself passed several orders in the case relating to the postponement of the hearing and analogous matters but died before the case could be heard on the merits and the review application was subsequently granted by the successor in office of the District Judge. *Held* that the order granting the review was in contravention of r 2 of O XLVII of the Civil Procedure Code and should be set aside. Where an order setting aside a sale was set aside on review and the sale confirmed. *Held* that an appeal against the order passed on review preferred after the sale was confirmed was not incompetent. An appeal against an order granting a review would lie under sub r 1 of r 7 of O XLVII even where no appeal would lie against the final decree disposing of the case. SHAMSER ALI v JAGANNATH (1912)
17 C W N 403

——— O XLVII r 4 (1882 Code 626)—

See APPEAL I L R 43 Calc 178
6 Pat L J 625

See LIMITATION ACT (IX OF 1908) ss 5 14 I L R 42 Bom. 295

See REVIEW I L R 41 Calc. 809

——— O XLVII, rr 4 7 (See 1882 Code ss 626 and 629)—

See APPEAL I L R 42 Calc 433
I L R 43 Calc. 178

See REVIEW I L R 42 Calc 830

——— O XLVII r 4 O XLI, r 11—*Appeal summarily d smissed—Appl cat on for rev ew if may be granted w thout notice to respondent—Practice—Hear ng of appeal if to be restricted to gro inds on whi [illegible] ssed—Bengal Tenancy*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——————— **O XLVII r 4 O XLI r 11**—*contd*

Act (VIII of 1885) ss 22 85 159 161 167 The practice of the Court allowing applications for review of orders dismissing appeals under O XLI r 11 of the Civil Procedure Code *to be granted* without the issue of any notice to the respondents is in conformity with the law and should not be departed from *Semble* The Division Bench which granted the review can alone consider the propriety of the order previously made and either maintain or vacate the original order of dismissal *Semble* An order granting a review of an order of dismissal under O XLI r 11 without issue of notice to the respondent if contrary to law is not a nullity At most it is one made irregularly or with material irregularity in the exercise of jurisdiction possessed by the Judges and cannot be ignored or vacated by the Bench hearing the appeal When an application for review of an order of dismissal under O XLI r 11 is granted the hearing of the appeal cannot be restricted to the *grounds* which were made the basis of the application for review JANAKINATH HORE *v* PRABHASINI DASI (1915) **19 C W N 1077**

——————— **O XLVII r 5 (1882 Code s 627)**—*Application for review heard by one of a Bench of two Judges the other having gone on a month s leave—Jurisdiction—Appeal under the Letters Patent* Where one of a Bench of two High Court Judges who had disposed of an appeal having left the Court on a month s leave an application for review of the judgment was heard and dismissed by the remaining Judge *Held* that the learned Judge had no jurisdiction to dispose of the application by reason of r 5 of O XLVII of the Civil Procedure Code and an appeal lay against that order JAGAT CHANDRA ACHARYA *v* SHYAMA CHARAN BHATTACHARYA (1917) **22 C W N 550**

——————— **O XLVII, r 7 (1882 Code s 629)**—

See O XLI r 10 **I L R 42 All 628**

See O XLIII r 1 **1 Pat L J 193**

See APPEAL **I L R 42 Calc 433**

1 ——————— *Reference by District Judge of case tried by Small Cause Court S 116 Civil Procedure Code—S 25 Small Cause Courts Act (IX of 1887)—Interference by High Court on question of fact* The plaintiff brought his suit in the Court of Small Causes for recovery of dam ages against the defendant who was said to have held some land under a contract to take half the pro ceeds as remuneration for his labour and expense The Small Cause Court found that the defendant was a servant remunerated by the receipt of half the produce and decreed the suit On a reference by the *District Judge recommending the setting* aside of the decree of the Small Cause Court Judge on the ground that the defendant should have been held to be a tenant against whom the suit could not be entertained *Held* that the Court of Small Causes was a Court subordinate to the District Judge and O XLVII r 7 contemplated a reference by the District Judge of cases tried by such Court That in cases of revision under s 11 Civil Procedure Code or under s 25 of the Small Cause Courts Act the High Court does not generally interfere with findings of fact arrived at by the first Court if those proceedings are supported by [illegible] before the Court No case having been made out for interference on a question of fact the reference was discharged RATAN BEPARI *v* HIRA LAL SARKAR (1916) **20 C W N 1110**

2 ——————— *Review of judg ment—Appeal from order granting of review—Grounds of appeal* In an appeal under O XLVII r 7 of the Code of Civil Procedure 1908 from an order granting an application for review of judg ment the appellant is strictly limited to the grounds set forth in the rule KHURSHED ALAM KHAN *v* RAHMAT ULLAH KHAN (1917) **I L R 40 All 68**

——————— **O XLVII r 8 (1882 Code s 630)**—*Decree of Division Bench of High Court of two Judges found erroneous giving plaintiff more than he claimed—Application for amendment before one of them—Jurisdiction of single Judge to amend decree—Court in granting application for review if bound to rehear whole case — Rehearing of case by single Judge without authority from Chief Justice—Jurisdiction* An application for amendment of a decree made in favour of the plaintiff by a Division Bench of the High Court of two Judges was moved by some of the defendants before one of them (the other Judge having left the Court) and a Rule was issued on the plaintiff to show cause why the decree should not be set aside or amended or why such other order should not be made as might seem fit on the ground that the decree purported to give plaintiff a relief not claimed by him The Judge made the Rule ab solute and then in terms of r 8 O XLVII C P C proceeded to rehear the case with the result that the judgment and decree of the Division Bench were amended The plaintiff appealed against this last decision *Held* (*Per* JENKINS C J and N P CHATTERJEA J) that in the absence of an order by the Chief Justice authorising the learned Judge alone to sit for the hearing of the case his decision was without jurisdiction The case thereafter was heard before the Regular Bench the Judges whereof refused to rehear the whole case and confining themselves to the point of amend ment only passed a decree amending the judgment and decree Some of the defendants having ap plied for review of this last decree on the ground that the learned Judges should have reheard the whole appeal *held* that the decree of the Division Bench stood amended as soon as the Rule to amend it was made absolute and *all subsequent* proceedings were superfluous. That as the last decree of the High Court only affirmed that order it was not necessary to set it aside *Per* MOOKERJEE J R 8 of O XLVII of the Civil Procedure Code *clearly leaves it optional with the Court to* determine whether when a review is granted the case should be reopened in part or in its entirety GOUR SUNDAR BHOWMIK *v* LAKHAL RAJ BHOWMIK (1916) **20 C W N 1165**

——————— **O XLVIII, r 9**—*Review of judgment—Second application for review—Practice. Semble* That there is nothing in the Code of Civil Procedure which prevents a second application for review being made after a previous application for review *has been made and rejected. Gobinda Ram Mondol v Bhola Nath Bhatta I L R 15 Calc 432* re ferred to PALLIA *v* MATHURA PRASAD (1916)

I L R 38 All 280

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd.

———Sch II *See* ARBITRATION

———*Reference of suit to arbitration by Judge and two others as arbitrators—Award—Decree in accordance therewith—Finality of decree—Reference whether under second schedule—Proceeding extra cursum curiae—Adjustment of suit under O XXIII Civil Procedure Code Consent decree* A reference of a pending suit to arbitration by the presiding Judge along with others as arbitrators is not a reference under the second schedule to the Civil Procedure Code but is a proceeding extra *cursum curiae* and a decree passed in accordance with their decision should be regarded as a consent decree not subject to the provisions of the second schedule and is therefore final. *Nanjappa* v *Nanjappa 23 M L J 290* and *Praydas* v *Girdhardas I L R 26 Bom 76* followed It is undesirable that a Judge before whom a case is pending should associate himself with other persons as an arbitrator CHINNA VENKATA SAMI NAICKEN v VENKATASAMI NAICKEN (1919) I L R 42 Mad 625

———Sch II para 1 (1882 Code s 506)—

———*Award* Reference by parties interested Defendant who did not appear not joining Validity of reference discussed 14 C W N 420

———*Reference to arbitration by some only of the parties to the suit—Ex parte defendant not a party to the reference—Reference whether valid award—Decree validity of—Jurisdiction of Court to make a reference— Party interested in, meaning of* Where a suit was referred to arbitration at the instance of some of the parties thereto but a defendant against whom relief was claimed in the plaint who was *ex parte* in the suit did not join in the reference though he had an interest in the subject matter of the reference and a decree was passed in accordance with the award of the arbitrators *Held* that the Court had no jurisdiction to make the order of reference under Sch II r 1 of the Civil Procedure Code that the decree was invalid and should be set aside and that the suit should be proceeded with on the merits. If a person is *ex parte* in a suit he does not thereby cease to be a party interested in the reference *Ishar Das* v *Keshab Deo I L R 19 All 657* and *Vaithianatha Iyer* v *Vaithialinga Mudaliar 18 M L T 374* dissented from *Girija* v *Karai 27 C L J 339* followed POTITA PAVANA PANDA v NARASINGA PANDA (1919) I L R 42 Mad. 622

——— A pardanashin lady and her two sons were defendants to a suit An agreement was said to have been made by the parties to refer the matter to arbitration and the Court made an order of reference The agreement to refer so far as it purported to be made by the lady was signed by her pleader to whom a *gomasta* had given a *vakalatnama* The *vakalatnama* however did not contain a power to refer the suit to arbitration though it contained powers to file petitions of compromise and so forth *Held* that the provisions of para 1 of Sch II to the Civil Procedure Code were not complied with in the case of the female defendant who was undoubtedly interested in the matters in difference in the suit along with her sons The provisions of this paragraph must be strictly complied with in order that there may be a valid reference *Ramjiwan Ram* v *Kali Charan Singh I L R 29 All 429 (1907)* *Seth Dooley Chand* v *Mamuji Mu aji 21 C W N 387 (1916)* and *Girija Nath* v *Kanai Lal 27 C L J 339 (1917)* referred to An appeal lies in a case where the reference itself is impugned for want of consent of the parties interested FANINDRANATH ROY v DWARKA NATH ROY 25 C W N 832

———Sch II para 5 (1882 Code ss 507 and 510)—*Arbitration—Refusal of arbitrator to act—Appointment of fresh arbitrator by Court—Notice* The authority of a Court to appoint a fresh arbitrator in the place of one who has refused to act does not arise unless and until the Court has served on the non applicant party the notice required by paragraph 5 (?) of the second schedule to the Code of Civil Procedure 1908 ABDUL GHANI v DIN DAYAL (1919) I L R 41 All 57?

——— Sch II rr 8 and 15—

See ARBITRATION 4 Pat L J 265
I L R 45 Bom 1071

———Sch II para 10 (1882 Code s 516)—

See ARBITRATION I L R 43 Calc 721

——— Sch II para 11—

——— *Arbitration—Reference to arbitration on condition that certain adjustments should not be taken into consideration—Adjustment difference between treating as an account stated and as a mere admission—Admissibility of documents in support of particular items though excluded as evidence of a general settlement—Arbitrator misconduct of—Evidence honest though mistaken admission of a document by an arbitrator in violation of a rule of evidence introduced pro hac vice.* The defendant in an action brought to recover certain sums claimed by the plaintiff under a mortgage and two deeds of further charge consented to the suit being referred to arbitration on a condition which was embodied in the consent order referring the case to arbitration to the following effect —

And it is further ordered that the said arbitrators do proceed on the basis of there having been no adjustments and the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration. The arbitration proceedings were carried on before arbitrators appointed for the purpose and afterwards before an umpire and in the course of the proceedings the umpire in spite of the defendant s protests admitted one of the adjustment in evidence as proof of an admission by the defendant that a certain item of Rs. 1 300 included in the adjustment was due from him to the plaintiff Previously the other of the two adjustments had been used by the plaintiff without protest from the defendant to prove one item therein The defendant protested and asked the umpire to submit a special case for the consideration of the Court under clause 11 of the Civil Procedure Code The umpire doubted whether that clause would apply but postponed further consideration of the item in question to enable the defendant to move the Court if so advised for leave for the umpire to state a special case The defendant thereupon, purported to put an end to the umpire s authority and refused to go on with the reference which nevertheless was proceeded with before the umpire *ex parte* and an award made the passage in the con

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—————— Sch II para 11—*contd*

sent order quoted above was reasonably susceptible of two constructions that it was either a particular and specific following upon a general exclusion of all adjustments *qua* adjustments or as contended by the defendant *a stipulation that certain documents containing the adjustments should not be admitted in evidence for any purpose* and that it was possible to admit a document as evidence in support of a particular item and at the same time *exclude it as evidence of a general settlement* *Held* further that if the defendant s contentions were correct the stipulation relied on was a rule of evidence introduced *pro hac vice* and that the hone t though mistaken admission by the umpire of a document in violation of that rule would not be a ground for setting aside the award and that the defendant s conduct *in rejecting the umpire s offer to adjourn* consideration of the item under discussion in order to give the defendant an opportunity to obtain the Court s leave for a statement of the case and in deciding to withdraw from the reference with *out the leave of the Court was incorrect* AJIRA BAI *v* ESSAJI (1913) I L R 38 Bom [illegible]

—————— Sch II para 12 (1882 Code s 506)—*Arbitration—Award—Clerical mistake in award—Commissioner appointed to examine the award—Report of the Commissioner reversed by the Court—Court passing a decree different from the award—Practice—Procedure* The matters in dispute in the suit were referred to arbitrators who made their award. Both parties filed objections to the award On an application being made by the parties to amend the award on the ground that *there were certain clerical errors the Court issued* notice to the arbitrators to rectify the award under paragraph 12 of the Second Schedule of the Civil Procedure Code The arbitrators considered the objections and submitted their opinion regarding the alleged errors The Court thereupon made an order appointing two Commissioners to *examine* accounts made by the arbitrators The Commissioners made their report supporting the opinion of the *arbitrators The Court then con* sidered the objections with regard to certain disputed items reversed the report of the Commissioners on these items and directed them to make a second report The said report was made and eventually the Court passed a decree in favour of the defendants which was different from the award of the *arbitrators* On appeal *to the High* Court *Held* (setting aside the decree of the lower Court and passing a decree in terms of the arbitrators award) (1) that a wrong procedure was followed by the Court from the commencement of the proceedings inasmuch as the Court in effect directed the Commissioner to sit in appeal on the award of the arbitrators with regard to the disputed items and when the Commissioner supported the decision of the arbitrators the Court itself sat in appeal on the decision of the Commissioner (2) that the Court could not be said to have exercised the only powers it had under para 12 (*b*) and (*c*) of Schedule II Civil Procedure Code 1908 which were either to amend an obvious [illegible] *or which could be amended without affecting* [illegible] to rectify a clerical mistake [illegible] *from an accidental slip or* [illegible] *v* [illegible] *Das* (1920) [illegible] GOPAL DINKAR *v* GANESH [illegible] (1920) I L R 45 Bom 512

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

—————— Sch II para 14 (1882 Code s 520)—*Award Illegal on the face of it meaning of—Patent illegality—Remittance to arbitrators for reconsideration when permissible* In a suit for partition and recovery of a share in the family properties the defendants pleaded *inter alia* that the plaintiff was born blind and was therefore not entitled to any share under *Hindu Law* After issues were framed the whole dispute was by agreement of the parties referred to arbitrators who without deciding the question as to congenital blindness passed an award to the effect that the *plaintiff was entitled to a life interest in one* fourth share subject to its becoming an absolute interest in case the plaintiff married *Held* on objection to the award that the award was not so patently illegal as to come within the meaning of cl (*c*) of paragraph 14 of the second schedule of the Civil Procedure Code and that the award *could not be remitted to the arbitrators for re* consideration English and Indian cases reviewed. MADEPALLI VENKATASWAMI *v* MADEPALLI SURAYYA (1917) I L R 41 Mad 1022

—————— Sch II paras 14 15 and 16—*Arbitration—Award—Ground for remitting or setting aside an award—Arithmetical error* It is not a ground for remitting an award on a matter referred to arbitration or for setting aside an award that the arbitrator has made a mistake in arithmetic and apparently unintentionally has awarded a larger sum of money to be paid by one party to *the other than he would have awarded if his* attention had been directed to the mistake Nor does the decision of an arbitrator appointed to divide family property that a certain debt is due from the family to a person not a party to the reference amount to the determination of a matter not referred to arbitration and in any case such a *decision so far as it might* be considered as an award in favour of the creditor would be entirely separable from the rest of the *award Allarakhia Shivji v Jehangir Hormasji 10 Bom H C Rep 391* and *Mustafa Khan v Phulja Bibi I L R 27 All 526* referred to SHIAM LAL *v* PARSHOTTAM DAS I L R 42 All 277

—————— Sch II para 14 15 20—

See ARBITRATION I L R 36 All 336

—————— Sch II Para 15 (1882 Code s 521)—

See ARBITRATION I L R 36 All 354
I L R 39 Calc 822
4 Pat L J 265

—————— Sch II paras 15 16—

See APPEAL 1 Pat L J 308

See ARBITRATION I L R 39 Calc 822
I L R 36 All 354

See AWARD I L R 38 Mad 256

—————— *Arbitration—Agreement to refer pending suit—Agreement not made by all the parties to the suit—Award—Objection to validity of agreement to refer—Revision* Out of *twenty one defendant sixteen joined with the* plaintiff in an application to refer the matter in the suit to arbitration *Of the remaining five* defendants three had not entered an appearance and the Court had already passed an *order that* the case would be proceeded with *ex part* as to them and as to the remaining two *the plaintiff* abandoned his claim against them A reference

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—contd

——— Sch II paras 15 16—contd

was made and an award was delivered for payment of a sum of money by one of the defendants alone and a decree followed in accordance with the award *Held* that there was a valid order of reference or at any rate one which the defendant against whom the award was made should not be permitted to challenge *Prem Mal v Sahib* Ali *I L R* 24 *All* 9 *J Kadh v Sin h v Pirthi Singh I L R* 9 *All* 4 *Nain Puran v Hira Singh* 6 *All L J* 333 *Ishar Das v Keshab Deo I L R* 3 *All* 6, *Hamra v Mahbub* 5 *All L J* 615 and *Salta Prasad v Dharam Kirti Saran I L R* 35 *All* 107 referred to *Held* also that in view of paragraphs 15 16 of the second schedule to the Code of Civil Procedure 1908 the question whether there had been a valid reference to arbitration was a question reserved to the decision of the trial Court and ought not to be made the subject of the revisional jurisdiction of the High Court *Lutawan v Lachya I L R* 36 *All* 69 referred to AJUDHIA PRASAD v BADE UL HUSAIN (1917) I L R 39 All 489

——— *Arbitration Decree in accordance with award—Appeal grounds for* No appeal lies from the decree of a Court as to the validity or invalidity of an award, except in cases where the decree pronounced in pursuance of the award is in excess of or not in accordance with the provisions of the award itself KHUDIRAM MAHATO v CHANDICHARAN MAHATON

1 Pat L J 308

——— Sch II paras 15 and 16 O XXXII r 7—*Arbitration—Agreement by guardian ad litem of minor party to refer—No objection taken to validity of award—Decree in accordance with award—Appeal* Per RICHARDS C J and BANERJI and RYVES JJ Where an objection to the validity of an award which might have been raised under article 15 of the second schedule to the Code of Civil Procedure is not raised within the time limited, or being raised is rejected and the Court proceeds to pronounce judgment and to frame a decree no appeal will lie except on the grounds stated in article 16 of the same schedule *Semble* (per RICHARDS C J and RYVES J) That Order XXXII rule 7 of the Code of Civil Procedure 1908 does not control article I of the second schedule It is not therefore necessary for the guardian of a minor party to obtain the express leave of the Court before agreeing to a reference to arbitration being made by the Court *Ghulam Khan v Muhammad Hassan I L R 29 Calc 167* and *Hardeo Sahai v Gouri Shankar I L R 28 All 35* referred to *Lakshmana Chetti v Chinnathambi I L R 24 Mad 326* distinguished LUTAWAN v LACHYA (1913) I L R 36 All 69

——— Sch II para 16—

See s 115 I L R 45 Bom 832

——— Sch II paras 16 21 O XXIII r 3—*Reference to arbitration—Decree on award—Appeal* A suit was instituted against four defendants Defendants Nos 1 to 3 were absent and as against them the Court ordered the proceedings to be *ex parte* At the first hearing the plaintiff and defendant No 4 appeared by counsel and an application was put in on behalf of the plaintiff with the concurrence of the defendant No 4 asking for an adjournment on the ground that negotiations for a compromise were going on. On the adjourned date the defendant No 4 made an application intimating to the Court that Mr W S Marris (then Collector of Aligarh) has been appointed as arbitrator by agreement between the plaintiff and himself and that the said arbitrator had consented to act and had begun to make inquiries and prayed for an adjournment The application was endorsed by the plaintiff s counsel The adjournment was granted and similar applications were from time to time made to the Court and they were granted Finally the Court communicated with Mr Marris himself inquiring how soon he hoped to be able to complete the award and fixed another date for the case On that date the Court was informed that the inquiries had been completed and the award might be expected shortly The absent defendants had in the mean time stated to Mr Marris their agreement to accept his award The award having been submitted to the Court the defendant No 4 applied that the award might be filed and be made a rule of Court The plaintiff objected on a variety of grounds The Court below overruled all the objections and passed a decree in conformity with the award On appeal to the High Court it was not contended that the decree was in excess of or not in accordance with the award *Held* that having regard to the substance rather than to the form of the proceedings before the Court below there was in this matter a reference to arbitration by the Court under the earlier paragraphs of the second schedule to the Code of Civil Procedure and in the circumstances the appeal which was against the decree based on the award was not maintainable *Nidamarthi Krishnamoorthy v Cangiparti Ganapatilingam 34 Indian Cases 741* and *Shama Sundram Iyer v Abdul Latif I L R 27 Calc 61* referred to KULSUM FATIMA v ALI AKBAR (1917)

I L R 39 All 401

——— Sch II para 17 (1882 Code s 522)—

See s 9 I L R 37 Bom 442

Agreement to refer to arbitration a pending litigation privately not coming under—Order filing agreement—Appeal maintainability of—Civil Procedure Code (Act V of 1908) O XXIII r 3—Mere agreement is not an adjustment under An order of a Court filing an agreement to arbitrate presented by the parties to a suit is the decree and is appealable as such even under the old Civil Procedure Code (Act XIV of 1882) as well as under s 104 (d) of the new Code. *Ghulam Khan Muhammad Hassan I L R 9 Calc 167 Narayana Rao v Sarabaiah 21 Mad L J 263* and *Tirutenoadathiengar v Vaidinatha Ayyar I L R 29 Mad 303* followed Paragraph 17 of second schedule to Civil Procedure Code (Act V of 1908) corresponding to s 523 Civil Procedure Code (Act XIV of 1882) covers only cases where parties without having recourse to litigation agree to refer their differences to arbitration. So an agreement to refer to arbitration a pending litigation made without the intervention of the Court cannot be filed under paragraph 17 of the second schedule *Ghulam Khan v Muhammad Hassan I L R 29 Calc 167* and *Tincowry Dey v Fakir Chand Dey I L R 30 Calc 218* followed A mere agreement to refer to arbitration a matter pending before a Court cannot be

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—contd

——— Sch II para 17 (1882 Code s 522)—
contd

treated as an adjustment of the dispute under O XXIII r 3 corresponding to s 375 Civil Procedure Code (Act XIV of 1882) though an award consequent on the arbitration may be so treated MACLEAN C J s view in *Tincowry Dey v Fakir Chand Dey I L R 30 Calc 218* followed *Pragla v Girdhardas I L R 26 Bom 76 Brojodurlabh Sinha v Ramanath Ghosh I L R 24 Calc 908* and *Lakshmana Chetti v Chinnathambi Chetti I L R 24 Mad 326* distinguished VENKATACHALA v RANGIAH (1913)
I L R 38 Mad 353

——— *Agreement to refer to arbitration—Mahomedan Law mother as* de facto *guardian if can execute the agreement on behalf of her minor children—A party to the agreement if can subsequently question the validity of the agreement and withdraw therefrom—Subsequent assent of the de jure guardian if can validate the agreement—Subordinate Judge if may allow mother to act for her infants in partition proceedings—Karta who is* A Mahomedan mother on behalf of her minor children entered into an agreement with some others to refer to arbitrators a dispute about some properties and they all made an application to Court under r 17 of the Second Schedule to the Civil Procedure Code The guardian of the minors properties appointed by the District Judge subsequently gave his assent to the agreement to refer and participated in the said application under r 17 The Court thereupon acted upon the agreement and referred the dispute to arbitration *Held* that the mother was not competent to bind the infants by the agreement to refer to arbitration The mother has no larger powers to deal with her minor child s property than any outsider or non relative who happens to have charge for the time being of the infant MOHSEN UDDIN AHMED v KHABIRUDDIN AHMED
26 C W N 246

——— Sch II paras 17 18—
See ARBITRATION I L R 46 Calc 1041

——— *Arbitration—Failure of arbitrators to make an award—Suit as to part of the matters referred—Direction by Court to proceed with the arbitration accepted by the parties* Certain persons agreed to refer matters in dispute between them to arbitration and two arbitrators and an umpire were appointed But owing to further disputes arising the arbitration was not proceeded with and one of the parties sent a notice to the umpire purporting to revoke his authority as umpire Thereafter one of the parties to the submission filed a suit in a Munsif's Court as to part of the matters referred to arbitration (the whole of such matters being beyond the pecuniary jurisdiction of the Munsif) The Munsif at first dismissed the suit but, the case having been remanded to him on appeal then passed an order staying the suit under paragraph 18 of the Code of Civil Procedure and further went on to issue a precept to the arbitrators and the umpire to continue the arbitration No exception however being taken by any one concerned to this order the arbitration proceeded, the parties argued their respective cases fully before the arbitrators and an award was made. An application to have this award made a rule of Court was accepted by the Subordinate Judge and an appeal against this order was dismissed by the District Judge *Held* that in the circumstances there was no ground for holding that the arbitrators had *no jurisdiction* to proceed with the case and deliver an award *Appavu Routher v Seeni Routher I L R 41 Mad 115* and *Sheo Babu v Udit Narain 12 A L J 757* referred to SUKHNATH RAI v NILAL CHAND I L R 42 All 661

——— Sch II cls 17 20—*Award—Application to file an award on reference made out of Court—Proceedings in Court continued—Limitation Act (IX of 1908) ss 5 and 14 Sch I Art 178* Pending proceedings for mutation of names the parties concerned referred to arbitration out of Court the whole question of their title to the property in dispute and the arbitrator delivered his award. The mutation proceedings were *nevertheless continued* More than six months after the date of the award some of the parties filed an application in the Civil Court purporting to be under cl. 17 of the Second Schedule to the Code of Civil Procedure and subsequently an amended application under cl. 20 *Held* that the application was time barred. Cl. 17 of the Second Schedule to the Code of Civil Procedure was totally inapplicable and neither s 5 nor s. 14 of the Indian Limitation Act 1908 could be applied in favour of the amended application under cl. 20 RAM UGRAH PANDE v ACHRAJ NATH PANDE (1915)

I L R 38 All 85

——— Sch II s 18 (1882 Code s 523)—
See ARBITRATION I L R 41 Mad 115

——— Suit on Hundi accepted by buyer—
See ARBITRATION I L R 2 Lah 335

——— *Agreement to refer disputes arising out of a contract to arbitration—Suit instituted by one of the parties for damages for short supply of goods—Whether suit should be stayed* Plaintiff sued defendant for a large sum as damages alleging that defendant had contracted to supply 75 cases of longcloth at certain rates but had given delivery of 38 cases only The defendant put in pleas and at the same time made an application to the Court under Schedule II paragraph 18 Civil Procedure Code praying that the suit should be stayed on the ground that clause 15 of the contract between the parties contained a provision to the following effect — Any claim or dispute arising in connection with this contract unless *an amicable settlement can be arrived at must be* referred to arbitration in Delhi in accordance with the Survey and Arbitration Rules of the Delhi Hindustani Mercantile Association The Senior Sub Judge Delhi declined to stay the suit *on the ground that the arbitration clause did* not apply to short delivery of goods citing *Chhajju Mal & Co v Gurmukh Singh Bhagwan Das (72 P R 1917)* *Held* that when a Court is apprised that a suit has been instituted in contravention of an arbitration agreement the Court has a discretion to stay the suit and that the burden lies on the plaintiff to show that some sufficient reason exists why the matter *should not be so referred* and not on the defendant to show that no such reason exists. The reason given by *the Lower* Court for declining to stay the suit was therefore

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— Sch II s 18 1882 Code s 523)—*contd*

incorrect and the case must be remanded for a decision of the application in accordance with law *Dinabandhu v Durgaprasad (I L R 40 Calc 1011) and Hodgson v Railway Passenger Insurance Co (9 Q B D 188)* followed. *Chajju Mal & Company v Gurmukh Singh Bhagwan Das (1 L R 1911) and Dreyfus v Jai Chand (51 I L R 1913)* distinguished GANESH DAS ISHAR DAS *v* DURGA DAT-JAGAN NATH I L R 2 Lah 19

——— Sch II, para 2 (1882 Code s 525)—*Private award application to file—Forum of institution and appeal if depends on value of award or value of matter in dispute—Change of law* When an award has been made on a reference to arbitrators without the intervention of the Court the amount of the award and not that originally in dispute between the parties determines the forum in which an application to file the award is to be made and the Court to which appeal shall lie from the order passed on the application *Narsingh Das v Ajodhya Prosad Sukul I L R 31 Calc 203* not followed in view of the change in the law MOHESH CH KOONDOO *v* AMAR CHANDRA KOONDOO (1914) 18 C W N 867

——— *Whether applicable where the award has been lost* *Held* that when an award has been reduced to writing and has been lost, the special procedure provided by paragraph 20 of Schedule II of the Code of Civil Procedure cannot be resorted to and the parties should be referred to a regular suit. *Gopi Peddi v Mahanandi Pedi (I L R 12 Mad 331)* and *Gowardhan Das v Kesho Ram (66 P R 1918)* referred to *Hill v Townsend (12 R R 595)* and *Banerji's Law of Arbitration p 370* distinguished. MUSSAMMAT KHODEJA *v* GHULAM NABIO I L R 1 Lah 45

——— Sch II paras 20 and 21—

See s 11 I L R 45 Bom. 327

See s 104 I L R 42 All. 185

——— *Private arbitration award filed and judgment pronounced and decree following if can be re opened in subsequent suit to set aside the award and decree*—Res judicata Matters heard and determined in proceedings under cl 21 of Sch II of the Civil Procedure Code are *res judicata* and cannot be re opened in a subsequent suit between the same parties and brought for the purpose of setting aside the award and the decree following upon the judgment pronounced in accordance therewith A proceeding under cl 21 of Sch II Civil Procedure Code is a suit within the meaning of s 11 of the Civil Procedure Code CHARU CHARAN SIRKAR *v* UMA CHARAN SIRKAR 26 C W N 940

——— Sch II para 21—

See ARBITRATION 4 Pat L J 394

——— Sch II para 21 O XLIII, r 1—*Arbitration—Application to file an award made out of Court—Application granted ex parte—Refusal to set aside ex parte order—Appeal* *Held* that an appeal will lie against an order rejecting an application to set aside an ex parte decree passed under para. 21 of the Second Schedule to the Civil Procedure Code, 1908 NIHAL SINGH *v* KHUSHHAL SINGH (1916) I L R 38 All 297

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— Sch III para 2 (1882 Code s 322)—

See s 48 I L R 42 All 118

See CIVIL PROCEDURE CODE 1882 s 325A I L R 46 Calc 183

——— Sch III para 7—*Held* that so far as the machinery necessary to satisfy a decree was concerned the Collector is the sole authority and a Civil Court cannot interfere with that discretion but the Court decides whether the decree has been satisfied or not BHURCHAND HANSRAJ *v* VIRA CHAMPA I L R 37 Bom 32

CIVIL SUIT

——— pendency of—

See CRIMINAL PROCEEDINGS STAY OF I L R 38 Calc 106

CIVIL TRESPASS

See PENAL CODE s 441 16 C W N 1007

CLAIM

——— *Crops wrongfully attached reaped and sold—Claimant if chargeable with costs of reaping—Indian Contract Act (IX of 1872) ss 69 70* Where perishable things under attachment in respect of which a claim has been preferred are sold the claim is not extinguished but attaches to the sale proceeds The decree holder attached some standing crops Before the crops were reaped the claimant preferred his claim to a portion of the crops and prayed that reaping might be stayed pending the adjudication of his claim or that the crops on his share of the land be kept separate This was not done and the crops were sold The claim was ultimately allowed *Held* that the claimant was not chargeable with the costs of reaping as in attaching and selling the crops the decree holders acted at their own peril and the claimant was not liable to pay those costs either under s 69 or s 70 of the Indian Contract Act *Dakhina Mohan v Saroda Mohan I L R 21 Calc 142 Tiluck Chand v Soudamini I L R 4 Calc 566 Abdul Wahid v Shaduka Bibi I L R 21 Calc 496 Goma Mahad v Gokaldas I L R 3 Bom. 74 Peruvian Guano Co v Dreyfus Brothers [1892] A C 166* referred to RASIK CHANDRA GHOSE *v* JITENDRA KUMAR GHOSE (1910) 15 C W N 817

CLAIM CASE

See RES JUDICATA I L R 44 Calc 698

CLAIM PETITIONS

See PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882) s 19 CL (*s*) I L R 39 Mad. 219

CLAIM PROCEEDINGS

See LIMITATION I L R 45 Calc 785

See PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882) s. 19 CL. (*s*). I L R 39 Mad. 219

CLAIMANT

See LIMITATION ACT (IX OF 1908) SCH I ART. 29 62 AND 120 I L R 38 Mad. 972

CLEAR RECEIPT

See CARRIERS I L R 39 Calc 311

CLERICAL MISTAKE

See DECREE I L R 39 Calc 265

CLERK

——— relinquishment by of employment without consent of master—

See MASTER AND SERVANT I L R 35 All 132

CLUB

See EXCESS PROFITS DUTY I L R 48 Calc 844

CO ACCUSED

——— confession of—

See CONFESSION I L R 38 Calc 446

I L R 38 Calc 559

See CONSPIRACY I L R 41 Calc 754

See EVIDENCE ACT (I OF 1872) s 30 I L R 38 Bom 156

I L R 43 Bom 739

——— plea of guilty by—

See CONFESSION I L R 38 Calc 446

COAL

See MINING LEASE I L R 41 Calc 492

——— wrongful removal of—

See JURISDICTION I L R 39 Calc 739

COAL MINES

See MINES I L R 38 Calc 372

——— grant of—

See DIGWARI TENURE I L R 39 Calc 696

COASTING-VESSELS ACT (XIX OF 1838)

——— ss 4, 7 and 13—*Registry of vessels—Certificate of registry—Certificate issued in the name of a person who trades in his own name jointly with his son—The son continuing the business in the same name after the person's death—Fresh certificate not obtained—Liability of the son for plying the craft without certificate* A person owning a craft had taken out a certificate of registry in his own name under s 7 of the Coasting Vessels Act (XIX of 1838) He traded in his own name jointly with his sons On his death his son carried on the business as before under the same name and did not take out a fresh certificate for the craft. The son was prosecuted under s. 13 of the Act for plying the craft without a certificate but was acquitted by the Magistrate The Government having appealed *Held* that the craft having been registered in the father's name and the ownership of it having passed on his death to his son the latter was bound to obtain a fresh certificate in his own name under s. 4 of the Coasting Vessels Act (XIX of 1838) and that his failure to do so was punishable under s. 13 of the Act EMPEROR v HARIDAS LALUMIDAS (1913) I L R 38 Bom 111

COCAINE

See BOMBAY ABKARI ACT s 43 I L R 34 Bom 342

See POST OFFICE ACT VI OF 1898 ss 19 61 70 I L R 37 All 289

——— importation of—

See EVIDENCE I L R 41 Calc 545

——— *Possession of illicit cocaine—Mere possession of bill of lading and invoice relating to illicit cocaine seized in the Custom House—Attempting to import such cocaine into Bengal—Alteration on the same fact of conviction of being in possession to one of attempting to import—Bengal Excise Act (Ben Act V of 1909) ss 2 (12) 46 (a) 52 and 61—Criminal Procedure Code (Act V of 1898) ss 236 237* The doctrine of constructive possession must be very cautiously applied especially in the domain of criminal jurisprudence The mere possession of a bill of lading and an invoice covering goods lying undelivered in the Custom House by a person who is not the consignee does not amount to possession of such goods within the meaning of the Bengal Excise Act *Kashi Nath Bania* v *Emperor I L R 32 Calc 557* and *Ashruf Ali* v *Emperor I L R 36 Calc 1016* distinguished Where the accused was found in possession of a bill of lading and an invoice relating to six bales of old wearing apparel which contained to his knowledge a large quantity of contraband cocaine purporting to be consigned to R I by a firm in London and he made over the documents to a firm of shipping agents for clearance from the Custom House and failed to produce the alleged consignee for whom he professed to be acting or to give any clue about him *Held* that the conviction of being in possession of such cocaine under ss 46 (a) and 52 of the Bengal Excise Act was not sustainable but that the accused should having regard to ss 236 and 237 of the Criminal Procedure Code be convicted on the same facts of attempting to import the cocaine into Bengal under s 61 read with ss 46 (a) and s 2 (12) of the Act KALI CHARAN MUKERJEE v EMPEROR (1913) I L R 41 Calc 537

CO CLAIMANTS

——— *Litigation expenses paid by if recoverable from others benefited by the result* Where some of several claimants take proceedings for recovery for their own benefit the fact that the result is also to the benefit of the other claimants does not create any implied contract or give the former an equity to be paid a share of the costs of the litigation by the latter *Abdul Wahid Khan* v *Shaluka Bibi I L R 21 Calc 496* and *Halima Bee* v *Roshan Bee I L R 30 Mad 526* followed RAMDHARI SINGH v PERMANAND SINGH (1913) 19 C W N 1183

CO CONSPIRATORS

——— separate trial of—

See CHARGE I L R 42 Calc 857

CO DEFENDANTS

See CIVIL PROCEDURE CODE (ACT V OF 1908) s. 11 I L R 40 Bom 210

CODICIL

See WILL I L R 40 Calc 192

CODIFICATION

See CUSTOMARY LAW 1 Pat L. J 22

COERCION

See CONTRACT ACT (IX OF 187) s 72 I L R 40 Mad 23

See HINDU LAW ADOPTION I L R 39 Bom 441

See LETTERS PATENT 2 Pat L J 63

See SPECIFIC RELIEF ACT (I OF 1877) s 39 I L R 33 Bom 149

See UNDUE INFLUENCE

See VOLUNTARY PAYMENT I L R 40 Calc 598

——— evidence of—

See WILL I L R 38 Calc 355

CO EXECUTANT

See ATTESTING WITNESS 14 C W N 1046

CO EXECUTORS

——— compromise between-

See HINDU LAW—WILL I L R 39 Mad. 265

COGNIZANCE OF OFFENCE

See COMPLAINT I L R 41 Calc 1013

See JURISDICTION OF MAGISTRATE I L R 37 Calc 221

See MAGISTRATE I L R 39 Calc 119

——— *Police report—Case made over to another Magistrate for enquiry and report—Criminal Procedure Code (Act V of 1898) ss 173 190 (1) (b)—Practice* Where a Magistrate upon receiving a police report under s 173 does not take cognizance of the case under s 190 (1) (b) which he is perfectly competent to do but makes it over for enquiry and report to an Honorary Magistrate he acts contrary to the provisions of the law ABDULLAH MANDAL v EMPEROR (1913) I L R 40 Calc 854

CO HEIRS

See TENANTS IN COMMON I L R 39 Mad. 1049

COLLECTOR

See BHAGDARI ACT (BOM ACT V OF 1862) s 3 I L R 38 Bom 679

See BOMBAY ABKARI ACT (V OF 1878) ss. 3? 67 I L R 37 Bom 101

See BOMBAY LAND REVENUE CODE 1879 s 48 I L R 42 Bom 123

s 121 I L R 45 Bom. 67

See CIVIL PROCEDURE CODE 1882—

ss 276 29? 3?0 32?A I L R 35 Bom 516

ss 3?1A 272 ?85 I L R 36 Bom 519

s 3??A I L R 36 Bom 510

See CIVIL PROCEDURE CODE 1908—

ss. 3 115 I L R 37 Bom 114

s 47 O XXI r 9? I L R 44 Bom 551

COLLECTOR—*contd*

s 68 O XXI r 100 I L R 37 Bom 45? I L R ?8 Bom ??2

s. 70 O XXI r. 7? I L R 2 Bom. ?91

s. 93 I L R 35 Bom 213

SCH. III s. 7 (1) (b) ss 69 70 I L R 37 Bom ?2

See COURT OF WARDS ACT (BOM ACT I OF 1905) s 3 (c) I L R 37 Bom 313

See HEREDITARY OFFICES ACT BOMBAY—

ss. 10 AND 13 I L R 35 Bom 1??

s. 11 I L R 37 Bom 37

s. 67 I L R 36 Bom 420

See INCOME TAX I L R 42 Calc 151

See INCOME TAX ACT 1886 ss 14 AND ?0 I L R 44 Bom 234

See LAND ACQUISITION I L R 38 Calc 230 I L R 44 Bom 9?

See LIMITATION ACT I L R 36 Bom 32?

See MAMLATDARS COURTS ACT BOMBAY s. 23 I L R 36 Bom 123

See PENSIONS ACT (XXIII OF 1871)—

s. 4 I L R 37 Bom 91

s. 6 I L R 39 Bom 352

See REVENUE JURISDICTION ACT (BOM ACT X OF 1876) I L R 3? Bom 542

——— award by—

See LAND ACQUISITION ACT I L R ?6 Bom 5 9

——— Boundary dispute—

See BOMBAY LAND REVENUE CODE 1879 s. 121 I L R 45 Bom ??

——— Certificate of—

See HEREDITARY OFFICES ACT (BOM. III OF 1874) ss 10 AND 13 I L R 35 Bom 146

See PENSIONS ACT (XXIII OF 1871) s 6— I L R 39 Bom ?5?

——— execution sale (setting aside of —

See BOMBAY HIGH COURT CIVIL CIRCULAR P 106 R. 17 I L R 45 Bom ? ?

——— partition effected by—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s. 54 I L R 42 Bom 68?

See DECREE I L R 40 Bom. 118

——— powers of—

See LAND REVENUE CODE (BOM. ACT V OF 1879)—

s 56 I L R 36 Bom 91

s. 79A I L R 35 Bom ?2

——— sale by—

See ADVERSE POSSESSION I L R 40 Calc. 173

See [illegible] OF SALE. I L R 37 Calc 10?

COLLECTOR—*contd*

— — — suit against without notice—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 424 I L R 35 Bom. 42

———— *Jurisdiction—Complaint to Collector of the District under s 58 (3) of the Bengal Tenancy Act (VIII of 1885)—Transfer of inquiry to Subdivisional Officer for disposal—Deputy Collector—Jurisdiction of Subdivisional Officer to hold such inquiry and to direct a prosecution for fabrication of false evidence—Bengal Tenancy Act s 3 (10) 58 (3)—Government Notification of 19th September 1910—Reg IX of 1833 s 20 and 21—Criminal Procedure Code (Act V of 1898) s 476* Under s 3 (10) of the Bengal Tenancy Act and Government Notification of the 19th September 1910 a Subdivisional Officer is a Collector and is authorized to hold an inquiry under s 58 (3) of the Bengal Tenancy Act A Collector of the District has power on complaint made to him to transfer such inquiry for disposal to a Subdivisional Officer who is under ss 20 and 21 of Reg IX of 1833 subordinate to the Collector and is required to perform all the duties assigned to him by the functionary Where therefore a complaint under s 58 (3) of the Bengal Tenancy Act was made to the Collector of the District and transferred by him for disposal to the Subdivisional Officer who found that certain rent receipt books filed in the course of the inquiry had been fabricated *Held* that the latter had jurisdiction under s 476 of the Criminal Procedure Code to direct a prosecution of the offenders for offence under ss 193 and 196 of the Penal Code [illegible] SINGH v [illegible] (1913)
I L R 40 Calc 465

COLLECTOR OF BOMBAY

office of

See BOMBAY CITY LAND REVENUE ACT (II OF 1876) ss [illegible] 39 40
I L R 39 Bom 664

COLLECTOR OF CUSTOMS

See SEA CUSTOMS ACT (VIII OF 1878) ss [illegible] 188 191
I L R 43 Bom 221

COLLECTOR OF RANGOON

— reference by

See APPEAL TO PRIVY COUNCIL
I L R 40 Calc 21

COLLECTORATE REGISTER

[illegible] the different [illegible] chargeable [illegible] although it [illegible] with all date [illegible] SINGH v [illegible] (1911)
16 C W N 590

COLLISION

See ADMIRALTY COURT
25 C W N 519

See CONTRIBUTORY NEGLIGENCE
I L R 41 Calc 358
I L R 37 Bom 576

COLLISION—*contd*

See RAILWAYS ACT (IX OF 1890) s 101
I L R 37 Bom 685

— — — at sea—

See ADMIRALTY JURISDICTION
20 C W N 1022

COLLUSION

See ASSIGNEE OF A MONEY DECREE
I L R 38 Mad 36

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 73 I L R 40 Mad 811

See DIVORCE I L R 44 Calc 1091

See EX PARTE DECREE
I L R 45 Calc 920

COLONIAL COURTS OF ADMIRALTY ACT 1890 (53 & 54 VICT C 27)

— ss 2 (3) (a) 35—

See ARREST OF SHIP
I L R 42 Calc 85

COLONIAL PROBATES ACT (55 & 56 VICT c 6)

See LETTERS OF ADMINISTRATION
I L R 40 Calc [illegible]

COLONIZATION OF GOVERNMENT LANDS (PUNJAB) ACT 1912

———— s 19—*Devise of his square by a tenant who became proprietor and subsequently—Whether rendered void by the Act and whether the devisee passes the proprietary right* One Sham Singh held a square of land in Chak No 157 in the Lyallpur District as a tenant On 5th July 1909 he made a will bequeathing his square in Chak No 157 to his son by a second wife After Act V of 1912 came into force he acquired proprietary rights in the said square and in 1913 he died The plaintiff the son of Sham Singh by his first wife then brought the present suit claiming [illegible] of the said square and contended [illegible] that the will was rendered void and inoperative by Act V of 1912 and that a devisee of occupancy rights could not pass proprietary right Both the Lower Courts dismissed plaintiff's suit Plaintiff appealed to this Court *Held* that as the testator was a proprietor at the time the succession fell in the will was not rendered void or inoperative by s 19 of Act V of 1912 *Held* also that as the occupancy rights had ripened into proprietary ownership before the will became operative the square passed to the devisee under the will [illegible] *followed* DALIP SINGH v BALWANT SINGH
I L R 1 Lah 500

COMMERCIAL CONTRACT

— — Indentor who has accepted shipping documents and draft—

See SALE OF GOODS
I L R 1 Lah 368

COMMERCIAL INTERCOURSE WITH ENEMIES ORDINANCE (VI OF 1914)

— — — s 3—

See TRADING WITH THE ENEMY
I L R 42 Calc 1094
I L R 40 Mad 31

COMMISSION

See ADMINISTRATOR GENERAL'S ACT (II OF 1874) s 20
I L R 33 Mad 1134

ADMINISTRATOR GENERAL'S LIFE
I L R 41 Calc 771

——— **Secret**—

See PRINCIPAL AND AGENT
I L R 37 Calc 81

— **to examine witnesses**

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXVI r 1
I L R 42 Bom 136

See PARDANASHIN, EXAMINATION OF
I L R 42 Calc 19

COMMISSION AGENT

——— **selling adulterated food**—

See ADULTERATION
I L R 39 Calc 682

See UNITED PROVINCES PREVENTION OF ADULTERATION ACT (VI OF 1912) ss 4 6
I L R 40 All 661

——— **Commission agency**—*Practice and procedure—Adjustment of accounts—Part of claim admitted by the defendant—Judgment on admissions—Liberty to plaintiff to prove balance of claim—Jurisdiction of Court—Discretionary powers—Civil Procedure Code (Act V of 1908) O XII r 6* Under XII O r 6 of the Civil Procedure Code the Court has jurisdiction to enter judgment for the amount admitted to be due from the defendants to the plaintiffs and it is in the Judge's discretion having regard to the nature of the case and the allegations contained in the pleadings and the admission made in Court whether he will allow the plaintiffs to proceed to prove the remainder of their claim The discretion of the Judge is judicial and an erroneous exercise thereof may be open to correction by a Court of Appeal which however will be slow to interfere unless either of the parties has been manifestly and unfairly prejudiced LEEMSUK DAS ASSARAM v UDAIRAM GANGABUX (1917)
I L R 45 Calc 138

COMMISSIONER

——— [illegible] *Act XI of 1859* [illegible] *Act VIII of 1868* [illegible] *Held* (affirming the decisions of the Court in India) that the Commissioner acting under Act XI of 1859 as amended by Bengal Act VII of 1868 had under the circumstances no power to review his order setting aside a sale held for arrears of revenue [illegible] COLESKA v NAND KUMAR [illegible] (1913)
I L R 40 Calc 552

COMMISSIONER FOR LOCAL INVESTIGATION

CIVIL PROCEDURE CODE O XXVI r [illegible]
I L R 44 Mad 640

——— [illegible] The Court which appoints a Commissioner for local investigation is the only Court having jurisdiction to deal with [illegible]

COMMISSIONER FOR LOCAL INVESTIGATION—*contd*

tion submitted by such Commissioner PANCHANAN SEN v MADHUSUDAN MULLICK (1918)
23 C W N 295

COMMISSIONER FOR TAKING ACCOUNTS

See CIVIL PROCEDURE CODE 1908 SCH II PARA 12 I L R 45 Bom 512

——— *Accounts—Power of the Commissioner to decide questions of law in the taking of accounts—High Court Rules (Original Side) Rr 31 399—Rules of the Supreme Court in England O 33 r 69—Redemption suit—Motion for direction to the Commissioner* The Commissioner to whom a suit is referred by a Judge on the Original Side of the High Court is entitled to decide questions of law which may arise while taking the accounts It is not open to any of the parties to the reference to ask the Judge to give his opinion on questions of law which have arisen in the taking of account The parties objecting to the decision of the Commissioner should proceed in the ordinary course by filing exceptions to his report *Per* MACLEOD J It must not be taken as holding that the Court once a reference has been made to the Commissioner loses all control over the proceedings until the Commissioner has made his report There may be cases in which the Court may find it necessary to withdraw the proceedings from the Commissioner and resume the hearing itself but such cases must necessarily be of rare occurrence It is a different matter to ask the Court to resume the hearing merely for the purpose of deciding certain questions which come within the powers of the Commissioner LAXMIBAI v HUSSAI BHAI (1916)
I L R 41 Bom 719

COMMISSIONER OF PARTITION

——— **sale by**—

See REVIEW I L R 40 Calc 149

——— **Commissioner's fees**—*How realised—If to be made part of decree—Partition suit* Where a decree in a partition suit entitled the Commissioner to realise by execution the sum awarded to him on account of his fee and expenses *Held* that the Commissioner who was an officer of the Court ought not to have been placed in this position The proper course for the Court would have been to call upon the decree holder to deposit in Court the full amount determined to be payable to the Commissioner and the decree ought not to have been drawn up till such amount had been deposited NANDA LAL SIRKAR v BENODE BEHARY BOSE (1910) 15 C W N 221

COMMISSIONER OF POLICE

——— **power of**—

See EXTRADITION I L R 40 Calc 470

COMMITMENT

See APPROVER I L R 42 Calc 836

See CRIMINAL PROCEDURE CODE (ACT V OF 1898)—

s 197 210 [illegible]
I L R 42 Bom 172

197 339 AND [illegible]
I L R 43 Bom 147

s 209
I L R 35 Bom 183

[illegible]
I L R 41 All 454

COMMITMENT—*contd*

s 213 I L R 38 Bom 114

ss 476 AND 478 I L R 40 All 116

s 478 I L R 40 All 32

See JURY

I L R 37 Calc 437

——— to Sessions—

See JURISDICTION OF CRIMINAL COURT

I L R 40 Calc 560

——— while suit pending—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XLIII R 1 (*t*) AND O XXXIX R 2 CL (3)

I L R 39 Mad 907

——— *Duty of Magistrate to examine witnesses not produced but whom the accused is prepared to produce after process—Application to summon witnesses and for time to file documents made after the commitment order—Criminal Procedure Code (Act V of 1898) s 208—Practice* A Magistrate is bound before passing an order of commitment to examine all the witnesses produced by the accused but not those whom he is prepared to produce after process obtained for their appearance *Queen Empress* v *Ahmadi* I L R 20 All 264 referred to *Emperor* v *Muhammad Hadi* I L R 26 All 177 dissented from. A Magistrate does not act illegally under s 208 of the Criminal Procedure Code in refusing an application for summons on witnesses and for time to file documents made after the order of commitment has been passed. EMPEROR v SURATH (1914) I L R 42 Calc 603

——— *Charge exclusively triable by a Court of Sessions—Magistrate's duty when there is evidence which if believed would support the charge* Where the charge against the accused was one of rape which is exclusively triable by a Court of Sessions and other minor offences and the Magistrate holding that the story of rape was probably an exaggeration tried the accused for the other offences and convicted him *Held* that as there was evidence which if believed would support the charge of rape the Magistrate should have committed the case to the Court of Sessions *Per* SHAMSUL HUDA J That in revision the High Court should not take the responsibility of coming to a conclusion even incidentally regarding a charge on which the accused has not been tried. MOZE ALI v KING EMPEROR (1919) 23 C W N 1031

COMMITTEE

See PARTIES—RELIGIOUS ENDOWMENT

I L R 40 Calc 323

COMMON CARRIERS

See CARRIERS

See CONTRACT ACT (IX OF 1872) ss 6 65 I L R 40 Bom 529

——— by sea—

See BILL OF LADING

I L R 38 Mad 911

——— liability of—

See CARRIERS ACT s 6 15 C W N 226

1 ——— — *Contract of carriage—Excepted risk—Construction—Negligence indemnity against—Carriers Act (III of 1865) ss 6 8 9—*

COMMON CARRIERS—*contd*

Insurance policy warranted no recourse against carriers—Subrogation—Right to recover—Misjoinder—Damages Goods were shipped on a flat belonging to the carriers under a bill of lading endorsed to the Manufacturing Company by clause 5 whereof the carriers were exempt from loss of the goods unless such loss should have arisen from the negligence or criminal acts of their servants or agents There was an existing agreement between the Manufacturing Company and the carriers by clause 10 whereof the Manufacturing Company undertook and agreed to hold the carrier harmless and indemnified from and against all claims which could be insured against or covered by an ordinary F I A policy An ordinary I P A policy was issued by the Insurance Company in favour of the Manufacturing Company in respect of the goods having the clause warranted no recourse against carriers The goods were lost by the negligence of the carriers and the Insurance Company paid the Manufacturing Company the amount of the policy In an action for the loss of the goods brought by the Insurance Company and the Manufacturing Company against the Carrying Company as common carriers — *Held* that the action lay The rights and liabilities of the common carrier in India are outside the Indian Contract Act and are governed by the principles of the English Common Law as modified by the Carriers Act A common carrier is subjected to two distinct classes of liability (i) insurable risks from which the element of default is absent and (ii) carrying risks in which that element is present English Courts in dealing with exemption clause recognise this distinction and construe them as not extending to carrying risks in the absence of clear words to that effect *Price & Co* v *Union Lighterage Company* [1904] 1 K B 412 *James Nelson & Sons Limited* v *Nelson Line (Liverpool) Limited* (No 2) [1907] 1 K B 769 *Wyld* v *Pickford* 8 M & W 443 *D'Arc* v *London and North Western Railway Company* L R 9 C P 325 *Martin* v *The Great Indian Peninsula Railway Company* L R 3 Ex 9 *Czech* v *General Steam Navigation Company* L R 3 C P 14 and *Crouch* v *The London and North Western Railway Company* 23 L J C P 73 referred to *Baxter's Leather Company* v *Royal Mail Steam Packet Company* [1908] 2 K B 626 distinguished *A fortiori* in India where there is statutory prohibition against exempting a carrier from loss arising from negligence and criminal act this canon of construction should be adopted at any rate within the limits implied in the prohibition. Clause 10 of the Agreement must be construed as an integral part of the contract of carriage it did not extend to losses arising from negligence or criminal acts The stipulation in the policy warranted no recourse against carriers did not amount to a relinquishment by the Insurance Company in respect of risks not exempted i e where the loss had arisen from the negligence of the carriers *Thomas & Co* v *Brown* 4 Com Cas 186 distinguished Inasmuch as the Insurance Company claimed by way of subrogation and not assignment the suit should have been brought only in the name of the Manufacturing Company *Burnand* v *Rodocanachi* L R 7 App Cas 333 and *Simpson* v *Thompson* L R 3 App Cas 279 referred to BRITISH AND FOREIGN MARINE INSURANCE Co LD v INDIA GENERAL NAVIGATION AND RAILWAY Co LD (1910) I L R 38 Calc 28

15 C W N 226

COMMON CARRIERS—*contd*

2. ——— Notice of loss *Carriers Act (III of 1865)* s *10—Waiver of Notice* Under s 10 of the Carriers Act before suit notice of loss must be given to the carrier by the plaintiff Knowledge of the loss derived *aliunde* by the carrier is not sufficient BRITISH AND FOREIGN MARINE INSURANCE CO LD v INDIA GENERAL STEAM NAVIGATION AND RAILWAY CO LD (1910)

I L R 38 Calc 50

3. ——— *Right of consignee to insist on carrier weighing goods before delivery—Refusal to re weigh if refusal to deliver—Right of consignee to weigh and charge for shortage* Defendant Steamer Company who were common carriers used to allow consignees of goods by their boats to inspect them before granting receipt in the delivery book and have them re weighed (if so demanded) in case of suspicion of short weight and enter the short weight in the delivery book The plaintiff's agent without making any such inspection paid the freight and had the bill of lading and gave a clear receipt in the delivery book of the Company but did not take actual delivery as he found some of the bags damaged. He then asked the Company's servant to re weigh the goods and this being refused, did not take delivery The plaintiff thereupon sued the Company for the price of the goods *Held* that the suit must fail as refusal to re weigh did not amount to a refusal to deliver the goods The mere fact of the plaintiff's agent accepting delivery and granting a clear receipt would not have taken away his right to compensation for proved loss of any portion of the consignment in transit or in the custody of the Company the position of the latter being that of an insurer He might weigh the goods himself and claim the price of the shortage in weight PANNASH AGARWALA v INDIA GENERAL NAVIGATION AND RAILWAY CO LD (1914)

22 C W N 310

4 ——— *Liability for injuries to goods—Through booking of goods—Through booking by one company and injury while the goods were in the custody of another Company—Indian Carriers Act (III of 1865) ss 6 8 9—Negligence—Onus of proof—Non feasance and misfeasance—Indian Railways Act (I of 1872) s 10* The plaintiff delivered 313 chests of tea to the first defendant (Railway Company) at Bo Iubi in Assam for transport to Chittagong and thence to England the railway receipt being in the usual form used for land transport from Assam to Chittagong The business arrangement on the first defendant's railway goods delivered for transport from Assam to Chittagong had to be transported from Gauhati to Chandpur by river in steamers and flats belonging to the second defendant under some arrangement with the first defendant which was not produced Accordingly the said chests of tea were put upon one of the flats of the second defendant at Gauhati for carriage to Chandpur and while the chests were in the said flat a fire broke out and destroyed 96 of the chests The plaintiff brought this action against both the defendants for recovery of Rs 7180 representing the value of the 96 chests so destroyed The action against the first defendant was dismissed under s 77 of the Indian Railways Act 1890 as the requisite notice was not served on them within the period of six months *Held* that there was no contract between the plaintiff and the second defendant and that under the arrangement there was a general contract between the defendants whereby one became a sub contractor to the other *Held* further that under the circumstances the first defendant had no authority to act as agent of the second defendant to enter into contract for carriage on the latter's behalf *Held* also that the second defendant was a common carrier within the definition of the Indian Carriers Act 1865 and as such was liable to the plaintiff who was the owner of the goods The Indian Carriers Act 1865 makes a common carrier liable to the owner of the goods as such though not as insurer *Held* also that the plaintiff was entitled to succeed inasmuch as he had established negligence on the part of the second defendant THE DEKHARI TEA CO v THE ASSAM BENGAL RAILWAY CO (1919)

23 C W N 928

COMMON GAMING HOUSE

See COTTON GAMBLING

I L R 39 Calc 908

See PUBLIC GAMBLING ACT (III OF 1867)

s 3 AND 4 I L R 41 All 366

4 AND 8 I L R 41 All 272

COMMON LAND

——— Abadi—*Occupied by some of the proprietors asserting their exclusive title and denying that of the other proprietors—Whether a suit by other proprietors for joint possession is competent—Partition of abadi land* Where a plot of abadi land was taken exclusive possession of by the defendants two of the proprietors of the village who asserted their exclusive title and denied the title of the other proprietor *Held* that a suit for joint possession by other proprietors was competent *Watson and Co v Ramchand Dutt (I L R 18 Calc 10 P C)* and *Maju v Teja Singh (9 P R 1918)* distinguished. A Civil Court but not a Revenue Officer or Revenue Court has jurisdiction to partition the abadi land, but the onus of proving that there was *shamilat* in the abadi which could be partitioned and that partition thereof was feasible rests upon the person claiming partition *Ishwar Singh v Atma Singh (117 P R 1894)* followed MANJI v GHULAM MUHAMMAD

I L R 2 Lah 73

——— Abadi—*encroachment by one of the co sharers—Suit for ejectment by some of the other co sharers without proof of material or substantial injury and without asking for partition* The plaintiffs and some other persons are the owners of 9 16th share of Pana Opra one of the Panas of the town Toshan the remaining co sharers (butchers by trade) own the rest of the Pana The plot in dispute is a vacant site in the Pana which was alleged to have been in long occupation of defendants Nos 3 and 4 who sold it to defendants 1 and 2 two of the co sharers in the rest of the Pana under two deeds of sale dated 6th August 1916 The plaintiffs alleged that the plot in dispute was part of the common land in Pana Opra that defendants 1 and 2 under the deeds of sale had taken exclusive possession of it on 11th December 1917 and begun to make constructions upon it and the plaintiffs had taken proceedings against them in the Criminal Courts which were dismissed on 4th March 1918 owing to defendants producing the deeds of sale They

COMMON LAND *contd*

alleged that the deeds of sale were fictitious and invalid and prayed for possession of the plot and a perpetual injunction The suit was instituted on the 9th March 1918 The defendants 1 and 2 pleaded that although the site appertained to the *abadi* Lana Ojra Toshan being a town according to the *Bajib-ul-arz* every occupier of the *abadi* land was its proprietor and possessed the right of making transfer and that they had consequently acquired a good title under the sale deed They also pleaded that plaintiffs had no right to institute the suit against the defendant without having a partition made The first Court held that defendants [illegible] and 4 had been in occupation of the plot and according to the *Bajib-ul-arz* they had a right to transfer it to defendants 1 and 2 and dismissed the suit The plaintiffs appealed and the Lower Appellate Court agreed in the finding of the first Court that according to the *Bajib-ul-arz* every inhabitant of the *abadi* whether a proprietor or not was entitled to alienate the *abadi* land exclusively in his occupation But it found that the vendee defendant 1 and 2 had not succeeded in proving the exclusive possession of defendants 2 and 3 their vendor and could not therefore transfer an exclusive title to the latter It accordingly passed a decree for joint possession in favour of the entire proprietary body of Lana Ojra The defendant thereon presented the present appeal to the High Court It was urged that even if the land belonged to all co-sharers in the [illegible] the plaintiffs had no right to eject the defendants without proving special damage or injury and that the only remedy the plaintiffs had was to have a partition effected *Held* that it is a well established custom that no individual proprietor can appropriate to himself a portion of the common land and use it in such a way as to affect the rights of all the co-sharers at the time of partition *Held* also that the plaintiff having come into Court without any delay were not obliged to show material and substantial injury and that the decree of the Lower Appellate Court was correct Civil Appeal No 2788 of 1917 per Scott Smith J (unpublished) followed *Chuhar Singh* v. *Dhanikal Singh* (77 P R 1884) *Chandu Mal* v. *Coga* (121 P R 1885) *Chan Singh* v. *Sadhu Singh* (3 [illegible] R 1852) and *Hidayat Ali* v. *Akbar* [illegible] 76 [illegible] 1893) referred to *Chaudhri Muhammad Khan* v. *Bibi* (1921 [illegible] 1889) *Hidayat Ali Khan* v. *Inayat Ali Khan* ([illegible]) *Mapu* v. *Iya Singh* (29 P R 1918) and *Nocury Lal* v. *[illegible]* (I L R 8 Cal 708) distinguished MANAK v. GHULAM MUHAMMAD

I L R 1 Lah 249

COMMON LAW

See CONTEMPT OF COURT I L R 41 Calc 173

See HINDU LAW—WIDOW I L R 36 Bom 383

COMMON MANAGER

See ACCOUNT I L R 40 Calc 108

— — suit against

See BENGAL TENANCY ACT [illegible] 24 C W N 108

— — — — — — *[illegible]* Act (VIII of 1885) *[illegible] 95—[illegible]* *[illegible] conditions* [illegible]

COMMON MANAGER—*contd*

by the District Judge [illegible] maintainable—Position of a Common Manager A Common Manager appointed under [illegible] 95 of the Bengal Tenancy Act by the District Judge is an officer of the Court created by the statute and in so far he holds his office and performs his duties under the provisions of the Act is in a position analogous to that of a Receiver appointed by the Court and is entitled to the same protection for the period during which he exercises his duties within the powers given to him by the Act as a Receiver appointed by the Civil Court No suit by a co-owner to render a general account for the whole period of his management could lie against a Common Manager who has in accordance with the provisions of the law which defines his duties regularly submitted accounts for the period of his management to the District Judge and which accounts have been duly audited and passed by the District Judge A suit is also not maintainable by a co-owner against a Common Manager for recovery of specific sums of money which in the ordinary course of the management ought to have appeared in the account and which the co-owner was aware at the time were not included in the account or with due enquiry might have discovered were not included in the account except with the previous sanction of the District Judge *[illegible]* *Chandra [illegible]* v. *Ormond* (I L R 39 Calc [illegible]8 : 16 C W N 516) and *[illegible]* *Chaudhury* v. *[illegible] Lal Singh Jog* 2 *Ind Cas* 397 distinguished NANI KISHORE MANDAL v. ATUL CHANDRA CHATTERJI (191[illegible])

I L R 40 Calc 150

— — — — — — *Application for the appointment of a Common Manager—Appointment of a receiver pending disposal of the application—Bengal Tenancy Act (VIII of 1885)* [illegible] 93—*Civil Procedure Code (Act V of 1908)* s 141 *O XL r 1* The terms of O XL r 1 of the Civil Procedure Code of 1908 are wider than the corresponding s 503 of the Civil Procedure Code of 1882 and do not provide that the appointment of a receiver should be confined to a suit An application for the appointment of a Common Manager under [illegible] 93 of the Bengal Tenancy Act is an original proceeding contemplated in s 141 of the Civil Procedure Code to which the procedure under O XL r 1 seems to be applicable *[illegible]* v. *[illegible]* (I L R 27 All 106) followed The relief of an aggrieved party to such an order is by way of an appeal and not by an application for revision ASADALI CHOWDHURY v. MAHOMED HOSSAIN CHOWDHURY (1916)

I L R 43 Calc 983

— — — — — — *Bengal Tenancy Act (VIII of 1885)* s [illegible]—*Suit for rendition of account [illegible]* Where a common manager appointed under [illegible] of the Bengal Tenancy Act resigned and the estate was released and when it was found that his account had not been properly rendered and passed by the District Judge *Held* that he could be sued for account with the permission of the District Judge *[illegible]* *[illegible] Chandra Chatterji* (I L R 40 Calc 150) distinguished DEBES PRASANNA ROY v. [illegible] CHANDRA SIRKAR (1916)

I L R 44 Calc 800

COMMON OBJECT

See RIOTING I L R 39 Calc 731

—— not unlawful—

See RIOTING I L R 39 Calc [illegible]

COMMON OBJECT — *contd.*

——— *Failure to prove common object—Conviction without distinct finding of common object of each rioter—Legality of conviction.* The mere fact that in a charge of rioting the common object is not stated does not invalidate the conviction if the evidence clearly shows what the common object of the assembly was. If two common objects are alleged and one is proved then the fact that the other common object is not proved will not exonerate the accused from liability. HAJI SULTAN SAH v. KING-EMPEROR

2 Pat L J 541

COMMUTATION OF RENT

See BENGAL TENANCY ACT 1885 ...

5 Pat L J 76

See RENT ... I L R 45 Calc 769

CO-MORTGAGEES

See MORTGAGE ... I L R 38 Calc 342
L R 43 I A 272
5 Pat L J 376

COMPANIES ACT (VI OF 1882)

See COMPANY.

——— ss 6 40 41—*Certificate of Incorporation of Company effect of—Objection to formation of Company the Memorandum of Association not signed by seven persons as required—Matter in issue not raised previously in the suit—Res judicata—Civil Procedure Code 1882 s 13.* The provisions of the Indian Companies Act (VI of 1882) as regards the incorporation of Companies are the same as those contained in the Imperial Act of 1862 except that it is specially provided in s 40 of the Indian Act that it is not the duty of the Registrar to require evidence as to whether the subscribers to the Memorandum of Association are competent to contract. S 6 of the Act provides that any seven or more persons ... may by subscribing their names to a Memorandum of Association and otherwise complying with the requisitions of this Act in respect of registration form an incorporated Company etc. And s 41 enacts that a certificate of the incorporation of any Company given by the Registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with. The Memorandum of Association of a projected Company was signed before the Registrar by two adult persons and also by a person who under the Guardians and Wards Act (VIII of 1890) had been duly appointed by the Court guardian of five minors the guardian making a separate signature for each minor and the Registrar issued a certificate of the due incorporation of the Company. In a suit in which it was objected *inter alia* that the Company was not properly constituted the Memorandum of Association not having been signed by the required number of seven subscribers *Held* (reversing the decision of the Chief Court of Lower Burma on its Appellate Side) that assuming the conditions of registration were not duly complied with the certificate of incorporation was conclusive for all purposes and the Court could not go behind it and consider any alleged defects in the formation or constitution of the Company. *In re Lim Ta Pottery Company Peel's Case* I R 2 Ch App 674 *per* Lord Cairn L J and *Oakes v Turquand* L R 2 H L Appeal 325 *per* Lord Chelmsford L C followed. But apart from the English decisions the use of the word otherwise in s 6 of Act VI of 1882 showed that the statutory condition that the Memorandum of Association must be signed by seven or more persons was as much a condition of registration as any other to be found in the Act which was preliminary to registration and apparently essential. *Held* also that the issue as to the invalidity of the Company might and ought to have been made a ground of attack in a former suit brought by the same plaintiff against the same defendants in 1903 which had been dismissed. All the facts on which the present suit was based were known to the plaintiff and were stated at length in the proceedings in the former suit. No further evidence would have been needed. Nothing was wanting but the addition of an issue on this point. The present suit as regards that question was therefore barred as *res judicata* under s 13 Explanation II of the Civil Procedure Code 1882. *Kameswar Pershad v Rajkumari Ruttan Koer* I L R 20 Cal 79 L R 19 I A 234 followed. MOOSA GOOLAM ARIFF v. EBRAHIM GOOLAM ARIFF (1912)

I L R 40 Calc 1

——— ss 28 45 61—*Indian Contract Act (IX of 1872) ss 2 (c) (d) 3 10—Company—Share holder—Inducement by the agent of the Company to take shares—Binding up—Liability for calls on shares—Agreement that shares were not to be paid unless dividend was given—Agreement not registered—Payment of shares in cash—Contribution—Condition—Subsequent—Bogus shareholder.* The question as to whether a particular person became a member of a Company is a question of fact. Where the Agent of a Company induces a person to sign an application for the shares of the Company and that person's name is accordingly entered in the register of members as a shareholder there is a complete contract between that person and the Company's agent under s 2 (c) (d) 3 and 10 of the Indian Contract Act (IX of 1872). No contract by which shares are to be considered as duly paid when they are not in fact paid up is valid unless it is registered and when there is no such registered contract the shares are payable in cash. Where in the event of a company not making a profit the shares were not to be paid for at all the shareholder was a bogus shareholder and this is opposed to the whole object of the Companies Act in England and in India. Calls made in the winding up being calls for something unpaid on the shares are not a debt due to the Company but are contribution due by a member under s 61 of the Indian Companies Act (VI of 1882) and he is liable to pay them. The contribution under this section applies to unpaid calls made before the winding up because although that is a debt due to the Company it is not the less an amount unpaid on the share with respect to which the member is liable. When the Manager of a Company forwards to an applicant notice that he is entitled to shares in the Company accompanied by a form of application for shares and the applicant signs the form of application and returns it to the Manager the applicant becomes liable as a shareholder. Notice of allotment being immaterial. MOTILAL CHUNILAL v. THAKORLAL CHIMANLAL (1912)

I L R 36 Bom 557

——— ss 40 and 41—

See s 6 ... I L R 40 Calc 1

COMPANIES ACT (VI OF 1882)—contd

s 58 I L R 20 Bom 557

See COMPANY I L R 40 Bom 3[illegible]

— s 58 *Rectification of register of shareholders—Winding up—Contributory—Application for shares—Condition attached—Applicant unable to fulfil the condition—Applicant's liability as a contributory—Intention to become a member in praesenti or in futuro* A manager of a Banking Company represented to the petitioner that if the petitioner took 400 preference shares he would be appointed a cashier in a new branch of the company In pursuance of this contract, the petitioner applied for 100 only of preference shares He paid the deposit money and was entered on the register of shareholders Subsequently he found himself unable to take up the remaining 300 shares he was not appointed a cashier in the branch office and the contract was treated as cancelled by the Directors The petitioner having applied to have his name removed from the list of contributories in respect of preference shares *Held* that the petitioner's application for 100 preference shares was conditional and that he had no intention to become a member of the company when he applied for the shares until he was appointed a cashier in the branch office He was therefore entitled to be struck off the register of preference shareholders and could not be called upon as a contributory on that account *Rogers Case—In re Universal Banking Company L R 3 Ch 633* followed PAMANBHAI C CHASHIRAM (1918)
I L R 42 Bom 595

— s 58—

See s 4[illegible] I L R 2 Bom 53[illegible]

— *Liquidation—List of contributories—Rectification of register of shareholders—Transfer signed by transferor and transferee and lodged before winding up of the Company—Transfer of the shares—Approval of the transfer—Refusal to register—Effect of—No default or unnecessary delay or absence of sufficient cause on the part of the Company—Liability of transferor as contributory* The applicant a shareholder in the Indian Specie Bank Ltd sold some of his shares to the respondents by various transfers which were lodged with the Company for registration The Company however went into liquidation before the transfers were in due course approved of by the Board of Directors According to the practice observed by the Company transfers lodged up to the end of the previous week were placed before the Board of Directors at their meeting in the following week The Company went into liquidation on the [illegible]th of November 191[illegible] [illegible] Board of Directors held [illegible] in the [illegible] only were [illegible] with the Company [illegible] both and [illegible] 28th of November 191[illegible] it was a[illegible] placed by the liquidator [illegible] list of contributories [illegible] which [illegible] his name on the [illegible] of November 1913 [illegible] contended that the [illegible] of the [illegible] Company [illegible] the name of the transferor [illegible] *Held* that [illegible] there was

COMPANIES ACT (VI OF 1882)—contd

— s 58—contd

either absence of sufficient cause or default or unnecessary delay on the part of the Company in dealing with the transfers the register of shareholders could not be rectified SORABJI NUSSERWANJI v C A PATWARDHAN (1915)
I L R 40 Bom 134

— s 61—

See s 28 I L R 2[illegible] Bom [illegible]

See COMPANY I L R 4[illegible] Bom 264

— s 61, 70 15[illegible]—*Company—Winding up—Contributory—Liability of contributory for calls* Once a member of a Company is upon the list of contributories unless he succeeds in showing as against the liquidator that he should not have been put on the list of contributories he is liable for all those matters in respect of which he may be charged in the event of the company being wound up that is to say to the extent of his original share held in the company which remains unpaid he is liable to contribute to the assets of the company for payment of the debts due to creditors and the expenses of the winding up under s 61 of the Indian Companies Act 1882 He is therefore liable in respect of unpaid calls even though as against the company the realization of such calls may have become barred by limitation *Sorabji Jamsetji v Ishwardas Jugjivandas I L R 20 Bom 531* and *Vudeswara Ayyar v Siva Subramani Mudaliar I L R 31 Mad 66* followed JAGANNATH PRASAD v U P FLOUR AND OIL MILLS COMPANY LIMITED (1916)
I L R 38 All 337

— 67 9[illegible] 1[illegible]—*Contract entered into by companies — Agreement to refer to arbitration—Whether seal of the Company necessary* *Held* that s 9[illegible] of the Indian Companies Act 1882 did not require that an agreement entered into by a company with a person who held a contract for the working of a certain portion of the company's business to refer disputes which might arise between the parties to arbitration should be made under the seal of the company CAWNPORE SUGAR WORKS LD v NORI MIAN (1915) I L R 37 All 273

— s 68—

See COMPANY I L R 43 Bom 5[illegible]0

— s 7[illegible]—*Penalty—Criminal Procedure Code s 260—Summary jurisdiction—Power to try summarily offences under the Indian Companies Act* There is nothing in law to prevent a Magistrate from trying summarily offences under the Indian Companies Act 1882 *Held* also that the penalty provided by s 74 of the Indian Companies Act 1882 is a fixed and not a maximum penalty *Queen Empress v Moore I L R 20 Calc [illegible]* referred to EMPEROR v DINA NATH (1913)
I L R [illegible] All 1[illegible]3

— s [illegible]—*Alteration of memorandum of association by articles—To what extent a company can by resolution alter articles* Under s [illegible] of the Indian Companies Act anything which appears in the articles of association but is not provided for in the memorandum of association may be altered by a special resolution Where the articles of association provide for matters which need not under [illegible] of the Companies Act be contained in the memorandum of association and which are not either expressly or impliedly dealt with by such memorandum the portions of the articles dealing with such matters cannot be

COMPANIES ACT (VI OF 1882)—contd

——— s 76—c

treated a part of the memorandum and can be altered by a special resolution of the company. Right which have their origin in a contract outside the articles though the terms of which contract are found in or incorporated in such articles can be altered by such alteration of the articles unless it is proved that one of the terms of such contract was that such right should not be affected by an alteration of the articles. CHETTI ATTARAN v CHETTIAR ... (1909)

I L R 33 Mad 36

——— ss 76 ... —Articles of association —Agent—Power to ... —Contract Act (IX of 18) s ...—Capital The agents of a joint stock company—a joint Hindu family firm—borrowed a considerable sum of money on hundis executed by the managing member of the firm in the name of the company. These hundis were signed with the name of the managing member simply having nothing on the face of them to indicate that the person who signed them was signing as an agent and not in his personal capacity. The company had no valid articles of association and neither the memorandum of association nor table A of the Indian Companies Act 1882 empowered the agents to borrow money. There were however what purported to be articles of association which though legally invalid (they had never been registered) were treated by the company and submitted to the public as being the genuine and legally adopted articles of association of the company. These articles did give the agents of the company power to borrow. *Held* that the signature of the managing member of the agent firm was sufficient and that although the articles of association were not valid yet the company was in the circumstances estopped from raising the plea of their invalidity against holders in due course of the hundis. KUNJ KISHORE v THE OFFICIAL LIQUIDATOR SETH BALDEO MILLS L (1914)

I L R 36 All 416

——— s 77—

See s 76 I L R 36 All 416

——— ss 77 173—*Voluntary winding up—Special resolution—Notice of extraordinary meeting for passing special resolution for voluntarily winding up and its confirmation—Waiver by share holders of defects of notice would make appointment of liquidator valid—If creditors may question validity of voluntary winding up and appointment of liquidator* Notice was given calling an extraordinary general meeting of the shareholders to consider the position of the Company and if necessary to pass a special resolution that the Company be voluntarily wound up and liquidators appointed and the notice stated further that in the event of the resolution being passed a special meeting would be held immediately after for confirming the resolution. *Held* that the notice was bad as under ss 77 and 173 (b) of the Indian Companies Act at least 14 days further notice should have been given for confirmation of a special resolution for voluntarily winding up the Company. Nor could it be treated as a proper notice calling a meeting to pass an extraordinary resolution for the voluntary winding up of the Company within s 173 ( ) of the Act. *In re Silkstone Fall Colliery Co* 1 Ch D 38 followed. That whether or not the subsequent meeting of the shareholders for fixing the remuneration of the liquidator cured the legal defect of the notice and validated the appointment it was open to the creditors of a Company to question whether the liquidators were appointed in accordance with the law. *In the matter of* INDIAN TRADING ENGINEERING Co LD (1911)

15 C W N 1047

——— s 90—

See s 6? I L R 37 All ?73

——— s 120—

See 6? I L R 37 All 2?3

——— s 1?5

See s 61 I L R 38 ? 34?

——— ss 1?? 129 130 and 131—*Winding up petition—Petitioner a creditor for an amount not immediately payable—General financial position of company—Scheme of arrangement—Practice* The definition of debt in s 130 of the Indian Companies Act (VI of 1882) is quite distinct from the meaning of the word creditor. A creditor is a person to whom money is owed by *the Company*. Whether he can claim immediate payment of that debt or his right to demand payment is deferred by his agreement with the Company to a future time he still remains a creditor. If the petitioners can satisfy the Court that the Company on a general perusal of its balance sheet cannot pay its debts in other words that its assets are not sufficient to satisfy its liabilities that will enable the Court to order its winding up. If an arrangement can be arrived at between the Company and its creditors it would be desirable that an attempt should be made to give effect to that arrangement. But any scheme or proposal by the Company to keep itself afloat cannot be discussed with any chance of success unless the winding up order is made. It is only after the winding up order is made that a three fourths majority of the creditors is able to bind the minority. Otherwise any one creditor can come in and upset any arrangement which has appeared satisfactory to the rest of his co creditors. *In the matter of* INDIAN COMPANIES ACT *in the matter of the* BOMBAY MANUFACTURING COMPANY AND *in the matter of* JATILAL KARSONDAS (1909)

I L R 34 Bom 533

——— ss 128 to 1?1—

See COMPANY ... I L R ?? Bom 1? and 4?

See ... I L R 34 Bom 533

——— s 13? 141—*Appointment of official liquidator after order for winding up company—Appeal by the managing director against order appointing official liquidator—competency of* A winding up order terminates the appointment of director except for certain special purposes and a managing director is therefore not a competent person to file an appeal against an order appointing an official liquidator. THE SOUTH INDIAN MILLS COMPANY LTD v RAJA BAHADUR MOTILAL (1916) I L R 40 Mad ?0?

——— s 14?—

See s ?5 I L R 40 Bom 1?4

——— 1?? 18?—

See I L R 1 Lah 3 8

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*contd*

Section of Act VII of 1913	Corresponding section of Act VI of 1882 etc
97	
98	
99	
100	
101	
102	
103	
104	
105	
106	
107	[illegible] A
108	
109	
110	
111	
112	
113	
114	
115	
116	
117	
118	
119	
120	
121	
122	
123	[illegible]
124	[illegible]
125	68
126	
127	[illegible]
128	
129	
130	
131 (1) (2) (4)	[illegible]4
131 (3)	
132	[illegible]4
133	
134	[illegible]
135	
136 (1)—(4)	[illegible]
136 ( )	
137	
138	[illegible]
139	
140	[illegible]
141	[illegible]
142	[illegible]
143	[illegible]

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*contd*

Section of Act VII of 1913	Corresponding section of Act VI of 1882 etc
144	
145	
146	
147	75
148	89
149	90
150	91
151	95
152	96
153	203
154	
155	
156	61 139 175
157	62
158	124
159	12[illegible] 178
160	126 154
161	125 197
162 (1) (3) (4) (5) (6)	128
162 (2)	
163	129
164	218
165	219
166	131 13[illegible]
167	131 para 2
168	133
169	134 para 1
170	135
171	136
172	137
173	13[illegible]
174	140
175	[illegible] 141 131
176	142
177	143
178	141 145
179	144
180	14[illegible]
181	146
182	
183	
184	147 148
185	149
186	150
187	151
188	152
189	1[illegible]
190	1[illegible]

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*contd*

Section of Act VII of 1913	Corresponding section of Act VI of 1882, etc
[illegible]	[illegible]
19[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible] 160 161
19[illegible]	[illegible] 161
[illegible]	
[illegible]	164
[illegible]	16[illegible]
199	16[illegible]
[illegible]	16[illegible]
[illegible]	16[illegible]
[illegible]	16[illegible]
[illegible]	1[illegible]
[illegible]	1[illegible] 4
2[illegible]	1[illegible]
20[illegible]	1[illegible]
[illegible]07	[illegible]
[illegible]	
[illegible]	
[illegible]	184
211	1[illegible]
21[illegible]	1[illegible] 0 181
213	[illegible]04
214	[illegible]0
21[illegible]	18[illegible]
21[illegible]	183
217	18[illegible] 18[illegible]
218	188
219	18[illegible]
[illegible]	1[illegible]
[illegible]1	191
2[illegible]	1[illegible]
[illegible]3	193
[illegible]	194
[illegible]	1[illegible]
[illegible]	1[illegible]
[illegible]	1[illegible] 197
[illegible]28	19[illegible]
[illegible]	
[illegible]30	200 A
[illegible]31	[illegible]1[illegible]
	[illegible]1[illegible]
[illegible]	
[illegible]	[illegible]01 [illegible]0[illegible]
[illegible]	[illegible]14
[illegible]36	[illegible]1
[illegible]37	[illegible]10
[illegible]38	[illegible]17
[illegible]39	140 1[illegible]3
[illegible]40	1

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*contd*

Section of Act VII of 1913	Corresponding section of Act VI of 1882, etc
[illegible]41	[illegible]00
[illegible]	199
[illegible]43	
[illegible]44	
[illegible]	172
[illegible]	2[illegible]4
[illegible]	
[illegible]	2[illegible]0
[illegible]	40
[illegible]50	2[illegible]1
[illegible]1	[illegible]
[illegible]	[illegible]3
[illegible]3	[illegible]24 2[illegible]
[illegible]4	2[illegible]
[illegible]	[illegible]7
[illegible]	[illegible]
7	[illegible]
[illegible]	231
[illegible]	[illegible]3[illegible]
[illegible]60	233
[illegible]61	[illegible]34
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	238
[illegible]	239
[illegible]66	240
[illegible]	[illegible]4 9 3 (XII of 189[illegible])
[illegible]	[illegible]41
[illegible]	[illegible]42
[illegible]	[illegible]43
[illegible]1	[illegible]43
[illegible]	[illegible]44
[illegible]3	[illegible]
[illegible]74	[illegible]
2[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	
[illegible]0	[illegible]
[illegible]81	
[illegible]	
[illegible]	
[illegible]	[illegible]0
[illegible]	2[illegible]1
[illegible]	[illegible]0 (f)
[illegible]	
[illegible]	[illegible]
[illegible]	2[illegible]
[illegible]	

COMPANIES ACT (VII OF 1913)

See COMPANIES ACT (VI OF 1882)

See COMPANY

—— ss 2 (3) 3 (3) 171 215 232—

See LIQUIDATOR I L R 43 Calc 586

—— s 22—

See COMPANY I L R 45 Calc 490

—— s 38—

See COMPANY (REGISTER)

I L R 47 Calc 901

—— *Purchase of share at a Court sale—Rectification of register—Power of Court—Director's power to refuse to register a Court purchaser as a shareholder—Court's power to interfere with the discretion—Appeal to the High Court—Practice* A purchaser of shares of a limited company at a Court sale is not entitled as of right to have his name entered in the register of the company as a shareholder He is subject to the same rules on this point as a private purchaser is The proviso to s 38 of the Indian Companies Act 1913 should not be confined to the last clause but must be read as a general reservation imposed on all clauses of the section Having regard to the fact that under the proviso an appeal is allowed from the decision of an issue directed to be tried it is necessary and desirable that there should be a clear direction as to the trial of an issue so that there may be no obscurity on the point and no room for the argument that there was no issue directed to be tried and consequently no right of appeal MANILAL BRIJLAL *v* GORDHAN SPINNING AND MANUFACTURING COMPANY (1916)

I L R 41 Bom 76

—— *Shares purchased by the father of a joint Hindu family and registered in his name—Death of father—Managing member entitled to registration* Where shares in a joint stock company have been purchased by the father of a joint Hindu family out of the joint family funds and registered in his name the person entitled on the death of the father to be registered in the books of the company as owner of such shares is the managing member of the family PIARI LAL *v* THE MUIR MILLS COMPANY LD CAWNPORE (1919) I L R 41 All 619

—— ss 76—

See COMPANY I L R 45 Calc 486

—— s 104, cl (1) (b)— *Share fully paid up otherwise than in cash meaning of—Exchange of debenture not matured for share whether a payment in cash for share* Where in accordance with the terms of a debenture deed a company allots to a debenture holder a fully paid up share in exchange for the surrender of a debenture deed *not then mature* the share as allotted is one fully paid up otherwise than in cash within s 104 (1) (b) of the Indian Companies Act (VII of 1913) *Spargo's Case L R 8 Ch App 407* distinguished THODA PUZA RUBBER COMPANY *v* THE REGISTRAR OF JOINT STOCK COMPANIES MADRAS (1917)

I L R 41 Mad 307

—— ss 131 134—

See COMPANY I L R 45 Calc 186

—— s 134 (1)—*Default to submit balance sheet to Registrar of Companies—Elements necessary to constitute offence* In order to bring within the

COMPANIES ACT (VII OF 1913)—*contd*

—— s 134 (4)—*contd*

rule laid down in *Park v Lawton [1911] 1 K B 588* a person whose defence to a charge under s 134 (4) of the Companies Act is that compliance on his part with the requirements of the section was impossible on account of no general meeting having been held it is necessary in the first instance to show with reference to the provisions of s 76 of the Act that the accused who was an officer of the company was knowingly a party to the default in holding the general meeting and where that question has not been inquired into at all the case has not been properly tried and the conviction cannot stand RAJ KUMAR KUSARI *v* KING EMPEROR (1917) 21 C W N 840

—— s 153—*Scheme or arrangement made between Bank in liquidation and its creditors—Date from which arrangement is binding on the construction of section 153—Creditor who has obtained a decree and is not one of those who have assented to the arrangement* A scheme or arrangement made between a company in liquidation and its creditors under s 153 of the Companies Act (VII of 1913) becomes on the true construction of that section operative and binding from the date it is made and duly assented to by a three fourths majority of the creditors and not from the date of its being sanctioned by the Court A creditor therefore who has obtained a decree between those dates cannot execute it against the company after the former date although he has not assented to the arrangement RAGHUBAR DAYAL *v* THE BANK OF UPPER INDIA (1919)

I L R 41 All 566

—— ss 158 and 259—*Contributory—Suit brought by the Company against alleged contributory before order for compulsory liquidation—Dismissed in default—Whether bar to subsequent application to have that person placed on list of contributories—Civil Procedure Code Act V of 1908 order IX r 8* The Punjab Building Company went into voluntary liquidation and the Voluntary Liquidator brought a suit against I D the present respondent for recovery of a certain sum alleged to be due to the Company by reason of his being a shareholder The respondent denied liability and the suit was dismissed in default on 15th May 1918 An application by a creditor had previously been made for compulsory winding up which was granted on 8th March 1918 The Official Liquidator then sought to place the respondent on the list of contributories of the Company and the question was whether the dismissal of the suit in default precluded the Liquidator from re agitating the question of the liability of the respondent as a contributory of the Company *Held* that the term Contributory as defined by s 158 of the Companies Act 1913 includes any person alleged to be a contributory and is not confined to a person whose liability as a contributory has been established *Held* also that s 259 of the Act is not applicable to a suit brought by the Company and such a suit can proceed in spite of an order for winding up made after its commencement *Held* consequently that the dismissal under O IX r 8 of the Code of Civil Procedure of the suit instituted by the Voluntary Liquidator is a bar to the subsequent application by the Official Liquidator to have the name of the defendant placed on the list of contributories PREM RAM *v* FAZAL DIN I L R 1 Lah 237

COMPANIES ACT (VII OF 1913)—*contd*

——— s 162—

See COMPANY I L R 47 Calc 654

——— *Company—Petition for winding up—Circumstances justifying an order for winding up— Just and equitable.* Certain share holders in a company registered under the Indian Companies Act, 1913 applied under s 162 of the Act praying that the company might be wound up by the Court. Of the circumstances mentioned in s. 162 as justifying an order for winding up the only one which might have been applicable was that mentioned in cl. (vi) but all that was shown by the applicants was that the company had not of late years made any profit and that the applicants themselves were apprehensive that if the company continued to work loss instead of gain would result On the other hand it was not apparent either that the substratum of the com pany was gone or that the company was conceived and brought forth in fraud. *Held* that the appli cants had failed to make out a case that it was just and equitable that the company should be wound up *In the matter of the* MAHAMANDAL SHASHTRA PRAKASHAK SAMITI LTD BENARES (1917) I L R 39 All 334

——— ss 162 163—*Winding up—Application for stay of winding up proceedings—Judgment cl 15 of the Letters Patent—Demand in writing—Company neglecting to pay within three weeks—Bona fide dispute as to the indebtedness of the Company—Petition presented with an ulterior object* On the 18th August 1915 the Company (appellant) instituted a suit against its ex directors (including the respondent the petitioning creditor) for the recovery of a sum of rupees six lacs the charge against the respondent being neglect of duty On the 15th April 1916 the respondent instituted a suit against the Company for the recovery of Rs 2 83 747 alleged to be due to him on account of deposits made by him with interest The Company in their written statement admitted the deposits denied interest was payable and contended that if the Company s suit was success ful nothing would be due to the respondent The Company s suit first came on for hearing on the 13th August 1917 was part heard on the 20th August 1917 and after several adjournments was fixed for some day in January 1918 On the 13th December 1917 a winding up petition was pre sented by the respondent against the Company and usual directions were given as to the issue of advertisements On the same day an applica tion was made by the Company to stay the issue of advertisements in order that an application might be made by the Company for stay of all proceedings in connection with the winding up petition on the ground that the said petition was an abuse of the process of the Court On the 14th December 1917 the said application was made and was dismissed by GREAVES J The decree provided that the Company be at liberty to prefer an appeal against the order and upon their paying to the respondent the sum admitted to be due to him without prejudice to their con tention the proceedings under the winding up petition would be stayed. The decree also pro vided that the respondent do return the said sum to the Company should the appeal be decreed but if the appeal be dismissed he do withdraw his petition for winding up *Held* that the order of GREAVES J was a judgment within

COMPANIES ACT (VII OF 1913)—*contd*

——— ss 162 163—*concld*

the meaning of cl. 15 of the Letters Patent *Held* also that the learned Judge was wrong in dismissing the application *in toto* The proper order to be made under the circumstances of the present case would be that the winding up proceedings be stayed until the determination of the two suits THE COMPANY v SIR RAMESHAR SINGH (1918) 23 C W N 844

——— ss 168 and 232—*Company—Winding up—Execution put in force —Attachment made before but sale after the date of the commencement of the winding up—Liquidator—Appeal—Practice* *Held* on a construction of s 232 of the Indian Companies Act 1913 that an execution is not put in force merely when property of the *judgment debtor is sold in pursuance thereof* but it is put in force when the property is attached Hence where property of an insolvent company was attached prior to the date of the commence ment of the winding up but was actually sold subsequently to such date the sale was upheld *Per* WALSH J —The recognized practice with regard to liquidators who are officers of the court and not ordinary litigants is that a liquidator appointed in a winding by the court might not to appeal in any case without the permission of that court and if the does so he runs considerable risk of having to pay the costs out of his own pocket KAYASTHA TRADING AND BANKING COR PORATION LD v SAT NARAIN SINGH I L R 43 All 433

——— s 169—

——— The right of appeal under s 169 is Co extensive with that under the Civil Procedure Code SANTI LAL v THE INDIA EXCHANGE BANK I L R 38 All. 539

——— On 3rd December 1910 the District Judge made an order for winding up On 7th February 1911 an application by some shareholders to reconsider the order was dismissed On 25th February 1911 applicants appealed to the High Court ostensibly against the order of 7th February 1911 but in effect that of 3rd December 1910—No notice of appeal was served on Respon dents until 25th March 1911 *Held* that the appeal was time barred under s 169 GHISU MAL v OFFICIAL LIQUIDATOR SHRI BALDEO MILLS CO LTD I L R 33 All 641

——— *Held* that the provi sions of this section as to service of notice of appeal *are imperative* C J BOWER v IMPERIAL BANK LD I L R 35 All. 177

——— s 171—

See LIQUIDATOR I L R 43 Calc 586

See WINDING UP 2 Pat L J 77

——— *Civil Procedure Code (1908) s 47—Transfer of decree against a company in liquidation—Application by transferee to be substituted for original decree holder—Procedure.* Where a decree against an insolvent company is transferred pending the insolvency proceedings, it is the duty of the transferee to go first to the execution court and get himself substituted for the original decree holder before he applies to prove his claim before the official liquidator KASHI PRASAD v THE UNION BANK OF INDIA, LIMITED DELHI (1919) I L R 41 All 432

COMPANIES ACT (VII OF 1913)—*contd*

——— s 207—*Voluntary liquidation—Decree passed against company prior to liquidation—Stay of execution—Jurisdiction* A decree had been obtained against a company which subsequent to the passing of the decree went into voluntary liquidation The decree holder applied for execution of the decree which was granted by the Court of first instance On appeal the District Judge ordered stay of execution *Held* that the District Judge had *no jurisdiction to stay execution* Under the Indian Companies Act the only Court that could stay execution was the High Court *Held* further that s 207 of the Indian Companies Act is no bar by itself to the progress of execution unless and until an order has been obtained from a Court having jurisdiction under the Companies Act either for winding up or for stay of proceedings SURAJ BHAN v BOOT AND EQUIPMENT FACTORY AGRA (1916) I L R 38 All 407

——— ss 207 (ii) 208—*Voluntary winding up—Appointment of liquidator—Liability of liquidator acting under irregular appointment* A person who accepts an appointment as liquidator of a company which is being voluntarily wound up and who acts as such must whether his appointment is regular or not carry out the duties as well as exercise the rights of a liquidator and must make a return of his appointment to the Registrar of Joint Stock Companies as provided by s 203 of the Indian Companies Act 1913 and obtain his retirement in a proper manner giving notice of that also *Semble* that it is competent to a company in general meeting assembled under s. 207 (ii) of the Indian Companies Act 1913 to delegate to the directors of the company the appointment of a liquidator EMPEROR v SATISH CHANDRA GHOSH (1917) I L R 39 All 412

——— s 215—

See LIQUIDATOR I L R 43 Calc 586

——— *Winding up—Voluntary liquidation—Examination of Directors and Managers—Discretion of Court* Under s 215 of the Indian Companies Act 1913 a voluntary liquidator can apply to the Court for examination of persons connected with the management of the Company NOWROJI PUDUMJI v LAXMAN MORESHWAR (1919) I L R 44 Bom 459

——— s 229—

See SET OFF I L R 45 Bom 1219

——— s 231—*Provincial Insolvency Act III of 1907 s 37—Transfer by a Bank of a customer's pro notes to one of its creditors within three months of going into liquidation—Whether the maker of the pro notes can when sued by the transferee object to the transfer to the plaintiff as a fraudulent preference by the Bank in favour of one of its creditors* The defendant had dealings with the Industrial Bank of Ludhiana and in 1913 executed two promissory notes in their favour The Bank got into financial difficulties and sold these two pro notes to the present plaintiff a creditor of theirs in part payment of his claim The Bank went into liquidation within three months of the transfer of the pro notes Plaintiff now sued defendant for principal and interest due on the pro notes It was urged for defendant that the transfer of the pro notes to plaintiff was invalid as a fraudulent preference by the Bank in favour of one

COMPANIES ACT (VII OF 1913)—*concld*

——— s 231—*concld*

of its creditors *Held* that a disposition of a Company's property cannot be impeached on the ground of fraudulent preference except on behalf of the general body of the creditors *Willmott v London Celluloid Company (31 Ch D 425 and 34 Ch D 147)* and *Lindley on Companies 6th edition Volume II page 90* followed also *Mohandas Thakardas v Tikamdas Hotchand (37 Indian Cases 250)* *And* that consequently the defendant could not invoke the aid of s 231 of the Companies Act to impeach the transfer of his pro notes to plaintiff s 37 of the Insolvency Act referred to RAM SARUP v JAGAT RAM I L R 2 Lah 102

——— s 232—

See LIQUIDATOR I L R 43 Calc 586

——— s 254—

See COSTS I L R 39 Bom 383

——— s 269—

See s 158 I L R 1 Lah 237

COMPANY

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXXIII I L R 41 Mad 624

See COMPANIES ACT (VII OF 1913)—

See COSTS I L R 39 Bom 383

See EXCESS PROFITS DUTY ACT 1919 s 6 I L R 45 Bom 881

See INSURANCE I L R 34 Bom 1

See LAND ACQUISITION I L R 44 Bom 797

See LIMITATION ACT (IX OF 1908) SCH I ART 116 I L R 42 Mad 33

See MORTGAGE I L R 39 Calc 810

See PROVIDENT INSURANCE I L R 42 Calc 300

See SALE I L R 43 Calc 790

See SET OFF I L R 40 Mad 1004

See WINDING UP I L R 34 Bom 533

——— borrowing powers of—

See COMPANIES ACT (VI OF 1882) ss 76 77 I L R 36 All 416

——— formation of—

See COMPANIES ACT 1882 ss 6 40 41 I L R 40 Calc 1

——— contracts by—

See COMPANIES ACT (VI OF 1882) ss 67 96 123 I L R 37 All 273

——— Contributory—

See COMPANIES ACT 1913 ss 158 269 I L R 1 Lah 237

——— Order reducing remuneration of an employee—

See COMPANIES ACT 1882 s 169 I L R 1 Lah 173

——— winding up of—

See COMPANIES ACT (VII OF 1913) ss 153 to 232

COMPANY—*contd*

———— **Registered and controlled in India but manufacturing outside—**

See INCOME TAX ACT 1918 s 3 (1) ...

I L R 45 Bom 1286

———— **Underwriting new Capital—**

See INCOME TAX ACT 1918 s 9

I L R 45 Bom 1306

1 ———— **Proprietors of zemindari—** *Forming into a company opposed to public policy* Where the proprietors of a zemindari having grown too numerous formed themselves into a limited liability company and the company was duly registered under the provisions of the Indian Companies Act *Held* that such a course was likely to be beneficial not merely to the proprietors themselves but to all who may be compelled to have dealings with them and there was nothing in the constitution of the company which was opposed to public policy LAL GOPAL DUTT CHOUDHURY *v* THE KHORORIAH MAJOZILLA ZEMINDARY SYNDICATE LTD (1911)

16 C W N 297

2 ———— **Two claimants to shares standing in name of third party—***Priority of title—When it prevails* The rule laid down in *Moor v North Western Bank [1891] 2 Ch 599* followed namely that as between two persons claiming title to shares in a company which are registered in the name of a third person priority of title prevails unless the claimant second in point of time can show that as between himself and the company before the company received notice of the claim of the first claimant he the second claimant, has acquired the full *status* of a shareholder or at any rate that all formalities have been complied with and that nothing more than some purely ministerial act remains to be done by the company which, as between the company and the second claimant the company could not have refused to do forthwith. So that as between himself and the company he may be said to have acquired a present absolute unconditional right to have the transfer registered before the company was informed of the existence of a better title SETHNA R D *v* NATIONAL BANK OF INDIA (1911) **I L R 33 Bom 334**

3 ———— **Internal defects in management of—***Innocent party not affected thereby—Principal and agent—Fraud of agent in withholding information from principal—Principal not affected by notice to agent in such case—Absolute undertaking to execute a mortgage on specified property on the happening of a particular contingency—Effect of such undertaking as giving a charge over the property on the occurrence of the contingency* By a mortgage of the 15th April 1905 the defendants mortgaged to the plaintiff certain property to secure a loan of six lacs. Under the mortgage the plaintiff had the right to appoint a nominee to be a director of the defendants and he appointed one Dani his *munim* in Bombay as such nominee In June 1907 the defendants borrowed three lacs on a cash credit opened with the Bank of India for one year from June 11th 1907 The said transaction was made conditionally on the defendants giving an undertaking not to further charge the property previously mortgaged to the plaintiff and a resolution to that effect was passed at a meeting of the defendants directors at which Dani was

COMPANY—*contd*

present No letter of undertaking was in fact given. The loan from the Bank of India was renewed at the end of the year for another year The Bank made some attempt to obtain a higher rate of interest but in the end the loan was renewed at the same rate as before In 1909 the defendants failed to pay the said loan to the Bank of India when due Finally the said loan was renewed for three months on further security being given on June 30th, 1909 On August 5th 1909 the defendants applied to the plaintiff for a further advance of five lacs of which two lacs were required urgently on the security of the said property mortgaged to the plaintiff The plaintiff consulted Dani who approved of the transaction. The plaintiff thereon advanced two lacs and received a receipt for the sum in which it was stated that the said two lacs formed part of a sum of five lacs intended to be advanced by the plaintiff that the plaintiff should have time to consider whether he would advance the said sum of five lacs as a further charge and that in the event of the plaintiff deciding to advance such sum the defendants would execute a proper legal deed of charge to secure such sum and interest and in the event of the plaintiff deciding not to make such further advance the said sum of two lacs should be repaid immediately with interest and together with the original loan of six lacs At the date of the said receipt there were only three directors of the defendants and not four the minimum number under the Articles of Association of the defendants Thereafter the plaintiff decided to make the proposed advance and signified his intention to the defendants A formal deed of charge was prepared but not executed owing to the insolvency of the defendants and other circumstances On August 10th the plaintiff for the first time received notice of the resolution of the defendants in favour of the Bank of India The plaintiff had the receipt passed in his favour by the defendants stamped as a charge on land and registered On September 17th the defendants were declared insolvent and Mr R. D Sethna was appointed liquidator As such liquidator he was ordered to sell the mortgaged property and hold the sale proceeds subject to the amount due to the plaintiff The liquidator sold the mortgaged property and paid the plaintiff's claim on the mortgage of six lacs. The plaintiff sued the defendants for a declaration that he was entitled to a charge on the balance of the sale proceeds for two lacs and interest and for payment of that sum *Held* that there was no properly constituted Board of Directors of the defendants at the date of the said receipt but held that the resolution of the defendants directors in favour of the Bank of India was exhausted after one year and was not renewed on the renewal of the loan by the Bank of India *Held* further that Dani had withheld information from the plaintiff as to the said resolution in favour of the Bank of India fraudulently and that the plaintiff could not be imputed to have received notice of the resolution that in any case the defendants would not be allowed to take advantage of their breach of resolution, and that the plaintiff's rights were in no way prejudiced by irregularities in the internal management of the defendant such as the absence of a Board at the date of the receipt in favour of the plaintiff of which the plaintiff had no notice *Held* further that the re[illegible] by the defendants to the plaintiff [illegible] an unconditional

COMPANY—*contd*

undertaking to execute a deed of further charge in favour of the plaintiff on the happening of a future event namely on the plaintiff tendering the sum of three lacs the balance of the proposed loan of five lacs on the property specified therein for the whole amount of five lacs of which the two lacs already advanced was a part and that the said receipt consequently gave the plaintiff a valid charge over the defendants property for the two lacs advanced and interest SHIVLAL MOTILAL v THE TRICUMDAS MILLS COMPANY LD (1912)
I L R 36 Bom 564

4 ———— Contract with company—*Terms of in correspondence and company's minute conflict between—Right of heir to enforce terms of sale* R by letter offered to sell to the appellant company a patent for Rs 10 000 paid in cash and Rs 20 000 in paid up shares of the company The letter contained a provision that the company would be entitled to retain and cancel these shares in the event of R who was to serve as the company's manager by reason of death resignation etc failing to complete 4 years service The company in their minutes recorded resolutions which did not embody this condition and in express terms spoke of the transaction as a sale of the patent for Rs 30 000 *Held* that the only contract between R and the company was that contained in the minute and that if this minute incorporated the terms of the letter it did so in so far only as the letter was not inconsistent with the express terms of the minute That on R's death within 4 years R's widow was entitled to have fully paid up shares to the amount of Rs 20 000 allotted to her PERFECT POTTERY COMPANY v IDA L. ROSE (1914)
18 C W N 1185

5 ———————— *Sale of share—Bond given for price—Unauthorized refusal of manager to register transfer—Suit on bond—Plea of non registration of transfer not open to defendant* A sold to B certain shares in a company and B instead of paying the price in cash executed a bond therefor in favour of A Registration of the transfer was refused by a person describing himself as the chief manager of the company who however did not appear to have any authority under the articles of association to refuse to register a transfer of shares *Held* on suit by A on the bond that it was not competent to B to plead as a defence that the transfer of the shares purchased by him had not been registered as there had in fact been no refusal to register by the company BAHADUR SINGH v SHIAM SUNDAR TEO (1914)
I L R 36 All 565

6 ———— Allotment of shares by an irregularly constituted board—*Notice of allotment not given to applicant—Limitation—Contributory* *Held* that an allotment of shares in a joint stock company made by an irregularly constituted board of directors was *prima facie* invalid *British Empire Match Company Limited Ex parte Ross 49 Law Times 291* referred to But this defect may sometimes be cured if the articles of association of the company provide for the validation of an act done by a *de facto* director in a *bona fide* manner *Held* also that if no notice of allotment of share in a company is given to an applicant before the company goes into liquidation such applicant is not liable to be placed on the list of contributories *In re Scottish Petroleum Company 23 Ch D 413 Dawson v African Consolidated Land and Trading Company [1898] 1 Ch 6* and *British Asbestos Company v Boyd [1903] 2 Ch 439* referred to CHANGA MAL v THE PROVINCIAL BANK LD (1914)
I L R 36 All 412

7 ———— Directors—Appointment of as officer under the company—*Personal interest of a director clashing with his duty to shareholders—Meeting of directors—No right for such director to vote on his appointment—Invalidity of appointment if no quorum of directors without counting him—Duties of an editor of a newspaper—Incapacity to perform—Propriety of dismissal for incapacity* The director of a company are agents of the company and trustees for the shareholders of the powers committed to them A director who has an interest in the subject of discussion of a meeting of the directors in which his interests conflict with his duty to the shareholders is incompetent to vote Hence even when the articles of association of a company may permit a director to hold any other office under the company in conjunction with his directorship and on such remuneration as the directors may fix yet the appointment of a director to any other office at a meeting of the directors at which the quorum was made up only by counting him also as one present is not a valid appointment as the company did not have the unbiased and independent advice of at least such a number of the directors as would without him have made a quorum A person appointed as co editor of a newspaper should put forth or publish the paper and exercise a general supervision over the matter which is written for the paper or extracted as news For this certain literary and business qualifications are necessary If he is absolutely incapable of performing these duties which the company has a right to expect of him his dismissal on that account from co editorship is right PARANADI IYER v THE MADRAS TIMES PRINTING AND PUBLISHING CO LTD (1915)
I L R 38 Mad 991

8 ———— Managing agent's authority to buy—*Liability of stranger or manager or manager's partner—Express and implied authority* The manager or managing director of a Mill Company has no implied authority to purchase on behalf of his mill the liability of a stranger still less of their own manager or manager's partner in a private transaction of his own. MOTILAL SHIVLAL v THE BOMBAY COTTON MANUFACTURING COMPANY LD (1915) 19 C W N 621

9 ———— Dismissing its Managing Agents—*Shareholders of Co if may be restrained from considering proposal of removal of Managing Agents—Injunction—Contract of service—Specific Relief Act (I of 1877) ss 21 and 57* Under ss 21 and 57 of the Specific Relief Act a Limited Liability Company cannot be restrained by injunction from dispensing with the services of Managing Agents even when the contract of service provides that the Managing Agents are only to be removed in a specified manner and after a specified period Nor can the shareholders be restrained by injunction from considering the question of such removal at an Extraordinary General Meeting The remedy of the Managing Agents for dismissal if wrongful lies in a suit for damages *Isle of*

COMPANY—*contd*

Wight Railway Co v *Tahourdin* 25 *Ch D* 320 relied upon. N C SIRCAR AND SONS v THE BARADONI COAL CONCERN LD (1911)

16 C W N 233

10 ——— Annual list of members—*And summary—Omission of director to file same with Registrar—Liability of director under Indian Companies Act (VII of 1913) s 32 (4)—Place where default committed—Jurisdiction of Presidency Magistrate to try offence—Criminal Procedure Code (Act V of 1898) s 182 531* The director of a company is liable under s. 32 (4) of the Indian Companies Act (VII of 1913) for default in filing a copy of the annual list of members and the summary prescribed therein in the office of the Registrar of Joint Stock Companies at Calcutta. A Presidency Magistrate has jurisdiction to try such offence under s 182 of the Criminal Procedure Code and even if not s 531 cures the defect. DEBENDRA NATH DAS GUPTA v REGISTRAR OF JOINT STOCK COMPANIES (1917)

I L R 45 Calc 490

11 ——— Balance sheet—*Of a company—Omission of director to call annual general meeting and to place before it a properly audited balance sheet—Liability of director for default in filing copy of the same—Indian Companies Act (VII of 1913) ss 76 131 134—Jurisdiction* The director of a company is liable under s 134(4) of the Indian Companies Act (VII of 1913) for default in filing a copy of the annual balance sheet duly prepared and audited in the office of the Registrar of Joint Stock Companies at Calcutta and cannot plead in answer to a charge under s 134 his own omission to call the annual general meeting of the company required by s 76 and to place before it such balance sheet. *Park* v *Lawton* [1911] *1 K B* 588 referred to The offence under s 134 (4) is triable in Calcutta whether or not if the prosecution had been laid under s 76 or 131 of the Act the Presidency Magistrate might have had jurisdiction to try the offences committed under the latter sections DEBENDRA NATH DAS GUPTA v REGISTRAR OF JOINT STOCK COMPANY (1917)

I L R 45 Calc 483

12 ——— Banking—*Company—Sale of shares through Company—Shares unsold through the misconduct of the Managing Director of the Company—Misrepresentation by the Managing Director that the shares were sold —Money paid to the shareholder as the price of the shares—Company going into liquidation—Shareholder as the registered owner of shares placed on list A of contributories—Payment of calls in liquidation by the shareholder—Suit by the shareholder to recover back the amount of calls paid—The Indian Companies Act (VI of 1882) s 61 cl (g)* Plaintiff No 1 through his nominees plaintiffs Nos 2 to 4 was the owner of 161 shares in the Indian Specie Bank Limited In April 1913 upon instructions from the plaintiff No 1 the share certificates and blank transfers executed by the nominal registered holders of the shares were handed to the Managing Director of the Specie Bank who undertook to sell the shares on commission. In May 1913 the Managing Director without selling the shares paid in respect of them a sum of Rs. 10 500 being approximately the equivalent of the net sale proceeds of the shares at Rs. 63 per share and he falsely represented to the plaintiffs that the shares had been sold at this figure In December 1913 the Specie Bank went into liquidation Plaintiffs Nos 2 to 4 were thereafter placed upon list A of contributories in respect of the shares standing in their name on behalf of plaintiff No 1 on the ground that they remained registered shareholders In the liquidation proceedings plaintiff No 1 was obliged to pay the amount of calls made aggregating in all Rs 8 050 with interest up to payment amounting to Rs 219 Plaintiff No 1 subsequently filed this suit to recover back the sums paid by him on the ground that the Managing Director in the course of his employment was guilty of neglect and misconduct towards the plaintiffs in not selling the said shares and that the direct consequence of such neglect and misconduct had been that plaintiffs Nos. 2 to 4 were placed upon list A instead of list B with the result that plaintiff No 1 had to pay the calls on the shares *Held* that the plaintiffs had no cause of action inasmuch as shareholders of a company contract to contribute a certain amount to be applied in payment of the debts and liabilities of the Company and it is inconsistent with their position as shareholders while they remain as such to claim back any of that money *Houldsworth* v *City of Glasgow Bank* 5 *App Cas* 317 and In re *Allestone Linoleum Company* 37 *Ch D* 191 193 referred to NAROTTAM MORARJI v THE INDIAN SPECIE BANK LIMITED IN LIQUIDATION (1917)

I L R 42 Bom 234

13 ——— Income Tax—*Fixed preference and ordinary shareholders—Preference shareholders liable to pay income tax on their dividends unless otherwise provided—The Income Tax Act (II of 1886) sections 4 11 17 49 Schedule II Part II —The Income Tax Amendment Act (V of 1916) —The English Income Tax Act of 1842 ss 40 54 102* As between fixed preference and ordinary shareholders in a joint stock company the former are not entitled to have their preference dividends paid free of income tax in a case where there are no express words to that effect in the contract regulating the rights of parties. Under the Indian Acts as well as the English Acts the income tax is in effect paid on behalf of the shareholder by the company In a narrow technical sense it may be said that the company being a separate legal entity the net profits belong to the company and not to the shareholder at any rate until a dividend has been actually declared. But in effect the net profits do belong to the shareholders If therefore any sum has to be paid out of the net profits to the Crown for tax in effect it is the shareholders who have to pay The provisions of the Income Tax Act as to assessment on and payment by the company are in effect merely machinery for the collection of the tax and the matter is made much clearer if one sweeps away this machinery and regards the matter as between the Crown and the subject. *Attorney General* v *Ashton Gas Company* [1904] 2 *Ch*. 621 referred to PURSHOTTUMDAS HARKISONDAS v THE CENTRAL INDIA SPINNING WEAVING AND MANUFACTURING COMPANY LIMITED (1917)

I L R 42 Bom 579

14 ——— Mortgage by—*Second mortgage by a Company—Suit on first mortgage against Company and second mortgagee —Company compulsorily wound up pending the mortgage suit — Liquidators obtaining sanction to create charges over assets to meet costs of litigation—Liquidators application opposed by first and second mortgagees*

COMPANY—*contd*

—*Charge created by the liquidators in favour of the first mortgagee—Sale of mortgaged property in the mortgage suit—Holder of charge claiming priority over the second mortgagee for moneys charged—Holder of charge postponed until the claims of second mortgagee satisfied—Transfer of Property Act (IV of 1882)* s 2 (d) *and* 52—*Lis pendens—Transfer effected under another Court's order pending suit—Sanction not an order capable of execution—Estoppel* The plaintiff the first mortgagee of a limited liability company instituted a suit in the High Court at Bombay to enforce his mortgage against the mortgagor defendant No 1 and second mortgagee of the company defendant No 2 During the prosecution of the suit the affairs of the first defendant company were ordered to be wound up at the instance of one of its creditors and the liquidation proceedings were transferred to the District Court at Poona where the company had its registered office The plaintiff however obtained leave from the High Court to proceed with his mortgage suit in Bombay against the company in liquidation Subsequently the liquidators of the company applied to the Poona *District Court in which the liquidation proceedings* were going on for sanction to raise Rs 25 000 for costs of litigation on the security of the assets of the company except the goods pledged to the plaintiff The plaintiff and the second mortgagees contended that the sanction should not be given so as to affect their security as the assets would not include the interests in the property held by the mortgagees The sanction was however given by the District Judge to the liquidators who *thereupon executed two documents of charge for* Rs 10 000 each in favour of the plaintiff reciting the decision of the District Judge and agreeing that upon the sale of the mortgaged premises the sums so charged and all interest due thereon should be payable out of the sale proceeds in priority to all other payments In the mortgage suit an order by consent was passed for sale of the mortgaged properties by the liquidators reserving the contention of all the parties The surplus sale proceeds *in the hands of the liquidators after satisfaction of* the plaintiff's mortgage claim in the suit amounted to Rs 81 000 or thereabouts The plaintiff claimed by virtue of the documents of charge to be paid the amount of Rs 20 000 secured thereby in priority to the claim of the second mortgagee contending further that as the latter failed to appeal *against the decision of the District Judge they were* estopped from disputing the same *Held* overruling the plaintiff's contention (i) that the second mortgagees were as parties to the pending mortgage suit protected by s 52 of the Transfer of Property Act against any postponement of their security by the charges created *pendente lite* by the *liquidator for the authority of the District Court* in Poona could not affect orders in a pending suit in the Bombay High Court (ii) that the charges created by the liquidators were not transfers in execution of an order of a Court within the scope of s 2 (d) of the Transfer of Property Act inasmuch as the Poona Court's sanction was not an order capable of execution but merely an authority to the liquidators to act in a certain manner if occasion should arise MOTILAL SHIVLAL *v* THE POONA COTTON AND SILK MANUFACTURING CO LIMITED (1917) I L R 42 Bom 215

15 ———— Pledge of partly paid up share—*In a Company—Shares transferred to the name of the pledgee in the register of the Company—Shares not fully paid up—Compulsory liquidation of the Company—Payment of calls as contributory by pledgee of shares—Pledgee not entitled to recover calls paid on the footing of an indemnity—Pledgee paying calls not a trustee for the pledgor—Contract—Agent and Principal* From March to October 1913 the plaintiff Bank advanced to B the agent of the undisclosed principal defendant No 1 various sums aggregating Rs 1 74 200 on the security of 3 605 shares of the Indian Specie Bank B undertaking to maintain a margin of Rs 15 per share The shares deposited by B were transferred to the plaintiff Bank's name on the share register of the Indian Specie Bank and the dividends when received by the plaintiff Bank were credited to the loan account of B In September 1913 the Indian *Specie Bank shares began to fall On 7th October* 1913 B provided further securities as margin which realised about Rs 20 000 but thereafter failed to provide any further margin and eventually 181 shares were sold by the plaintiff Bank of which 161 had been transferred to the purchaser's name before December 1913 when a winding up order was made for the compulsory liquidation of the Indian Specie Bank In the liquidation the plaintiff Bank had been placed on the A list of contributories for 3 444 *shares and on the B list for 161 shares for the* shares deposited by B On the 20th February 1914 B was adjudicated insolvent Subsequently in pursuance of the call made by the Official Liquidator of the Indian Specie Bank the plaintiff Bank paid Rs 50 per share in respect of 3 444 shares standing in its name The plaintiffs sued to recover from the 1st defendant (1) Rs 1 57 665 13 7 and interest thereon in respect of the advances made by them (2) Rs 1 72 200 being the amount of calls *paid by them* as contributories and interest thereon and (3) an indemnity for any claim which might be made against them in respect of 161 shares The Official Assignee as the assignee of the estate and effects of B was made a formal party being defendant No 2 The trial Court decreed the entire claim of the plaintiffs *Held* on appeal (i) *That the plaintiff's claim must be limited to a* decree for the sums advanced by them interest and costs (ii) That the plaintiffs were not entitled to be indemnified for the amount of calls paid or to be paid by them as contributories inasmuch as the forced payment of calls by them as the registered holder of the shares upon a compulsory liquidation could not be regarded as an expenditure for the preservation of the security nor were the plaintiffs as mortgagees the trustees for the mortgagor at the time of paying such calls *Phene v Gillan 5 Hare 1 10* referred to BIRDICHAND JIVRAJ *v* THE STANDARD BANK LIMITED (1916)
I L R 42 Bom 159

16 ———— Unregistered charge—*Charge given by resolution of Company to its Secretary on unpaid calls for special services rendered to the Company—Failure to register charge—Duty of officers to register neglected—Indian Companies Act (VI of 1882)* s 68—*Explanation—Mode of construction—Proceedings in Legislative Council cannot be referred to to aid construction* The question in this appeal was whether a charge given to the appellant the Secretary of a Limited Company upon unpaid calls could be enforced by him although not registered as required by s 68 of Act VI of 1882 (Indian Companies Act) which section required registration of all mortgages

COMPANY—*contd*

and charges specifically affecting property of the company and imposed a penalty upon any official of the company who knowingly and wilfully authorizes or permits the omission of such entry in the register The decision of this question depended on the proper interpretation of the explanation to the section which was as follows —

Omission to register under this section a mortgage or charge does not render the same invalid But the officers of the Company cannot avail themselves as such of a mortgage or charge specifically affecting property of the company and not so registered *Held* that the construction of the explanation must depend upon its terms and no theory of its purpose can be entertained unless it is to be inferred from the language used No statement made on the introduction of the measure or its discussion in the Legislative Council can be looked at as affording any guidance as to the meaning of the words *Held* that the words as such in their proper construction should not be read as denoting the capacity in which the officers take the mortgages or charge as contended by the appellant nor do they refer to the following words of a mortgage or charge as contended by the respondents. They are introduced simply as giving the reason for the inability to take advantage of the securities which is that officers entrusted with a duty as to registration could not take advantage of a security to them as to which they had neglected this duty In the circumstances of the case therefore it was held that the appellant could not avail himself of the charge even though he had ceased to be an officer KRISHNA AYYANGAR v NALLAPERUMAL PILLAI (1920) I L R 43 Mad 550

17 ———— Winding up—*List of contributories—Minor—Estoppel by conduct after attaining majority—Indian Companies Act (VI of 1882)* F a minor applied for and was allotted certain shares in a limited company He received dividends and continued to do so after attaining majority On the winding up of the company he was included in the list of contributories *Held* that having intentionally permitted the company to believe him to be a shareholder and in that belief to pay him dividends since he attained majority he was estopped by his conduct while a person *sui juris* from denying as between himself and the Company that he was a shareholder View of Stirling *J* in *Re Yeoland Consols Limited (No 2) 58 L T 922* adopted A minor may be a member of a company under the Indian Companies Act (VI of 1882) FAZULBHOY JAFFER v THE CREDIT BANK OF INDIA LD (1914) I L R 39 Bom 331

18 ———————— *Companies Act (VI of 1882) ss 128 129—Compulsory winding up—Creditor s petition—Company s inability to pay its debts* The petitioner who was an assignee of certain debts due by the defendant Company to its late Secretary and Manager demanded payment from the Company The Company refused to pay on the ground that the demand was in respect of a claim which the Company honestly believed to be a fraudulent claim and unsustainable at law The petitioner thereupon applied to the Court to compulsorily wind up the affairs of the Company It was not shown that the Company was unable to pay its debt in full The lower Court having rejected the application the petitioner appealed. *Held* that the application was rightly rejected for the petitioner s object in making the application was to bring the pressure of insolvency proceedings to bear upon the Company in order to make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the Civil Court The principle upon which a Company can be wound up on a creditor s application is simply its inability to pay its just debts The inability is indicated by its neglect to pay after proper demand made and the lapse of three weeks Such neglect must be judged by reference to the facts of each particular case Where the defence is that the debt is disputed all that the Court has first to see is whether that dispute is on the face of it genuine or merely a cloak of the Company s real inability to pay just debt TULSIDAS LALLUBHAI v THE BHARAT KHAND COTTON MILL COMPANY LTD (1914) I L R 39 Bom 47

19 ———————— *Indian Companies Act (VI of 1882) ss 128 and 131—Winding up—Petition for compulsory winding up of company by the Court—Grounds to be alleged in petition—Internal mismanagement of the company not such grounds—Admission of petition discretion of Court as to—Shareholder petition by* Any ground alleged under 128 (*e*) of the Indian Companies Act in a petition for the winding up of a company presented under s 131 of that Act must be of a like nature to the specific grounds given under cls (*a*) (*b*) (*c*) and (*d*) of s 128 If any other grounds are alleged they do not fulfil the requirements of the Act Allegations as to the internal management or mismanagement of a company are matters for the shareholders to deal with and do not call for the interference of the Court A petition by a shareholder stands in a different footing to a petition by a creditor and should be more closely scrutinized on presentation There is no obligation on the Court to admit a petition merely because it is presented Not only must a petition allege facts which if proved would justify an order for winding up a company but even if it alleges such facts the Judge has a discretion to consider whether it is really *bonâ fide* The Court may if it thinks fit refuse to admit a petition or as an alternative course give the company concerned notice that a petition has been presented so that it may take proceedings to restrain the petitioner from proceeding with his petition PIONEER BANK LIMITED *In the matter of th* (1914) I L R 39 Bom 16

20 ———————— *Winding up—Shares applied for subject to a condition and partly paid for—Condition not fulfilled—Resolution of company to refund part payment—Position of applicant as regards winding up proceedings* A company started in Meerut in 1904 with objects of a very general nature proposed in 1906 to erect a mill at Fyzabad and accordingly issued a prospectus and invited the public to subscribe the necessary capital On the faith of this prospectus one *M* applied for shares but added to his application a condition to the following effect — These shares are only subscribed on the condition that any mill is started in the suburbs of Fyzabad The company however found that they could not raise the necessary funds to start a mill at Fyzabad and therefore passed a resolution that the money already subscribed for that purpose should be refunded But before this was done the company went into Liquidation *Held* that *M* was in the circumstances no a

COMPANY—*contd*

member of the company but a creditor and entitled to get back what he had already paid. MAHENDRA GOPAL MUKERJI v LACHMAN PRASAD (1913) I L R 35 All 538

21 ———————— *Contributory—Applications for allotment of shares made by alleged contributory under conditions which were not carried out by the Company* A who was the holder of fifty shares in a limited liability Company entered into an agreement with the Company through its managing director to take 150 more shares on the conditions (a) that he was to be appointed a terminal director of the Company and (b) that the business of the company was to be transferred from Meerut where it had been formed to Saharanpur The 150 shares were allotted to A but he never paid the allotment money and though the business of the Company was nominally at least transferred to Saharanpur A was never appointed a director Shortly after this allotment the Company went into liquidation *Held* that A could not be made a contributory in respect of the 150 shares which he had offered conditionally to take *The London and Provincial Provident Association Ld In re Hogridge 57 L J Ch 932* referred to POWELL v SEN (1917) I L R 40 All 45

22 ———————— When there has been a suspension of business of a Company the power of the Court to wind up the Company will be exercised when there is a fair indication that there is no intention to carry on business MURALI DHAR ROY v THE BENGAL STEAMSHIP CO LD I L R 47 Calc 654

23 ———————— Form of order under the Indian Companies Act 1913 for the dissolution of a Company in compulsory liquidation undistributed assets remaining in the hands of the Liquidator IN re SHRAGERS LD (IN LIQUIDATION) I L R 47 Calc 620

24 ———————— A shareholder applied to have his name removed from the Register of the Company under s 38 of the Companies Act 1913—*R a mortgagee of the uncalled capital of the shares came to Court and opposed* *Held* that R was entitled to intervene and oppose being vitally interested in the proceedings and might be seriously prejudiced by and order of Rectification made behind his back *Held* also that the jurisdiction under s 39 of the Act is unlimited RAMESH CHANDRA MITTER v JOGIN MOHAN CHATTERJI I L R 47 Calc 801

25 ———————— *Whether interest is payable to creditors entitled thereto after commencement of winding up if Company turns out to be solvent—where interest is not mentioned in the order adjudicating upon the claim— Solvency explained—Indian Companies Act VII of 1913* *Held* that if a Company is or ultimately turns out to be solvent interest is payable upon any debts which carry interest or upon which a right to interest has been acquired out of the surplus assets remaining after payment of principal and interest up to the date of the winding up order *Buckley on Companies 9th edition page 471* referred to *Held also* that the solvency of a company is established if after payment of the principal and interest up to date of winding up there are some assets which may be realized and will be

COMPANY—*concld*

available to meet the liability on account of interest which accrued due after the commencement of the liquidation *Held further* that the creditor is not debarred from claiming the interest merely because he did not ask for it when proving his claim originally In re *Duncan and Co (1 Ch D 307) per Buckley J* referred to—also Stiebel s Company Law page 1222 GHANSHAM DAS v PUBLIC BANKING AND INSURANCE COMPANY IN LIQUIDATION I L R 1 Lah 154

26 ———————— *Solvent Company —surplus funds after paying creditors in full whether payable to creditors in payment of interest due subsequent to date of winding up order—Indian Companies Act VI of 1882 ss 147 and 169—Joint appeal from order dealing with two separate cases —notice of appeal not served within three weeks* The Official Liquidators of the Peoples and Amritsar Banks in liquidation paid up 16 annas in the rupee to the creditors and there remained still a substantial surplus in their hands. The creditors claimed that they were entitled to the surplus in payment of interest accured due since the dates of the winding up orders while the contributories claimed that the surplus funds should go to them *Held* that the Banks under liquidation having turned out to be solvent the creditors whose debts carried interest were entitled to claim out of surplus assets interest subsequent to the date of the winding up order In re *Humber Ironworks and Shipbuilding Co (Warrant Finance Co s Case) (L R 4 Ch Ap 643)* In re *Duncan and Co (1 Ch D 307)* In re *Whitaker (1 Ch D 299) Ram Saran Das v Basheshar Nath (55 P W P 1907)* In re *Pereira (1 Mad H C R 21)* In re *Mukammad Mahmud Shah (I L R 13 Calc 66)* and In re *General Rolling Stock Co (L R 7 Ch Ap 646 649)* Halsbury s Laws of England Volume 5 page 512 Lindley on Companies page 1009 Buckley s Company Law page 474 (9th Edition) and Stiebel s Company Law page 1222 followed *Held also* that although a joint appeal against an order dealing with two separate cases is not sufficient as in this case all the parties concerned in both cases were served with notice and the mistake was merely one of form it could be rectified by putting in a properly stamped appeal with the second case *Held further* that though the respondents did not receive notice of the appeal within three weeks as provided for by s 169 as the present case did not show any marked want of diligence on the appellants part the appeal was properly instituted *Daulat Ram v The Woollen Mills Co Limited Delhi (95 P R 1909) Tara Chand Jeramdas v Official Liquidators Peoples Bank of India Limited (46 P R 1915) Hira Lal v Himalaya Glass Works Co (176 P L R 1911) and Bishen Das v Liquidator Doaba Bank Limited Amritsar (42 P L R 1916)* distinguished DEVI DITTA MAL v OFFICIAL LIQUIDATOR AMRITSAR BANK ETC I L R 1 Lah 363

COMPENSATION

See BOMBAY CITY IMPROVEMENT ACT 1898 I L R 36 Bom 203

See CIVIL PROCEDURE CODE 1908—

ss 96 100 I L R 38 Bom 360

s 200 I L R 40 All 79
I L R 44 Bom 463

O XXIII r. 3 I L R 38 Mad. 959

COMPENSATION—*contd.*

See Compensation to Accused
I L R 38 Calc 302

See Contract Act (IX of 1872) s 65.
I L R 38 Bom 249

See Criminal Procedure Code s 250
I L R 37 Bom 376
I L R 36 All 132
I L R 44 Bom 463
I L R 40 All 610

See District Municipal Act (Bombay) s 160 I L R 36 Bom 47

See Ejectment Suit in
I L R 41 Mad 641

See Electricity Act (IX of 1910) ss 14 19 I L R 39 Bom 124

See Information 14 C W N 326

See Interest I L R 35 Bom 255

See Land Acquisition

See Land Acquisition Act (I of 1894)

See Madras Estates Land Act (*I of* 1908) s 6 and Sub ss (*6*) and (*8*)
I L R 39 Mad 944

See Malabar Compensation for Tenants Improvements Act (Mad I of 1900) ss 5 19 I L R 38 Mad 589

See Municipal Law L R 43 I A 243

See Penal Code (Act XLV of 1860)
s 494 I L R 40 All 615

See Railways Act (IX of 1890) s 75 80 I L R 34 All 422

See Shebait I L R 39 Calc 33

See Specific Moveable Property
I L R 39 Mad 1

See Transfer of Property (Act IV of 1882) s 83 I L R 39 Mad 579

——— apportionment of—

See Bombay Improvement Act 1898
I L R 36 Bom 203

See Land Acquisition Act (I of 1894)
I L R 36 Mad 395

——— for breach of contract—

See Contract I L R 34 All 429

——— for improvements—

See Hindu Widow
I L R 40 Calc 555

——— for loss of crops by theft or cattle—

See Estates Land Act (Mad I of 1908) ss *4 27 73 143*
I L R 40 Mad 640

——— for vexatious accusations—

See Criminal Procedure Code s 250
I L R 34 All 354

——— for wrong to land—

See Jurisdiction
I L R 42 Calc 942

COMPENSATION—*contd*

——— order for—

See Criminal Procedure Code (Act V of 1898) ss 250 423
I L R 38 Mad 1091

——— principles of apportionment of—

See Land Acquisition Act (I of 1894)
I L R 36 Mad 395

——— right to—

See Malabar Tenants Improvements Act (Mad Act I of 1900)
I L R 36 Mad 416

——— withdrawal of—

See Shebait I L R 40 Calc 895

——— Appellate Court powers—*Criminal Procedure Code* (*V of 1898*) *s 250—Consequential or incidental order* An Appellate Court has no power to order compensation under s 250 of the Criminal Procedure Code. Mehi Singh *v* Mangal Khandu (1911) I L R 39 Calc 157

——— Fixtures removal of—*Calcutta Municipal Act* (*Beng III of 1899*) *ss 341 617—Fixtures erected on buildings before 1st June 1863—Assessment of compensation not a condition precedent to demolition of fixtures—Small Causes Court as Special Tribunal for determination of compensation—Amount of claim exceeding ordinary jurisdiction of Small Cause Court—Suit not cognizable by Subordinate Judge—Decree correct in substance but not in form—Costs* In s 341 of the Calcutta Municipal Act (Beng III of 1899 which in respect to fixtures erected on buildings before 1st June 1863 enacts that the Corporation shall make reasonable compensation to every person who suffers damage by the removal or alteration of the fixtures there is nothing that renders the assessment of compensation a condition precedent to the demolition of the fixtures. Until the removal is effected no damage at all is in fact suffered S 617 where any municipal authority is required by this Act to pay compensation, the amount to be so paid and if necessary the apportionment of the same shall in case of dispute be determined by the Court of Small Causes includes a claim for compensation by a person against the Corporation for removal of fixtures although the amount exceeds the ordinary jurisdiction of the Small Cause Court In a suit in the Court of a Subordinate Judge by the appellants against the Corporation for compensation for removal of fixtures they prayed for (*a*) a declaration that the fixtures in dispute had been erected before 1st June 1863 (*b*) that they were entitled to compensation for the loss they would suffer by their compulsory removal (*c*) that the Corporation could not remove the fixtures until reasonable compensation had been paid (*d*) asked the Court to fix the amount of compensation and (*e*) for an injunction restraining the Corporation from interfering with the fixtures until compensation was paid The Subordinate Judge decreed the suit giving compensation. It was dismissed, as being premature (under s 341) and not cognizable by the Subordinate Judge (under s. 617) by the High Court where the Corporation, though they had denied the fact in their written statement, admitted that the fixtures had all been erected before 1st June 1863. *Held* by the Judicial Com

COMPROMISE—*contd*

Procedure Code (Act XIV of 1882) ss 462 464 The sanction of the Civil Court (required by s 462 of the Civil Procedure Code of 1882) is not necessary for a compromise entered into under the authority and by the direction of the Court of Wards on behalf of a minor under their charge NARIMO DEWANI *v* PEMBA DITCHEN (1917)
I L R 44 Calc 829

4 ——————— *Petition of compromise reciting a verbal mortgage in a proceeding prior to Transfer of Property Act (IV of 1882)—Destruction of record suit to redeem mortgage after—Certified copy of petition if admissible and if constitutes mortgage document—Petition if should be stamped—Copy bearing one rupee stamp—Original petition if must have been stamped with one rupee stamp—Court fees Act (VII of 1870)* On April 1st 1857 the parties to a suit filed a petition of compromise reciting the terms on which the dispute was settled among them being an agreement by one party who was recognized as owner to grant a usufructuary mortgage to the other The Judge ordered the compromise to be placed on the record and the case to be put for final disposal on the following day The record of the proceedings having been destroyed in the present suit for redemption of the mortgage a certified copy of the petition bearing a stamp of R 1 only was produced as evidence of the agreement *Held* that the certified copy was rightly admitted in evidence relative to the facts recited therein That the suit was not brought on the petition but on an antecedent verbal mortgage valid according to the law in force before the Transfer of Property Act and did not depend upon whether the petition was fully stamped or not That if the Judge did pass his formal order as he proposed to do no objection could be taken on the ground of the stamp on the petition being insufficient That no inference could be drawn from the copy bearing a one rupee stamp (which was the proper stamp for issuing a copy under the Court Fees Act of 1870) that the original petition (if it be treated as the document creating the mortgage) was not properly stamped AHMAD RAZA *v* SAIYAD ABID HUSAIN (1916)
21 C W N 265

3 ——————— *Petition of compromise presented to the Magistrate whilst writing judgment—Duty of Magistrate to accept and give effect to the petition—Criminal Procedure Code (Act V of 1898) 345* Under s 345 of the Criminal Procedure Code a case may be compounded at any time before sentence is pronounced A Magistrate therefore cannot refuse to accept a petition of compromise presented to him whilst he is writing the judgment ASLAM MEAH *v* EMPEROR (1917)
I L R 45 Calc 816

4 ——————— *Compromise of a claim—Consideration—Claim must be bona fide—Mimanshapatra obtained from guardian of infant by setting up a false will* A died in 1902 leaving an adopted son B and a daughter P who was married to one G B died in 190 leaving as his heir P s son K then an infant only two or three months old. About this time certain agnates of A set up a will by A under which they claimed A s estate as from the death of B and G and they purported to settle the dispute by mimanshapatra whereby G on his son s behalf gave up certain portions of the estate left by D to the other party On the validity of the mimanshapatra being challenged by B on behalf of her son K in a suit for partition brought by her against the other party to the deed. *Held* that though the latter could be expected and were not obliged to prove the will in solemn form in the present litigation it was necessary for them to show that there was a will and that upon that will they had a claim which was made honestly and in good faith. *Held* on the evidence that there was no will and the claim put forward on its basis was not honest or *bonâ fide* but merely a sham claim with a view to inducing G to give up some of the infant s property in their favour That upon the question of the validity of the mimanshapatra the position of the infant was different from what would have been G s position had he executed the deed for himself KRISHNA CHANDRA DATTA ROY *v* HEMAJA SANKAR NANDI MAZUMDAR (1917)
22 C W N 463

5 ——————— *Construction of—Whether benefit of annuity under it was confined to lineal heirs of grantee—No illegal perpetuity where annuity was a charge on the zamindari as long as heirs of grantee existed—Right to arrears of annuity by assignee of a reversioner—Objection not taken in early stage of case and no issue on it settled not allowed to be raised in appeal to Privy Council.* In a suit between an ancestor of the appellant (third defendant) and an ancestor of the respondent (third plaintiff) for an impartible zamindari a compromise was come to in 1831 by the parties by which the ancestor of the appellant retained the zamindari subject to his giving up one village and paying an annual sum of Rs 700 a month in perpetuity to the ancestor of the respondent The terms of the compromise were contained in two petitions dated 8th January 1861 one being in Tamil and the other in English the only difference between them being that in the former the annuity was to be paid to the grantee and his descendants from generation to generation and in the latter to the grantee and his heirs In a suit for the annuity by a collateral defendant of the respondent s ancestor *Held* on the construction of the compromise that the right to it was not confined to lineal heirs *Held* also that the agreement lay not in covenant but in charge and that the annuity being a charge on the estate it was not illegal as there was no difficulty in making it perpetual as long as there were lineal or collateral heirs of the grantee Where an objection which might and ought to have been but was not taken by the appellant at a stage of the case when an issue could have been raised on it and the matter was subsequently decided by the High Court against the appellant the objection by him was not allowed to be raised on an appeal to the Privy Council RAJAH OF RAMNAD *v* SUNDARA PANDIYASAMI TEVAR (1918)
I L R 42 Mad 581

6 ——————— *Compromise for bill n by two—Agreement to compromise non compoundable offence in suit for cancellation of or declaration of nullity of the agreement* Defendant instituted criminal proceedings against the plaintiff under the Indian Penal Code ss 408 and 477 both of which are non compoundable offences In consideration of his withdrawing both criminal proceedings and a civil suit pending between the parties plaintiff executed a deed conveying to the defendant his share of a certain village There was a proviso in the deed that the conveyance should only come into operation if and when all the above mentioned proceedings were withdrawn.

COMPROMISE—*contd.*

The criminal proceedings were withdrawn and the plaintiff was acquitted the order of the Magistrate being made with the consent of the parties. When the defendant took steps to fulfil the rest of his agreement namely to withdraw his civil suit against the plaintiff the latter declined to give his consent to the withdrawal. Plaintiff instituted this suit praying for cancellation of the deed of conveyance executed by him and for a declaration that it was null and void on the ground of its having been executed for an illegal consideration. *Held* that a part of the consideration for the agreement being illegal the agreement was void. But that the plaintiff being in *pari delicto* with the defendant the Court acting on principles of equity would refuse the prayer for relief by way of a declaration that the deed was null and void. The Court will not exercise its discretionary power under the Specific Relief Act 1877 s. 39 in favour of a party who is in *pari delicto* with his opponent BINDESHARI PRASAD v LEKHRAJ SAHU **1 Pat L. J 48**

6(a) ——————— So far as it relates to properties within the scope of the suit a compromise decree operates as res judicata but so far as it relates to properties outside the scope of the suit such a decree if the terms of the compromise are embodied within the decree is evidence of an agreement to transfer an interest in the property It is not necessary in such a case to register the compromise petition BISSESWAR RAM v MUHADEO PAHAN

1 Pat L J 208

6(b) ——————— This appeal related to the Taluka of Taringa in the Central Provinces which originated in a grant by Government early in the 19th Century of a large tract of waste land to the ancestor from whom both the contending parties derived their descent In 1860 the subject of the grant had been reclaimed and covered with villages The family of the grantee were then the Taluqdar (Badrinath) his two younger brothers and a cousin (Lokenath) the son of the grantee s second son This last mentioned member of the family sued the Taluqdar in the Revenue Court to establish his right to a half share of the rents of the Taluka on the ground that it was joint family property subject to the ordinary incidents of Hindu Law and that he was entitled to a moiety of the estate He obtained a decree which was put into execution In the course of the subsequent proceedings a compromise was come to and the dispute was referred to arbitration An award was given which was made a decree of Court on 29th October 1864 under which the claimant obtained in settlement of his claim 11 villages free from all liability for revenue The compromise deed stated that the plaintiff (claimant) was to possess and enjoy them The defendant (Taluqdar) has no power over these villages The plaintiff is at liberty to possess occupy and manage them just as he pleases But the defendant is to pay out of his own pocket the Government revenue in respect of these villages The plaintiff has no concern with the payment of the revenue and will not have to pay it The defendant shall have power over the rest of the villages in the Taluq The plaintiff shall have no power over them The defendant shall be responsible to pay (revenue) to Government Plaintiffs shall have no concern On settlement being finally effected the defendant shall be responsible for payment of the revenue assessed Corroboration of that award was given by the judgment of the Settlement officer dated 31st October 1867 which was affirmed on appeal by the Ha ib ul ar of 24th May 1867 by a letter from the Government of India to the Chief Commissioner in 1890 regarding the liability of the claimant (Lokenath) to reimburse the taluqdar in respect of the enhanced revenue by the decision of the Board in 1899 [Lokenath v Bisseswarnath (1899) I L R 27 Calc 103 L R 26 I A 2?8] and by other documentary evidence in the case In the present suit brought on 16th July 191? against the then taluqdar by the grandson of the claimant (Lokenath) the main question was whether the revenue assessed on the villages in possession of the plaintiffs was a charge as they claimed on the rest of villages of the taluqua and the plaintiffs prayed for a declaration that it was *Held* (reversing the decision of the Court of the Judicial Commissioner) that the liability to pay the revenue on the 11 villages granted to the claimant without the right to reimbursement was not a charge on the estate There was nothing to support the charge and it could not be inferred from the surrounding circumstances *Raja of Ramnad* v *Sundara pandiyasami Tevar* [*(1918) I L R 42 Mad 581 L R 46 I A 64*] distinguished SUNDERLAL v RAMJILAL (P C 1920)

I L R 47 Cal 932

7 ——————— *Certain properties not included in suit—Registration—Compromise incorporated in decree—Registration Act (16 of 1908) s 17 (1)—Code of Civil Procedure (Act 5 of 1908) O XXIII r 3* Where a suit for partition is compromised on the understanding that each defendant admits the plaintiff s right to certain portions of the claim made by him in consideration of the plaintiffs admitting the claim of each of the defendants for certain property which each such defendant desires to retain and the compromise is incorporated in the decree then such compromise does not require to be registered even though it deals with property not included in the suit such a decree although not registered, is evidence of an agreement between the parties under which certain lands have been allotted to each. Per *Jwala Prasad* J —The words so far as it relates to the suit in O XXIII r 3 of the Code of Civil Procedure 1908 show that all the terms which form the consideration for the adjustment of the matters in dispute whether they form the subject matter of the suit or not, become related to the suit and can be embodied in the decree. KABU MIAN v TEJO MIAN **3 Pat L J 43**

8 ——————— *Adjustment of matters outside scope of suit—Alteration of terms of registered lease—whether registration compulsory —Registration Act (XVI of 1908) s 17 (1) (b) (c) (?) (VI)—Transfer of Property (IV of 1882) ss 105 and 107—Duty of Court in filing compromise—Code of Civil Procedure (Act V of 1908) O XXXII rr 3 and ?—Parties to compromise whether minors are bound—Construction of Compromise* Documents in the nature of affidavits, petitions, and pleadings which are filed in the course of a proper judicial proceeding are admissible in evidence without the necessity of registration. A compromise which ... to and is

COMPROMISE—*contd*

incorporated in an order of the Court or is filed by way of petition in the proceedings is within the protection of sub s (2) (*vi*) of s 17 of the Registration Act 1908 and does not require registration even where it effects an alteration in a registered document A lease of certain coal land executed in 1895 provided for the payment of a commission of 6 annas per ton over and above a certain quantity taken from the mine each year and that in default the minimum royalty was to be measured at Rs 1 750 *per annum* It was stipulated that the commission and royalty should be payable to each of the co sharer lessors according to their respective shares and that in respect of the share of each co sharer he should be entitled to recover the same by suit from the lessee In 1901 a suit was brought on behalf of all the lessors or the successors of the original lessors for the recovery of commission and royalty on the basis of the agreement of 1895 At the time of the institution of the suit four of the plaintiffs *G* A *H* and *K* were minors The suit was compromised in 1902 The Court did not expressly sanction the compromise on behalf of the minors but nevertheless the recompromise was recorded By the compromise the rate of commission and the royalty were reduced and a certain sum was accepted in lieu of the arrears claimed. In his judgment embodying the compromise the Subordinate Judge remarked — The terms of the lease have also been changed but this is no part of the subject matter of the suit In 1906 there was another suit between the lessors and the lessee In that suit *G* who had attained his majority challenged the compromise of 1902 on the ground that he was a minor at that time *K* had also attained his majority before the institution of the suit but did not challenge the compromise of 1902 Before the institution of the suit *H* had disposed of his entire interest in the leasehold property as follows one third was purchased by *S* one third was purchased by *J* and the remaining one third by *K* *S* and *J* were co sharer landlords In 1906 *N* was still a minor The suit was compromised *Held* in a suit by the lessors for recovery of arrears of commission and royalty at the rates provided in the lease of 1895 (1) That under the terms of the lease the amount payable to the co sharers by way of commission and royalty was divisible and therefore although the compromise of 1902 was not binding on all the minor plaintiffs it was not void in its entirety and accordingly those of the lessors who were bound by the compromise were entitled to recover commission and royalty at the compromise rate only (2) That *N* was not bound by the compromise of 1902 (3) That *G* was not bound by the compromise of 1902 although he was an adult at the time when the suit of 1906 was compromised as he had in that suit challenged the compromise of 1902 (4) That *K* was bound by the compromise of 1902 as he did not impeach it in the suit of 1906 (5) *S* and *J* were bound by the compromise of 190 as they were adults and being themselves bound in respect of their own individual shares they were also bound in respect of the shares purchased from the minor *H* (6) The compromise *did not per se constitute lease* and therefore did not require to be registered under the provisions of sub s. 1 (*d*) of s 17 of the Registration Act 1908 but that it fell within the terms of sub s. 1 (*b*) and as it was embodied in the decree of the Court it was exempted from the necessity of registration by sub s 2 (*vi*) CHARU CHANDRA MITRA *v* SAMBHU NATH PANDEY

3 Pat L J 255

9 ——— *Compromise incorporated in decree—interest not claimed in plaint inserted in compromise decree whether recoverable.* Where the plaintiff sued for the recovery of a certain sum of money with interest at *9 per cent per annum* and the suit was compromised on the terms that if a specified amount were paid on a particular day interest should be calculated at 12 *per cent* while if it was paid after that date interest should run at 24 *per cent*—*held* in a suit on the compromise decree that interest was recoverable at the rate of 9 *per cent* only The agreement to pay after a specified date a rate of interest not claimed in the suit was outside the scope of the suit and that portion of the compromise was therefore invalid. GAURI DUTT *v* DOHAN THAKUR

2 Pat L J 673

10 ——— *Construction of document—Compromise settling all matters in dispute except one—Agreement therein that on that matter the parties would be bound by the finding of the Court—Finding of th Court not appealable* The parties to a suit for the recovery of property of various kinds by right of succession agreed in respect of the various classes of property except one As to this however they agreed that they would be bound by the finding of the court in respect of it *Held* that the effect of this last term of the compromise was that the finding of the court was final and binding upon the parties and that no appeal would lie against it *Bahir Das Chakravarti v Nobin Chunder Pal I L R 29 Calc 306* followed. SHAHZADI BEGAM *v* MUHAMMAD IBRAHIM **I L R 43 All 266**

11 ——— *Procedure—Minor—Guardian appointed by Court of Wards—Assent of Civil Court—Court of Wards Act (IX of 1879) ss 14 18 51—Civil Procedure Code 1882 ss 375 464* A guardian appointed under the Court of Wards Act 1879 on behalf of minors has power to compromise proceedings in a Civil Court to which these minors are defendants upon the guardian assenting to an agreement of compromise it is necessarily recorded by the Civil Court under s 375 of the Civil Procedure Code 1882 and its validity does not depend upon its terms having been examined and approved by the Civil Court. NARDIO DEWANI AND OTHERS *v* PEMBA DICHEN AND OTHERS (1910)

I L R 48 Calc 469

12 ——— *Not notified to Court—Claim decreed subsequently—Whether decree holder can bring a fresh suit for recovery of sum on the compromise which he might have got by execution of the decree* The plaintiffs appellants brought a suit against the defendant respondent for the recovery of money due to them by the latter The evidence in the case had been closed on 25th January 1910 and the Court ordered certain files to be sent for so the case was adjourned to 10th February and on that day to the 28th February for the same reason. On the 19th February the defendant by way of compromise executed a lease in favour of plaintiffs of certain land under which the latter s claim was to be adjusted. The plaintiffs however did not withdraw their suit and on the 28th February the Court passed a decree in their favour The plain

COMPROMISE—*contd*

tiffs having failed to recover their claim now sued for the amount due to them under the lease admittedly their decree had become barred by limitation *Held* that the decree superseded the compromise and the plaintiffs could not now sue on the lease to recover the sum which they might have got by execution of the decree *Moturi Seshayya* v *Sri Rajah Venkatadri* (41 Mad I J 919) approved *Sucaram Narrayana* v *Kashi nath* (*I L R 15 Bom 119*) *Tukaram* v *Anant bhat* (*I L R 5 Bom*) and *Lashab Perda* v *Elokasi Panda* (*1 Indian Cases 53*) distinguished. HIRA RAM v DOST MUHAMMAD

I L R 1 Lah 445

13 ——————— *Whether relates to subject matter of suit—Suit by tenant against co tenant for share of rent paid in respect of tenancy—Compromise by which Defendant tenant gives up land and Plaintiff gives up claim* One of two joint tenants having paid up the entire rent sued the other for contribution By a compromise which was embodied in the decree the Defendant in consideration of the Plaintiff abandoning his claim gave up his share of the land to Plaintiff *Held*—That the terms of the compromise related to the suit or at all events were covered by its subject matter JACHIM MONDAL v CHEMINES A BIBI 2 C W N 328

14. ——————— *Suit by a female heir of a joint owner compromised by a solenama—The compromise is binding upon her sons—* Bona fide *compromise in settlement of family disputes effect of* After the death of one of the members of a joint Hindu family his daughter brought a suit for establishment of her title of her father s share in the ancestral estate The suit was brought against an alleged adopted son of her father and the heirs of her father s brothers The suit was terminated by a *solenama* entered into by the daughter and the *alleged adopted son who alone was contesting* the suit Under the *solenama* they mutually gave up claims to certain properties in favour of each other and the disputes were settled Two subsequent suits by the daughter based upon the *solenama* also ended in compromise On the death of the daughter her sons brought a suit for *declaration of their title to the estate of their* maternal grandfather *Held*—That there could be no doubt that there was a final settlement of disputes and of the rights of each party and the settlement being also *bonâ fide* was binding upon the reversioners *Lala Khunni Lal* v *Kunwar Gobind L R 38 I A 87 (102) s c 15 C W N 547 (1911) Lala Oudh Beharee v Panee Mewa Kunuar 3 Agra H C R 84 (1867) Hiran Bibi* v *Sohan Bibi 18 C W N 929 (P C) (1914) Mahendra Nath* v *Shamsunnessa 21 C L J 157 (162 163) (1914)* and *Shyam Lal* v *Jamesuari 28 C L J 8? (83) (1915)* referred to RAJENDRA NATH MITRA v NIBARAN CHANDRA ROY

25 C W N 899

COMPROMISE AFTER DECREE

——————— Execution of—*Adjustment of mesne profit after decree enforceable by execution—When decree becomes incapable of execution* Where in a suit for land and mesne profit the decree leaves the amount of mesne profits undetermined the suit to that extent remains undisposed of and is open *to the parties to adjust* that portion of the suit by a lawful compromise and a decree made in accordance with the terms of such compromise can be enforced by execution Where such compromise provides that the amount of mesne profits must be recovered by execution first against certain land execution cannot be taken against the person of the judgment debtor merely because the land is not immediately available for sale in execution It must be shown that the obstacle is one which cannot be removed VYTHINADA AIYAR v VYTHINADA AIYAR (1909) I L R 33 Mad 78

COMPROMISE DECREE

See APPEAL TO PRIVY COUNCIL

6 Pat L J 171

See CIVIL PROCEDURE CODE 1908 O XXXII R 7 6 Pat L J 190

See COMPROMISE

See CONSENT DECREE

See HINDU LAW—WIDOW

I L R 38 All 679

See MISTAKE

I L R 43 Cal 217

See PRACTICE

I L R 36 Bom 7

See REGISTRATION OF DOCUMENTS

I L R 46 I A 240

See RES JUDICATA I L R 35 Mad 75

See REVIEW APPLICATION FOR

I L R 40 Calc 541

——————— against widow—

See HINDU LAW—WIDOW

I L R 43 Bom 249

——————— by guardian without Court s leave—

See CIVIL PROCEDURE CODE (ACT V 1908) O XXII R 7

I L R 2 Lah 164

——————— effect of—

See MUTT I L R 40 Mad 177

———————A decree obtained by consent or compromise can be attacked in a separate Suit not only on the ground of fraud but also any reason sufficient to avoid an agreement. SHAM NATH CHOWDHURY v JAMIA

I L R 34 All 144

——————— *Suit to set aside on the ground that agreement was unlawful—Civil Procedure Code (Act XIV of 1882) s 375—Administrator agreeing to execute lease for which sanction afterwards refused by Court—Probate and Administration Act (V of 1881) s 90 cls ( ) and (4)—Test whether agreement specifically enforcible—Specific Relief Act (I of 1877) s 21 (e)—Administrator as trustee —Compromise based on agreement which is unlawful in part—Decree if to be wholly set aside or in part—No universal rule* Where a person acting for himself and also as administrator of the estate of a deceased person on compromise a suit agreeing thereby to execute within a month a *dur putni* lease of property jointly belonging to himself and

COMPROMISE DECREE—*contd*

the estate of the deceased and undertook previously to doing that to obtain the permission of the Court which had granted the letters of administration but such permission was refused on the ground of the proposed lease not being beneficial to the estate *Held* that the administrator had acted in excess of his powers under s 90 of the Probate and Administration Act in entering into the compromise which was therefore not a lawful compromise within the meaning of s. 375 of the Civil Procedure Code (Act XIV of 1882) Where a compromise decree has been made on the basis of an unlawful agreement a suit lies to set it aside *Golab Koer v Badshah Bahadur 13 C W N 1197 sc 10 C L J 120* followed A compromise decree can be set aside on any ground on which the agreement itself could be set asid *Huddersfield v Lister [1895] 2 Ch 273* followed If the agreement could not be specifically enforced nor should the decree The agreement by the administrator in this case could not be specifically enforced being one made by a trustee in excess of his powers within the meaning of s 21 cl (c) of the Specific Relief Act *Held* that in the circumstances of the case the whole decree should be set aside and not merely the portion affecting the estate of the deceased Whether in such a case the decree should be set aside in the entirety or only to the extent directly effected by the illegality would depend upon the circumstances of the case and no universal rule can be laid down with regard to it SARBESH CHANDRA BASU v HARI DOYAL SINGH (1910) **14 C W N 451**

———— *Date of payment fixed by agreement of parties—Court's jurisdiction to extend time—Civil Procedure Code (Act V of 1908) O XXXIV r* In a suit upon a mortgage a compromise decree was made directing that on payment by the defendant into Court of a certain sum on or before the 4th April 1917 the plaintiff shall deliver up to the defendant all documents relating to the mortgaged property and put the defendant into possession of the same On the 31st March 1917 the defendant paid into Court a portion of the sum and applied for enlargement of time to pay up the balance The application was refused the defendant however paid into Court the balance on the 12th May 1917 *Held* that it would be equitable to extend the time for the payment of the balance up to the 12th May 1917 on which date the money was paid into Court and the High Court extended the time up till that date and directed the lower Court to make a final decree in terms of O XXXIV r 3 of the Civil Procedure Code ABKACH MONDAL v AMINUDDI MULLICK (1918) **23 C W N 439**

———— *Defendant to be ejected from land in suit unless he executed agreement of lease in favour of Plaintiff within two months—Lease not executed in two months—Time if essence of contract—Executing Court if may relieve against forfeiture—Civil Procedure Code (Act V of 1908) O XXIII r 3* Government sued the defendant for recovery of possession of a plot of land in the Barrackpore Cantonment The suit was compromised on terms under which the Defendant admitted the right of the Plaintiff and agreed to hold the land as a separate holding under the Plaintiff but without the payment of any additional tax and the Defendant and his son undertook within two months to execute an agreement in favour of the Plaintiff in a certain form embodying therein the terms of the compromise in default whereof it was provided that the Plaintiff would take *khas* possession of the land in suit by executing the decree that would be passed on the basis of the compromise A decree was passed in terms of the compromise The Defendant and his son not having executed the agreement within two months as stipulated the Plaintiff applied for execution and prayed for recovery of possession On receipt of notice of the application the Defendant expressed his willingness to execute the agreement and before the executing Court urged that there was not the essence of the contract and the Court had power to relieve him against the forfeiture *Held* that it is open to the execution Court to consider what the rights of the parties equitable or otherwise are which follow from the contract embodied in a compromise decree That the relation of landlord and tenant having been created in the case by the compromise decree the principle of the case of *Krishna Bai v Hari Govind I L R 31 Bom 15 (F B) 8 Bom L R 813 (1906)* was applicable to the case and the executing Court had erred in refusing relief to the Defendant on the ground that the contract had crystallised into a decree *Lachiram v Jana Yesu 16 Bom L R 668 (1914)* referred to In the circumstances of the case the High Court held that the defendant should not be ejected for failure to execute the agreement within two months from the date of the compromise decree and should be given some time within which to exercise it SURENDRA NATH BANERJEE v THE SECRETARY OF STATE FOR INDIA **'24 C W N 545**

———— Compromise of a suit by a female heir of a joint owner held binding RAJENDRA NATH MITRA v NIBARAN CHANDRA ROY **25 C W N 859**

———— *Compromise decree dealing with properties other than those in suit effect of—Res judicata—whether registration of compromise is necessary* So far as it relates to properties within the scope of the suit a compromise decree operates as *res judicata* but so far as it relates to properties outside the scope of the suit such a decree if the terms of the compromise are embodied within the decree is evidence of an agreement to transfer an interest in the property It is not necessary in such a case to register the compromise petition BISSESSWAR RAM v MAHADEO PARAN **1 Pat L J 208**

———— Respondents brought a suit for a declaration that certain property attached by the appellant in execution for money decree against a third party belonged to them A compromise was arrived at to the effect that the Respondents would execute a mortgage bond for the amount in favour of the appellant A decree embodying this was passed and the mortgage bond not being executed within the terms of the decree appellant applied for execution of the mortgage bond *Held* that the question as to what was the subject matter of the suit must depend upon the facts of each case and that in the present case the mortgage bond was capable of being enforced in execution of the decree under Civil Procedure Code O XXXI r 34 In the matter of Arshu Prokash Ghose **24 C W N 68**

COMPROMISE DECREE—*contd*

——— Suit to set it aside—*On ground of fraud and of being ex parte quo the minor plaintiffs—where compromise was sanctioned by Court under a misapprehension of a material fact* One Jiwan died leaving a widow a son B S and a daughter Mst L. The son succeeded to the father s property but died in 189_ during his minority He was succeeded by his mother who remained in the enjoyment of the property for many years and upon her death Jiwan s collaterals took possession On 8th February 1914 Jiwan s daughter and sister of B S brought a suit against the collaterals for recovery of the property as Jiwan s daughter and on 2?th May 1914 a compromise was arrived at between the parties upon which a decree followed The present plaintiffs (two of whom being minors) who were among the defendants in that suit brought the present action for setting aside the decree based on the compromise They alleged fraud inasmuch as Mst L. claimed as Jiwan s daughter and not as sister of B S the last male owner but failed to show that they did not know of this or at any rate had not the means of knowing it They also pleaded that the decree was *ex parte* as far as they were concerned and that at all events the minor plaintiffs were not bound by the decree *Held* that as the decree was not tainted with fraud no suit lay to set it aside as regards parties who were majors at the time SADHO MISSER v *Golal Singh* (3 Calc W N 3) followed *Held also* that the objection that the decree was *ex parte* could only be taken by an appropriate proceeding in the suit itself e g by an application under O IX rule 13 of the Code of Civil Procedure or an application for review or an appeal to a superior Court *Held* however as regards the two minor plaintiffs that the decree was not binding on them as the sanction of the Court to the compromise was obtained under a misapprehension of a material fact as the status of Mst L *qua* the estate she being represented as the daughter of the last male owner while as a matter of fact she could come in only as a sister *B? e Solomon* v *Abdool A* (*I L R 6 Calc 68?*) followed JHANDA SINGH v *Mst* LACHHMI I L R 1 Lab 344

COMPROMISE PETITION

See HINDU LAW—PARTITION
I L R 48 Calc 1059

COMPULSION OF LAW

——— payment under—

See DEPOSIT IN COURT
I L R 43 Calc 269

See VOLUNTARY PAYMENT
I L R 40 Calc 598

COMPULSORY ACQUISITION

See LAND ACQUISITION

COMPULSORY SALE

See Pre-emption. I L R 42 All 402

COMPUTATION OF TIME

See CONTRACT FOR SALE
I L R 45 Calc 481

See LEAVE TO APPEAL TO PRIVY COUNCIL.
I L R 42 Calc 35

CONCILIATION

See DEKKHAN AGRICULTURISTS RELIEF ACT ss 39 48
I L R 36 Bom 18

See LIMITATION I L R 38 Bom 65

——— certificate of conciliator—

See DEKKHAN AGRICULTURISTS RELIEF ACT (XVII OF 1879) s 48
I L R 42 Bom 36

——— effect of award—

See CENTRAL PROVINCES TENANCY ACT (XI OF 1898) s 45
I L R 43 Calc 76

CONCLUSIVE PROOF

See AGRA TENANCY ACT 1901 s 9
I L R 43 All 61

CONCURRENT FINDINGS

See LIMITATION L R 46 I A 197

See MAHOMEDAN LAW—LEGITIMACY
I L R 48 Calc 856

See REGISTRATION
I L R 41 Calc 972

See SPECIAL OR SECOND APPEAL
I L R 37 Mad 443

See WILL I L R 38 Calc 355

CONCURRENT JURISDICTION

See PROBATE I L R 37 Calc 224

See RESTORATION OF SUIT
14 C W N 508

CONCURRENT SENTENCES

See APPEAL I L R 40 Calc 631

See CRIMINAL PROCEDURE CODE s 413
15 C W N 734

See MISJOINDER OF PARTIES
I L R 38 Calc 453

CONDEMNATION OF VESSEL

See SALE OF GOODS
I L R 45 Calc 28

CONDITION PRECEDENT

See CHARITABLE TRUST
I L R 48 Calc 124

CONDITIONAL ADOPTION

See HINDU LAW—ADOPTION
I L R 37 Bom 251
I L R 43 Bom 542

CONDITIONAL BEQUEST

See WILL I L R 48 Calc 1100

CONDITIONAL CONSENT

——— by Collector—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 9. I L R 39 Bom 580

CONDITIONAL OFFER

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXIII R. 3
I L R 38 Mad. 9 3

CONDITIONAL ORDER

See PUBLIC NUISANCE I L R 42 Calc 702

See PUBLIC PATHWAY I L R 44 Calc 61

CONDITIONAL SALE

See MORTGAGE I L R 2 Lah 53

——— foreclosure proceedings—

See MORTGAGE I L R 1 Lah 292

CONDONATION

See DIVORCE I L R 39 Calc 395
I L R 44 Calc 1091

CONDUCT

——— causing injury to health—

See DIVORCE I L R 39 Calc 395

CONDUCT OF PARTIES

See ZAMINDARI SALE I L R 37 Mad 22

CONFESSION

See ADMISSIONS

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS I L R 41 Calc 601

See CONSPIRACY TO WAGE WAR I L R 38 Calc 559

See CRIMINAL PROCEDURE CODE ss 14 15 164 3 Pat L J 291

s 164 I L R 2 Lah 325 129

s 255 AND 342 I L R 39 Mad 302

EVIDENCE ACT 1872—

s 24 I L R 45 Bom 1086

s 26 I L R 42 Bom 1

s 30 I L R 38 Bom 156
I L R 37 All 247
I L R 43 Bom 739

s 91 I L R 35 All 260
I L R 36 All 222

See EXCISE OFFICERS I L R 46 Calc 411

See MISDIRECTION I L R 45 Calc 557

——— admissibility of—

See JURY RIGHT OF TRIAL BY I L R 37 Calc 467

——— admissibility of against a co conspirator—

See CONSPIRACY TO WAGE WAR I L R 38 Calc 169

——— by co accused—

See BAIL I L R 49 Calc 95

See EVIDENCE ACT (I OF 1872) s 30 I L R 38 Bom 156
I L R 37 All 247
I L R 43 Bom 739

See JURY TRIALS I L R 49 Calc 789

——— effect of retracted—

See CRIMINAL PROCEDURE CODE s 342 5 Pat L J 400

CONFESSION—*contd*

——— to Magistrate after arrest—

See CONSPIRACY TO WAGE WAR I L R 38 Calc 169

——— recorded by Magistrate without enquiring whether voluntary—

See CRIMINAL PROCEDURE CODE s 164 AND ? I L R 2 Lah 325

——— record d memo of—

See CRIMINAL PROCEDURE CODE 1898 ss 164 342 I L R 2 Lah 129

——— relevancy of—

See CONSPIRACY TO WAGE WAR I L R 38 Calc 559

——— Unrecorded

See MISDIRECTION I L R 45 Calc 557

1 ——— Purporting to be involuntary—*Evidence Act 1872 s 24* A statement in writing by the accused which contains an allegation from which it is to be inferred that the statement of which it forms a part was not made voluntarily is inadmissible EMPEROR *v* TARANATH ROY CHOWDHURY (1910) I L R 37 Calc 735

2 ——— Under Criminal Procedure Code 1898 ss 164 342 364—*Evidence Act 1872 s 29* A confession under s 164 of the Criminal Procedure Code must be made either in the course of an investigation under Chapter XIV or after it has ceased and before the commencement of the inquiry or trial The condition requiring the confession to be prior to the commencement of the inquiry or trial is only imposed when the investigation has ceased and not when it is made in the course of the police investigation Where a number of persons were arrested on the 1st May and the confessions of some of them were recorded on the 4th and 5th while others were brought in subsequently and their confessions taken while the police investigation was then actually going on and on the 17th an order under s 196 was obtained and the police report sent in and on the next day the examination of the prosecution witnesses begun —*Held* that the Magistrate did not take cognizance under s 190 of the Code nor did the inquiry commence on the 4th and that the confessions were taken in the course of an investigation under Chapter XIV The fact that the Magistrate who has taken the confessions afterwards holds the inquiry does not under s 164 constitute the recording of the confessions an examination of the accused in the course of it and at its commencement *Empress v Anuntram Singh I L R 5 Calc 954* and *Empress v Jakub Khan I L R 5 All 253* declared obsolete *Sat Narain Tewari v Emperor I L R 32 Calc 1085* distinguished S 164 includes confession taken by a Magistrate who afterwards holds such inquiry or trial *Empress v Anuntram Singh I L R 5 Calc 954* and *Reg v Pitambar 10 Bom. H C 166* declared obsolete on the point Ss 164 342 and 364 of the Code are not exhaustive and do not limit the generality of s 21 of the Evidence Act as to the relevancy of admissions *Queen Empress v Naraijen (188?) Ratan Lal Unrep. Cr C 679* referred to The mere fact that a statement was elicited by a question does not make it irrelevant as a confession under s 164 of the Criminal Procedure Code or s 29 of the

CONFESSIO *cont*

Evidence Act th u h e i h fa t may be mat rial on th question of its unts ess Iart pra Kumar Ghose v Emper r (1909)

I L R 37 Calc 467

3 ——— ——— ——Retracted *Evi dence of—I c n e f c nfe s n whether ex m nation of s y* Where the only evidence given during the trial to connect the accused with the act f murder with which they were charged were their own confessions contained in stat m nt s lur arily made by them under section 164 of the Code of Criminal Procedure 1898 which confessions were retracted before the trial commenced *Held* that the confessions were admissible in evidence against the accused. It is not necessary that the record of a confession should be always examined Gija Majhi v The King Emperor

2 Pat L J 60

4 — — — By co accused *Ice pl n ers of g a ty the Court a d re o al of co acc s d from the dock—Trial of rema ning pri oner alone—Admissibility of confession of co acc sed against prisoner on trial—Evidence Act (I of 18) s 30* Where a co-accused pleads guilty and the Court has accepted the pl and directed his removal from dock and the trial proceeds against the remaining prisoner alone confession by the former is not admissible under s 30 of the Indian Evidence Act 1872 against the latter *Q en Empress v Iak ji I L R 19 Bom 195* approved Emperor v Keramat Sirdar (1911) I L R 38 Calc 446

5 ——— Verification by Magistrate Where a confession was verified by a Magistrate the proper course for the prosecution was to examine the Magistrate himself and not the other verification witnesses whose evidence would be inferior to his Kader Sundar v *Emperor (1911)* 16 C W N 89

6 ——— Retracted—*Confes ion made after long police custody admissions in not retracted if admissible* A who was charged with an offence under the Arms Act made a confession in the course of which he stated he was a member of a *Samity* but subsequently retracted the confession *by a statement in which he repeated that he was* a member of the *Samity* *Held* that the statement that he was a member of the *Samity* was good evidence against himself even though the original confession might have been made after long police custody *Amir Khan v King Emperor 7 C W N 457 Narendra Kumar Ghose v Emperor 14 C W N 1114 I L R 37 Calc 467 King Emperor v Annya 3 Bom L R 438* and *Emperor v Abani 1 C W N* referred to Pulin Behari Das v King Emperor (1911)

16 C W N 1105

7 ——— Recording of—*Questioning the accused regarding its voluntariness at the end of the statement—Criminal Procedure Code (Act V of 1898) s 164—Confession partly false evidentiary value of* Where an enquiry as to the voluntary character of the confession is made by the Magistrate not at the commencement but at the end of the statement by the accused the defect is merely one of form. If a confession is found to be false in part as to the justifying motives for an offence it does not follow that the rest of it relating to the commission of the offence must be rejected Where the entire statement of a prisoner has been given in evidence any part of it may be contradicted by the prosecution and if sufficient grounds exist the Court may accept the incriminatory and reject the exculpatory portions. *Rex v Higgins 3 C & P 603 Rex v Clewes 4 C & P 221 Rex v Steptoe 4 C & P 397* referred to Pulin Tanti v Emperor (1913) I L R 40 Calc 873

8 ——— By force—*Allegation of ill treatment and inducement to extort confession—Onus of proof* Where an accused when retracting a confession alleged ill treatment and inducement by the Police to extort the confession the onus is on him to prove such ill treatment and inducement King Emperor v Kapili Katoni (1918)

22 C W N 809

9 ——— *Evidence Act (I of 1872) s 24—Circumstances making confession inadmissible* When a confession was made after police custody for several days and protracted consultation between the accused and the investigating and other police officers and was subsequently retracted *Held* that the confession was made under circumstances which excluded its admissibility Mobarak Ali v King Emperor (1919) 23 C W N 886

CONFESSION AND STATEMENT

——— difference between—

See Criminal Procedure Code (Act V of 1898) s 164

I L R 39 Mad 977

CONFIDENTIAL COMMUNICATIONS

——— test of—

See Easement Act (V of 1882) s 15

I L R 39 Mad 304

CONFIRMATION OF SALE

See Sale in Execution of Decree.

I L R 41 Calc 590

CONFISCATION

——— of boat—

See Opium Act s 11

15 C W N 296

——— *Cargo—Enemy ship—Cargo shipped by British subjects before declaration of war—War declared whilst cargo at sea—Cargoes consigned to German merchants (in one instance to British merchant)—Destination (Enemy Port)—Contracts C I F—Moneys advanced by British Banks against documents of title—Property in goods at the time of capture* On August 4th, 1914 war was declared between Great Britain and Germany Before the declaration of war H S N C. & Co British subjects, had shipped some bales of jute by a German ship the S S *Pappenfels* of the Hansa Line, and had consigned the goods to D C & Co British merchants G & Co and G W & Co had also shipped goods by the same ship but had consigned the goods to German merchants The *Pappenfels* was captured at sea after the declaration of war and condemned as good and lawful prize at Colombo The *Pappenfels* was sent to Calcutta to have the liability of the cargo to condemnation determined by the High Court at Fort William in Bengal Messrs. H. S N C. & Co G & Co. and G W & Co submitted claims for the [illegible] their goods. These claims were [illegible] Crown —*Held* (i)

CONFISCATION—*contd*

that in determining the question of liability of the goods to confiscation regard must be had to the property in the goods and not to the risk except so far as it may assist the Court in determining the answer to the question— To whom did the goods belong at the time of capture? (ii) that the sellers did not pass the property in the goods to the buyers at the time of appropriating the goods to the contract and (iii) that in the circumstances the property in the goods was in the seller and they were not liable to be confiscated RE CARGO *ex* S S RAPPENFELS (1914)
I L R 42 Calc 334

CONGENITAL BLINDNESS

See HINDU LAW—INHERITANCE
I L R 45 Calc 17

CONSCIOUS POSSESSION

See COUNTERFEIT COIN
I L R 44 Calc 477

CONSENT

See ACQUIESCENCE
I L R 37 All 412

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 92 I L R 39 Bom 580

See CONSENT OF COURT

See CONSENT OF PARTIES

See EVIDENCE I L R 38 Mad 160

See LESSOR AND LESSEE
I L R 48 Calc 176

See PENAL CODE (ACT XLV OF 1860) ss 366 360 90
I L R 42 Bom 391

———— of landlord—

See TRANSFERABILITY
I L R 42 Calc 172

———— of father-in-law but not senior widow to adoption by junior widow

See HINDU LAW—ADOPTION
I L R 44 Bom 508

CONSENT DECREE

See CIVIL PROCEDURE CODE 1882 ss 13 462 I L R 36 Bom 53

See CIVIL PROCEDURE CODE (1908) O XXXIV I L R 38 Bom 32

See COMPROMISE AND COMPROMISE DECREE

See INSTALMENTS I L R 38 Bom 32

See JURISDICTION I L R 38 Calc 639

See MORTGAGE I L R 35 Bom 371

See PROCEDURE I L R 36 Bom 77

See WRONGFUL DISMISSAL
L R 46 I A 314

———— effect of—

See MUTT I L R 40 177

1 ———————— *Parties—Hindu Widow—Reversionary heirs—Confession of judgment* When in a suit between a Hindu widow and a claimant to the estate of her husband a stranger who was not a party to the suit in the Original Court was made a party to the appeal without leave of the Court and a

CONSENT DECREE—*contd*

consent decree made the decree was not binding upon the reversionary heir A Hindu widow who is a limited or qualified owner cannot confess judgment and be party to a consent decree so as to bind the inheritance in the hands of the reversionary heirs *Katama Natchier* v *The Rajah of Shivagunga 9 Moo I A 539 Stapilton* v *Stapilton 1 White & Tud 8th Ed 234 1 All 2* distinguished *Imrit Konwar* v *Roop Narain Singh 6 C L R 76* explained *Sheo Narain Singh* v *Khurgo Koerry 10 C L R 337 Sant Kumar* v *Deo Saran I L R 8 All 365 Jaram Laljee* v *Veerbai 5 Bom L R 885 Gobind Krishna Narain* v *Khunni Lal I L R 29 All 487 Mahadei* v *Baldeo I L R 30 All 75 Roy Radha Kissen* v *Nauratan Lall 6 C L J 490 Asharam Sadhani* v *Chandi Churn Mukerji 13 C W N 117* referred to A consent decree does not operate to the prejudice of persons not parties thereto *Nicholas* v *Asphar I L R 4 Calc 219 In re South American and Mexican Company* [1895] *1 Ch 37* and *The Bellcairn 10 P D 161* distinguished *Huddersfield Banking Company Limited* v *Lister* [1895] *2 Ch 273* followed RAJLAKSHMI DASSEE v KATYAYANI DASEE (1910) I L R 38 Calc 639

2 ———————— *Res judicata—Consent decree between predecessors in title of parties in suit—Civil Procedure Code (Act V of 1908) s 11* A consent decree has to all intents and purposes the same effect as *res judicata* as a decree passed *per invitum* and this notwithstanding the words in s 11 of the Civil Procedure Code has been heard and finally decided *In re South American and Mexican Company* [1895] *1 Ch 37* followed A consent decree come to between the predecessors in interest of the present parties touching matters now substantially and directly in issue between them is *res judicata* BHAISHANKAR NANABHAI v MORARJI KESHAVJI & Co (1911) I L R 36 Bom 283

3 ———————— *Default—Variation—Court s power to vary the terms of consent decree* The plaintiff sued for a declaration that an ostensible sale deed was merely a mortgage deed and that he was entitled to redeem the property The parties arrived at a compromise and a consent decree was passed in terms that the plaintiff do pay defendant within one month from the 4th September 1917 a sum of Rs 1 100 and the survey No 529 at Jamner should be given in plaintiff s possession as owner by defendant in February 1918 after removing that year s crop if the above sum was not paid by plaintiff to defendant within one month defendant should retain possession of the survey number as owner The plaintiff made default and the defendant claimed that he was entitled to retain the property under the terms of the consent decree The plaintiff thereupon paid the sum into Court on the 26th November 1917 and presented an application for extension of time mentioned in the consent decree The lower appellate Court dismissed the application on the ground that it had no power to vary the terms of the consent decree On appeal to the High Court *held* that it would be open to the Court to relieve against a default of the plaintiff on proper terms inasmuch as the plaintiff paid the money still three months before he would get possession under the consent decree *Per Macleod C J* — In each case the terms of the consent decree must be considered The Court cannot

CONSENT DECREE—*contd*

lay down a general principle that in no case can the terms of the consent decree be varied SUPTU DHONDU v MADHAVRAO JIVRAM (1919)
I L R 44 Bom 544

4 ———— — — Dekkhan Agriculturists Relief Act (XVII of 18[illegible]) s 15 B—Instalment—Fetter[illegible] of consent decree [illegible] In a suit for possession of land which the plaintiff alleged had been sold to him but which the defendant contended had been mortgaged a consent decree was passed directing the defendant to pay to the plaintiff a certain sum for his right as mortgagee within six months from the date of the decree failing which his right to redeem the mortgage was to cease The defendant instead of complying with the terms of the decree made an application that he was an agriculturist and that he should be allowed to pay the sum by annual instalment The lower Courts allowed the instalments on the ground that the terms of the consent decree could be altered under s 15 B of the Dekkhan Agriculturists Relief Act 1879 *Held* reversing the order that the defendant by his application had asked the Court to alter the terms of the consent decree entirely and this could not be done even under s 15B of the Dekkhan Agriculturists Relief Act 1879 *Shivayogappa* v *Govindappa* (1913) 37 *Bom 614* relied on *Supdu Dhodu* v *Madhavrao Jivram (1919) 44 Bom 544* explained MADHAV BALKRISHNA v APPAJI VENKATESH (1921)
I L R 45 Bom 1123

CONSENT OF COURT

See MAHOMEDAN LAW—MARRIAGE
I L R 42 Calc 351

CONSENT OF GOVERNMENT

See MAGISTRATE I L R 39 Calc 119

CONSENT OF PARTIES

See JURISDICTION
I L R 42 Calc 116

CONSENT ORDER

———— Effect of—

See RECEIVER 6 Pat L J 208

CONSEQUENTIAL ORDER

See COMPENSATION
I L R 39 Calc 157

CONSEQUENTIAL RELIEF

See COURT FEE
I L R 40 Calc 245 615
I L R 44 Calc 352
3 Pat L J 194

See SPECIFIC RELIEF ACT ss 9 42
I L R 33 Mad 452

———— prayer for—

See COURT FEES ACT s
I L R 39 Calc 704

CONSIDERATION

See CONSTRUCTIONS OF DOCUMENT
I L R 41 Bom 5

See C I L CONTRACT
I L R 42 Bom 473

CONSIDERATION—*contd*

See EVIDENCE I L R 33 All 49

See EVIDENCE ACT (I OF 18[illegible]) s 9
I L R 35 All 55
I L R 36 All 53

See GUARDIANS AND WARDS ACT (VII OF 1890) ss 7 (?) 29 30
I L R 37 Mad 3

See MORTGAGE I L R 36 All 47
I L R. 41 All 25

See PROMISSORY NOTE
I L R 37 All 9
I L R 38 Mad 68

See STAMP DUTY I L R 37 Calc 63

———— effect of non payment of—

See CONTRACT ACT (IX OF 1872) s 39
I L R 34 All 27

———— failure of—

See BILL OF EXCHANGE
I L R 41 Bom 56

See CONTRACT ACT (IX OF 1872) s 18 CL. (3) I L R 35 Bom 2

ss 20 65 I L P 40 Bom 63

See LIMITATION ACT (IX OF 1908) SCH I ARTS 97 62 I L R 37 Bom 53

s 97 I L R 41 Bom. 3

See MORTGAGE I L R 35 Bom 39

———— for Hundi—

See HUNDI SUIT ON
I L R 40 Bom 47

———— interest in advance added to bond—

See INTEREST I L R 44 Bom 77

———— minor representing as major—

See SPECIFIC RELIEF ACT 1877 s 41
I L R 44 Bom 17

———— unlawful—

See CONTRACT ACT (IX OF 1872) s 24
I L R 42 Bom 33

———— *Mortgage—Legal consideration—Contract Act (IX of 1872) s 2 cl (d)* Where *A* executed a mortgage in favour of *X* in 1884 and in consideration of Y not enforcing the same and in substitution therefor *A* along with *B C* and *D* executed a fresh mortgage in 1893 in favour of Y and on Y suing to enforce the later mortgage the Court of first instance dismissed the suit on the ground that there was no legal consideration *Held* that the mortgage of 1893 which replaced that of 1884 was for legal consideration *Held* further that it was not necessary that the promisor should benefit by the consideration it was sufficient if the promisee did some act from which a third person was benefited and which he would not have done but for the promise *Hurkissen Dass Serowgee* v *Nibaran Chander Banerjee 6 C W N 27 Alhusen* v *Prest 6 Exch Rep 7 0 Bailey* v *Croft 4 Taunt 611 Haig* v *Brooks 10 A & E 309* referred to FANINDRA NARAIN ROY v KACHEMAN BIBI (1917)
I L R 45 Calc 7[illegible]

CONSIGNEE.

———— duty of—

See C s I. L. R 41 Calc 70[illegible]

CONSIGNEE—contd

———— possession of—

See OPIUM I L R 46 Calc 820

CONSIGNMENT

———— loss of—

See RAILWAY COMPANY I L R 41 Calc 576

CONSOLIDATED RATE

See RATES AND TAXES I L R 42 Calc 625

CONSOLIDATING STATUTE

———— construction of—

See EXECUTION I L P 38 Mad 199

CONSOLIDATION OF APPEALS

See APPEAL I L R 43 Calc 95

See APPEAL TO PRIVY COUNCIL 3 Pat L J 446

See CIVIL PROCEDURE CODE 1908 s 110 O XLV r 4 I L P 43 All 223

CONSOLIDATION OF MORTGAGES

See MORTGAGE I L R 32 All 651
I L R 1 Lah 105

CONSPIRACY

See CHARGE I L R 42 Calc 957

See CRIMINAL CONSPIRACY

See DAMAGES I L R 41 Bom 137

See MARRIAGE CONTRACT OF I L R 39 Bom 682

See PENAL CODE ss 34 109 467 I L R 38 Bom 524

s 120B I L R 40 All 41

———— as a cause of action—

See LIMITATION I L R 40 Calc 898

———— charge of—

See CONSPIRACY TO WAGE WAR I L R 38 Calc 559

See PENAL CODE s 121A

———— to cheat—

See WITNESS I L R 46 Calc 700

1 ———————— *Suit for damages for—Conspiracy provision relating to in the Indian Penal Code if excludes civil action for other conspiracies—Common unlawful object—Arrest of father by Magistrate and Police officers to induce son to confess to a crime—Motive difference in amongst persons so conspiring not material—Special damages to what extent to be proved in suit for damages for conspiracy—Malicious prosecution by joint tort feasors and conspiracy different causes of action for—Limitation—Limitation Act (XV of 1877) Sch II Arts 23 36 120—Standard of proof for actionable conspiracy if same as for criminal offence—Assessment of damages* The law does not permit of a man being arrested in order to put pressure on his son to confess even if the person causing the arrest believed that by so doing he will get evidence that will lead to the conviction of persons engaged in a huge conspiracy Where three persons were found to have acted in concert in having a man arrested with that object the fact that two of

CONSPIRACY—contd

them did not believe the story upon which the charge against the son was based to be true whilst the third believed in its truth was no ground for the exemption of the latter from liability for damages resulting to the father from the conspiracy for the motive of one conspirator may be different from that of the others The standard of proof of a conspiracy in a suit for damages resulting therefrom is not in India the same as if the defendants were being tried on a criminal charge *In the Goods of Gopessur Dutt* (unreported) relied on. A suit for damages resulting from a conspiracy which would be indictable at Common Law lies in British Indian Courts according to the principles of justice equity and good conscience and the Indian Penal Code by providing for only one form of criminal conspiracy *viz* to wage war against the King cannot be considered to have taken away this civil remedy either expressly or by necessary implication. *Quinn v Leathem* [*1901*] *A C 495* followed A suit brought on a conspiracy must be kept strictly to the cause of action that has been set out in the plaint If a conspiracy is as in this case indictable at Common Law it gives rise to civil liability if damage has been occasioned by it to the plaintiff The present suit being based on two causes of action *viz* (i) to recover the damage occasioned to the plaintiff as the result of an actionable conspiracy and (ii) to recover damages for malicious prosecution against the defendants as joint tortfeasors *Held* that the suit though instituted beyond the period of limitation provided *for suits for compensation* for malicious prosecution was in regard to the first mentioned cause of action not barred by limitation as it was brought within the period provided by Art 36 or Art 120 of the Limitation Act the former article being applicable to the matter *and if it did not apply the latter being* applicable Damage to a substantial amount should be proved by the plaintiff in order to establish a cause of action for conspiracy though if substantial damage is proved the damages awarded need not be limited to the precise amount proved *Held* that the plaintiff should recover the amount he had to spend owing to his arrest such damage not being too remote PEARY MOHAN DAS v D WESTON (1911)

16 C W N 145

2 ———————— *Constructive offence in furtherance of an intention common to the accused on trial and another—Abetment by conspiracy—Conspiracy between two persons on trial three other so named and others unknown—Acquittal by jury of conspirators on trial effect of—Verdict not conclusive as to persons not on trial—Distinct evidence against latter—Character of verdicts in England and India—Evidentiary value of the same witness as to the identity of different persons—Opinion of the Judge as to the weakness of evidence of identity of persons under trial—Stay of trial against others—Warrant against one withdrawn on acquittal of other alleged co-offender—Prosecution of proceedings by the District Magistrate on the advice of law officer of the Crown—Legality of proceeding* Where two persons were charged under ss , and , of the Penal Code for offences committed in pursuance of an intention common to them and to the petitioner and also under ss , and , of the Penal Code for abetment by conspiracy between themselves, the petitioner two others named and others unknown and were acquitted by jury *Held* that

CONSPIRACY—contd

the acquittal on the conspiracy charges did not conclude the liability of the petitioner for conviction of the same offence as there were two others named and others unknown who were also alleged to have been members of the conspiracy. *Held* also, that the acquittal did not affect the question of the petitioner's criminality as the jury had not and could not have formed or expressed an opinion as regards him as he was not then on trial, and that there was, besides, that not evidence alleged against him in the case. The incidents of the English law based on the sacred character of jury verdicts cannot be imported so as to give such a character to verdicts in India where by the express provisions of the law it does not attach to them. *Punch Chand v. Emperor, I. L. R. 41 Calc. 350, per* BEACHCROFT J., approved. The evidence of the same witness as to the identification of one person may be quite different to that as regards the identification of others. Where the Judge clearly stated that the identification of the two persons under trial was weak and on that ground he accepted the verdict of acquittal it would be unwarranted for the High Court to stay the ordinary course of justice in the case of the petitioner. Where after the acquittal of the two persons on trial the warrant against the petitioner was withdrawn but proceedings were re-instituted against him by the officer in charge of the police station within whose jurisdiction the offence was committed under the direction of the District Superintendent of Police who could not appear himself but had been instructed by the District Magistrate on the advice of the law officer of the Crown that the case could go on against the petitioner on the evidence: *Held* that the District Magistrate was competent to take cognizance of the case if on taking legal advice he thought that the evidence brought the accused within the purview of the law. MANINDRA CHANDRA GHOSE *v.* EMPEROR (1914) . . . . I. L. R. 41 Calc. 754

3. ——————— *Procedure—Criminal conspiracy—Special trial.* A person may be guilty of criminal conspiracy even though the illegal act which he has agreed to do has not been done for the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means. *Reg. v. Hibbert, 1 Cox, 8; Q. v. Latham [1901] A. C. 495; The Queen v. Mo?? ? Q. B. D. 244, 14 Cox 583* and *O'Connell v. The Q., 11 Cl. & F. 155, 1 Cox 413, 5 St. Tr. N. S. 1,* referred to. The indictment in all cases of conspiracy must in the first place charge the conspiracy, but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed. *The King v. Gill, 2 B. & Ald. 204; The Queen v. Kenrick, 5 Q. B. 49; The Queen v. ?? 6 Q. B. 126; Sydserff v. The Queen, 11 Q. B. 245; The Queen v. Compert, 9 Q. B. 824, 2 Cox 145; Aspinall v. The Queen, 2 Q. B. D. 48; Taylor v. The Queen [1895] 1 Q. B. 25; Reg. v. Parker, 3 Q. B. 292,* referred to. If all the known co-conspirators named in the charge are not placed on their trial the trial of some (separately) without the others is not vitiated. *Emperor v. Lalit Mohan Chuckerbutty, I. L. R. 38 Calc. 559, 15 C. W. N. 593,* explained. AMRITA LAL HAZRA *v.* EMPEROR (1915) . . . . I. L. R. 42 Calc. 95

CONSPIRACY TO WAGE WAR

See JURY, RIGHT OF TRIAL BY. I. L. R. 38 C. 467

CONSPIRACY TO WAGE WAR—contd

1. ——————— Admissibility of confession against a co-conspirator jointly tried—*Confession of conspirator made to a Magistrate after arrest—Evidentiary value of such confession—Evidence Act (I of 1872), s. 10, 30—Penal Code (Act XLV of 1860), s. 121.* A confession by a conspirator made to a Magistrate after arrest disclosing the existence of a conspiracy, its objects and the names of its members is not admissible under s. 10 of the Evidence Act against the co-conspirators jointly tried with him but only under s. 30 of the Act. S. 10 is intended to make as evidence communications between different conspirators while the conspiracy is going on with reference to the carrying out of the conspiracy. The confession of a co-accused was not intended to be put on the same footing as a communication passing between conspirators or between conspirators and other persons with reference to the conspiracy. The evidentiary value of such a confession under s. 30 is not higher than that of the statement of an accomplice, and it cannot be acted upon unless corroborated by independent testimony implicating the accused in the design with which they are charged. EMPEROR *v.* ABANI BHUSHAN CHUCKERBUTTY (1910) . . . I. L. R. 38 Calc. 169

2. ——————— Acquittal, effect of—*Acquittal on charge of conspiracy under s. 121A, Penal Code (Act XLV of 1860)—Subsequent trial of others on identical charge—Evidence in latter trial of what acquitted prisoner had said or done, if admissible.* It would be a dangerous principle to adopt to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates. *R. v. Plummer [1902] 2 K. B. 339,* relied on. One *N* was charged with conspiracy to wage war against the King under s. 121A, Indian Penal Code, and acquitted. In a subsequent trial of others on an identical charge it was *held* that what he said or did cannot be admitted in evidence at such trial in view of his acquittal. EMPEROR *v.* NONI GOPAL GUPTA (1910) . . . 15 C. W. N. 593 & 646

3. ——————— Charge of conspiracy—Acquittal, effect of—*Penal Code (Act XLV of 1860), s. 121A—Whether persons charged with one conspiracy can be found guilty of different conspiracies—Whether person acquitted can be charged with same offence as part of a conspiracy—Discharge, effect of—Accomplice—Corroboration—Verification proceeding, whether corroboration of accomplice or confession—Confession, relevancy of, against co-accused—Evidence Act (I of 1872), s. 30—Retracted confession, unreliability of.* Where the accused were charged with conspiracy with persons known and unknown: —*Held* that if the persons were known they should be named in the charge. Where a person has been tried for a specific offence and acquitted, and he is subsequently charged with conspiracy of which that offence is alleged to form a part:—*Held* that an acquittal is conclusive, and it would be a very dangerous principle to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates. *R. v. Plummer [1902] 2 K. B. 339,* referred to. The course of not making completed offences the subject of a separate trial but of throwing them into a case of conspiracy, though lawful, is not to be commended. Before the testimony of an accomplice can be acted on it must be corroborated in material particulars. There must be corroboration not only as to the crime but also as to the identity of each one of

CONSPIRACY TO WAGE WAR—*concld*

the accused This is no technical rule but one founded on long judicial experience For a conspiracy to wage war no act or illegal omission is necessary the agreement of two or more will suffice While admissions which include confessions are by s 21 of the Evidence Act 1872 declared *relevant* and may be proved as against the persons making them all that s 30 of the Evidence Act provides is that the Court *may* take them into consideration as against other persons This distinction of language is significant and shows that the Court can only treat *a confession as lending assurance to other evidence* against a co accused and a conviction on the confession of a co accused alone would be bad in law Moreover under s 30 that only can be taken into consideration which is a confession in the true sense of the term so that to place any reliance on a retracted confession against a co accused would be most unsafe *Yasin v Emperor I L R 28 Calc 689* referred to Verification proceedings do not add any value to an approver s evidence or to confessions and cannot *be regarded as corroboration A discharge is not* binding on the Court for it is not equivalent to an acquittal Still a discharge means that the Magistrate after taking the evidence found that there were not sufficient grounds for committing the accused for trial A retracted confession cannot ordinarily take the place of legal proof Where several persons are charged with the same conspiracy it is a legal impossibility that some should be found guilty of one conspiracy and some of another and any accused not shown to be a member of that conspiracy is entitled to demand an acquittal EMPEROR v LALIT MOHAN CHUCKERBUTTY AND OTHERS (1911)

I L R 38 Calc 559

CONSTRUCTION

See CONSTRUCTION OF DOCUMENT

See CONSTRUCTION OF STATUTES

See CONTRACT I L R 37 Calc 334

See CONTRACT FOR SALE
I L R 45 Calc 481

See DEKKHAN AGRICULTURISTS RELIEF ACT s 2 EXPL (*b*)
I L R 36 Bom 151

See DISTRICT MUNICIPAL ACT (BOMBAY) s 160 I L R 36 Bom 47

See HINDU LAW—WILL
I L R 41 Calc 642
I L R 42 Calc 561
I L R 43 Calc 432

See JAGHIR I L R 46 Calc 683

See LIMITATION I L R 28 Mad 101

See MORTGAGE 15 C W N 722

See POWER OF ATTORNEY
I L R 41 Bom 40

See TRANSFER OF PROPERTY ACT 1882 s 108 I L R 37 All 144

See WILL I L R 38 Calc 327
I L R 44 Calc 181
I L R 45 Bom 711

———— of deed of sale executed by Hindu widow—

See HINDU LAW—ALIENATION
I L R 37 All 369

CONSTRUCTION—*concld*

———— of deeds executed by natives of India—

See HINDU LAW I L R 37 All 369

CONSTRUCTION OF CONTRACTS

See CARRIER LIABILITY OF
I L R 33 Mad 120

See CONSTRUCTION

See CONTRACT ACT (IX OF 1872) s [illegible]
I L R 40 Bom 301

See MAHA BRAHMAN
I L R 35 All 412

See PRINCIPAL AND AGENT
I L R 34 Bom 292

CONSTRUCTION OF DEEDS

See CHARITABLE TRUST
I L R 48 Calc 124

See CONSTRUCTION

See ESTOPPEL 2 Pat L J 600

See HINDU LAW 1 Pat L J 581

See MORTGAGE 1 Pat L J 563
2 Pat L J 355

1 ———————— *Simultaneous execution of sale deed and agreement to reconvey—Transaction amounts to mortgage by conditional sale* The land in dispute was sold by the defendants to the plaintiff s father on the 7th November 1892 for Rs 300 On the same day the latter agreed with the defendants that if they repaid Rs 300 in five years he would resell the land to them From 1893 the defendants were in possession *of the land as tenants of the plaintiffs and* paid Rs 18 as rent every year In 1910 the plaintiffs sued to recover possession of the land The defendants claimed to redeem the lands alleging that the transaction of 1892 amounted to mortgage The first Court held that the transaction was a mortgage and allowed redemption but the lower appellate Court held that it was a sale and decreed plaintiff's claim The defendant having appealed —*Held* reversing the decree that in view of the facts and the contemporaneous nature of the two documents the proper construction would be that they constituted conditional sale and that the real intention of the parties was to effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and re sale MADHAVRAO KESHAVRAO v SAKHERAO GANPATRAO (1914)

I L R 39 Bom 119

2 ———————— *Deed of sale—Contemporaneous agreement to reconvey on payment of consideration—Lease for a term of years—Sale deed amounts in effect to a deed of mortgage—Debt treated as continuing—Property treated as security for repayment of debt* The plaintiffs executed in favour of the defendants a sale deed of lands for Rs 2,000 a large part of which consisted of old bond debt Contemporaneously with it two more documents were executed between the parties One of them was an agreement of reconveyance executed by the defendants to the plaintiff agreeing to reconvey the land (i) if the sum of Rs 2,000 was repaid at a certain specified date and (ii) on repayment with interest of sums if any spent by the defendants upon the lands or of any further sums ber

CONSTRUCTION—contd

rowed from them The other document was a lease executed by the plaintiffs under which they took the land on lease from the defendant for a period of ten years at an annual rental of Rs. 57 which seemed to have been made up of ... Government assessment on the land and ... representing interest at ... per cent on the principal sum of Rs. ... The plaintiffs filed the present suit for a declaration that the sale deed ... to them was in reality a mortgage and for an order allowing the plaintiff to redeem the land on payment to the defendant of any sum that might be found due to them on accounts taken under the Dekkhan Agriculturists' Relief Act The trial Judge was of opinion that the transaction was a sale while the District Judge on appeal held it was a mortgage by conditional sale The defendants having appealed *Held* that the *transaction was in reality a mortgage by conditional sale* inasmuch as the apparent price of Rs. 2,000 was not the real price of the sale but was treated and regarded as a continuing debt between the parties the property being made security for the repayment of that debt *Mar ... v. ... 2 Bom ... 10 ...* followed KASTURCHAND LAKHMAJI v. JAKHIA LADIA (191...)

I L R 40 Bom 74

3 ——————— In the case of Watan property the distinction between grants of the Royal share of revenue and grants of soil which is admissible in the case of Inam and Saranjams cannot be conveniently made without detriment to the statutory restriction on the Vatandar's power of alienation and should not be made unless it is clearly justified by the terms of the settlement AMRIT VATSAN v. HARI GOVIND

I L R 44 Bom 237

4 ——————— *Interpretation of agreement—Position of the parties and position of affairs at the time of the agreement to be considered—Predeceased son's widow ekrarnama with ... legal heir—Property given ... absolute or limited estate—Absolute right or given for maintenance—Hindu Widows Remarriage Act (XV of 1856) s. 2 ... remarriage of widow ... forfeiture of the property—If the section applies ... the case of widows ... according to their ... property the husband ... predeceased ... within the category of ... husband's property ... within the meaning of ... the Act* A a Hindu governed by the Mitakshara law died leaving a daughter *B* and two predeceased sons' widows *C* and *D* After *A*'s death the daughter *B* and the two widows *C* and *D* to settle family differences executed an *ekrarnama* and divided the property left by *A* into three equal shares the property in C's share being a house which she let out to a tenant Subsequently the widow *C* remarried The present suit was brought by the widow *C* for declaration of title to and for possession of the house and for arrears of rent Plaintiff alleged that by the family arrangement (in the *ekrarnama*) she got an absolute estate whereas defendants pleaded that she had got only a life interest by way of maintenance which interest too was forfeited on her remarriage *Held per* SANDERSON *C J*—In construing the deed the Court has to take into consideration the position of the parties who executed the document and the position of affairs at the time the agreement was entered into as also the real intention of the parties in a certain way which the Court has to consider the whole of the document and to consider all its terms one with the other The intention was that plaintiff should have some property for maintenance and the agreement was entered into upon the basis of the plaintiff's right to maintenance The word "heir" in the agreement having regard to the other provisions of it was not used in the strict legal sense but rather as a word implying persons interested in the estate The widow by her remarriage forfeited all her interest in the estate Though the plaintiff belonged to a caste which by custom allows the remarriage of a widow that in itself would not prevent her from forfeiting her right to maintenance out of the deceased husband's property The deceased husband having had an interest in the ancestral property out of which he would be maintained during his life the obligation to maintain her out of that property continued after his death when the property passed by survivorship and the property passed to the defendant No 3 (the daughter) subject to the plaintiff's right to maintenance It does not much matter whether s. 2 of the Widow Remarriage Act applies or not because this section is practically a statement of the Hindu Law as it existed apart from the Act so far as it related to the forfeiture of a widow's interest on her remarriage *Per* CHATTERJEA *J*—In construing the document we should bear in mind the position of the party making the grant and of the person taking it The daughter herself had no absolute right and she could not confer an absolute right If expressions used in the deed are capable of both constructions contended for by both the parties then that construction should be adopted which is consistent with the law to which the parties are subject The husband had an interest in the property (which was ancestral property) out of which plaintiff was entitled to be maintained during his life and the obligation to maintain her out of that property continued after his death whether it passed by inheritance or by survivorship This being so there is no doubt that the property that the plaintiff obtained under the document was by way of maintenance out of the property of her deceased husband in the hands of the daughter The question whether ... of the Act is applicable to the case because the plaintiff ... according to the custom of the caste to which she belongs could have remarried independently of the Act is of no practical importance as on the general principle of Hindu law a widow whose remarriage may be legal *according to the custom of the caste to which she belongs* would forfeit any interest which she had in the husband's estate on her remarriage The plaintiff therefore forfeited her interest in the property to the extent she obtained it by way of maintenance MAHARAJ ... v. MAN KUAR (1917)

21 C W N 906

CONSTRUCTION OF DOCUMENTS

See CIVIL PROCEDURE CODE 188 —

581 ... I L R 34 All 529

O 11 R ... O XXXIV RR 2 4

I L R 39 All 50

See CONTRACT ... I L R 43 All 63

See CONSTRUCTION—

See CONTRACT I L R 42 Bom 341

See CONTRACT ACT (IX OF 1872) s 74

I L R 38 All 62

CONSTRUCTION OF DOCUMENTS—*contd*

s 131 I L R 43 All 132

See Evidence Act (I of 1872) s 94
I L R 38 All 103

See Hindu Law—Adoption
I L R 40 Bom 668

See Hindu Law—Endowment
I L R 39 All 553

See Hindu Law—Gift
I L R 40 All 575

See Hindu Law—Partition
I L R 35 All 337

See Hindu Law—Will
I L R 33 All 41
I L R 34 All 405
I L R 43 All 291

See Landlord and Tenant
I L R 34 All 545

See Letters Patent s 10
I L R 34 All 13

See Mahomedan Law—Dower
I L R 33 All 421

See Mahomedan Law—Gift
I L R 34 All 478
I L R 4[illegible] Bom 372

Mahommedan Law—Wakf—
I L R 43 All 508

See Mortgage I L R 33 All 107
I L R 34 All 446
I L R 38 All 497
I L R 41 All 45

See Oudh Estates Act (I of 1869) ss 13 16 and 17 I L R 32 All 227

See Pensions Act (XXI of 1871) ss 3 4 6 and 8 I L R 33 All 580

s 11 36 All 318

See Pre-emption
I L R 32 All 63 187

I L R 33 All 85 104 296 299

See Second Appeal 5 Pat L J 251

See Talukdari Property
I L R 43 All 297

See Transfer of Property Act (IV of 1882) ss 58 100
I L R 36 All 201

s 58 I L R 39 All 244

s 105 I L R 43 All 330

See Will

—— — Lease and Sanad —

See Resumption I L R 39 Bom 279

1 —— —— Deed of [illegible] followed after an interval by an agreement for repurchase—*—Sale—Mortgage by conditional sale* A document purporting to be an out and out sale deed was executed on a certain date and seven days later a second document was executed by the vendee whereby he covenanted to reconvey the property sold if the vendor paid back the purchase money after the lapse of nine or ten years from the date of that sale deed The two deeds [illegible] separately stamped and were registered on [illegible] *Held* in view of the delay inter[illegible] between the two deeds and other circum[illegible] their execution that the two [illegible] to be parts of one and the same transaction so as together to constitute a mortgage by conditional sale but must be construed separately and were merely what they purported to be *Bhagwan Sahai* v *Bhagwan Din I L R 12 All 387* followed *Lalla Kishen Das* v *Legge I L R 22 All 149* distinguished. Jhanda Singh v Wahid ud din (1911)
I L R 33 All 585

2 ———— Mortgage—*Sale subject to agreement executed on the same day reserving right of vendor to repurchase—Documents to be read together* Two documents were executed by the same parties on the same day The first purported to be an out and out sale of certain property but was expressed to be subject to the terms of the deed of agreement executed by the vendee The agreement referred to was an agreement under certain conditions to reconvey the property purchased. *Held* that in the circumstances the two documents *must be read together as constituting a mortgage* by conditional sale *Bhagwan Sahai* v *Bhagwan Din I L R 12 All 387* distinguished Wajid Ali Khan v Shafakat Husain (1910)
I L R 33 All 122

3 —————— Sale—Agreement to repurchase executed on same day—*Mortgage by conditional sale* When what purported to be an out and out sale was accompanied by a contemporaneous agreement given to the vendor a right of repurchase within five years at the same price it was *held* that the transaction was what it purported to be and could not be construed as a mortgage by conditional sale *Bhagwan Sahai* v *Bhaguan Din I L R 12 All 387* followed *Jasudeo* v *Bhau I L R 31 Bom 528* referred to Ghulam Nabi Khan v Niaz un nissa (1910)
I L R 33 All 337

4 ———— Will—*Devise of one kind of property accurately described exclusive of other somewhat similar property not mentioned in the will* By his will a testator devised to his wife shares in certain *pattis* of which the numbers were given in the village of Hariah describing the property as in his separate possession *Held* that this description would not pass shares in *shamilat pattis* in the village which were not mentioned or referred to in the will Parsha v Mathura Puri (1910)
I L R 33 All 66

5 —————— Will—*Gift—Property given to two brothers who were joint—Nature of taken by brothers—Hindu law* Where property is given or devised, without specification of the individual interests of the recipients to persons who are members of a joint Hindu family it does not follow that they take such property as joint property the principle of joint tenancy being unknown to Hindu law save in connection with the joint Hindu family *Jogeswar Narain Deo* v *Ram Chandra Dutt I L R 23 Calc 670 Bai Diwali* v *Patel Becharbhai I L R 26 Bom 445* and *Lopes* v *Jalliara I L R 23 All 41* referred to *Mankamna Kunwar* v *Balkishan Das I L R 28 All 38* doubted Kishori Dulain v Mundra Dubain (1911)
I L R 33 All 665

6 ———— *No will when there is no power to revoke* One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is whether the paper is revocable If it is not revocable the document is not a will The fact that the paper is drawn in the form of an agreement and that it is registered

CONSTRUCTION—*contd*

are circumstances to be taken into consideration though it is not by itself a conclusive test. Where the document contains provisions which are not of an ambulatory character the presumption will be against the testamentary nature of the document and the fact that such provisions are expressed to operate in the future will not affect the nature of the document. The intention of the parties will be given effect to though it is expressed in inappropriate language. The reservation of a life interest does not make the document testamentary. *In the matter of ... Lord ...* I L R ... 10 ... referred to. *In the goods of ...* ... referred to. KALAVATHI *v.* ... (1909)

I L R 33 Mad 204

7 ———————— *Will—Deduction of property for religious purposes—Surplus religious objects amounting to only a small part of income of estate—Heirs of testator.* The will of a Hindu provided that the worship of certain idols should be maintained out of the property dealt with therein, but the rest of the property was assigned to the maintenance of the heirs of the testator generation after generation. The income of the property was about Rs 7,000 annually but the customary expenses of the religious rites and ceremonies amounted to only some Rs 500 per annum. *Held* on a construction of the will that it created a charge on the estate for the expenses of the idol and that subject to that charge the property was to go to the testator's legal heirs who were fully entitled to appropriate all the income of the property. *Sonatun Bysack v. Sreemutty Juggut soondree Dossee* 8 Moo I A 66 and *... v. Doorga Churn Chatterji* I L R ... Calc ... referred to. SUKDA ... *v.* ... NARAIN PAM (1917)

I L R 9 All 311

8 ———————— *Will—Bequest to person described as the adopted son of the testator—Adoption not proved—Intention of testator.* One N a separated Hindu brought up in his house A who was the son of his wife's brother. N provided for A's marriage and later by a deed of gift made over to A most of his zamindari property. Ultimately N made a will bequeathing to A whom he described as his adopted son the residue of his property. After N's death his reversionary heirs sued A to recover the property left to him by N's will alleging that no adoption had taken place or if it had that it was invalid. The suit was at first contested upon the ground that there was a valid adoption and a deed of adoption was produced but at a later stage of the suit that defence was given up. *Held* that A's right to take under N's will did not in the circumstances rest on the fact of his being the legally adopted son of N but upon N's intention to leave his property to A irrespective altogether of the validity of the adoption. *... v. ...* I L R 28 All 188 and *... v. ...* I L R 11 Calc 463 referred to. KHUB SINGH *v.* ... LAL (1919)

I L R 41 All 666

9 ———————— Sale—*Sale of houses in consideration of Mehr—Consideration not necessary to support transaction—Limitation Act (IX of 1908) Sch I Arts 142 144.* The plaintiff's husband sold to her two houses in 1898 by a registered document in consideration of her *Mehr* (dower). One of the houses remained in the occupation of the plaintiff's husband from 1898 till his death in 1911. Soon after his death the defendant took possession of the house. The plaintiff having failed to recover possession in the lower Courts ... the suit on the grounds that the sale of 1898 was a sham and unsupported by no consideration and that the claim was barred by limitation. On appeal *Held* that the deed of 1898 was on the face of it a document of advancement and needed no consideration. *Held also* that the possession of the house by the plaintiff's husband up to 1911 being permissive the plaintiff was in constructive possession of it and her claim was therefore not barred by limitation. IBRAHIM BHULLA *v.* ... (1916) I L R 41 Bom 5

10 ———————— *Sale or agreement to sell—Test—Words of restriction—Registration Act (III of 1877) s 17—Admissibility—Evidence.* Whether a document operates by way of a present conveyance of property or only as an agreement to create a future right depends upon the intention of the parties as expressed in the instrument. Even if a present right is created the instrument though unregistered is admissible in evidence in a suit for specific performance. *Nagappa v. ...* I L R 14 Mad ... and *Upendra Nath Banerjee v. Umesh Chandra Banerjee* I L R ... followed. The instrument in this case was construed as an agreement to sell notwithstanding that it contains certain words showing a present transfer. MAN... *v.* PANAMMA (1914)

I L R 37 Mad 480

11 ———————— *Covenant in sale deed that vendee would pay revenue on other land of the vendor—Land subsequently transferred—Regulation No XXXI of 1803 s 6.* In 1884 one Altaf Husain sold certain land to the predecessor of the defendants and reserved some land for himself. The sale deed contained a covenant to the effect that the vendee would pay the Government revenue not only for the land purchased by him but also for the land reserved by the vendor for himself. The vendor subsequently sold the reserved land to the plaintiff who when the representatives of the original vendee refused to pay the Government revenue paid it himself and sued to recover from them the amount so paid which the plaintiff had to pay owing to the defendant's refusal to pay. *Held* (i) that the agreement was void under Regulation XXXI of 1803 which was in force in 1884 and (ii) that in any case the covenant was a personal one and the plaintiff had no right to sue in respect of its breach. *... v. ...* I L R ... All ... *... v. ...* ... and *... v. ...* ... referred to. ... HUSAIN *v.* HABIBULLAH (1916) I L R 38 All 250

12 ———————— Mortgage—*Deed of sale followed after an interval by an agreement for repurchase after stated period—Mortgage by conditional sale—Right of redemption—Intention of parties as evidenced by language of deeds ... of parties ... surrounding circumstances—Statutory provision of prohibition against ... by Mahomedans—Regulations I of 1798 and XVII of 1806.* The question in this appeal was whether two instruments in writing a deed dated the 29th of August 18.. executed by the appellants' predecessors in title purporting to be a deed of absolute sale of certain property

CONSTRUCTION—*contd*

and an agreement dated the 5th of September 1892 executed by the predecessors in title of the respondents reserving to the vendors a right to repurchase the property sold on repayment of the original purchase money within nine or ten years constituted when taken together a mortgage by way of conditional sale of the property or an absolute sale of it with an agreement for repurchase The deeds were separately stamped and registered on different dates The vendors never availed themselves of the conditions of repurchase and the appellant sued in 1907 for redemption The parties to the suit were Mahomedans Their *Lordships of the Judicial Committee were of* opinion that the intention of the parties which was the test in such a case must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstance and came to the conclusion that *on this principle the* decree of the High Court appealed from that the transaction was an out and out sale and not mortgage by conditional sale should be affirmed *Bhagwan Sahai* v *Bhagwan Din I L R 12 All 387 L R 17 I A 98* followed *Balkishen Das* v *Legge I L R 22 All 149 L R 27 I A 58* distinguished *Alderson* v *White 2 DeGex & J 97*, referred to The provisions of a bond executed by the parties of even date with the sale deed refuted the suggestion that any of the parties to the sale deed held any religious scruples against the payment or receipt of interest on money lent or that when intending to create a mortgage they would have adopted special methods of conveyancing to conceal the fact that interest for the loan was in fact to be given and received With reference to a remark of Lord CRANWORTH L C in *Alderson* v *White* that I think a Court after the lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be their *Lordships* commenting on the facts that the period of 10 years fixed in the present case for repurchase terminated in 1903 that the suit was instituted on the 5th of October 1907 14 years after the lapse of that period that the judgment appealed from was delivered on the 11th of March 1911 that the record was not received at the Privy Council office till the 25th of February 1915 and the appeal not set down for hearing until June 1916 said litigation so prolonged becomes an instrument of oppression is discreditable to any judicial system and every effort should be made to correct the abuse JHANDA SINGH *v* WAHID UD DIN (1916) **I L R 38 All 570**

13 ——————————*Sale or mortgage*—*Sale with option of repurchase—Transfer of Property Act (IV of 1882)* s 58 cl (c) The plaintiffs mortgaged in 1899 with the defendants 32 fields for Rs 8000 the rate of interest agreed upon being 8 per cent per annum In 1904 the parties made up accounts under the mortgage and of other transactions and the plaintiffs were found indebted to the defendants for Rs 13000 To pay the amount the plaintiffs sold to the defendants 20 out of 32 fields mortgaged The sale deed contained the provision that if within the period of 20 years the plaintiffs repaid Rs 13000 in one lump sum or in instalments the defendant should reconvey the land to the plaintiff On the same day the plaintiff executed to the defendants a permanent lease of the land sold at a fixed annual rental of Rs 412 8 0 The plaintiffs alleged that the transaction of 1904 was a mortgage and sued to redeem the same in 1911 on accounts being taken under the Dekkhan Agriculturists Relief Act *Held* that the transaction in dispute was not a mortgage but a sale with an option to the plaintiffs to repurchase NARAYAN RAMKRISHNA *v* VIGHNESHWAR (1915) **I L R 40 Bom 378**

14 ——————————*of stock in trade of business—Schedule of stock in trade forming part of mortgage* Where the stock in trade of a business was mortgaged as security for a loan and a list of the specific articles of which it consisted was attached to the mortgage deed *Held* that the mortgage did not include stock acquired after the date of the mortgage to replace that which had been sold *Tapfield* v *Hillman 6 Man & Gr 245* and *Coltman* v *Chamberlain 25 Q B D 328* referred to ROBERT WILLIAM ANDERSON *v* BANK OF UPPER INDIA LIMITED (1915) **I L R 37 All 390**

15 —————————— **Sale or bai bil wafa**—*Ostensible sale with collateral agreement for repurchase—Agreement containing terms as to payment of interest and accounting for the profits of the property sold* Of two documents executed on the same day and between the same parties the first purported to be an absolute sale of a certain village The second was an agreement on behalf of the vendees the material terms of which were as follows After a description of the property purchased, the agreement continued with a recital that the property had been purchased by the executants for Rs 6125 *on this condition that whenever within five years the vendors shall* pay to us the amount of the consideration mentioned in this document we or our heirs shall have no objection in re conveying the aforesaid share. If we set up any plea the same shall be invalid and the vendors shall be at liberty to take legal steps and to have the property reconveyed by us They shall also have to pay interest on the whole consideration at the rate of 10 annas per cent per month out of which the actual produce of the village sold shall be deducted, and they shall have to pay the balance along with the consideration money *Held* that the terms of the agreement that interest should be paid on the purchase money and that profits of the village should be taken into account in order to ascertain the actual sum which the vendors would have to pay in order to recover the property indicated that the transaction was not merely a sale with a condition for repurchase but a bai bil wafa or mortgage by conditional sale *Alderson* v *White* 2 De Gex and J 97 *Bhagwan Sahai* v *Bhagwan Din I L R 12 All 387 Ghulam Nabi Khan* v *Niaz un nissa I L R 33 All 337* and *Jhanda Singh* v *Wahid ud din I L R 38 All 570* referred to MUHAMMAD HAMID UD DIN *v* FAKIR CHAND **I L R 42 All 437**

16 —————— **Guarantee**—*Letter of construction of—Conditional or unconditional guarantee—Undertaking by broker to find money on mortgage of debtor's property and pay off sums advanced by creditor—Debtor declining to make the mortgage through broker whether discharges broker's liability to pay off advance* D being in financial difficulties approached F for an advance of 14 lac of rupees representing that he was about to raise a loan of 11 lacs on a first mortgage of certain Mills through broker *B* and would pay off F's advance out of that loan F advanced the money to *D* upon *B*

CONSTRUCTION—*contd*

giving a guarantee to this effect In consideration of your having at my request acceded to the proposal of *D* to advance to him a sum of Rs. 11 lacs, I hereby bind myself to you to procure a loan within two weeks of Rs. 11 lacs as the first mortgage of the Mills, and to pay you thereout the sum of Rs. 1½ lacs agreed to be advanced by you to the Mills" *Held* that by this document *B* gave a substantial undertaking that a loan should be procured and out of the loan the sum of Rs. 1½ lacs was to be paid to D and not merely a conditional undertaking that *B* would procure the lending of 11 lacs if a first mortgage of the Mills was given and pay thereout Rs. 1½ lacs to D. Vussanji Sons & Company v. Shapurji Burjorji (1912)

I L R 36 Bom 387
16 C W N 769

18 ———— Bond—*Construction of—Rate of interest—Stipulation to pay interest at Re 1 9 per month and compound interest with six monthly rest—Per cent if to be read into the stipulation* Where the executants of a bond which secured an advance of Rs. 2000 stipulated therein "we shall pay interest on this sum at the rate of Re 1 9 per month and we shall pay the interest every six months from this date If we fail to do so interest and compound interest shall at the end of every six months be added to the principal and we shall go on paying interest therein at the aforesaid rate until the time of repayment" *Held* that upon a true construction of this bond the stipulation was that interest should be paid at the rate of Re 1 9 per cent per month. Indro Deb Das v. Azizur Rahaman Sarkar (1912)

16 C W N 957

19 ———— Agreement—*Broker—Commission—Authority to raise loan on security of immoveable property—Broker if entitled to commission on finding capitalist when latter insists on a margin of security not proposed or agreed to by borrower—Construction of contract—Broker if must find funds or only capitalist—English rules of construction artificial if to be applied here—Time in essence of contract—Quantum meruit for services if may be claimed when no case established under contract as express* [illegible] The defendants being urgently in need of money to save their property from sale executed the following letter of authority in favour of the plaintiffs "We authorise you to raise a loan of 11 lakhs (or less if so required) to clear all our present debt on mortgage of our entire estate at an interest of 7 per cent per annum within the period of one month We agree to pay you a commission of 5 per cent on such amount as may be advanced by the capitalist to us"

The defendants did not state what the value of the security was but the plaintiffs on their own responsibility represented to the capitalist whom they found that the value of the property would be not less than 20 lakhs and the capitalist insisted upon satisfactory proof that there was that margin of security before he would agree to make the advance The negotiation with the capitalist having for this reason fallen through the plaintiffs sued for recovery of the stipulated commission *Held* that upon a construction of the contract that the stipulation was not merely to find a capitalist ready and willing to advance the money but also to procure funds for the satisfaction of the debts of the defendants That even assuming that the plaintiffs undertook only to find a person ready and willing to advance the money they had not done so as the capitalist whom they found imposed a condition as to the margin of security never proposed or accepted by the borrower and at no stage of the negotiations was he ready to accept the estate as it stood as security for the loan i e to advance the funds on the terms prescribed by the principal *Held* also that time was, in the circumstances of the essence of the contract and no case had been made out of an extension of time by continuation of *bona fide* negotiations for completion *Quære* Whether an implied contract to pay the agent a *quantum meruit* for his services could be presumed when there was an express contract upon which the plaintiff's case failed. *Held* that no such case having been made by the plaintiffs, and no evidence given to show upon what scale remuneration could be calculated *quantum meruit* no relief could be granted on that basis *Quære* Whether the technical meaning ascribed to the expression "to raise a loan" in English cases implying that the agent who is engaged to raise a loan discharges his duty as soon as he finds a creditor who is able and willing to advance money should be imported in the interpretation of contracts in this country *Held* that where the remuneration of an agent is payable upon the performance by him of a definite undertaking he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do even if the principal acquires no benefit from his services and except where there is an express agreement or special custom to the contrary even if the transaction in respect of which the remuneration is claimed fall through provided it does not fall through in consequence of any act or default of the agent Kishan Prosad Singha v. Purnendu Narain Singha (1911)

16 C W N 753

20 ———— Lease—*Unilateral mistake not induced by fraud—More land included in lease than intended by lessor—Rectification of mistake when ground for—Contract if may be repudiated—Second appeal* Where as a matter of construction a certain plot of land was found to be included in a lease having regard to its terms and the character of the property but the Court of Appeal below refused to give effect to this construction on the ground that the lessor did not intend to include the plot in the area leased *Held* on second appeal that in the absence of fraud making the document inoperative as a title to the land it is not or of failure through a common mistake to give correct expression to the common intention of the parties such as would be a ground for its rectification the contract as expressed could not be repudiated by the lessor and the lower Appellate Court erred in law in not giving effect to it Somaruddi Mollah v. The Port Canning and Land Improvement Company Limited (1911)

16 C W N 225

21 ———— Misconstruction of a document does not always confer a right of second appeal Kuldip Narayan Lal v. Banwari Rai

5 Pat L J 251

CONSTRUCTION OF STATUTES

See Assam Labour and Emigration Act (VI of 1901) 2 Pat L J 91

See Bengal Ferries Act 1885 11
5 Pat L J 500

See Chota Nagpur Tenancy Act 1908.
4 Pat L J 411

CONSTRUCTION—*contd*

See CRIMINAL PROCEDURE CODE 1898—
ss 14 15 — 3 Pat L J 291
ss 408 413 — 4 Pat L J 435
s 524 — 5 Pat L J 321

See DEFAMATION I L R 40 Calc 433

See DEFENCE OF INDIA ACT 3 Pat L J 537 & 581

See INTERPRETATION OF STATUTES

See MUSSALMAN WAKF VALIDATION ACT I L R 39 Bom 563

See NON OCCUPANCY RIGHT 3 Pat L J 1

See PENAL CODE ss 361 366 4 Pat L J 74

See STATUTE CONSTRUCTION OF

———— Consolidating Statutes—
See EXECUTION I L R 38 Mad 199

1 ————————*Rights if may be conferred by implication from language of statutes* Rights cannot be conferred by mere implication from the language used in a statute There must be clear and unequivocal enactment *Arnold v Mayor of Gravesend 2 K & J 574 591 4 c 110 R P 327* followed AMULYA RATAN SIRCAR v TARINI NATH DEY (1914) 18 C W N 1290 I L R 42 Calc 254

2 ————————Where a later Act of Legislature does not purport or affect to supersede an earlier Act the Court will endeavour to read the two enactments together and to avoid conflict if possible RANGACHARYA v DASACHARYA (1912) I L R 37 Bom 231

3 ———————— *Bombay Land Revenue Code (Bom Act V of 1879) s 18* The Bombay Land Revenue Code (Bom Act V of 1879) is a taxing enactment and must be construed strictly in favour of the subject SECRETARY OF STATE v LALDAS (1909) I L R 34 Bom 239

4 ————————*City of Bombay Municipal Act (Bom Act III of 1888) s 251A cl (a)—Building— Directly over or directly und r —Construction* Where it is no suggested that a word bears any technical sense in the context in which it occurs, the construction must proceed upon the general rule that statutes are presumed to use words in their popular sense CURRIMBHOY EBRAHIM v MUNICIPAL COMMISSIONERS (1909) I L R 34 Bom 496

5 ———— Interpretation—*Preamble* Though the preamble of an Act does not control any plain enactment which follows it it may be a most useful guide when a question of doubt arises upon the construction of a particular provision and considerations relating to the scope of the Act are involved. SITAL CHANDRA CHOWDHURY v DELANNEY (1916) 20 C W N 1158

6 ————————*Per* MOOKERJEE J In construing a section of an Indian Act which is professedly based on an English Act and which, in fact reproduces almost word for word the language of the English enactment we are in practice if not in theory bound by the decision of the English Court of Appeal JAMENDRA NATH LAW v JOGENDRA NATH DASS (1917) 21 C W N 704 I L R 45 Calc 111

CONSTRUCTION—*contd*

7 ————————The Court should not interpret the statutory law when it provides for a specific procedure by reference to decisions pronounced under a different system of procedure RADHAKISSEN KHETTRY v LUKHMICHAND JHAWAR 24 C W N 454

8 ————————The rule that enactments in a statute are generally to be construed to be prospective and intended to regulate the future conduct of persons is deeply founded in good sense and strict justice and in the absence of clear word to that effect a statute will not be construed so as to take away a vested right of action accrued before it was passed PROMOTHA NATH PAL CHOUDHURI v SAURAV DASI CHAUDHURANI 24 C W N 1011

CONSTRUCTION OF WILL

See HINDU LAW—ADOPTION I L R 37 Bom 107

See HINDU LAW—WIDOW S ESTATE L R 46 I A 259

See NAIKINS I L R 37 Bom 116

See SUCCESSION ACT (X OF 1865) I L R 37 Bom 611

See WILL I L R 38 Bom 637
I L R 13 Bom 88
I L R 41 Bom 70

CONSTRUCTIVE NOTICE

See HINDU LAW—JOINT FAMILY PROPERTY 2 Pat L J 513

See MORTGAGE I L R 43 Calc 1032
I L R 48 Calc 1

See PRINCIPAL AND AGENT L R 46 I A 250

See RATES AND TAXES I L R 42 Calc 625

See TRANSFER OF PROPERTY ACT 1882 s 41 5 Pat L J 521

CONSTRUCTIVE OFFENCE

See CONSPIRACY I L R 41 Calc 751

CONSTRUCTIVE POSSESSION

See MINES AND MINERALS 5 Pat L J 273

CONTEMPORANEOUS AGREEMENT

See EVIDENCE ACT (I OF 1872) s 9 PROV I I L R 35 Bom 93

CONTEMPORANEA EXPOSITIO

See SANAD CONSTRUCTION OF I L R 35 Bom 639

CONTEMPT OF COURT

See ANONYMOUS COMMUNICATION I L R 43 Calc 685

See CIVIL AND CRIMINAL CONTEMPT I L R 45 Calc 169

See CIVIL PROCEDURE CODE 1882 s 170 I L R 33 All 69

See CIVIL PROCEDURE CODE 1908 s 115 I L R 42 All 26

CONTEMPT OF COURT—*contd*

See LEGAL PRACTITIONERS ACT (XVIII OF 1879) s. 14
I L R 39 Mad 1045

See PROFESSIONAL MISCONDUCT
I L R 44 Calc 639

1. ———————— *Its quasi-criminal character—Comments reflecting on witness and party under cross-examination if contempt—Contempt proceedings strict observance of rules of practice in—Application by private party—If applicant to name the person charged with contempt—Court taking notice of its own initiative practice different—Rule issued against editor printer publisher without naming them on application of private party if to be discharged—Person charged waiving objection subject to question of costs—When apology accepted by Court if would allow costs when rule omitted name* An article in a newspaper reflecting on the party to a suit more especially when he is a witness under cross examination is a contempt of Court. Proceedings in contempt are of a *quasi* criminal character and all the rules of Court must be observed strictly in respect thereof. Where a private party applied for a rule against the editor printer and publisher of a newspaper alleging contempt of Court and omitted to name them respectively — *Held* that the rule was liable to be discharged If the persons concerned waive the objection and offer apology which is accepted by Court the Court would not order any costs against them when the rule omitted to name them WESTON *v* EDITOR, PRINTER AND PUBLISHER OF THE BENGALEE (1911) 15 C W N 771

2. ———————— *High Courts in India made Courts of Record by Charter jurisdiction of to commit for criminal contempt of inferior Magistrate's Court in Mofussil—Common law and inherited powers of Calcutta High Court—Powers inherited by Calcutta High Court from the Supreme Court the Suddar Dewani and Suddar Nizamat Adawlats—Original Side and its jurisdiction—Calcutta High Court if possessed power of English King's Bench as custos morum or guardian and protector of justice throughout the Kingdom—Power as Court of Record and one having superintendence over other Courts limits of their power—Contempts not in the face of the Court how punishable—Appellate jurisdiction contempt of deterring witnesses from deposing before Magistrate if contempt of High Court—Pleadings—Criminal contempt motion for must proceed on legal evidence—Statement on information and belief if may be relied on in contempt proceedings—In Civil interlocutory motion source of information to be stated—Denial when not given by person charged with criminal contempt if admission—Admission in affidavit if may be considered—Supplementary affidavit or evidence in course of contempt proceedings—Superintendent and Remembrancer of Legal Affairs status of to move for or instruct Advocate General for commitment for contempt on Original Side—Governor in Council as party to motion for contempt of lower Criminal Court—Right of person charged with contempt to know who is moving—Costs—Civil and Criminal contempt—Summary proceeding in contempt drawback of to be sparingly resorted to—Contempt proceedings to be taken with the greatest caution—Taken only when interferes with course of justice and not contingent or too remote—Where no real prejudice* prima facie *tendency of language or reprehensible or objectionable writing if enough—Commenting on the conduct or method of investigation by Police if contempt of Court—Criminal Investigation Department making imputation against pending trial if contempt — Positive evidence meaning of—Leave to move upon conditions not fulfilled—Motion petition of and parties moving amendment of when allowable—Indian High Courts Act 24 & 25 Vict c 104 ss 1 3 9 15—Letters Patent 1862 cls 1 26 and 27 Letters Patent 1865 cls 27 and 28—Supreme Court Charter of 1774 cls 2 5 and 21—53 Geo III c 155—Sudder Dewani Adawlat 21 Geo III c 70 s 21—Sudder Nizamat Adawlat—Reg IX (Bengal) of 1793—Reg II (Beng) of 1901 s 2—Act XXX of 1841—Indian Penal Code (Act XLV of 1860) if repeals all penal laws pre existing* Neither the Supreme Court nor the Sudder Dewani Adawlat nor the Sudder Nizamat Adawlat had jurisdiction to commit a person for contempt of a Criminal Court in the mofussil The Calcutta High Court which has inherited all jurisdictions and every power and authority in any manner vested in the Supreme Court the Sudder Dewani Adawlat and the Sudder Nizamat Adawlat has not derived any such jurisdiction from any of those Courts Upon a true reading of the judgment in *Rex v Davies* [1906] 1 K B 32 the jurisdiction to commit for contempt of an inferior Court by summary proceeding which the King's Bench Division of the High Court in England assumed in that case has been inherited by it from the old King's Bench and not from the other Courts of Record which became amalgamated in the English High Court That jurisdiction rested on the special power of that Court to correct and protect against extra judicial error and to punish every kind of misdemeanour on a summary proceeding as well as an indictment or information as the *custos morum* or the guardian and protector of public justice throughout the Kingdom a dignity that reverted to it or was revived on the abolition of the Star Chamber The Common Law powers as *custos morum* never belonged to the Supreme Court of Calcutta at least in regard to contempts of inferior Courts outside the Presidency Town and the Calcutta High Court cannot lay claim to this power by inheritance or by reason of its having been constituted by Charter a Court of Record or by reason of its power of superintendence over the Courts of mofussil Magistrates Under 13 *Geo III c 63* and the Charter of the Supreme Court of 1774 thereunder and subsequent legislation the criminal jurisdiction of the Supreme Court of Calcutta (apart from crimes maritime) was limited to the local limits of that Court except as to British subjects and that Court had no general power over mofussil Criminal Courts. The Common Law was similarly limited in its application to the Presidency Town and to British subjects outside its local limits The Supreme Court possessed no statutory jurisdiction over the mofussil Magistrates or other Courts of the East India Company except as provided in 53 *Geo III c 155 s III* and as regards contempts except in relation to such as were committed on the face of such Magistrates or Courts as provided in *Act XXX of 1841* and not proceeded against in such Courts The Sudder Nizamat Adawlat was neither a Court of Record nor a King's Court The High Court however has in all its jurisdiction as a Court of Record power to commit for any contempt of itself in relation to [illegible] those jurisdictions and

CONTEMPT OF COURT—*contd*

the Court on its Original Crown Side would have power so to punish any interference with the due administration of justice by a Division Bench in relation to a criminal appeal pending before it amounting to an offence under the Common Law and might possibly have such power even before any appeal was pending as for instance where it was shown that witnesses were being deterred from giving evidence or the jury were likely be prejudiced. *Surendra Nath Banerjee v The Chief Justice and Judges of the High Court of Bengal I L R 10 Calc 109* considered *In re Abdool 8 W R 32* What may be a contempt of an inferior Court is not necessarily a contempt of the High Court No person can be punished for criminal contempt unless the offence be proved by legal evidence A statement made on information and belief is not legal evidence upon which a person may be committed for criminal contempt A party charged with criminal contempt need not deny that which is not legally proved against him. *The Queen v Stranger L R 6 Q B 352 40 I J Q B 91* The absence of denial by such person cannot be taken to amount to an admission. But an admission in his affidavit in answer to a motion for committal for contempt can be taken into consideration by the Court The power to commit for contempt by summary proceeding being an arbitrary unlimited and uncontrolled power should be restored to sparingly and with the greatest caution It is not enough for its exercise that there should be a technical contempt of Court It must be shown that it was probable that the publication would substantially interfere with the administration of justice Notwithstanding the *primâ facie* tendency of the language where it appears that there was in fact no prejudice to any trial or the prejudice was contingent or too remote the Court would not take summary proceedings in contempt The fact that any writing is reprehensible or otherwise objectionable does not necessarily make it cognizable for contempt of Court *Held* that the articles in question in the present case did not constitute contempt of any Court The Superintendent and Remembrancer of Legal Affairs and *ex officio* Public Prosecutor Bengal cannot move or instruct counsel to move the High Court in the exercise of it Common Law jurisdiction on its Original or Crown Side The proper person to move the Court for contempt in the present case was the Governor in Council. The condition on which leave to serve a notice of motion is given must be complied with otherwise the application would be liable to dismissal. *Per* JENKINS *C J Quære* Whether contempt of inferior Courts committed out of Court should not be left to be punished by the general law by indictment or otherwise and not by summary procedure. JENKINS *C J* *Positive* evidence means evidence which goes expressly to the very point in question and that which if believed proves the point without aid from inference or reasoning as the testimony of an eye witness to an occurrence as distinguished from indirect or circumstantial evidence. MOOKERJEE *J*— Positive evidence means direct evidence as distinguished from circumstantial evidence JENKINS *C J*— Where the articles impugned expressed distrust of the police and deprecated its mode of searches, arrests and treatment of prisoners but said nothing which would deter witnesses from giving evidence they cannot be said to have constituted contempt of any Court MOOKERJEE *J* The C I D by reason of having investigated an offence under inquiry or trial, does not become the prosecutor thereof and an imputation that the investigation has been carried on in an objectionable manner does not constitute a contempt of Court MOOKERJEE *J* It is a matter of vital importance for the party against whom an order for commitment for contempt is sought to know the person or persons at whose instance the application is made If the application is refused he is entitled to know who is responsible for his costs If the application is successful he is entitled to know who is the respondent in a possible appeal by him. The motion for commitment for contempt having failed costs were awarded to the respondent to be assessed as between party and party as on a hearing on the Original Side *In the matter of the* AMRITA BAZAR PATRIKA (1913)

I L R 41 Calc 173
17 C W N 1253

3 ———————— *Receiver appointed by the Court interference with while discharging his duty—Interference by one not a party to the suit if contempt—Strangers to the suit duty of when affected by order appointing Receiver—Practice in contempt matter—Affidavit* The right of a stranger in possession to continue in possession is not affected by the order appointing a Receiver but the fact of his possession does not give him the privilege to interfere with the Receiver directed to take possession of the property His proper course is to apply to the Court for the redress of his grievance If he interferes with the Receiver he does so at his peril The Court will not permit a Receiver appointed by its authority to be interfered with or dispossessed of the property he is directed to receive by any one although the order appointing him may be perfectly erroneous The Court requires and insists that application should be made to the Court for permission to take possession of any property of which the Receiver either has taken possession or is directed to take possession *Ames v The Trustees of the Birkenhead Docks 20 Beav 353* followed RAI CHAUDHURI *v* NOLINI PROKAS SEN (1913) 18 C W N 289

4 ———————— *Practice—Appeal—Assisting in contempt—Procedure* Where the prohibitory injunction on the defendant firm made no mention of *M* an assistant or of servants and agents but the notice of motion for committal for breach thereof was upon *M* who did nothing after service on him of the injunction *Held* that the notice of motion was erroneous and the procedure which had been adopted was misconceived the proceeding against *M* if any should have been for *assisting* in a contempt of Court *Held* also (on the merits) that there had been no contempt or participation in contempt on *M*'s part as all that he did had been done prior to the injunction MARSHALL *v* GRANDHI VENCATA RATNAM (1915)

I L R 42 Calc 1169

5 ———————— *What constitutes contempt—Actual impediment of justice if necessary to complete offence—Jurisdiction of High Court to punish summarily contempt out of Court—Liability of printer and publisher of newspaper irrespective of knowledge of contents of offending publication—Summary jurisdiction in respect of contempt when should be exercised—Civil and criminal contempt distinction between—Contempt by attack on Court criminal nature of—Rule of interpretation appli*

CONTEMPT OF COURT—*contd*

cable to writing constituting contempt—Evidence Act (I of 187) s 74—Returns filed with Registrar of Joint Stock Companies if public document and secondary evidence thereof is admissible—Onus on party producing certified copy to prove execution of document—Liability for contempt of director of limited company owning newspaper—Proceeding in contempt if lies against Corporations—Necessity of legislation for the registration of editors of newspapers In a suit decided in the Original Side of the High Court the trial Judge (GREAVES J) held that the Calcutta Improvement Trust had power to acquire land compulsorily for the purpose of recoupment. In an appeal against a decision of the Subordinate Judge of 24 Parganahs two Judges of the Court (MOOKERJEE and CUMING JJ) sitting as a Division Bench on the Appellate Side held that the Trust had no such power When the appeal against the decision of the single Judge in the Original Side was ready for hearing the following two articles appeared in the 'Amrita Bazar Patrika' newspaper in two of its issues —(i) There is a mischievous rumour afloat which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice We do not believe that it is possible for anyone, far less the Chairman of the Trust to secure a Bench after his own heart as a counterpoise to the Mookerjee and Cuming Bench. We are sure the interest of every rate payer is safe in the hands of the Hon ble Judges and we do not think that any official of the Trust can go so far (ii) Something like consternation prevails on account of the proposed new constitution of the Apellate Bench of the Calcutta High Court before which appeals against the awards of the Improvement Trust are to be heard It is known to the reader how this Bench was originally composed of Sir Asutosh Mookerjee and the Hon ble Justice Cuming and how latterly it has come to be presided over by the Hon ble the Chief Justice and Mr Justice Woodroffe Rumour has it that for purposes of hearing Improvement Trust appeals the Bench is going to be strengthened by the appointment of Mr Justice Chitty Now what neither the public nor ourselves can understand is this special arrangement for such a Special Bench If it is contended that two Hon ble Judges of the highest Court in the land are incompetent to decide in appeal cases in which the Improvement Trust is concerned a contention however which we do not believe the Chief Justice will care to advance why should there be a Special Bench of three and not a Full Bench of five on which at least two Indian Judges could find seats As a matter of fact as landowners in Calcutta are mostly Indians and as Indian Judges are likely to know more of the conditions practices etc prevailing here it is but meet that the Appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European colleagues The withdrawal of Sir Asutosh has given rise to unsavoury impressions in the public mind since this proposed arrangement is to follow close upon the heels of his judgment in the case of *The Improvement Trust* v *Chandra Kanta Ghosh* 21 *C W N* 8 Be that as it may we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter his Lordship will rather form

CONTEMPT OF COURT—*contd*

a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of Improvement Trust appeals Proceedings in contempt were taken against the printer and publisher of the newspaper and the directors and manager and secretary of the company called The Amrita Bazar Patrika Co Ltd to which the newspaper belonged in respect of the said two articles *Held* that the articles constituted a contempt of Court not only on the ground that they scandalized the Court but also on the ground that they were calculated to prejudice a litigant and interfere with the due course of justice That the High Court in the Indian Presidencies are Superior Courts of record The offence of contempt of Court and the power of the High Court to punish it are the same in such Courts as in the Superior Courts in England It has the power of summarily punishing for contempt out of Court in relation to any of its jurisdictions That the jurisdiction to punish for contempt is not obsolete That the printer and publisher of a newspaper is liable for contempt even though he was not aware of the subject constituting such contempt Necessity of legislation for the registration of the editor of a newspaper pointed out and what constitutes contempt of Court discussed *Held per* SANDERSON *C J*—That the jurisdiction which the Court has in respect of a contempt of Court should be exercised with great care and should only be exercised when the case is beyond all reasonable doubt and this should especially be the case when the proceedings are at the instance of the Court itself That the question was not whether the article in fact obstructed or interfered with the due course of justice but whether it was calculated to obstruct and interfere with the due course of justice *Per* WOODROFFE *J*—That all proceedings whether in respect of civil or criminal contempts are of a criminal nature when their object is to punish by fine or imprisonment but the procedure in such cases is not in all respects the same as in an ordinary criminal case Both the offence as also the jurisdiction and procedure under which it is tried are *sui generis* As regards the standard of proof there is but one rule of evidence which in India applies to both civil and criminal trials and that is contained in the definition of proved and disproved in s 3 of the Evidence Act Whether the case is civil or criminal a fact is only proved or disproved if it comes within the terms of that section *Per* MOOKERJEE *J*—That a criminal contempt is conduct that is directed against the dignity and authority of the Court A civil contempt on the other hand is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein Consequently in the case of a criminal contempt the proceeding is for punishment of an act committed against the majesty of the law and as the primary purpose of the punishment is the vindication of the public authority the proceeding conforms as nearly as possible to proceedings in criminal cases In the case of a civil contempt on the other hand the proceeding in its initial stages at least when the purpose is merely to secure compliance with a judicial order made for the benefit of a litigant may be deemed instituted at the instance of the party interested and thus to possess a civil character But here also refusal to obey the order of the Co[illegible] render it necessary for the Court to adopt [illegible] measures against the person who has d[illegible]hority at that

CONTEMPT OF COURT—*contd*

stage at least the proceedings may assume a criminal character Where the contempt consists in an attack upon the Court the proceedings instituted to vindicate its dignity are of a criminal nature even though the attack has been made in connection with civil suits or appeals either actually decided or pending or about to be taken up for disposal That in deciding whether there has been a contempt the obvious cour e to pursue is to read the offending words as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary It is incumbent on the Court in all cases to consider the general tone of the writing The meaning and intent are to be determined by a fair interpretation of the language used and are matters of law for the Court as to whether or not they constitute contempt Disclaimer on the part of the publisher as to any intentional disrespect to the Court is consequently not a sufficient defence when the purpose and meaning of the writing is obviously of a contrary import If the language is fairly capable of an innocent interpretation the Court will not be astute to read into it a sinister import But if the intent is fairly clear liability to punish for contempt of Court cannot be successfully evaded by the use of a transparent artifice That the two articles relating to the same topic and published in the editorial columns of the same newspaper at a brief interval of time between them might legitimately be read together to determine their scope and purpose even though they were proved not to have been written by the same person *Per* WOODROFFE and MOOKERJEE JJ —That the returns in the custody of the Registrar of Joint Stock Companies constitute public records of private documents within the meaning of s 74 sub s (2) of the Evidence Act and secondary evidence thereof is admissible under s 65 cl (*e*) *Per* MOOKERJEE J —That although secondary evidence may be admissible the party who produces the evidence is not relieved of his obligation to prove the execution of the document just as if the original had been produced unless the case is covered by s 90 of the Evidence Act or the legislature has expressly provided that the document or endorsement thereon is receivable in evidence without proof of execution *Per* MOOKERJEE J —That the statement in the affidavits of two of the defendants could not be used to the detriment of the other defendants as the proceeding was in the nature of a criminal trial and supplementary evidence could not be given so as to prejudice the defendants *Per* MOOKERJEE J —That it cannot be held as a matter of law that the directors of a limited company which owns a newspaper are liable to be committed for contempt of Court on account of a libel published in the paper *Per* WOODROFFE J —That the question whether persons in the position of directors are responsible must depend on the facts of each case *Per* MOOKERJEE J —*That proceedings by way of contempt* would lie against Corporations as well as individuals in the case of individuals the process is by attachment of the person followed by fine or imprisonment or both in the ca e of Corporations the process is by fine followed by sequestration or distraint The Court sentenced the printer and publisher to pay a fine of Rs 300 and discharged the other defendants in the absence of proof of their complicity with the publication of the offending articles *In the Matter of the* AMRITA BAZAR PATRIKA (1917) **21 C W N 1161**

6 ——————— *Civil and Criminal Contempt—Court of Record—Prosecution by Judges—Trial by the same Judges—Jurisdiction—Standard of proof—Fair comment—Publication—Printer liability of—Manager and Directors of Newspaper Company liability of—Evidence Act (I of 1872) ss 3 74 (2)—Editor registration of* Where a newspaper unlawfully published articles scandalising the High Court and the Chief Justice in his administration thereof by allegations implying that the Chief Justice had constituted a packed Bench the articles having a tendency to prejudice the parties and interfere with the administration of justice *Held per* CUPIAM (MOOKERJEE J discussing whether contempt proceedings were civil or criminal) that the Judges had jurisdiction to hear the Rule though issued of their own motion that the articles constituted a contempt of Court that the printer of the newspaper was liable therefor that there was no sufficient evidence of the existence of an editor that the *primâ facie* case of responsibility for the publication against two of the directors and the managers of the company owning the newspaper had been met and that in the case of the third director although the facts raised a case of strong suspicion again t him it was just possible he might not be responsible for the publication and that he should be given the benefit of the doubt The Rule was therefore made absolute against the printer who was fined and discharged as regards the other respondents The Legislature should provide for the registration of the editor or the person really responsible for the contents of a newspaper *Per* WOODROFFE J There is only one Standard of Proof applicable alike to civil and criminal trials *vide* definition of proved and disproved in s 3 of the Evidence Act The word record includes a collection of private documents *The Queen* v *Gray* [1900] 2 Q B 36 *Surendra Nath Banerjee* v *The Chief Justice and Judges of the High Court at Fort William in Bengal* I L R 10 Calc 109 L R 10 I A 171 *Legal Remembrancer* v *Moti Lal Ghose and Others* I L R 41 Calc 173 *McLeod* v *St Aubyn* [1899] A C 549 *The American Exchange in Europe Case* 58 L J Ch 706 *St James Evening Post Case* 2 Atk 469 *Daw* v *Eley* L R 7 Eq 49 *In re Banks and Fenwick* 26 C L J 401 *Cheshire* v *Strauss* 12 T L R 291 *Reg* v *Judd* 37 W R (Eng) 143 *Ex parte Green* 7 T L R 411 *Weston* v *Peary Mohan Dass* I L R 40 Calc 898 referred to MOTI LAL GHOSE AND OTHERS *In re* (1917)
I L R 45 Calc 169

7 ——————— The petitioner was the plaintiff in a suit in the Court of Small Causes which was decreed Later the Munsif on the Defendant s application for retrial or review issued a notice on the petitioner directing him to appear in Court with certain account books on a specified date and give his depo ition failing which the suit was to be decided against him The petitioner did not appear as directed and the Munsif called upon him to show cause why he should not be fined for disobedience Cause was shown by a petition but there was no appearance and the petitioner was fined for contempt of Court *Held* that the order was without jurisdiction and not covered by s 151 C P C or 4 O Cr P C or 1 5 I P C S 151 C P C does not give the Court an absolute discretion to make any order it pleases It does not certainly confer upon any Court a summary jurisdiction

CONTEMPT OF COURT—*concld*

which it does not otherwise possess to punish contempts by fine or imprisonment In the case there was no contempt committed in the view and presence of the Court *In re Rasik Lal Nag 20 C W N 1251* referred to CHAGMAL SERAOGI v KING EMPEROR (1919) 23 C W N 389

8. ——————— *Publication of proceedings in pending cases—Publication not permissible until the case comes on for hearing—Pleaders duty of—Practice and procedure* All proceedings in cases pending before a Court of Justice are privileged: they must not be published until the case comes on for hearing before the Court *In re* KALIDAS J JAHAVERI (1919)

I L R 44 Bom 443

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I L R 37 Calc 671

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I L R 42 Calc 1140

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I L R 41 Calc 825

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1 Pat L J 48

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See CONSTRUCTION OF DOCUMENT
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See CONTRACT OF GUARANTEE

CONTRACT—*contd*

See CONTRACT OF SERVICE

See CONTRACT TO LEND OR BORROW

See CONTRACT ACT (IX OF 1872) s 30
I L R 34 All 273

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I L R 41 Calc 130

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I L R 40 Bom 517

See GUARDIAN AND MINOR
I L R 38 All 433

See HINDU LAW—ADOPTION
I L R 39 Bom 528

See HINDU LAW—JOINT FAMILY
I L R 37 Bom 340

See HINDU LAW (MITAKSHARA)
3 Pat L J 396

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See ILLEGAL CONSIDERATION
2 Pat L J 630

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I L R 35 Bom 511

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I L R 47 Calc 1079

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I L R 35 All 132

See MINOR I L R 34 All 296
I L R 1 Lah 389

See PESHKOSH I L R 45 Calc 866

See PRINCIPAL CONTRACT

See PRINCIPAL AND AGENT
I L R 39 Calc 802

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887) s 411 ACT 3
I L R 37 Mad 533

See REGISTRATION ACT 1908 ss 17 49
I L R 45 Bom 8

See SPECIFIC PERFORMANCE

See UNDER INFLUENCE
I L R 42 Calc 286

See WORKMAN S BREACH OF CONTRACT ACT (XIII OF 18 9) ss 2 AND 3
I L R 41 All 390

——————— breach of—

See LIMITATION ACT (IX OF 1908) ARTS 97 AND 116 I L R 45 Bom 955

See LOSS OF GOODS
I L R 44 Calc 16

——————— breach of by labourer or maistry—

See MADRAS PLANTERS LABOUR ACT (I OF 1903) ss 24 35
I L R 39 Mad 889

——————— breach of promise of marriage—

See HINDU LAW I L R 44 Bom 446

——————— breach of, to deliver goods at a particular time—

See CONTRACT ACT (IX OF 1872) ss 39 55 63 73 I L R 37 Mad 412

——————— by bough[illegible] sold notes—

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——— by members of Hindu joint family—
See HINDU LAW—JOINT FAMILY
I L R 39 Bom 715

——— C I F terms—
See CONTRACT C I F

——— construction of—
See SALE OF GOODS
I L R 43 Calc 305
See MORTGAGE I L R 44 Calc 542

——— Counter propo als do not constitute—
See REGISTRATION ACT 1908 ss 17 AND 49 I L R 45 Bom 8

——— for monthly deliveries—
See SALE OF GOODS
I L R 43 Calc 305

——— implied contract to pay compound interest—
See BANKERS I L R 44 Bom 474

——— *illegality of*—
See CONTRACT ACT (IX OF 1872) ss 56 (2) AND 65 I L R 40 Bom 570

——— incapacity to make—
See HINDU LAW—MINOR
I L R 38 Mad 166

——— induced by threat to commit suicide—
See CONTRACT ACT (IX OF 1872) ss 15 16 I L R 41 Mad 33

——— made before 1886—
See MALABAR TENANTS IMPROVEMENTS ACT (MAD ACT I OF 1900)
I L R 36 Mad 410

——— made by telegram—
See CIVIL PROCEDURE CODE 1908 O 7 R 10 I L R 1 Lab 203

——— of pre-emption—
See PRE EMPTION I L R 38 Mad 114

——— public policy—
See CONTRACT ACT 1872 s 23
I L R 44 Bom 6

——— recision of—
See LIMITATION ACT (IX OF 1908) SCH I ART 9? I L R 37 Bom 158
See SALE I L R 43 Calc ?90

——— suit for specific performance of—
See LIMITATION ACT (IX OF 1908) SCH I ART 113 I L R 41 Mad 18

——— to contribute to costs of litigation—
See CONTRIBUTION 1 Pat L J ?201

——— to pay money—
See MARRIAGE 16 C W N 447

——— *to sell*—
See CONTRACT FOR SALE
See CONTRACT ACT (IX OF 1872) ss 39 5? 61 6? ?3 ?4 AND 7?
I L R 38 Mad 178

CONTRACT—*contd*

——— to sell—*contd*
See HINDU LAW—ALIENATION
I L R 38 Mad 1187
See REGISTRATION ACT 1877, ss 3 17, 40
I L R 35 Mad 63

——— to sell goods without authority—
See LIMITATION ACT (XV OF 1877) SCH II ARTS 36 115, 120
I L R 38 Mad 275

——— Risk Note 'B —
See RAILWAY COY
I L R 45 Bom 1201

——— Signed by party personally—whether oral evidence can show he contracted as agent—
See EVIDENCE ACT 1872 ss 91 AND 92
I L R 45 Bom 1242

——— variation of—
See SALE FOR ARREARS OF REVENUE
I L R 39 Calc 981

——— void—
See NORTH WESTERN PROVINCES RENT ACT (XII OF 1881)
I L R 39 All 645

——— Unconscionable bargain—
See LANDLORD AND TENANT (MISC)
1 Pat L J 604

1 ——— Construction of— *Or 700 800 say seven to eight hundred tons Words of description and not of estimation—Warranty—Equitable set off* The plaintiff owner of a stock of coal at Shalimar Depôt agreed to sell to the defendant the entire stock at *Shalimar Depôt or 700 800* say seven to eight hundred tons of steam coal for immediate delivery The entire stock at Shalimar Depôt in fact amounted to 469 tons only which the plaintiff duly delivered On a *suit by the plaintiff for the price of the coal sold* and delivered —*Held* that the words or 700 *800* say seven to eight hundred *tons must* be construed to be descriptive of the words entire stock and not merely words of estimation that the delivery of only 469 tons was a breach of the contract by the plaintiff and that the defendants were entitled to set off against the plaintiff's claim the damages caused by such breach KALLYANJEE SHAMJEE *v* SHORROCK (1910)
I L R 37 Calc 334

2 ——— Sale—Deposit—*Failure of purcha er to complete contract—Vendor entitled to retain deposit* Plaintiff agreed to purchase 500 bales of cotton yarn from defendants and to deposit 5 rupees per bale as earnest money He deposited somewhat more than half of the earnest money and *thereafter repudiated the contract Held* that plaintiff was not entitled to recover that portion of the earnest money which he had paid *Collins v Stimson 11 Q B D 14? Howe v Smith L R 27 Ch D 89 Ex parte Barrell In re Parnell L R 10 Ch App 51?* and *Bhelan Chand v Radha Kishen Das I L R 19 All 489* referred to ROSHAN LAL *v* THE DELHI CLOTH AND GENERAL MILLS COMPANY (1910) I L R 33 All 166

3 ——— Suit for damages for breach of contract *is not supplying railway sleepers* according to contract—*Specification of Railway Company as to dimensions and quality of sleepers—Implied warranty where agents had knowledge*

CONTRACT—contd.

of purpose for which the sleepers were required—Stipulation that passing of sleepers was to be by manufacturer a party to contract—Requirements in such a case—Insufficiency of means taken to make sleepers conform with the contract— Passing of sleepers not reliable In this case the respondent was the transferee of contracts entered into by one Iyer (i) with the Madras Railway Company to supply them with 1,000 sleepers and (ii) with the appellants through their agents at Madras to purchase from them 1,000 sleepers to enable him as he stated to the appellants agents to carry out his contract with the Madras Railway Company the basis of which was a specification of the Railway Company's requirements in the matters of dimensions and quality The contract with the appellants through their agents was contained in letters which passed between the parties and was never embodied in a formal instrument In one of the letters written by the agents to Iyer it was stipulated that the passing of our Moulmein or Rangoon friends the Bombay Burmah Trading Corporation (the appellants) is as usual final as regards both measurement and quality On the transfer of the contracts to the respondent a formal agreement was drawn up between him and the Madras Railway Company and duly executed by both and in it the description of the sleepers to be supplied was practically identical with that in the specification of the Railway Company and the stipulation as to the passing of the sleepers was again insisted upon in the correspondence between the appellants agents and the respondent In a suit by the respondent for damages in consequence of the rejection by the Railway Company of a quantity of the sleepers as not being in accordance with the contract nor fit for the purpose for which they were required one of the questions raised was whether Iyer had ever given a copy of the specification of the Railway Company to the appellants agents and so made it the basis of his contract with the appellants As to this the first Court found that he did so and the Appellate Court came to a contrary conclusion *Held* that it was unnecessary to decide the question *first* because their Lordships concurred with the opinion of the Court of Appeal that the evidence showed that the specification merely contained an enumeration of the qualities of a good sleeper usually insisted on by railway authorities *secondly* because the appellants having through their agents been fully informed of the purpose for which Iyer purchased the sleepers from them must be taken to have impliedly warranted that they were reasonably fit for that purpose and *thirdly* because their Lordships thought that a sleeper the qualities of which were inferior to those of a good sleeper as usually insisted on by railway authorities could not well be considered a sleeper of the dimensions specified reasonably fit for use by the Madras Railway Company and the point was therefore irrelevant Another question was whether the main defence of the appellants that they had not contracted to supply the sleepers in accordance with the specification of the Railway Company but according to the stipulation as to the passing of the sleepers in the contract between themselves and Iyer which was confirmed by them on the transfer of the contract to the respondent was maintainable On this point the Courts below also differed the first Court deciding in favour of the appellants and the Court of appeal in favour of the respondent *Held* that on the true construction of the stipulation as to passing it must have been contemplated that there was some standard with which those sleepers should be compared which at the lowest must have been the standard set up expressly or impliedly by the contract between the parties which was the specification or at least the requirement that the sleepers were reasonably fit as sleepers of the dimensions described for use by the Madras Railway Company so that the right conferred upon the appellants by the stipulation amounted merely to the right to determine by and through the skilled and experienced persons whom they should necessarily employ for the purpose acting honestly and impartially according to the best of their judgment whether the goods supplied were in conformity with the requirements of the contract under which they were so supplied The real defence therefore rested upon the alleged fact that the sleepers were passed by the two expert persons employed for the purpose in the impartial exercise of their judgment They may have acted honestly as the first Court thought they did but the evidence showed that they never approached the question they had to determine namely the conformity of the sleepers supplied with the contract under which they were supplied They merely determined that the sleepers were fit to be sent out as the manufacture of their employers and there was not therefore any passing of the sleepers within the meaning of the contract BOMBAY BURMAH TRADING CORPORATION LIMITED v AGA MAHOMED KHALEEL SHIRAZI (1911)

I L R 34 Mad 453

4 ———— Sale of goods—Goods not appropriated—*Re sale power of in contract—Measure of damages* The plaintiffs contracted to sell 750 tons of sugar at an agreed price for delivery in equal instalments from August to December 1910 under an agreement which contained the following term The goods to be at the buyer s risk and peril from the time of landing of the sugar until they be removed from jetty dock ghat or godown and should the buyers fail to take delivery of the sugar the sellers will have the option of re selling the same in the open market by private sale or by public auction and hold the buyers responsible for all consequence The defendants failed to take delivery of 1?5 tons under the August shipment The goods remained in bulk and were never ascertained or even appropriated for the purposes of the agreement After notice to the defendants the plaintiffs purported to dispose of the goods under the power of re sale provided in the agreement and brought an action for the recovery of damages estimated on the basis of such re sale *Held* that as the goods had not been ascertained or even appropriated for purposes of the agreement they did not come within the power of re sale as framed and the re sale was inoperative as a method of measuring damages *Moll Schutte & Co* v *Luchmi Chand I L R 25 Calc 505* distinguished *Semble* A power of re sale in a contract can be so framed as to operate on goods even before appropriation. Inasmuch as the claim for damages was based on re sale in the circumstances of the case no decree could be made for damages on the basis of the difference between the contract and market rates. ANGELIJA & CO v SASSON & CO (1912)

I L R 36 Calc 68

CONTRACT—*contd*

5 ———————— Covenant in sale *deed to discharge a debt due to a third party—Suit for compensation for breach—Actual damage not necessary to support suit—Cause of action—Limitation Act (XV of 1877) Sch II Art 116* On a sale of immoveable property the vendees covenanted with the vendors to pay a certain sum of money on account of a mortgage debt due by the vendors They did not pay in accordance with the covenant and the mortgagee thereupon brought a suit upon his mortgage and obtained a decree *Held* on suit by the vendors for compensation for breach of the covenant that it was not necessary that the vendors should have suffered any loss before they could bring their suit and that as no time was specified in the sale deed for the payment of the mortgage money limitation began to run from the date of the execution of the deed *Lethbridge* v *Mytton 2 B & Ad 772 Carr* v *Roberts 5 B & Ad 78 Loosemore* v *Radford 9 M & W 657 Ashdown* v *Ingamells I R 5 Exch D 280 Dorasinga Tevar* v *Arunachalan Chetti I L R 23 Mad 441 Raghunath Rai* v *Brijmohan Singh All Weekly Notes 1901 14 Kumar Nath Bhattacharjee* v *Nobo Bhuttacharjee I L R 26 Calc 241* and *Batiley* v *Faulkner 3 Born & All 228 22 R R 390* referred to RAGHUBAR RAI v JAIJ RAJ (1912)

I L R 34 All 429

6 ———— Return of goods not up to sample—*Purchaser not bound to return goods to vendor* When goods sent to a purchaser professedly in execution of a contract of sale are not of the kind which the vendor had agreed to supply it is not the duty of the purchaser to see that such goods are returned to the vendor it is enough if he gives notice to the vendor that the goods are lying at the place to which they were sent at the vendor s risk. *Grimoldby* v *Wells I R 10 C P 391* followed PHAGGU MAL v BABU LAL, (1913)

I L R 35 All 325

6(a) ———— Goods supplied for special purpose—Appellants agreed to supply C sleepers for the Railway and therefore implied by warrants that their supplies would be good for that purpose—They were rejected as unfit for the purpose—Appellants relied on a stipulation in the contract to the effect that the passing of the sleepers by themselves would be final both as regards measurement and quality *Held* that this did not mean that they were entitled to deliver sleepers not up to warranty—They had to employ skilled and impartial people to say whether these supplies conformed with their warranty THE BOMBAY BURMAH TRADING CORPORATION LTD v AGA MAHOMED KHALEEL SHIRAZEE

15 C W N 981

7 ———— Carriage of goods on inlands waters—*of Lower Burma—Receipt for goods shipped on cargo boats plying on river Irrawaddy—So-called mate s receipts not negotiable documents nor documents of title—Transfer of Property Act (IV of 1882) s 137—Rate Circular issued by ship owners—Delivery by them of cargo without production of mate s receipt—Liability of Shipping Company* The plaintiffs (appellants) advanced money to the first defendant under an agreement by which the money was to be employed in purchasing paddy to be stored in the plaintiffs godown at Dounggyi and thence to be taken to Rangoon for sal The agent of the first defendant at Dounggyi induced the plaintiffs' agent to allow the paddy to be shipped to Rangoon in boats belonging to the second defendant Company in the name of the first defendant as shipper Eleven boat loads in all were sent in respect of eight of which the first defendant paid the money to the plaintiffs nominee at Rangoon. In respect of the cargoes of the last three boats the agent of the first defendant endorsed and delivered to the plaintiffs what purported to be mate s receipts for the cargoes loaded The first defendant sold the cargoes, obtained delivery of the paddy from the defendant Company without producing the mate s receipts which the Company's agents had given for the paddy and delivered the paddy to the purchasers paying nothing to the plaintiffs. In a suit against the first defendant for the amount due for advances and against the defendant Company for damages for that amount on the ground that the Company s agents had delivered the paddy to the first defendant without production by him of the mate s receipts and that their doing so was in breach of a representation which the Company made to the public by a printed Rate Circular or Notice and by their usual course of business that delivery of cargo carried by the Company's boats would *only* be made to persons holding mate s receipts for the cargo *Held* (affirming the decision of the Chief Court of Lower Burma) that the receipt was not bill of lading nor a mate s receipt and not a negotiable instrument nor was it a document falling within s 137 of the Transfer of Property Act (IV of 1882) and therefore not a negotiable document in the sense of that section It was merely a simple ordinary receipt for goods and not a document of title upon the transfer of which the goods passed. *Held* also that the clause in the defendant Company s circular that ' mate s receipts must be given up before discharge is allowed to commence, or in the event of the mate s receipt not having come to hand, the Company s usual guarantee must be signed merely set forth a mode in which in conducting their own business, the Company would protect themselves in the course of their trade but did not constitute an obligation upon which the plaintiffs were entitled to found any liability on the part of the Company if the clause was not strictly complied with There was therefore no document constituting a contract, and no course of business from which a contract could be inferred between the plaintiffs and the defendant Company Nor was there any failure of duty on the part of the Company in delivering the goods without production of the mate s receipt by reason of the knowledge that the plaintiffs had rights against the shipper because the evidence in the case showed that these rights had been the subject of negotiation and settlement which resulted in the plaintiffs consenting to the goods being forwarded in the name of the first defendant, to whom they were therefore rightly delivered. NATCHEAPPA CHETTY v IRRAWADDY FLOTILLA COMPANY (1913) I L R 41 Calc 670

8 ———— Illegality—Promissory note executed for compounding a charge of grievous hurt if valid—*Practice—Revision—Grounds of interference—Moral as opposed to legal justice—Mere errors of procedure or technical defects* Where a promissory note was executed as consideration for compounding a charge of grievous hurt against a person who had died previous to the complaint *Held* that, as the offence could not be compounded except with the consent of the person to whom the

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grievous hurt was caused, the agreement to pay money evidenced by the promissory note was illegal and the promissory note was consequently unenforceable The fact that the complainant may have a right to claim damages for the injury caused to the deceased would make no difference unless such right had been set up and proved The High Court as a Court of Revision has no power to consider justice apart from such justice as the law recognises. *Sheikh Aulbee Buksh v Bebee Hingon, 8 W R 41* referred to MOTTAI v THANAPPA (1914) I L R 37 Mad 385

9 ———— Minor's rights over property purchased for his benefit—*by maternal uncle—Sale of such property by father invalid* Where certain immoveable property was purchased for the benefit of a minor by his maternal uncle and was subsequently sold by the minor's father as if it belonged to the joint family of which himself and the minor were members *Held* in a suit by the minor after attaining majority to recover the property from the alienee that the sale for the benefit of the minor was valid, and he was entitled to recover *Kulla Pandithan v Ramayi Second Appeal No 881 of 1909* followed. *Kamta Prasad v Sheo Gopal I L R 26 All. 342 Ulfat Rai v Gauri Shankar 8 All L J 670* and *Meghan Dube v Pran Singh I L R 30 All 63* referred to The essential fact which renders void a transaction by a minor is that some agreement by the minor is necessarily an essential part of the transaction. But when a contract by the minor is not a necessary condition for upholding his right in property his right should be maintained *Mohori Bibee v Dharmodas Ghose I L R 30 Calc 539 Navakotti Narayana Chetty v Logalinga Chetty I L R 33 Mad 312* referred to MUNIA v PERUMAL (1914) I L R 37 Mad 390

10 ———— Earnest money forfeited—damages for breach *of contract—ascertainment of—deposit of forfeiture of—Credit for forfeited amount* Where a person deposits a certain amount as earnest-money for the due performance by him of his part of the contract under which he agrees to pay the other party a certain sum but breaks the contract thereafter the other party who becomes entitled to retain the deposit as forfeited under the terms of the contract must in a suit by him for damages for the breach of contract give credit for the amount retained as forfeited and can only recover the difference between the actual loss sustained and the amount of the forfeited deposit *Ockenden v Henly 1 E B & E 485 s c 27 L J Q B 361* followed. VELLORE TALUK BOARD v GOPALASWAMI NAIDU (1914) I L R 38 Mad. 801

11 ———— Breach of contract—*Attachment of plaintiff's property in consequence—Right of suit without actual damage* The defendant having agreed with the plaintiff as one of the terms of a compromise of a suit *in forma pauperis* to pay part of the Court fee if subsequently levied and having failed to do so in consequence of which the plaintiff's properties were attached *Held* that on the defendant's failure to pay the plaintiff according to his contract the plaintiff was entitled to sue at once and recover substantial damages RAMALINGATHUDAYAR v UNNAMALAI ACHI (1914) I L R 38 Mad. 791

12 ———— Priority of—*No right of suit on the contract generally* A mortgaged his lands to *B* part of the consideration therefor being *B*'s promise to discharge a debt of *A* to *C* *Held* that *C* who was a stranger to the contract cannot sue *B* for the payment of his debt without joining *A* as a party *Per curiam* The following are some of the circumstances under which a stranger to a contract can sue the promisor — (a) the creation of a trust in favour of the plaintiff in respect of the amount sued for but a direction *to pay as in the present case does not of itself* create an express or constructive trust owing to the absence of the elements necessary to constitute a trust (b) the creation of a charge on immoveable property by the promisor or allocation by the promisor of the specific money in suit in favour of the plaintiff (c) the creation of a settlement on marriage in which the plaintiff may be beneficially entitled as provided by s 23 of the Specific Relief Act and (d) estoppel as against the promisor owing to transactions between the plaintiff and the promisor *Khwaja Muhammad Khan v Husaini Begam I L R 32 All 410* and *Debnarain v Ramasadhan 17 C W N 1143* distinguished ISWARAM PILLAI v SONNIVAVERU TARAGAN (1913) I L R 38 Mad 753

13 ———— Privity of contract—*Right of third parties to sue on covenant in lease* Where on a lease of certain muafi land the lessees undertook as between themselves and their lessor to be responsible for the payment to the zamindars of certain sums which the muafidar was primarily bound to pay *Held* that the zamindars could not enforce this covenant by suit against the lessees *Khwaja Muhammad Khan v Husaini Begam I L R 32 All 410 Touche v The Metropolitan Railway Warehousing Company L R 6 Ch App 671* and *Debnarayan Dutt v Chunilal Ghose I L R 41 Calc 137* distinguished MANGAL SEN v MUHAMMAD HUSAIN (1914) I L R 37 All 115

14 ———— *Stranger's right of suit on—Family settlement—Trust—Provision for nuptials of plaintiff a daughter of the family—Her right of suit though not a party to the contract* A person though not a party to a contract can sue to enforce the terms thereof if it be a family settlement by which some provision is made for him or her as a member of the family (e g) for maintenance or marriage though the same is not made a charge upon the family properties *Iswaram Pillai v Taregan 26 Mad L J 127* distinguished. If the contract constitutes by its terms a trust in favour of the plaintiff a stranger to the contract a suit to enforce such trust is beyond the cognisance of a Court of Small Causes SUNDARARAJA AIYANGAR v LAKSHMIAMMAL (1914) I L R 38 Mad 788

15 ———— Interpretation of—Contracts should be interpreted by themselves and it is improper to interpret one contract by reference to another because they may seem to differ very little as it may result in identifying contracts which are wholly different *Gobboy v Aleetoom I L R 17 Calc 449* distinguished. *Southwell v Bowditch L R 1 C P D 374* followed. PATIRAM BANERJEE v KANKINARRA CO LD (1915) 19 C W N 623 I L R 42 Calc 1050

Specific performance and ... *alleged not proved but another found* ... *for specific performance or*

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damage if lies The principle upon which the Court refuses specific performance of a contract not the subject matter of the suit is equally applicable to the claim for damages for breach of that contract. The principle on which damages are decreed in a suit for specific performance considered NIL KANTA RAI CHAUDHURI *v* LALIT MOHAN BANERJEE (1915) 19 C W N 923

17 ——— Arbitration—Calcutta Baled Jute Association's contract—*Effect of clause containing home guarantee—Arbitration in London between Calcutta purchaser and London purchaser whether binding on Calcutta seller* R D & Co a firm carrying on business in Calcutta as balers of jute sold 500 bales of jute to E D S & Co for shipment to London. The contract contained a clause in writing known in the export trade as a Home Guarantee that is a clause by which the Calcutta seller guaranteed the weight condition and quality at the port of destination. E D S & Co sold the jute to a London buyer who claimed an allowance for inferiority of quality and upon an arbitration in London an award was given against E D S & Co R D & Co brought this suit in Calcutta against E D S & Co to recover the price of the 500 bales of jute F D S & Co contended that they were not liable on the ground that under the terms of the contract R D & Co had guaranteed the condition and quality of the goods at the port of destination that by the award the goods had been invoiced back to the sellers and that in terms of the contract P D & Co were bound by the award *Held* that the clause in writing that is to say the home guarantee does not mean that a London award in a submission by the Calcutta purchaser and the London purchaser in accordance with the rules and conditions of the London Association contract of 1913 would be binding in a dispute between the Calcutta seller and the Calcutta buyer To make such an award binding upon a total stranger to the London submission there should be a clear and unambiguous agreement to that effect *Held* also that although it may be correctly contended that any dispute about quality between the Calcutta seller and the Calcutta buyer may be validly referred to arbitration in London in accordance to that clause the meaning of the clause cannot be extended so as to make an award between the Calcutta purchaser and the London purchaser binding upon the Calcutta seller RAM DUTT RAMKISSEN DASS *v* E D SASSOON & CO (1915) I L R 43 Calc 47

18 ——— Trafficking in offices—*Official corruption—Contract for return of money paid to Nazir to secure appointment as peon—Suit to enforce such contract maintainability of—Public policy—Contract Act (IX of 1872) ss 23 65* The sale of a recommendation nomination or influence in procuring a public office is illegal and void, for trafficking in offices would inevitably tend to official corruption and the Court will not assist a party who has entered into a contract tainted by moral turpitude both sides being *particeps criminis in pari delicto* *Tappenden v Randall 2 Bos & P 467 5 R R 662* followed. A suit to enforce a contract for the return of money paid to a Nazir to secure an appointment as a District Court peon for the plaintiff's son is not maintainable *Bai Vijli v Nansa Nagar I L R 10 Bom 152* referred to *Pichakutty v Narayanappa 2 Mad H C R 213* discussed and distinguished Such an agreement is void *ab initio* its object being opposed to public policy within the meaning of s 23 of the Indian Contract Act while s 65 thereof applies to an agreement *subsequently* (i) found to be void (ii) or made void by supervening circumstances. *Bakshi Das v Nadu Das 1 C L J 261* and *Gulabchand v Ful Bai I L R 33 Bom. 411* considered inapplicable. LEDU COACHMAN *v* HIRA LAL BOSE (1915) I L R 43 Calc 115

19 ——— Part performance—*equitable doctrine of if may be invoked by stranger to—Relinquishment of share in tenure without registered deed but for consideration by purchaser out of possession to person in possession—Remand order scope of* Where a permanent tenure having been sold in execution of a decree for rent obtained against G the question was whether C at the date of the sale had a subsisting interest in the tenure so that (if he had) certain under tenures held by G were not touched by the sale and it appeared that C having acquired a share in the tenure at an execution sale had subsequently for consideration relinquished the share to G who was and continued in possession but no conveyance was executed to give effect to this transaction *Held* (in a suit by the purchaser at the rent sale to eject G) that though a mere admission or disclaimer cannot operate to pass title to property where a conveyance is required under the law to transfer title here G could have sued C for specific performance of the contract and G could have successfully resisted a suit to recover possession by C That by the application of the equitable doctrine of part performance C was precluded from setting up any title against G and had no subsisting right to the share at the date of the rent suit *Walsh v Lonsdale L R 21 Ch D 9* *Puchha Lal v Kunj Behari Lal 18 C W N 445* and *Mohammed Musa v Aghore Kumar Ganguli L R 42 I A 1 I L R 42 Calc 801* relied on *Jadunath Poddar v Rup Lal Poddar 4 C L J 23 s c 10 C W N 650* *Oodey Koowur v Ladoo 13 Moo I A 585* and *Dharam Chand Baid v Manji Sahu 16 C L J 436* distinguished *Held* further that the purchaser though no party to the contract was entitled to invoke the aid of this doctrine in the same way as a creditor could in respect of contract of purchase made by his debtor with a stranger That a remand order by the High Court directing a trial upon the issue whether C had a subsisting interest in the property covered an enquiry as to whether C had lost his interest in the property by the operation of the equitable doctrine of part performance KHAGENDRA NATH CHATTERJEE *v* SONATON GUHA (1915) 20 C W N 149

20 ——— Bond signed by defendant only and registered—*suit upon* A contract in writing in this country does not necessarily imply that the document must be signed by both the parties thereto *Apaji Bapuji v Nil Kanta 3 Bom L R 66* *Ramasami Chetti v Sekhanoda Chetti 1 Mad L J 737* *Girish Chandra v Kunjo Behary I L R 35 Calc 683 s c 12 C W N 628* *Ambalajani Pandrama v Yaguram I L R 19 Mad 52* *Kotappa v Vallur Zemindar I L R 25 Mad 50* *Zemindar of Vizianagram v Behara Suryanarayana I L R 25 Mad 587* and *Sanney Kotappa v Venkata Narasimham Naidu 11 Mad L J 125* referred to CHELLAPHROO CHOWDHURI *v* BANOA BEHARI SEN (1915) 20 C W N 408

5 ——— What constitutes—*Conditional proposal to make provision for the plaintiff by purchase*

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of immoveable property on condition of her living with the promisor until her death—Acceptance by plaintiff and performance of condition—Suit against heirs of promisor to recover village purchased for plaintiff by relative a wealthy and childless Rani—Limitation—Representation—Practice of Privy Council—Grant of special leave to cross appeal. This appeal arose out of a suit brought by the appellant for possession of a village called Repudi which had belonged to her great aunt a wealthy childless and widowed Rani and to which on her death in 1899 the three defendants had in litigation between themselves been declared to be entitled in equal shares as her heirs. The appellant had been brought up by the Rani from an early age and had lived with her until 1886 when she was married and then the Rani being anxious that the appellant should not leave her offered (amongst other things) to make ample provision for her by the purchase of immoveable property in consideration that she and her husband would continue to reside with her This they did until 1893 during which time the Rani purchased two small properties in her own name and transferred them after a time to the appellant In 1893 the Rani purchased Repudi also in her own name though making no concealment of her intention that the appellant was eventually to have it but the Rani s delay in transferring it to her caused unpleasantness and the appellant s husband left and went to his own home Negotiation took place and eventually the Rani on 12th October 1893 wrote to the appellant a letter in which she said Repudi was purchased for you alone. I shall retain it under me so long as I am alive and afterwards convey it to you yourself Thenceforth the appellant and her husband lived with the Rani until her death *Held* (reversing the decision of the High Court) that the letter was not merely an expression of intention but a conditional promise by the Rani and the promise was accepted and the condition performed by the appellant and her husband and there was accordingly a complete contract between the parties *Maunsell* v *Hedges 4 H L C 1039 Maddison* v *Alderson L R 8 A C 467* and *Jordan* v *Money 5 H L C 185* referred to and discussed *Held* also that the Rani s dying declaration constituted a re affirmation and confirmation of the contract the true effect of the language being to declare that Repudi was already the appellant s and that the Rani knew an oral bequest to be unnecessary From such a contract it was not open for those representing the Rani or her estate to resile from or fail to perform the obligation to deliver possession of the village to the appellant such possession to take effect from the Rani s death The cause of action in the suit was on a ground common to all the defendants The third defendant did not appeal from either of the decree against him in the District Court and in the High Court He was however in each case made a respondent by another defendant who appealed On the present appeal by the plaintiff to the Privy Council, the Judicial Committee granted the application of the third defendant to be made a respondent and in that capacity granted him special leave to bring a cross appeal notwithstanding that his right of appeal to His Majesty in Council had then become barred by the Limitation Act VENKAYYAMMA RAO *v* APPA RAO (1916) I L R 39 Mad 509

21 ———— Carriage of goods by rail—Risk note—*Liability of company for goods consigned on a risk note—Burden of proof* Where goods are booked for carriage by railway under a risk note and are lost in transit it lies upon the consignor claiming damages against the railway company to show that the loss was occasioned by the theft or wilful neglect of the company s servants. *Sheobarat Ram* v *The Bengal and North Western Railway Company 16 C W N 66* referred to *Bengal and North Western Railway Company* v *Haji Mutsaddi 7 All L J 833* distinguished EAST INDIAN RAILWAY COMPANY *v* NATHMAL BEHARI LAL (1917)

I L R 39 All 418

22 ———— Damages of a breach—Custom of the Bombay Silver Market—*Shroffs ostensible buyers and sellers—Shroffs acting for outside principals work either for kacchi or for pakki adat kacchi adat distinguished from pakki adat—Principal of kacchi adatia may sue in his own name for damage or breach of contract without impleading the kaccha adatia* On the 13th of July 1914 the plaintiff a merchant in the name of his *kachha adatia* and agent H and acting by his broker B entered into a contract whereby H agreed to buy and the defendants to sell 50 bars of silver at Rs 75 5 0 per 100 tolas for the ensuing *Shravan i e.* August *vaida* The contract was entered into subject to the rules of the Panch Shroff Association whereby it was the duty of the defendants to tender a delivery order by the 12th of August 1914 On the 10th of August the plaintiff tendered to H the price of bars and on the 11th H asked for a delivery order The defendants failed to give a delivery order by the 12th August. The plaintiff thereupon sued the defendants without making H a party for damages for breach of contract at the rate of Rs 3 3 0 per 100 tolas which was the difference in price between the contract rate and the rate prevailing in the market on the 13th of August The defendants pleaded a custom of the silver market whereby the selling Shroffs were not personally liable to the principal of the buying *adatia* The defendants without prejudice further stated that the rate of Rs 76 12 0 must be taken to be the highest buying and selling rate with reference to which damages could be assessed as the Shroffs at a special meeting held on the 10th August 1914 resolved that where a party was not able to give delivery silver bars could be bought and sold at Rs 76 12 0 *Held* (i) that the evidence called by the defendants fell far short of proving the custom alleged (ii) that if at the date of breach damages were recoverable by the usual and recognised measure it did not matter whether the *adatia* or the *principal* sued (iii) that the ordinary law of principal and agent applied and the plaintiff was entitled under the contract to claim the difference in price between the contract rate and the market rate at the time of breach It was not disputed at the trial that a custom of the Bombay Silver Market for forward contracts was that only Shroffs were the ostensible buyers and sellers though Shroffs might have and often did have outside principals for whom they were acting The Shroffs when acting for principals, worked sometimes for *kacchi adat* and some times for *pakki adat* In the case of *kacchi adat* the *adatia* Shroff guaranteed the performance of the contract to the other Shroff but did not guarantee its performance to his own principal. In the case of *pakki adat* the *adatia* Shroff who then acted for a high mission was liable as a

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principal both to his own employer and to the other Shroff ABRAHAM E J ABRAHAM v SARUPCHAND (1917) I L R 42 Bom 224

23 ———— Damages for Breach after outbreak of war—*to supply enemy goods out of stock in a particular ship—Royal Proclamation prohibiting contract as illegal effect of—Capture and condemnation of steamer and goods by Prize Court effect of on contract—Purchase of goods from Prize Court by defendant and bringing goods to place of performance by other steamers effect of—Contract to supply goods of a certain description and quality—Supply of inferior goods effect of* A contract made on the 25th August 1914 after the outbreak of war with Germany on the 4th August 1914 to supply German dyes expected to arrive by certain steamers believed to have started on their voyage from Germany before the war is unenforceable if under the contract the defendant was not to be liable in case of non arrival of the steamers at certain ports on account of the state of war and the ship and the dyes therein were as a fact seized during the voyage and condemned as prize by a Prize Court *Held* further (a) that the effect of the Royal Proclamation of 9th September 1914 prohibiting trading with the enemy and in enemy goods as illegal was to render the further performance of the contract illegal and to put an end to the contract (b) that the condemnation of the goods by the Prize Court related back to the date of seizure and divested the owners of the goods as from the date of seizure (c) that the fact that the defendants for their own convenience bought the goods from the Prize Court and brought them to the place of performance is immaterial as the goods ceased to be goods consigned to the defendants and (d) that a contract to supply dyes of 40 per cent strength on arrival of certain steamers is not enforceable when the steamers arrive with dyes of inferior description and quality viz 16 per cent strength *Hale* v *Rawson 27 L J C P 189* distinguished *Arnhold Karberg Co* v *Blythe Green Jourdain & Co [1916] 1 K B 495 The Odessa [1916] A C 153* and *The Zamora [1916] 2 A C 77* followed ABDUL RAZACK v KHANDI ROW (1917) I L R 41 Mad 225

24 ———— Damages for Breach of promise to marry—*parties being Konkani Mahomedan—suit for damages for breach of promise to marry as under English law not maintainable under Mahomedan law* Under Mahomedan law in a suit for breach of promise to marry the plaintiff cannot recover the damages peculiar to an action for breach of promise under the English law The action under the English law though based upon the hypothesis of a broken contract is attended with some of the special consequences of a personal wrong and damages may be given of a vindictive and uncertain kind not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner This anomaly should not be introduced in the case of Mahomedans whose views of the relationship of the married parties to one another are so different to those of persons governed by the English law ABDUL RAZAK v MAHOMED HUSSEIN (1916) I L R 42 Bom 499

25 ———— By certificated guardian on behalf of minor with Courts leave—*Specific performance* Where a guardian of minors appointed by Court with the Court s sanction agreed to sell the minor's property to A at a price which was above that fixed by the Court *Held* that a suit by A for specific performance of the contract was maintainable INNATUNNESSA BIBI v JANAKI NATH SARKAR (1917) 22 C W N 477

26 ———— Privity of—*Agreement between vendor and purchaser that the latter will pay the former's debt to a third person out of consideration money retained with him if may be enforced by vendor's creditor* The first two defendants borrowed on a promissory note a sum of money from the plaintiff they thereafter transferred their properties to the third defendant who executed an agreement in favour of his vendors expressly undertaking to pay to the plaintiff his dues out of the consideration money retained in his hands The plaintiff sued his debtors as also the third defendant for his money *Held* that the plaintiff was entitled to enforce the agreement made between the third defendant and his vendors The principle underlying the decision in *Debnarain Dutta* v *Ramsadhan Mandal I L R 41 Calc 137 s c 17 C W N 1143* applied to the case and the distinction that the arrangement between the first two defendants and third defendant was never brought to the notice of the plaintiff was not material DWARKA NATH ASH v PRIYA NATH MALKI (1916) 22 C W N 279

27 ———— *Third party s right to sue on—Limitation Act (IX of 1908) s 18 arts 62 115 and 116—Suit for rent by the third party to contract—Date from which limitation begins* Contrary to his undertaking to redeem a prior *kanam* and to collect and pay the *jenmi* arrears of rent due by the *kanamdar* a *melkanamdar* assigned his rights and liabilities under the *melkanam* to the *kanamdar* by the registered deed in 1909 without the knowledge of the *jenmi* and thus enabled the *kanamdar* to continue in possession for a further period The *jenmi* who came to know of the assignment in 1912 at once recognized it demanded arrears of rent from the *kanamdar* and brought the suit in 1913 against the *kanamdar* and the *melkanamdar* for all the rent due during the periods of the *kanam* and the *melkanam* *Held* by WALLIS C J and KUMARASWAMI SASTRIYAR J (BAKEWELL J dissenting) that (a) the *jenmi* was entitled to recover from the *kanamdar* the arrears of rent as moneys had and received to the plaintiff s use and that the suit was not barred by limitation by reason of Art 62 and s 18 of the Limitation Act *Per* WALLIS C J and BAKEWELL J The *jenmi* was not entitled to sue on the assignment to which he was not a party *Per* KUMARSWAMI SASTRIYAR J The *jenmi* was entitled to sue on it *Jamna Das* v *Ram Autar Pande I L R 34 All 63* and *Tweddle* v *Atkinson 30 Ch D 57* and other cases considered ITTI PANKU MENON v DHARMAN ACHAN (1917) I L R 41 Mad 488

28 ———— *Stranger to a contract when can sue —Privity of contract—The relation of trustee and cestui que trust when established—Covenant between assignor and assignee whether a stranger can enforce it—Part payment effect of* H demised on the 8th October 1910 a certain zemindary to N for a term of three years at a yearly rent of Rs 10 000 (Rs 6 000 out of which was to be appropriated by N in reduction of the debts due to him from H) It was also agreed that in certain events N would pay H 75 per cent of the actual realisable arrears of

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rent. On the 16th December 1910 *H* mortgaged to *K* (in consideration of a sum of Rs 10 000 due to *K* from *H*) the sums payable to him under the demise of the 8th October 1910 A was put into possession of the demised premises on the 26th January 1910 By an Indenture dated 23rd January 1911 *H* assigned to A all arrears of rent payable to him by A for three years and (also all other moneys payable to him) under the said demises of 8th October 1910 By the said indenture A covenanted with *H* that he would pay the said sum of Rs 10 000 with all interests and costs due to *K* from *H* under the void mortgage dated 16th December 1910 and would keep *H* indemnified against the same On the 23rd March 1911 A in pursuance of this covenant paid to A a sum of Rs 5 000 *K* (plaintiff appellant) brought this suit to recover the balance due under his mortgage from A (1st defendant respondent by virtue of his covenant contained in the indenture of the 23rd January 1911 and also against *H* (the second defendant) *H* did not contest the suit *Held* that the suit must be dismissed as there was no privity of contract between *K* and A neither was A a trustee for *K* in respect of the sums payable by *H* to *K* A contract can create no right or liability in a person who is not a party to it unless he can claim or be charged through a party as in the case of a *cestui que trust* claiming through a trustee There is however no doubt that a contract may be *in form* with a named person and yet intended to secure a benefit to another as a *cestui que trust* in such a way that the latter may sue in his own right to enforce the contract KHERODE BEHARI GOSWAMI v RAJA NORENDRA LAL KHAN (1918)
23 C W N 453

29 ——————— Where the appellants contracted with Government to maintain the rights of all tenure holders entered in the Record of Rights prepared prior to the giving of a *kabulyat* by the appellants *held* that a suit by the appellants for a declaration that one of the tenure holders covered by the Record of Rights had obtained a fraudulent entry therein and had no such rights as those recorded was not maintainable MAHARAJA KUMAR MANMATH NATH ROY v SHEIKH AMEER KHAN 2 Pat L J 39

30 ——————— Illegal consideration—*agreement to work without remuneration— Slavery bond —indivisibility of contract—Contract Act IX of 1872) s 24—Limitation Act (IX of 1908) Schedule 1 article 75* A contract whereby a labourer engages to work without any payment whatsoever under conditions that make it practically impossible for him to discharge the debt until some other capitalist redeems him is wholly void Where two labourers executed a bond for a consideration of Rs 10 repayable at the end of two years with interest and the second of the two executants undertook to labour for the promisee for the period of two years without remuneration and agreed that in the event of his absenting himself from work at any time during that period the promisee should be entitled to recover the principal with interest *held* (i) that the bond was a slavery bond and was therefore illegal and void; and (ii) that the provision for the payment of interest being inseparable from that part of the contract which was illegal was not enforceable The general principle that time begins to run from the earliest date applicable to cases of instalment bonds under article 75 of the Limitation Act 1908 is also applicable to cases of contracts which are subject to a condition and therefore time began to run against the promisee from the date the second executant of the bond absented himself from work SATISH CHANDRA GHOSH v KASHI SAHU
3 Pat L J 412

31 ——————— Interpretation—Implied terms —*Compensation assessment of* Plaintiffs contracted to supply labour for reclamation work undertaken by the defendant Trust The agreement *inter alia* provided that the plaintiffs were to find the necessary labour for filling and emptying waggons of sand and were to be paid by measurement of the area reclaimed having before commencing work satisfied themselves as to the correctness of the depths shown on the sections of the ground It recited that the defendant Trust was at the time engaged in putting rubble protection to enclose the area to be reclaimed and this would be in progress probably when the works would be commenced and it was stipulated that the plaintiffs were not to make any claim for alleged or actual loss of material being washed away during the progress of the work and when quoting their rate for the labour in filling and emptying it must include all and every such contingency as loss in bulk through washing or spreading by the sea, sinking and settlement or leaking or blowing out of the waggons during their transit from the sandhills to the site of the reclamation and that the plaintiffs would be paid strictly in accordance with the work when actually done on the sections of the ground at the completion of the work and no allowance whatever as stated in the previous clause would be entertained for sinking washing away etc The trial Judge held that the plans and sections added an implied term to this contract that the defendant Trust was to supply the protection actually shown on the plans and sections whilst the Appeal Court was of opinion that the implied covenant was to supply an adequate protection the inadequacy being proved by the mere fact of the discrepancy between what they considered the proved waggon loads deposited and the proved amount measured *Held* by the Judicial Committee that assuming without deciding that the contract had an implied condition that condition was only to execute the protection as shown on the plans KARACHI PORT TRUST v J MACKENZIE DAVIDSON (1918)
22 C W N 961

32 ——————— Sale on condition that the vendor or his descendants should have the right to repurchase—*Nature of the right reserved whether personal or assignable—Specific Relief Act (I of 1877) s 23—Construction of document—Second Appeal—Civil Procedure Code (Act V of 1908) s 100* One V obtained a decree against G G being unable to satisfy the decretal debt sold his land to V in 1903 on condition that after the lapse of ten years G or his descendants should have the right to repurchase it within two years for the same price for which the land was sold. After the death of G his son was his only descendant and on his death his mother took as heir She sold the rights reserved to G and his descendants in the sale deed to one M who in turn sold them to the plaintiffs A suit having been brought to recover possession of the land sold by G the question was raised whether on the terms of the sale deed of 1903 the intention of the part that the right reserved

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principal both to his own employer and to the other Shroff ABRAHAM E J ABRAHAM v SARUPCHAND (1917) I L R 42 Bom 224

23 ———— Damages for Breach after outbreak of war—*to supply enemy goods out of stock in a particular ship—Royal Proclamation prohibiting contract as illegal effect of—Capture and condemnation of steamer and goods by Prize Court effect of on contract—Purchase of goods from Prize Court by defendant and bringing goods to place of performance by other steamers effect of—Contract to supply goods of a certain description and quality—Supply of inferior goods effect of* A contract made on the 25th August 1914 after the outbreak of war with Germany on the 4th August 1914 to supply German dyes expected to arrive by certain steamers believed to have started on their voyage from Germany before the war is unenforceable if under the contract the defendant was not to be liable in case of non arrival of the steamers at certain ports on account of the state of war and the ship and the dyes therein were as a fact seized during the voyage and condemned as prize by a Prize Court *Held* further (*a*) that the effect of the Royal Proclamation of 9th September 1914 prohibiting trading with the enemy and in enemy goods as illegal was to render the further performance of the contract illegal and to put an end to the contract (*b*) that the condemnation of the goods by the Prize Court related back to the date of seizure and divested the owners of the goods as from the date of seizure (*c*) that the fact that the defendants for their own convenience bought the goods from the Prize Court and brought them to the place of performance is immaterial as the goods ceased to be goods consigned to the defendants and (*d*) that a contract to supply dyes of 40 per cent strength on arrival of certain steamers is not enforceable when the steamers arrive with dyes of inferior description and quality *viz* 16 per cent strength *Hale* v *Rawson 27 I J C P 189* distinguished. *Arnhold Karberg Co* v *Blythe Green Jourdain & Co [1916] 1 K B 495 The Odessa [1916] A C 153* and *The Zamora [1916] 2 A C 77* followed ABDUL RAZACK v KHANDI ROW (1917) I L R 41 Mad 225

24 ———— Damages for Breach of promise to marry—*parties being Konkani Mahomedan—suit for damages for breach of promise to marry as under English law not maintainable under Mahomedan law* Under Mahomedan law in a suit for breach of promise to marry the plaintiff cannot recover the damages peculiar to an action for breach of promise under the English law The action under the English law though based upon the hypothesis of a broken contract is attended with some of the special consequences of a personal wrong and damages may be given of a vindictive and uncertain kind not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner This anomaly should not be introduced in the case of Mahomedans whose views of the relationship of the married parties to one another are so different to those of persons governed by the English law ABDUL RAZAK v MAHOMED HUSSEIN (1916) I L R 42 Bom 499

25 ———— By certificated guardian on behalf of minor with Courts leave—*Specific performance* Where a guardian of minors appointed by Court with the Court s sanction agreed to sell the minor s property to A at a price which was above that fixed by the Court *Held* that a suit by A for specific performance of the contract was maintainable INNATUNNESSA BIBI v JANAKI NATH SARKAR (1917) 22 C W N 477

26 ———— Privity of—*Agreement between vendor and purchaser that the latter will pay the former s debt to a third person out of consideration money retained with him if may be enforced by vendor s creditor* The first two defendants borrowed on a promissory note a sum of money from the plaintiff they thereafter transferred their properties to the third defendant who executed an agreement in favour of his vendors expressly undertaking to pay to the plaintiff his dues out of the consideration money retained in his hands The plaintiff sued his debtors as also the third defendant for his money *Held* that the plaintiff was entitled to enforce the agreement made between the third defendant and his vendors The principle underlying the decision in *Debnarain Dutta* v *Ramsadhan Mandal I L R 41 Calc 137 s c 17 C W N 1143* applied to the case and the distinction that the arrangement between the first two defendants and third defendant was never brought to the notice of the plaintiff was not material DWARKA NATH ASH v PRIYA NATH MALKI (1916) 22 C W N 279

27 ———— *Third party s right to sue on—Limitation Act (IX of 1908) s 18 arts 62 115 and 116—Suit for rent by the third party to contract—Date from which limitation begins* Contrary to his undertaking to redeem a prior *kanam* and to collect and pay the *jenmi* arrears of rent due by the *kanamdar* a *melkanamdar* assigned his rights and liabilities under the *melkanam* to the *kanamdar* by the registered deed in 1909 without the knowledge of the *jenmi* and thus enabled the *kanamdar* to continue in possession for a further period The *jenmi* who came to know of the assignment in 1912 at once recognized it demanded arrears of rent from the *kanamdar* and brought the suit in 1913 against the *kanamdar* and the *melkanamdar* for all the rent due during the periods of the *kanam* and the *melkanam* *Held* by WALLIS *C J* and KUMARASWAMI SASTRIYAR *J* (BAKEWELL *J* dissenting) that (*a*) the *jenmi* was entitled to recover from the *kanamdar* the arrears of rent as moneys had and received to the plaintiff s use and that the suit was not barred by limitation by reason of Art 62 and s 18 of the Limitation Act *Per* WALLIS *C J* and BAKEWELL *J* The *jenmi* was not entitled to sue on the assignment to which he was not a party *Per* KUMARASWAMI SASTRIYAR *J* The *jenmi* was entitled to sue on it *Jamna Das* v *Ram Autar Pande I L R 34 All 63* and *Tweddle* v *Atkinson 30 Ch D 57* and other cases considered ITTI PANKU MENON v DHARMAN ACHAN (1917) I L R 41 Mad 488

28 ———— *Stranger to a contract when can sue —Privity of contract—The relation of trustee and cestui que trust when established—Covenant between assignor and assignee whether a stranger can enforce it—Part payment effect of* *H* demised on the 8th October 1910 a certain zemindary to *N* for a term of three years at a yearly rent of Rs 10 000 (Rs 6 000 out of which was to be appropriated by *N* in reduction of the debts due to him from *H*) It was also agreed that in certain events *N* would pay *H* 75 per cent of the actual realisable arrears of

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rent On the 16th December 1910 *H* mortgaged to *K* (in consideration of a sum of Rs 10 000 due to *K* from *H*) the sums payable to him under the demise of the 8th October 1910 N was put into possession of the demised premises on the 26th January 1910 By an Indenture dated 23rd January 1911 *H* assigned to N all arrears of rent payable to him by N for three years and (also all other moneys payable to him) under the said demises of 8th October 1910 By the said indenture N covenanted with *H* that he would pay the said sum of Rs 10 000 with all interests and costs due to *K* from *H* under the void mortgage dated 16th December 1910 and would keep *H* indemnified against the same On the 23rd March 1911 N in pursuance of this covenant paid to *K* a sum of Rs 6 000 *K* (plaintiff appellant) brought this suit to recover the balance due under his mortgage from *N* (1st defendant respondent by virtue of his covenant contained in the indenture of the 23rd January 1911 and also against *H* (the second defendant) *H* did not contest the suit *Held* that the suit must be dismissed as there was no privity of contract between *K* and *N* neither was *N* a trustee for *K* in respect of the sums payable by *H* to *N* A contract can create no right or liability in a person who is not a party to it unless he can claim or be charged through a party as in the case of a *cestus que trust* claiming through a trustee There is however no doubt that a contract may be *in form* with a named person and yet intended to secure a benefit to another as a *cestus que trust* in such a way that the latter may sue in his own right to enforce the contract KHEBODE BEHARI GOSWAMI *v* RAJA NORENDRA LAL KHAN (1918) 23 C W N 453

29 ———————— Where the appellants contracted with Government to maintain the rights of all tenure holders entered in the Record of Rights prepared prior to the giving of a *kabulyat* by the appellants *held* that a suit by the appellants for a declaration that one of the tenure holders covered by the Record of Rights had obtained a fraudulent entry therein and had no such rights as those recorded was not maintainable MAHARAJA KUMAR MANMATH NATH ROY *v* SHEIKH AMEER KHAN 2 Pat L J 39

30 ———— Illegal consideration—*agreement to work without remuneration— Slavery bond —indivisibility of contract—Contract Act IX of 1872) s 24—Limitation Act (IX of 1908) Schedule I article 75* A contract whereby a labourer engages to work without any payment whatsoever under conditions that make it practically impossible for him to discharge the debt until some other capitalist redeems him is wholly void Where two labourers executed a bond for a consideration of Rs 10 repayable at the end of two years with interest and the second of the two executants undertook to labour for the promisee for the period of two years without remuneration and agreed that in the event of his absenting himself from work at any time during that period the promisee should be entitled to recover the principal with interest *held* (i) that the bond was a slavery bond and was therefore illegal and void and (ii) that the provision for the payment of interest being inseparable from that part of the contract which was illegal was not enforceable The general principle that time begins to run from the earliest date applicable to cases of instalment bonds under article 75 of the Limitation Act 1908 is also applicable to cases of contracts which are subject to a condition and therefore time began to run against the promisee from the date the second executant of the bond absented himself from work SATISH CHANDRA GHOSH *v* KASHI SAHU 3 P L J 412

31 ———— Interpretation—Implied terms —*Compensation assessment of* Plaintiffs contracted to suppy labour for reclamation work undertaken by the defendant Trust The agreement *inter alia* provided that the plaintiffs were to find the necessary labour for filling and emptying waggons of sand and were to be paid by measurement of the area reclaimed having before commencing work satisfied themselves as to the correctness of the depths shown on the sections of the ground It recited that the defendant Trust was at the time engaged in putting rubble protection to enclose the area to be reclaimed and this would be in progress probably when the works would be commenced and it was stipulated that the plaintiffs were not to make any claim for alleged or actual loss of material being washed away during the progress of the work and when quoting their rate for the labour in filling and emptying it must include all and every such contingency as loss in bulk through washing or spreading by the sea, sinking and settlement or leaking or blowing out of the waggons during their transit from the sandhills to the site of the reclamation and that the plaintiffs would be paid strictly in accordance with the work when actually done on the sections of the ground at the completion of the work and no allowance whatever as stated in the previous clause would be entertained for sinking washing away etc The trial Judge held that the plans and sections added an implied term to this contract that the defendant Trust was to supply the protection actually shown on the plans and sections whilst the Appeal Court was of opinion that the implied covenant was to supply an adequate protection the inadequacy being proved by the mere fact of the discrepancy between what they considered the proved waggon loads deposited and the proved amount measured *Held* by the Judicial Committee that assuming without deciding that the contract had an implied condition that condition was only to execute the protection as shown on the plans KARACHI PORT TRUST *v* J MACKENZIE DAVIDSON (1918) 22 C W N 961

32 ———— Sale on condition that the vendor or his descendants should have the right to repurchase—*Nature of the right reserved whether personal or assignable—Specific Relief Act (I of 1877) s 23—Construction of document—Second Appeal—Civil Procedure Code (Act V of 1908) s 100* One V obtained a decree against G G being unable to satisfy the decretal debt sold his land to V in 1903 on condition that after the lapse of ten years G or his descendants should have the right to repurchase it within two years for the same price for which the land was sold. After the death of G his son was his only descendant and on his death his mother took as heir She sold the rights reserved to G and his descendants in the sale deed to one M [illegible] sold them to the plaintiffs. A suit havi[illegible] to recover possession of the land [illegible] question was raised whether on [illegible] to deed of 1903 the intention of [illegible] the right reserved

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was to be a right personal to G and his descendants or a right which he could assign to any other person *Held* on the construction of the sale deed that the intention of the parties was that the assignees outside the family would not enforce the contract specifically It was a case of personal quality mentioned in s 23 of the Specific Relief Act 1877 as the personal quality need not necessarily be restricted to particular skill or learning but might include anything peculiar to a man or his descendants which would entitle them to special favour at the hands of the other contracting parties In second appeal the High Court will have as good a right as the lower appellate Court to put its own construction upon a document as a whole in order to arrive at the intention of the parties thereto VITHOBA MADHAV *v* MADHAV DAMODAR (1918) I L R 42 Bom 344

33 ———— Wagering Contract—*Pakka Adatia business in Bombay if necessarily wagering transaction—Speculation and wagering distinguished* Pakka Adatia dealings are well established as a legitimate mode of conducting commercial business in the Bombay market Speculation does not necessarily involve a contract by way of wager and to constitute such a contract a common intention to wager is essential BHAGWANDAS PARASRAM *v* BURJORJI RUTTONJI BOMANJI (1917) I L R 42 Bom 373 22 C W N 625

34 ———— Suretyship—*Interpretation—Sale of principal debtor's interest in subject of contract if discharges him or surety—Forbearance of creditor to sue principal debtor if ground of discharge* Anything done or any promise made for the benefit of the principal may be a sufficient consideration to a surety for giving a guarantee Where the sureties undertook liability for the performance by a lessee of the conditions of the lease the fact that the lessee's interest was sold in execution and purchased by a stranger did not have the effect of releasing the debtor or his sureties from liability to perform the covenants and conditions of the lease as agreed upon by them Mere forbearance on the part of a creditor to sue the principal debtor or to enforce any other remedy against him does not in the absence of any provision in the guarantee to the contrary discharge the surety KALI CHARAN *v* ABDUL RAHMAN (1918) 23 C W N 545

35 ———— To supply goods indented from England—*Terms of indent if incorporated in the contract* Upon the interpretation of a contract by appellants to deliver to respondents certain articles which both parties knew were to be shipped from England the question was whether a stipulation in the following words *viz* Terms cash less three months discount equal to 1¾ per cent *Per* Indent Nos 906 907 908 909 (the number referring to indents which under these numbers were the contracts made by the appellants with English manufacturers for the supply of the goods) was meant to incorporate the forms of the indents as terms of the contract *Held* that the indents were not made parts of the contract in suit and the date of shipment in the indent was not incorporated in the contract as the date of shipment under the contract ALEXANDER *v* GOCUL DASS (1918) 21 C W N 1091

36 ———— Broker— *Principal contract —Appropriation and assent—Stoppage in transitu—Assignment—Contract Act (IX of 1872) ss 99 108 193 Exceptions (1) (2)—Bill of lading assignment of* Where the plaintiff a broker liable on a principal contract appropriated the goods to the contract and the defendant assented to the appropriation by accepting the documents representing goods in qustion and dealing with and handing the same to a third party *Held* that the property in the goods passed and the provisions of Exception (1) of s 108 of the Contract Act were not applicable *Held* also that the plaintiff must prove that for the purposes of Exception (3) of s 108 of the Contract Act the circumstances under which the defendant obtained possession of the documents amounted to an offence on his part *Held* also that the plaintiff had the right of stoppage conferred by s 99 of the Contract Act *Held* also that the delivery of the bills of lading to a third party amounted to an assignment of the bills of lading within the meaning of s 102 of the Contract Act RAMENDRA NATH ROY *v* BRAJENDRA NATH DAS (1919) I L R 46 Calc 831

37 ———— Specific performance of Agreement to lease certain share in property—*at fixed rent and premium—No express provision made for payment of kists and interest on arrears or for security—Draft approved of by pleader to be prepared—Receipt of earnest money—Agreement whether completed or not—Intention of parties* There may be a completed agreement though a document has to be executed embodying its terms It depends on the question whether the parties intended that there should be no binding contract till the execution of a document or whether they intended the document to be merely commemorative of the terms of a bargain already completed even though its execution is in a manner required by law *Hyam* v *Gubbay 20 C W N 66* referred to and distinguished *Winn* v *Bull 7 Ch D 29* and *Hampshire* v *Wickens 7 Ch D 555* distinguished Where the defendant entered into an oral agreement to grant the plaintiff a *putnit* lease of his specified share in certain *mouzas* at a fixed annual rent and a stipulated premium and a draft *pottah* was to be prepared and approved of by his pleader and part of the premium was paid at once and accepted by the defendant as earnest money but no such draft was prepared and approved of and there was no express provision made by the parties as to the payments of *kists* interest on arrears of rent and as to security for due payment of the rent *Held* that the agreement was complete and enforceable in a suit for specific performance notwithstanding the omission of the approved draft and of express provisions as to *kist* interest and security it having been found by the lower Appellate Court that the draft was intended by the parties to be merely commemorative of the terms already agreed upon and not a condition of the completion of the agreement and further that the matters relating to the *kists* and interests were presumably intended to be regulated by the Tenancy Law of the country and that no provision for security was necessary BIJOYA KANTA LAHIRI CHOWDHURY *v* KAILASH CHANDRA BHOUMIK (1919) I L R 46 Calc 771

37(a) ———— *X and Y who* were carrying on business at Cawnpore and Calcutta agreed to accept for accommodation of *Z's* firm in Cawnpore a hundi for Rs 2,000 drawn on X and Y in Calcutta by one A in Delhi in favour

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of one B in Delhi and in the case of payment by the acceptors of the amount of the Hundi to debit the same to the accommodation party Z s firm—In a suit by the acceptors against the accommodation party to recover the amount of the Hundi which was duly accepted and the amount which was paid to B in Calcutta, *Held* that the Plaintiff cause of action would not be complete unless they proved the fact that they had accepted the hundi in Calcutta in accordance with their undertaking to the drawers of the hundi and paid the bill in Calcutta on due date in accordance with their acceptance *Held* also that part of the cause of action arose within the Local limits of the ordinary jurisdiction of the High Court. PAMCHANDER CAURISHANKAR, v GANAPATRAM BISWANATH I L R 47 Calc 583

38. ——— Railway Risk Note—*Liability of Company for goods consigned on a risk note—Burden of proof—Indian Evidence Act (I of 1872) s 103* The plaintiff consigned certain bales of piecegoods by the defendants Railway under a risk note By the terms of the risk note in consideration of a special reduced rate being charged the consignor agreed to hold the Railway Administration harmless for any loss except for loss of a complete consignment due to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants provided that wilful neglect was not to be held to include robbery from a running train or any other unforeseen event The goods were properly carried in a closed waggon but one of the bales was lost in transit The plaintiff having sued the defendant Railway Company for the value of the missing bale the Subordinate Judge decreed the plaintiff's claim holding that the defendant Company failed to prove the theft from the running train though he found that there was no evidence to prove that there was any theft from the train The defendant Company having applied to the High Court under its revisional jurisdiction *Held* reversing the decree and dismissing the suit that the burden lay on the plaintiff under s 103 of the Indian Evidence Act to give proof of the fact that there was wilful neglect or theft by railway servants and he not having done so no question was reached of robbery from a running train *East Indian Railway Company v Nathmal Behari Lal I L R 39 All 418* approved B B & C I RAILWAY COMPANY v PANCHHODLAL CHHOTALAL & Co (1919) I L R 43 Bom 769

39 ——— Forfeiture of deposit—*Failure of purchaser to carry out his part of the contract—Vendor entitled to retain deposit* Where a plaintiff has advanced money to the defendant by way of earnest money and as a guarantee for the fulfilment of the contract in respect of which he is suing he cannot recover the earnest money where it is found that the breach of the contract is due to his own default *Bishan Chand v Radha Kishan Das I L R 19 All 489 Roshan Lal v The Delhi Cloth and General Mills Company Limited I L R 33 All 166* and *The Vellore Taluk Board v Gopalasami Naidu I L R 38 Mad 801* referred to MUHAMMAD HABIBULLAH v MUHAMMAD SHAFI (1919) I L R 41 All 321

40 ——— Offer and acceptance when acceptance may be inferred—*Receipt of money sent by would be purchaser* The plaintiffs on the 7th of February 1918 wrote to the defendants inquiring the price of cocaine The defendants replied on the 13th of February that it was Rs 20 per ounce without engagement meaning thereby that as the rate was varying from day to day they could not give any definite quotation On the 14th of February the plaintiffs sent to the defendants a money order for Rs 17 8 0 and asked the defendants to set aside for them an amount of cocaine represented by this sum The money was received on the 16th of February On the 23rd of February the plaintiffs sent to the defendants the permit which they had received for the import of the cocaine On the 4th of March the defendants wrote that they were unable to supply cocaine at Rs 20 per ounce and later they returned the money which the defendants had sent The plaintiffs thereafter sued the defendants for damages for non-delivery *Held* that it was a legitimate inference from the conduct of the defendants in receiving the money sent by the plaintiffs and crediting it to their account that they had accepted the plaintiff s proposal BISHAN PADO HALDAR v CHANDI PRASAD & Co I L R 42 All 187

40(a) ——— B entered into a contract with C for sale of 30 bales of dhoties with the condition we sold the goods as were bought by us to L J batta chafare all other terms according to Bahar (importing) Firms The contract between B and L J had a clause for arbitration embodied in it—B filed a suit in respect of 27 bales out of 30 for no delivery and referred the matter to arbitration in respect of 3 bales on similar dispute *Held* that the arbitration clause was not incorporated into the contract between B and C CHATTURBHUJ CHANDUN MULL v BASDEODAS DAYAL I L R 47 Calc 799

41 ——— Uncertainty—*Agreement to convey land by way of gift*—An *egrarnamah* contained the following provisions — If the Sitambari Jain Society shall require any place on Paresnath Hill or below at Madhuban for erecting *mandir* or *dharamsala* and for doing repairs and making bricks for the said purpose in that case I and my heirs shall give for making *mandir dharamsala* and bricks land stones and timber from the hill free of cost and if I and my heirs refuse to give in that case the Sitambari Jain Society shall take the same of its own power *Held* that if this provision was an attempt to create an interest in favour of future generations of Sitambaris it was void for remoteness *Held further* that the provision was not intended to create an interest in favour of the Sitambaris and that such a provision could not in India be regarded as creating an interest in favour of the other party to the transaction A contract to convey immovable property by way of gift does not create any interest in the property DAHYA BHAI v MAHRAH BAHADUR SINGH 1 Pat L J 238

42 ——— *Uncertainty—Public Policy—agreement by* Gayawal *to pay part of his earning from certain ceremonies to an* Acharjya *—maintainability of suit on the agreement* Where the defendant a *Gayawal* undertook for a consideration that if he performed any ceremonies without calling in the plaintiff an *Acharjya* to assist him he would pay to the latter in one set of circumstances three fourths and in another the whole of his (the defendant s) earnings from the performance of the ceremonies *held*, that the

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agreement not being void as being against public policy or for uncertainty a suit lay at the instance of the plaintiff for recovery of the amounts due to him under the terms of the agreement BABULAL BARIK GAYAWAL *v* HARIHAR PANDIT

1 Pat L J 539

43 ———— Forfeiture of deposit—A deposit if nothing more is said about it according to the ordinary interpretation of businessmen a security for the completion of the purchase so that in the event of the contract being performed it is brought into account but if the *contract is not performed by the payer it is forfeited* to the payee But every payment made by the purchaser to the vendor is not in the nature of a deposit liable to be forfeited if the purchaser violates his contract It is incumbent upon the Court in each case to ascertain the real intention of the parties from all the terms of the contract *NAWAB KHAJA HABIBULLAH v ARMAN DEWAN*

24 C W N 60

44 ———— Broker *appointing under-broker*—D & Co on 31st May 1911 appointed the Respondents to be their brokers for the sale and purchase of sugar for a period of five years The Respondents being by the agreement authorised to appoint under brokers on the 8th January 1911 entered into an agreement with the Appellants constituting them under brokers in respect of all contracts to be entered into by them (the Respondents) for and on behalf of the D & Co under the Respondents agreement with D & Co and during the subsistence of the said agreement On the 2nd December 1912 a new agreement was entered into between D & Co and the Respondents differing in many material respects from the contract of 31st May 1911 and appointing the Respondents brokers in the same business for a new period of five years on different terms On the 12th August 1912 the Appellants contract was summarily ended by the Respondents without any justifying reasons In a suit by the Appellants for damages for wrongful dismissal *Held* (no case being made that the previous agreement between D & Co and the Respondents was ended simply as a means of defeating the Appellants rights)—That the appointment of the Appellants as under brokers terminated on 2nd December 1912 with the termination of the original contract of D & Co with the Respondents LACHMANDAS KHANDELWAL *v* RAGHUMULL 24 C W N 577

44(a) ———— C I F—To purchase and ship—E and Co Commission Agents entered into a contract with defendants under which they undertook to purchase and ship certain goods on account and risk of defendants and did ship them C I F on a Germanship—Owing to outbreak of war during transit the goods were delayed—On defendants refusal to accept they were sold by the Plaintiff the liquidator of E and Co who sued defendants for damages *Held* that E and Co as Commission Agents were under the special contract the general law and s 222 of the *contract Act to recover damages for breach of contract* HARRY MEREDITH *v* ABDULLA SAHIB

I L R 40 Mad 1060

44(b) ———— *Fidelity guarantee* —Contract Act ss 120 and 131—Upon the appointment of a Khazanchee to a Bank in 1903 he his father and the Bank entered into an agreement whereby the father deposited security and the Bank agreed to employ the son subject to 3 months notice and *the son agreed to act* as Khazanchee and to inquire and if required report to the Bank upon the solvency of Asiatics having dealings with the Bank and any loss arising for the carelessness or default in so doing The Khazanchee was also a customer and in 1907 and 1908 deposited promissory notes for which in *1908 1909 he without informing the Bank* received payment from the makers—The money went to reduce his debit but the Bank relying on the notices made further advances In 1910 the Khazanchee became insolvent—In 1913 his father s executors sued for return of the securities deposited by the father *Held* that the agreement of 1903 did not constitute a continuing guarantee under the Contract Act s 129 so as to be *ipso facto* revoked on death of father under s 131 and that the Bank *was entitled to hold the securities against the son s* default SEN *v* BANK OF BENGAL

L R 47 I A 164

45 ———— *Impossibility* of performance—Where the parties were fully aware of the restriction imposed by Government on the supply of railway waggons on account of the war *and a* contract was entered into for the sale of goods and delivery thereof in the manner *stipulated in* the contract on the assumption that by the time *the goods would become deliverable under the* contract the said restriction would be removed *Held*—That the contract was void being impossible of performance and the buyer was not entitled to recover any compensation from the seller who *was excused from* the performance of the contract KUNJILAL MONOHAR DASS *v* DURGAPROSAD DEBI PROSAD 24 C W N 703

46 ———— Anticipating breach—*Measure of damages*—Damages for breach of contract by *renunciation thereof before performance* is due are measured by what the individual would have suffered by the continued breach due to the time of complete performance less any abatement by reason of circumstances of which he ought reasonably have availed himself MANINDRA CHANDRA NUNDY AND OTHERS *v* ASWINI KUMAR ACHARJYA 25 C W N 297

47 ———— Failure of condition—Where a contract provided that it should be void if there was a fluctuation in price announced by a certain syndicate—*Held* that the contract could not be avoided because that syndicate continued to exist on out break of war TOOLSIDAS TEJPAL *v* M. P VANKATA *25 C W N 26*

48 ———— Public policy—*agreement to bring about adoption—suit for recovery of consideration money* Although it is now established that where money is paid for a purpose which is contrary to public policy it may be recovered at any time before the consideration for the payment has been performed *yet if the contract involves any* thing of criminality or moral turpitude such as the courts on that ground would refuse to enforce them not only will the court refuse to enforce the contract but it will not assist either party to recover back anything paid under the contract even though the contract has not been performed. Where the plaintiff had paid the *guru* of a *Hindu* widow Rs. 5 000 as a consideration for him to induce the widow *to adopt one of the* plaintiff's sons on the understanding that if the adoption

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did not take place the money would be refunded, and the adoption did not take place with the result that the plaintiff claimed Rs 5,000 as damages for the breach of contract *Held* that the Court would not assist the plaintiff to enforce the terms of the contract or to recover the money paid by him RAGHUBAR DAS MAHANT *v* RAJA NATABAR SINGH 4 Pat L J 542

49 ———— Minor—*Void contract—Indian Contract Act (IX of 1872) s 65* Plaintiff sued to recover value of the goods sold to the defendant The defendant contended that he was a minor at the date of the transaction The Subordinate Judge held that the defendant was a minor and dismissed the plaintiff's suit On an application being made to the High Court it was contended that under s 65 of the Contract Act the defendant was either bound to restore the goods or to give its price *Held* discharging the rule that s 65 of the Contract Act started from the basis of there being an agreement or contract between competent parties and had no application to a case in which there never was and never could have been any contract. *Mohori Bibee v Dharmodas Ghose (1903) 30 Cal 539* relied on. MOTILAL MANSUKHRAM *v* MANEKLAL DAYABHAI (1920)
I L R 45 Bom 225

50 ———— Sale for purchase of goods of particular quality and description—Breach of contract—*Date of breach is the date on which goods are to be supplied according to contract—Date of breach not postponed until it is ascertained whether goods supplied are not according to contract—Measure of damages* On 9th May 1918 the defendants agreed to sell to the plaintiffs 50 tons of Yellow Katha wheat at Rs 8 2 0 per cwt The delivery was to be in May June 1918 at the seller s option The last day for such delivery accordingly fell on 30th June 1918 The Railway receipts relating to the contract goods were handed over to the plaintiffs within the contract time The plaintiffs took delivery and warehoused the goods about the 13th July 1918 On examining the goods the plaintiffs became dissatisfied with their quality and contended that there was not a proper and fair tender of the goods against the contract Subsequently a joint survey was held and on 15th August 1918 the surveyors adjudged that the wheat tendered was not of the contract quality On 20th August 1918 the plaintiffs rejected the goods On 23rd August 1918 the plaintiffs bought 49 tons of wheat of the quality and description mentioned in the contract and sued to recover Rs 2,950 15 0 the difference between the price paid by them for 49 tons and the contract price The trial Court held that as there was an attempted performance of the contract the date of the breach must be taken to be the date when the parties actually found that the goods tendered were not of the contract quality and that as there was no delay on plaintiffs part to buy against the sellers the plaintiffs were entitled to recover the sum claimed with interest The defendants appealed *Held* reversing the decision of the trial Court (1) that inasmuch as the breach of contract was in respect of goods to be delivered at a future date the ordinary rule applied that the measure of damages was the difference between the contract rate and the market rate at the date of the breach (2) that the date of breach must be considered to be the date when the seller ought to have tendered goods according to the contract and failed to do so (3) that in the absence of an agreement to the contrary the date of the breach was not postponed until it was ascertained whether the goods were of the contract quality or not (4) that as the plaintiffs had failed to prove that the due date must not be taken to be the date of the breach or that there was any difference between the contract rate and the market rate at the due date they were not entitled to claim damages against the defendants RAMCHANDRA PANNALLABH *v* VASANJI SONS & Co (1920)
I L R 45 Bom 129

51 ———— Illegal consideration—*Past cohabitation whether good consideration* A past co-habitation will not be good consideration for the transfer of property KISONDAS *v* DHONDU (1919) I L R 44 Bom 542

51(a) ———— Sale of "Ready goods" A seller under a contract for sale of ready goods sued the buyer to recover damages for not taking delivery of the goods The defence was that the seller had not the goods in his possession at the date of the contract and the buyer was not therefore bound to take delivery *Held* that if at the time of entering into the contract and the period intervening between that date and the date the seller was in a position to deliver when called on he had sufficiently complied with the terms of the contract MULCHAND CHANDOLIA *v* KUNDAN MULL I L R 47 Calc 458

52 ———— Sale and purchase of goods to be manufactured by a mill—*Vendor agreeing to give delivery as and when the goods are received from the Mill—Contract conditional and not absolute—Vendor not bound to deliver goods on failure of the Mill to supply goods—No implied warranty that the Mill would manufacture and supply goods—Implied condition that the Mill would supply goods—Condition failing both parties released from contract—Buyer not entitled to damages* On the 26th November 1917 the plaintiffs entered into a contract with the defendants for the purchase of 864 bales of Dhoties manufactured by a particular Mill. The contract which was in Gujarati provided Delivery by the 31st December 1918 Goods to be manufactured (*bunto*) are sold The same are to be taken delivery of as and when the same may be received from the Mill. The plaintiffs obtained delivery of 360 bales only from the defendants who failed to deliver the balance of 504 bales The plaintiffs accordingly sued to recover Rs 70,216 12 9 as damages contending that the contract was absolute and that the defendants had committed a breach in not supplying the full number of bales contracted for The defendants pleaded that the contract was conditional the condition being that the goods were to be delivered to the plaintiffs if they were supplied by the Mill and not otherwise The defendants also submitted that they had done everything in their power to get delivery of the remaining bales from the Mill but the Mill failed to supply the same to the defendants. The trial Court held that the contract was not absolute but conditional only and that the plaintiffs were not entitled to claim damages except with regard to 23 bales which the defendants in the circumstances of the case were bound to deliver to the plaintiffs The plaintiffs were accordingly awarded Rs. 2,875 as damages, but the rest of their claim was disallowed The plaintiffs appealed —
Held by *H* [illegible] confirming the decision of the

CONTRACT—*contd*

trial Court that the basis or the foundation of the contract was the anticipation common to both the parties to the contract that the Mill would supply the goods to be manufactured to the vendor and that if that anticipation was disappointed the foundation of the contract disappeared and neither party had any claim against the other for damages *Held* by *Marten J* concurring that on the true construction of the contract the vendor did not warrant the manufacture and supply by the Mill of the goods in question but that there was an implied condition that the goods were to be manufactured and supplied by the Mill and that if that condition was not fulfilled both parties were released *quoad* those unmanufactured goods *Taylor v Caldwell (1863) 3 B & S 826* *F A Tamplin Steamship Company Limited v Anglo Mexican Petroleum Products Company (1916) 2 A C 397* and *Tribhovandas v Nagindas (1919) 21 Bom. L R 1137* referred to HUKMANDRAI FULCHAND *v* PRAGDAS BUDHSEN (1919)

I L R 44 Bom 907

53 ———— Anticipatory breach—*Damages—Costs—High Court Original Side Rule Ch. XXXII r 93* On the defendants repudiation of a contract to pay the plaintiff certain share in the profits on contracts secured by him for the defendants to supply goods the plaintiff brought a suit for damages before time for performance of the supply contracts had arrived *Held* that the plaintiff was entitled to sue at once but his damages were to be assessed according to the cost of performance not at the time and place of the breach but at the time and place set for performance. *Bradley v Newson Son & Co (1909) A C 16 Bilasiram v Gubbay I L R 43 Calc 305* referred to Anticipatory breach takes effect as a premature destruction of the contract rather than a failure to perform it in its terms *Costs are allowed as* incidental damages to indemnify a party against expense of successfully vindicating his rights in a Court Only in very special or exceptional cases costs on special scale *(Scale No 3) should* be allowed MANINDRA CHANDRA NANDI *v* ASWINI KUMAR ACHARJYA

I L R 48 Calc 427

54 ———— Death of vendor before completion—*Vendee put in possession of property by vendor's widow—Suit to recover possession—Vendee can plead his contract of sale and possession delivered under it* In January 1904 N the owner of property in suit entered into an agreement with the defendant for sale of the property and received a part of the consideration as earnest money Before the sale deed could be executed N died and his widow who was then a minor executed the deed in September 1904 in pursuance of the agreement of sale and put the defendant in possession of the property on receipt of the balance of the consideration amount Thereafter the widow adopted plaintiff who in 1915 sued to recover possession of the property contending that the sale was invalid on account of the minority of the widow The Court of First Instance passed a decree in favour of the plaintiff for possession on his paying within six months Rs. 1 000 to the defendant as compensation for cancellation of the sale deed On appeal *held* reversing the decision of the lower Court and dismissing the plaintiff's suit (1) that there was no objection to the widow putting the purchaser in possession and receiving the purchase price and thus carrying out the fiduciary obligation arising under the contract entered into by her husband (2) that the defendant by reason of his obtaining possession under a contract of sale could successfully resist the plaintiff's suit to eject him *Bapu Apaji v Kashinath Sadoba (1916) 41 Bom 438* followed. LAXMANRAO *v* BHAGWANSINGH (1920)

I L R 45 Bom 434

55 ———— Right to enchance rent—*Expression putni taluk whether imports fixity of rent—Hereditary tenure whether implies fixity of rent* See Landlord and Tenant BHUPENDRO CHANDRA SINGHA *v* HARIHAR CHACKRAVARTI

24 C W N 874

56 ———— Restraint of Trade—*Goodwill sale of Contract Act (IX of 1872) s 27* By a written agreement the respondent purported to buy from the appellant the goodwill of his business of plying ferry boats between certain places on a river together with the interest which he had acquired by agreement for the use of landing places and settlements for the collection of tolls at landing places and the appellant agreed that for three years he would not ply boats between the places in question The appellant sued to recover the consideration agreed *Held* that the agreement was for the sale of the goodwill of a business within *Exception* 1 to s 27 of the Indian Contract Act 1872 and therefore was not void under that section as being in restraint of trade Judgment of the High Court reversed CHANDRA KANTA DAS *v* PARASULLAH MULLICK (1921) **I L R 48 Calc 1030**

57 ———— Wagering contract—*Criteria for determining whether a speculative contract is also a wagering contract* When persons who are in a position to carry out a contract at the time of making the contract or can reasonably be expected to be in that position when the time of performance falls due contract to receive or deliver goods at a future date such contracts are not necessarily wagering contracts because an element of speculation enters into them, even if the contract provides for the alternative of receiving or paying as differences instead of for actual delivery The determination whether the parties intend to take delivery is important in arriving at a decision as to whether such contracts are or are not by way of wager and another important essential is whether the parties are dealing with actual commodities that they are handling or expecting to handle or agreeing to settle an account according to fluctuation in prices of commodities in which they do not have and cannot expect to have any real title SRI NEWAS *v* RAM DEO

I L R 43 All 585

58 ———— Specific performance of—*Contract—Agreement of sale executed on an unstamped paper—Part performance by delivery of possession of part of the property and execution of stamped but unregistered sale deed of the rest of the property—Secondary evidence of the agreement of sale not permissible—Suit for specific performance competent* The defendant agreed in writing (unstamped) to sell two of his lands and a house to the plaintiff in consideration of an adjustment of accounts between the parties In pursuance of the agreement the defendant handed over to the plaintiff possession of the lands and executed a stamped but unregistered sale deed of the house On the plaintiff subsequently suing

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for specific performance the written agreement of sale abovementioned was not forthcoming *Held* that secondary evid nce of the un tamped agreement of sale was no a lmi ible even on payment of penalty *Raja of Pothil* v *Inuganti Chına Sitaramaami Garu (1899)* 3 *Mad* 49 followed *Held* further n the facts that the agreement of sale having been confes ed and in part carried into execution the matter had advanced beyond the stage of Contract and the equities which had ari en could not be adminis tered unless the Contract was regarded—Specific performance was therefore decreed HIRALAL LAXMINARAYAN v SHANKAR HIRACHAND

I L R 45 Bom 1170

59 ———— **Sale of goods**—*D l very of good to be q te on arrival of a steamer—Steam r arriving without goods—Warranty that th goods were on board th steamer—Vendor liable for br a h of contract* The defendant contracted to sell goods to the plaintiff under the following terms We have duly made a contract to give you the delivery of two tons of sodium sulphide packed in two cwt drums of United Alkali s make shipped per S S *City of Delhi* at the rate of Rs 50 per cwt deliver at Bombay In ca e of the steamers meeting with any accident on the way we are not bound to give you the goods but on arrival of the aforesaid steamer we are bound to give you the delivery of the goods The *City of Delhi* arrived in Bombay harbour but it did not carry the contract goods on board The plaintiff having sued to recover damages for breach of contract *Held* allowing the suit that the defendant by contracting that he would be bound to deliver the goods on arrival of the steamer gave a warranty that the goods which he had sold were on board the steamer but as the steamer arrived without the goods he was liable *Hale* v *Rawson (1858)* 4 *C B N S 85* relied on BHAILAL CHATURBHAI v KALYANBAI VRAJRAI (1921)

I L R 45 Bom 1222

CONTRACT ACT (IX OF 1872)

See EXECUTION **I L R 44 Mad 919**

———— **Common Carriers (including carri rs by S a) not govern d by—**

Se BILL OF LADING

I L R 38 Mad 941

———— **A Bailee for hire**—Is ordinarily bound to return the article hired at the end of the period of hire but when the article is hired out for use for a certain purpose there is an implied warranty it is fit for that purpose and if there is breach of warranty the bailee is not liable to pay the hire and need take no step to return the article to the bailor ISUFFALLI HASSANALLY v IBRAHIM DAJIBHAI

I L P 45 Bom 1017

———— ss **1 118**—*Evıden e Act (I of 18 2) s 92—Contract for sale and purchase of pi ce goods to be manufactured according to sample—Purchasers to clear good within twenty four hours of their being rea ly for delivery—Notice of the goods being ready for d livery tantamount to tender—D livery to be taken by signing a d livery ord r—Goods and price debited to purchasers on signing a del very order—Goods tendered different in quality and design fron sample—Cont act providing for reference to arbitration—Power of arbitrators to award an allow*

CONTRACT ACT (IX OF 1872)—*contd*

ance in pri e when difference in quality not unreason able—Parties reque ting arbitrators to award an allowance bound by the award—Custom of the trade permitting allowance if the differenc in quality not unreasonabl —Custom cannot vary written contract In September and October 1913 the defendants entered into seven contracts with the plaintiffs referred to under the letters A to G for the ale and delivery of piece goods of certain specified de criptions The contracts provided for delivery of the goods by instalments within a fixed period As soon as the goods were ready for delivery the defendants sent a delivery order to the plaintiffs whereupon the plaintiffs would either remove the goods from the defendants premises or sign the delivery order acknowledging that the goods had been taken delivery of and the price debited to them in which case the goods remained with the defendants at the ri k of the plaintiffs The goods were sub equently cleared by the plaintiffs at their convenience on payment of the price interest thereon at 9 per cent warehouse rent and all other charges A common feature of all the con tracts was that the defendants had agreed not to give delivery of similar goods to other customers during the period fixed for delivery under the plaintiffs contracts. Contract A was for the 251 bales of which the plaintiffs took delivery of some while the contract was cancelled as regards others and 84 bales remained the subject of dispute as the plaintiffs contended that the bales were in ferior in quality and were not otherwise in accord ance with the contract The di pute was referred to the arbitration of two experts in the trade nominated by the parties During the survey of the good both parties being represented by their re pective salesmen the arbitrators were asked by the plaintiffs to award an allowance in price in the event of their holding that the goods are different in quality from the sample The arbitrators found that there was a difference in finish quality width and in some ca es of design and colour and they decided that the plaintiffs were entitled to an allowance of 4 annas per piece but must take delivery of the 84 bales with the allowance The plaintiffs however refused to take delivery of the bales with any allowance on the ground that they were not bound to do so under their contract and that the arbitrators had in fact acted beyond the scope of the reference under the contract Con tracts B C and D covered 658 bales of which 159 were taken delivery of by the plaintiffs who re fused to take delivery of the rest on the ground that the defendants had committed a breach of the condition not to give delivery of similar goods to other dealers during the period fixed for delivery under the plaintiffs contract Contracts E F and G covered 305 bales of which 150 were taken delivery of while as to 42 the contract was can celled and the plaintiffs demanded the balance of 113 bales on payment of Rs 7 036 being the amount due by them on an account being taken in respect of all the seven contra ts The defendants refused to deliver the 113 bales on receipt of Rs 7 036 but claim d Rs 34 734 7 6 the contract price thereof The plaintiffs thereupon filed a suit a king for delivery of 113 bales on payment of R 7 036 The defendants pleaded that with respect to 84 bal s under the con ract A the plaint iffs were bound by the award of the arbitrators and that with respect to 499 bales under the con tracts B C, and D the plaintiffs wrongly rejected to take delivery the defendants ha l

CONTRACT ACT (IX OF 1872)—*contd*

given delivery of goods to other customers by sending them delivery orders and obtaining their signatures before the period of plaintiffs contracts begun to run The defendants counter claimed Rs 2 00 230 12 0 in respect of 722 bales of which the plaintiffs failed to take delivery The defendants subsequently amended the written statement by pleading a custom of the trade that the buyer could not reject for difference in quality provided the same was not excessive or unreasonable and could be met by an allowance in the price *Held* (i) that the custom alleged by the defendants was inconsistent with the stipulation in the contract that a certain quality of goods should be delivered in return for payment of a certain fixed price *In re North Western Rubber Company Limited and Huttenbach & Co* [1908] 2 K B 907 followed *In re Walkers Winser & Hamm and Shaw Son & Co* [1904] 2 K B 152 not followed (ii) that the plaintiffs were bound by the award of the arbitrators made in pursuance of their request and not objected to by their opponents *Re an arbitration between Green & Co and Balfour Williamson & Co* 63 L T 525 referred to (iii) that the defendants had not committed a breach of the contracts B C and D as the debiting of the goods to the buyers and their signing a delivery order marked the period of delivery rendering them liable for not clearing the goods from the premises of the defendants who held as warehousemen and bailees for the buyers and (iv) that the plaintiffs suit should be dismissed and the defendants counter claim be allowed RUTTON v POWJI v THE BOMBAY UNITED SPINNING AND WEAVING CO (1916) I L R 41 Bom 518

——— s 2

See LAND ACQUISITION
I L R 44 Bom 797

——— s 2 (a) (b)—

See COMPANIES ACT ss 28 45 61
I L R 36 Bom 557

——— s 2 (d)—

See CONSIDERATION
I L R 45 Calc 774

——— s 2 (i)—There is nothing in the Contract Act (IX of 1872) to show an intention that a person not a party to the contract can sue on it. SHANKAR VISHVANATH v UMABAI (1913) I L R 37 Bom 471

——— s 2(d) 16 25—*Consideration—Loan of money not advanced until the borrowers made themselves responsible for a previous loan to their brother—Undue influence—Inadequacy of consideration* Defendant No 1 being under arrest on a charge of embezzlement his brothers defendants Nos 2 and 3 approached the plaintiff for a loan in order therewith to obtain the release of defendant No 1 on bail and to arrange for his defence Plaintiff with whom defendant No 1 had previous dealings refused to advance any money unless defendants Nos 2 and 3 made a *mobalaqbundi* including a previous debt of defendant No 1 amounting to Rs 3 069 The defendants Nos 1 and 2 failing to obtain money elsewhere accepted these terms took a loan of Rs 1 200 and made the *mobalaqbundi* in the way desired *Held* that the acknowledgment of liability by the defendants Nos 2 and 3 was a part of the consideration which they gave for the money borrowed from plaintiff that the Rs 1,200 advanced was good and valuable consideration for the promise or promises made by defendants Nos 2 and 3 and there was no inadequacy of consideration within the meaning of Explanation (2) of s 25 of the Contract Act Urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate the will within the meaning of s 16 of the Contract Act BIJOY SINGH DUDHURIA v KUMUDI KANTA TALUKDAR (1918) 23 C W N 690

——— ss 2 (d) 62—

See DEBTOR AND CREDITOR
I L R 41 Calc 137

——— s 3—

See COMPANIES ACT
I L R 36 Bom 557

——— s 4 61 and 103—*Transfer of Property Act (IV of 1882) s 137—Stoppage in transit—Instruments of title—Railway receipts effect of assignment of* A from Bagalkote consigned to B at Bombay certain consignment of bales of cotton These consignments A entrusted to the Madras and Southern Mahratta Railway at Bagalkote for conveyance to Bombay which was effected by rail as far as Murmagoa on the lines of that Company and afterwards from Murmagoa to Bombay by sea by ships of the Bombay Steam Navigation Company The Railway Company issued in respect of these consignments receipts which A handed over to B as the consignee of the goods in exchange for hundies for the amount of the value of the goods drawn by B in favour of A—These railway receipts contained *inter alia* the following condition — That the railway receipt given by the Railway Company for the articles delivered for conveyance must be delivered up at destination by the consignee to the Railway Company or the Railway may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may at the discretion of the Railway Company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Company While the goods were in transit and in the possession of the Bombay Steam Navigation Company B became insolvent and some of the hundies given by him to A in respect of the goods in transit were dishonoured A thereon purported to stop the goods and gave the Steamship Company instructions not to deliver them to B but to C In the mean time B had borrowed monies from D and E and had transferred to D and E respectively the railway receipts for certain of these consignments as security On the arrival of the bales at Bombay they were claimed by D and E respectively and also by C The Bombay Steam Navigation Company filed two suits one against A E and D and the other against A and F claiming that the defendants in each suit might be restrained from taking proceedings against the plaintiff Company in relation to the bales and that the defendants in each suit might be required to interplead together concerning their claim to the goods in question in

CONTRACT ACT (IX OF 1872)—*contd*

——— ss 4 61 and 103—*contd*

such suit *Held* that reading s 103 of the Contract Act in conjunction with s 13 of the Transfer of Property Act (as provided for by s 4 of the Transfer of Property Act) railway receipts must be taken to be mercantile documents of title fulfilling one or other of the conditions specified in the explanation to s 137 of the Transfer of Property Act re proving in the ordinary course of business the possession or control of goods or authorising or purporting to authorise either by endorsement or delivery the possession of the document to transfer or receive the goods thereby represented and that under the third condition of the railway receipts in question it was clear that those documents fell under the latter class *Great Indian Peninsula Railway Company v Hanmandas Ramkrishan and Virji Hansraj I L R 14 Bom 57* not followed Simultaneously with these suits *D* had filed a suit against *A* and *B* to recover the monies advanced by him against the railway receipts transferred to him Subsequently the entries in the general account of *B* in *D's* books showed that various sums were credited to *B* which if the rule laid down in s 61 of the Contract Act were applied would extinguish that debt *Held* that the intention of *D* as indicated by his suit to enforce his claim against the proceeds of the bales of cotton covered by the railway receipts in question negatived the application of the rule *Held* accordingly that *D* and *E* were respectively entitled to the benefit of s 103 of the Contract Act as against *A* and the bales having been sold that the persons in whose hands the sale proceeds were should hand over the net sale proceeds to *D* and *E* deducting any charges justly due AMERCHAND & Co *v* RAMDAS VITHALDAS (1913) I L R 38 Bom 255

——— s 6—

See CIVIL PROCEDURE CODE (ACT V OF 1908) ss 47 115 I L R 42 Mad 776

——— ss 7 8 9—

See CONTRACT I L R 42 All 187

——— s 9—

See s 56— 26 C W N 573

——— s 10—

See COMPANIES ACT ss 28 45 61 I L R 36 Bom 557

See LAND ACQUISITION I L R 44 Bom 797

——— ss 10 11—*Guardian and minor—Sale of his own property by guardian to minor—Sale valid if for benefit of minor* A certificated guardian transferred some immovable property belonging to himself to his minor wards in satisfaction of money which he owed to them After the guardian's death the minors sued his heirs for possession of the property *Held* on the finding that the transaction was *bona fide* and for the benefit of the minors that the transfer in their favour was valid and could be enforced by them as against the heirs of their late guardian ULFAT RAI *v* GAURI SHANKAR (1911) I L R 33 All 657

——— s 11—

See MINOR I L R 40 Mad 208

CONTRACT ACT (IX OF 1872)—*contd*

——— s 11—*contd*

——— *Minor—Sale—Minor vendee subsequently dispossessed by third party—Right of vendee to recover purchase money from vendor* Where certain zamindari property was sold to persons who were minors at the time of sale and the purchasers were subsequently ousted on suit by third parties it was *held* that the purchasers were at any rate entitled to recover from the vendors the sum which they had paid as purchase money *Mir Sarwarjan v Fakhr ud din Mahomed Chowdhuri L R 39 I A 1 I L R 39 Calc 232* and *Mohori Bibee v Dharmodas Ghose I L R 30 Calc 539* distinguished WALIDAD KHAN *v* JANAK SINGH (1913) I L R 35 All 370

——— ss 11 64 65 70— *Sale by a minor —Discharge of mortgage by vendees—Sale not completed—Suit by vendees to recover consideration paid* *H* and *R* two Hindu widows of whom *R* was a minor sold a shop to the plaintiffs Registration of the sale deed was refused and the vendees thereupon sued to recover Rs 231 alleged to have been paid to certain mortgagees in discharge of a mortgage on the shop and Rs 100 as paid in cash to the vendors and they asked for sale of the shop *Held* that the sale being by a minor the plaintiffs acquired no interest to support their discharge of the mortgage and that the remaining sum of Rs 100 not having been paid for necessaries was also not recoverable SHIAM LAL *v* RAM PIARI (1909) I L R 32 All 25

——— ss 15 16—*Threat by a stranger to a contract to commit suicide held out to his wife and son and inducing them to enter into contract on that account—Validity of contract—Coercion and undue influence—Suicide whether an act forbidden by Indian Penal Code — Prejudice in s 15 meaning of* By a threat of suicide a Hindu induced his wife and son to execute a release deed in favour of his brother in respect of certain properties which they claimed as their own *Held* by WALLIS *C J* and SESHAGIRI AYYAR *J* (OLDFIELD *J* dissenting) that the threat of suicide amounted to coercion within s 15 of the Indian Contract Act and that the release deed was therefore voidable *Per* WALLIS *C J* and SESHAGIRI AYYAR *J* —Suicide is an act forbidden by the Indian Penal Code and suicide by a Hindu if actually committed will be an act not only to his own prejudice but also to the prejudice of his wife and son with s 15 *Per* OLDFIELD *J* —Suicide is not an act forbidden by the Indian Penal Code directly or inferentially and hence the threat did not amount to coercion and the release was not voidable on that account As the person who held out the threat was not a party to the release deed it was not voidable on account of undue influence within s 16 of the Indian Contract Act AMMIRAJU *v* SESHAMMA (1917) I L R 41 Mad 33

——— s 15 to 18—

See HINDU LAW ADOPTION I L R 33 Bom 441

——— ss 15 69 70 72 illus (b)—

See VOLUNTARY PAYMENT I L R 40 Calc 598

——— 16—(as amended by Act VI of 1899)—

See s 2 23 C W N 690

CONTRACT ACT (IX OF 1872)—*contd*

——— s 16—(as amended by Act VI of 1899)—*contd*

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXIII r 3

I L R 38 Mad 850

See LETTERS PATENT Cl 20

2 Pat L J 663

——— *Interest grounds for reduction of—Undue influence* It is not open to a Court to reduce the rate of interest in a promissory note unless the stipulation as to interest was obtained by the exercise of undue influence as defined in s 16 Indian Contract Act (Act IX of 1872) *Balkishan Das v Madan Lal I L R 29 All 303* dissented from *Dhanipal Das v Raja Maneshar Bakhsh Singh 33 I A 118* followed *Per* THE CHIEF JUSTICE —It was not open to the District Judge on general equitable grounds to interfere with the contract between the parties unless he was satisfied that the contract was brought about by the exercise of undue influence *Per* SANKARAN NAIR J —Excessive interest in itself may be evidence of the fact that the debtor must have been in a very helpless condition to accept the term imposed by the creditors KESAVULU NAIDU v APIHILLAI AMMAL (1913)

I L R 36 Mad 533

——— *Undue influence—Onus of proving undue influence—Suit to cancel contract on ground of undue influence —Domination of will must be put in action* To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it is erroneous That merely proves influence But both by the Law of India and the Law of England more than mere influence must be established so as to render it in the language of the law undue It must be established that the person in a position of domination has used that domination to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid When the relation of influence as above set forth has been established and it is also made clear that the bargain is with the person who influences the other and is in itself unconscionable then the person in a position to use the influence has a heavy burden thrown on him of proving affirmatively that no domination was practised POOSATHURAI v KANNAPPA CHETTIAR

I L R 43 Mad (P C) 546

——— ss 16 19—

See UNDUE INFLUENCE

I L R 42 Calc 286

——— ss 16 19A—Undue influence—*Contract—Facts necessary to justify interference of Court on the ground of undue influence* The power of a Court to interfere with contracts alleged to be unconscionable is limited by the provisions of the Indian Contract Act 1872 ss 16 and 19A The fact that an excessive rate of interest is charged in a contract is not alone sufficient to establish *that the making thereof has been induced by undue influence* but the Court must also find that the lender was in a position to dominate the will of the borrower *when the contract was entered into before* any presumption arises that the contract was induced by undue influence *Balkishan Das v Madan Lal All Weekly Notes (1907) 55 Kirpa Ram v Sami ud din Ahmad Khan I L R 25 All 284* and *Dhanipal Das v Maneshar Bakhsh Singh I L R 28 All 570* referred to DEBI SAHAI v GANGA SAHAI (1910)

I L R 32 All 589

CONTRACT ACT (IX OF 1872)—*contd*

——— ss 16 74—

See HINDU LAW (MINOR)

2 Pat L J 212

See INTEREST

I L R 42 Calc 652 690
24 C W N 444

——— *Interest—Stipulation for compound interest on default—Hard and unconscionable bargain—Limit of Court s powers to interfere—onus probandi —Mortgage suit—Part of property sold to third party—Purchaser not impleaded effect of—Practice—Subordinate Courts bound to follow decisions of Patna High Court* A contract cannot be avoided by a Court merely because it considers that the rate of interest is hard and unconscionable or unusual or that it will be ruinous to the debtor and a debtor cannot be relieved from his obligations except by showing that he comes within s 16 or 74 of the Contract Act 1872 A vague suggestion without a definite finding that the lender was in a position to take advantage of the pressing needs of the borrower does not entitle the Court to reduce the rate of interest unless the Court finds that the lender used his position to take an unfair advantage over the borrower An agreement to pay interest on a mortgage bond at 2 *per cent per mensem* with yearly rests is not necessarily a hard and unconscionable bargain *Per* MULLICK J —The subordinate Courts within the jurisdiction of the Patna High Court are bound to follow the decisions of that Court whether they are in conflict with the decisions of other High Courts or not KAMLA PRASAD v PANDEY RAM CHANDRA PRASAD NARAIN SINGH

4 Pat L J 565

——— s 18 cl (3)—*Civil Procedure Code (Act V of 1908) O XXI r 91—Stamp Act (II of 1899) s 35—Court sale—Discovery that the judgment debtor had no saleable interest—Failure of consideration—Suit by auction purchaser for possession or return of purchase money—Relations of the judgment creditor and the auction purchaser—Suit not cognizable by Small Causes Court—Unstamped document regarded as non existent* A Court sale purchaser having discovered that the judgment debtors had no saleable interest in the property sold brought a suit against the judgment creditor for recovery of possession of the property or in the alternative return of the purchase money on the footing of total failure of consideration A question having arisen as to whether the suit was maintainable *Held* that the suit was maintainable inasmuch as under the Civil Procedure Code (Act V of 1908) there was an implied warranty of some saleable interest when the right title and interest of a judgment debtor was put up for sale and the purchaser s right based on such implied warranty to a return under certain conditions of the purchase money which had been received by the judgment-creditor was recognized The relations of the parties namely the judgment creditor and the Court sale purchaser were in the nature of contract *Held* further that such a

CONTRACT ACT (IX OF 1872)—*contd*

——— s 18 cl (3)—*contd*

sui though the subject matter was less than R 500 was not cognizable by a Court of Small Causes there being a prayer for possession of immovable property An unstamped document being inadmissible in evidence must be taken as non-existent PESTONJI ARDESHIR IRANI *v* VINAYAK GANGADHAR BHAT (1910)

I L R 35 Bom 29

——— ss 18 and 19—

See CHUKANI RIGHT

I L R 42 Calc 28

——— s 19—*Registered deed of gift—Right of revocation not reserved by the donor—Title of the donee—Challenge by a third party having no title* Though it might be open to a donor within the time allowed by the Law of Limitation to attack his gift under a registered deed which reserved no right of revocation on the grounds mentioned in s 19 of the Contract Act (IX of 1872) still so long as the registered deed stands the title of the donee under it cannot be challenged by a third party who has no title TRIMBAK BHIKAJI *v* SHANKAR SHAMRAV (1911) I L R 36 Bom 37

——— ss 19 19A—

See S 16 I L R 32 All 589

See TRUSTS ACT (II OF 1882) s 88

I L R 43 Bom 173

See UNDUE INFLUENCE

I L R 42 Calc 286

——— s 20—*Contract made under a mutual mistake as to the nature and extent of vendor's title—Contract to grant mining lease by Mogols Brahmattardar at a time when Brahmattardars generally were believed to own subsoil rights—Refusal to complete contract on decisions of Court throwing doubts on the law—Suit for refund of advances—Specific Relief Act (I of 1877) s 36* In October 1903 the defendants who owned a share in some *Mogols Brahmattar* land contracted to give the plaintiffs a lease the object of which was to enable the plaintiffs to work coal underground The contract expressly provided that there should be a good title At this time it was generally believed that the rights of the tenure holders included mineral rights The plaintiffs advanced some moneys but later when the decision of the Privy Council in *Abhiram v Shyama Charan I L R 36 Calc 1908* s c *16 C W N 1* and *Hari Narayan Singh v Sriram Chuckerbutty 14 C W N 746* threw doubts upon this understanding of the law the plaintiffs refused to carry out the contract unless defendants satisfied them as to their title to the property which the defendants not having done the plaintiffs sued for refund of the advances *Held* that the contract was void under s 20 of the Indian Contract Act as having been entered into under a mutual mistake That the contract had also been broken by the defendants by their failure to show a good title and to cure the defect therein and the plaintiffs were entitled to recover the money advanced by them RAM CHANDRA MISRA *v* GANESH CHANDRA GANGOPADHYAY (1916)

21 C W N 404

——— *ss 20 and 56—*

See s 56 26 C W N 573

CONTRACT ACT (IX OF 1872)—*contd*

——— ss 20 and 65—*Fraudulent representation and impersonation by one of the executants of a deed—Mistake as to a matter of fact essential to the agreement—A person fraudulently mortgaging property not his own—Mortgagee believing in good faith the mortgagor to be owner of property—Transfer of mortgage by mortgagee in favour of a third party—Deed of transfer signed by the mortgagor as a concurring party the mortgagor again fraudulently representing to be owner—Transferor and transferee acting under the belief that the real owner concurred in the transfer—Failure of consideration—Avoidance of contract* Under the will of their father J F and L M became entitled as tenants in common to equal moieties of a house at Mazagaon in Bombay The third son C was given a right of residence in the house so long as he lived in harmony with his brothers and sisters C however fraudulently representing himself to be his brother L M purported to create a mortgage of a moiety of the said house in favour of the defendant Subsequently the defendant in consideration of a sum of Rs 1 770 paid to him by the plaintiff transferred the said mortgage in favour of the plaintiff The plaintiff having insisted that the said L M should be a party to the deed of transfer C fraudulently representing himself to be L M joined in executing the said deed as a concurring party The plaintiff having discovered that the mortgage and the transfer deed were not executed by L M but by a forger in his name sued the defendant as transferor for return of the purchase money as on a total failure of consideration The trial Judge applied the maxim *caveat emptor* and dismissed the suit The plaintiff thereupon appealed *Held* that the defendant was bound under s 65 of the Indian Contract Act to repay the purchase money to the plaintiff inasmuch as both parties being in the belief that the real owner had joined in the transfer were under a mistake as to a matter of fact essential to the agreement which was therefore avoided under s 20 of the Indian Contract Act ISMAIL ALLARAKHIA *v* DATTATRAYA (1916) I L R 40 Bom 638

——— s 21 65 and 72—

See CONTRACT WITH ENEMY

I L R 44 Bom 631

——— s 23—

See AGREEMENT AGAINST PUBLIC POLICY

See BILL OF LADING

I L R 38 Mad 941

See EXPECTANCIES

I L R 39 Mad 554

See HINDU LAW—MARRIAGE

I L R 39 Bom 528

See LIMITATION ACT (IX OF 1908) s 19

I L R 40 Mad 701

See MARRIAGE 15 C W N 447

See PUTNI 14 C W N 1031

——— *Agreement to remunerate third party for using his influence to bring about settlement of civil dispute if opposed to morality or public policy* Where A promises to remunerate C in consideration of the latter undertaking to use his influence over B so as to effect a compromise of a civil dispute between A and B the consideration or object of the agreement is

CONTRACT ACT (IX OF 1872)—*contd*

——— s 23—*contd*

no illegal and it is enforceable SYED MAHOMED ZAHURUL HUQ v SHAH WAZIRUL HUQ (1911)
16 C W N 480

2 ——— *Criminal breach of trust prosecution against gomastha dropped at the instance of Magistrate on accused executing mortgage bond for the amount embezzled—Compounding non compoundable offence if contrary to public policy* Where at the trial of a *gomastha* for criminal breach of trust under s 408 Criminal Procedure Code the Magistrate having suggested that the matter should be settled out of Court the accused executed out of Court a mortgage bond in favour of his master for the amount embezzled and the prosecution was dropped and the accused was acquitted or discharged though the withdrawal of the prosecution was not mentioned in the mortgage bond as forming part of the consideration *Held* that the mortgage bond was illegal and a suit on its basis was not maintainable Per CARNDUFF J —It is against public policy to compound a criminal case which is declared to be non compoundable by the Criminal Procedure Code and an agreement to that end is wholly void in law *Williams* v *Bayley L R 1 H L 200* referred to The circumstance that the Magistrate wrongfully suggested or sanctioned the compromise makes no difference *Collins* v *Ballantern 1 Sm L C Ed 11 at p 369* relied on *Sheikh Nubbee Buk h* v *Bibee Hingon 8 W R 412* not followed SHEIKH MAJEBAR RAHMAN v SYED MUKTASHEB HOSSEIN (1912)
I L R 40 Calc 113
16 C W N 354

3 ——— *Agreement between several firms to fix rates for ginning and baling cotton and to share profits—Agreement neither in restraint of trade nor against public policy* *Held* that an agreement whereby certain firms fixed the rates to be charged for ginning and baling cotton and further as to the manner in which the profit should be shared by the parties thereto was an agreement neither in restraint of trade nor opposed to public policy *Haribhai Manek Lal* v *Sharafali Isabji I L R 22 Bom 61* and *Fraser & Co* v *The Bombay Ice Manufacturing Co I L R 29 Bom 107* followed KUBER NATH v MAHALI RAM (1912) I L R 34 All 587

4 ——— *Contract between third parties for the payment of money on the failure of a marriage void as opposed to public policy* An arrangement between *A* and *B* that *B's* daughter shall marry *A's* son and that if she fails to do so *B* shall pay a sum of money to *A* is opposed to public policy and void under s 23 Indian Contract Act (IX of 1872) *Venkata Kristnayya* v *Lakshmi Narayana I L R 32 Mad 184* applied *Hermann* v *Charlesworth* [1905] 2 K B 123 referred to *Purlamdas Tribhovandas* v *Purshotamdas Mangaldas I L R 21 Bom 23* explained DEVARAYAN v MUTTURAMAN (1914) I L R 37 Mad 393

5 ——— *Forest Act (VII of 1878)—License—Agreement to enter into partnership contravening the terms of the license—Agreement not unlawful* An agreement to share profits which would contravene the terms of the license as between the Forest Officer and the licensee is not forbidden by law nor would it defeat the provisions of any law *Raghunath Lalman* v *Nathu Hirji Bhate I L R 19 Bom 626* distinguished NAZARALLI SAYAD IMAM v BABAMIYA DUREYATIMSHA (1915)
I L R 40 Bom 64

6 ——— *Contract — Agreement opposed to public policy—Assignment of mortgage taken by a patwari* *Held* that the taking of an assignment of a mortgage by a patwari is not a transaction opposed to public policy within the meaning of s 23 of the Indian Contract Act 1872 *Shiam Lal* v *Chhaki Lal I L R 22 All 220* and *Sheo Narain* v *Mata Prasad I L R 27 All 73* overruled BHAGWAN DEI v MURARI LAL (1916) I L R 39 All 51

7 ——— *Contract—Agreement opposed to public policy—Purchase by a kanungo of mortgaged property* *Held* that there exists no legal prohibition against a kanungo purchasing mortgaged property and suing to redeem the mortgage existing on it nor is such a transaction opposed to public policy within the meaning of s 23 of the Indian Contract Act 1872 KAMALA DEVI v GUR DAYAL (1916) I L R 39 All 58

8 ——— *Agreement to pay money to the vakil's clerk for giving special attention to a case whether opposed to public policy* An agreement by which a litigant binds himself to pay his vakil's clerk a certain amount for giving special attention to his legal business which his vakil was bound to see to in consideration of his fee is opposed to public policy and is void and unenforceable *Ex parte Cotton 9 Beav 107* referred to SURYANARAYANA v SUBBAYYA (1917)
I L R 41 Mad 471

9 ——— *Public policy interpreted according to the dicta of English Judges—Contracts for the sale and purchase of gold sovereigns at bullion rates for forward deliveries—Notifications under the Defence of India Act (IV of 1915)* The plaintiff a commission agent entered into contracts on behalf of the defendant his up country constituent to purchase sovereigns for Vaishakh and Jeth *vaidas* of Samvat year 1974 i e May and June 1918 settlements The defendant failing to make payment on the *vaida* days the plaintiff sued for damages occasioned by breach of the contracts The defendant contended *inter alia* that the contracts were opposed to public policy within the meaning of s 23 of the Indian Contract Act and in support of his contention relied upon two Notifications issued under the Defence of India Act (IV of 1915) The first Notification dated 29th June 1917 and published on 9th July 1917 provided that "no person shall melt break up or use otherwise than as currency any current gold or silver coin" The second Notification which was subsequent to the date of breach of the contracts and issued on the 22nd August 1918 provided that "no person shall sell or purchase or offer to sell or purchase any coin for an amount exceeding the face value of such coin or shall accept or offer to accept any such coin in payment of a debt or otherwise for an amount exceeding its face value" The trial Judge dismissed the plaintiff's suit holding that the trafficking in the gold currency of the country while the Great War was in progress tended to defeat and embarrass the whole scheme of the Government finance and was in its very essence opposed to public policy which in India at any rate was defined by and coincided with

CONTRACT ACT (IX OF 1872)—*contd*

———— s. 23—*contd*

measures of Government and that the Notification of August 1918 following that of July 1917 showed that the trafficking in such coins had for some time therefore been contrary to public policy The plaintiff appealed *Held* reversing the decision of the trial Judge and decreeing the plaintiffs suit (1) that the contracts in suit were not void as opposed to public policy within the meaning of s. 23 of the Indian Contract Act inasmuch as no clear general head of public policy could be evolved which would justify the Court in holding them unlawful on the ground (2) that if the case was to be decided on the Notifications the contracts must be shown to be forbidden by law and would then fall under the first head of s 23 of the Indian Contract Act and any reference to public policy would be irrelevant (3) that the contracts were not obnoxious to the Notification of June 1917 and were untouched by the Notification of August 1918 *Per* HAYWARD *J* — There was in my opinion, no substantial justification for holding that those dicta (*i e* the English Judges on public policy) should be disregarded by Judges in India and that public policy should be interpreted under s 23 of the Indian Contract Act as comprehending all the political policies from time to time of the Government of India. SHRINIVA DAS LAKSHMINARAYAN *v* RAMCHANDRA RAMBATTANDAS (1919) I L R 44 Bom 6

10 ———————— *Contract for supply of copies of a specimen picture—Copyright in the picture obtained by a firm in England—Publication of picture in India not fraudulent—Copyright at common law—Fine Arts Copyright Act of 1862 (25 & 26 Vict c 68)* On the 10th February 1912 the defendant entered into a contract with the plaintiff to prepare and supply to the plaintiff within three months from the date of the contract twenty thousand copies of picture of the Coronation of Their Majesties in England. The specimen picture was originally published in England by A Vivian Mansell & Co which had obtained a copyright in the said picture The defendant having committed a breach of contract the plaintiff sued for damages The defendant contended that the object of the contract being to defraud an English Company who had a copyright in the picture the contract was void under s 23 of the Indian Contract Act 1872 *Held* overruling the contention that the contract did not come within s 23 of the Contract Act 1872 and the plaintiff was entitled to sue for damages for breach The Fine Arts Copyright Act of 1862 (*25 & 26 Vict c 68*) does not extend to any part of the British Dominions outside the United Kingdom As soon as an author a publisher or a painter gave to the world what he had written or created it became public property and there was no right at Common Law before the Statute of Anne (8 Anne c 19) which protected him from his works being copied by one who chose to do so *Graves & Co Limited* v *Gorrie [1903] A C 496 Jefferys* v *Boosey (1854) 4 H L C 815* and *MacMillan* v *Khan Bahadur Shamsul Ulama M Zaka (1895) 19 Bom 557* referred to VASUDEO GANESH *v* ANUPRAM HARIBHAI (1919) I L R 44 Bom 723

11 ———————— *Principal's illegal contract with a stranger—Money recovered by agent from stranger under the contract—Right of principal to recover from agent money realised* The illegality of a contract between the principal and a stranger under which an agent recovers money due to the principal is no bar to the principal recovering the money so realized from the agent PALANIYAPPA CHETTIAR *v* CHOCKALINGAM CHETTIAR (1921) I L R 44 Mad 334

12 ———————— *Contract in restraint of trade* *Held* on a construction of the *kabuliyat* that an agreement whereby the plaintiff in consideration of an annual rental granted to the defendant the right to carry on a trade in hides in a particular district but which did not contain any undertaking that the plaintiff would not grant a similar right to any one else was not void under the Contract Act 1872 s as being against public policy A suit for the rent reserved in a *kabuliyat* is governed by Article 116 of the Limitation Act 1908 and not by Article 110 *K L Mackenzie* v *Maharaja Sir Rameshwar Singh* BAHADUR. 1 Pat L J 37

13 ———————— *Public Policy —Ante nuptial agreement to provide for wife's maintenance in event of dissension between the parties* *Held* that an ante nuptial agreement entered into between the prospective wife on the one side and the prospective husband and his father on the other (the parties being Muhammadans) with the object of securing the wife against ill treatment and of ensuring her a suitable amount of maintenance in case such treatment was meted out to her was not void as being against public policy *Bai Fatma* v *Alimahomed Aiyeb I L R 37 Bom 280* distinguished MUHAMMAD MUIN UD DIN *v* JAMAL FATMA I L R 43 All 650

———— ss 23 65—

See AGRA TENANCY ACT (II OF 1901) s 10 20 83 I L R 39 All 173

———————— *Agreement for consideration to procure appointment to a public office—Failure to fulfil promise—Suit to recover amount paid if lies—In pari delicto parties—Refund* Any contract to appoint one to a public office or involving the sale of a public office or securing an office for the promisor or recommending him for such office is opposed to public policy Such contracts are void without reference to the question whether improper means are contemplated or used in their execution *Pichakutti* v *Narayannappa 2 Mad H C R 243* distinguished and doubted Where the contract alleged was that the defendant a Nazir of a District Judge's Court, was in consideration of plaintiff paying him Rs 150 to provide the latter's son with the post of a permanent peon within two years and the suit was to recover Rs 100 alleged to have been paid by plaintiff as aforesaid on the ground that the defendant had failed to perform his promise within the time stipulated *Held* that the parties in this case being clearly in *pari delicto* the Court would not assist the plaintiff to recover the money Although where money has been paid under an unlawful agreement but nothing else done in performance of it the money may be recovered back this exception will not be allowed if the agreement is actually criminal or immoral s. 65 of the Contract Act aptly applies only in cases of agreements which are subsequently found to be void on account of some latent defect or of circumstances the date of the agreement

CONTRACT ACT (IX OF 1872)—*contd*

———— s 23 65—*contd*

or of an agreement which is afterwards made void by circumstances which supervene LEDU COACHMAN v HIRALAL BOSE (1915)
I L R 43 Calc 115
19 C W N 919

————*Marriage brocage agreement—Money paid under when recoverable—Principle of English Law applicability of—Transfer ostensible or real whether a proper test* A marriage brocage agreement is unlawful and void *ab initio* and brokerage paid thereunder is recoverable if the agreement or substantial part of it is not performed. Such an agreement does not fall within s 65 of the Contract Act and the rule to be applied is the rule of English Law *Taylor* v *Bowers 1 Q B D 291 Kearley* v *Thomson 24 Q B D 742 Barclay* v *Pearson* [1893] *2 Ch 154* and *Petherperumal Chetty* v *Muniandy Servai I L R 35 Calc 551* referred to *Ledu Coachman* v *Hiralal Bose I L R 43 Calc 115* dissented from The rule applies whether the transfer of the property under the agreement was merely ostensible or real. *In re Great Berlin Steamboat Company 26 Ch D 616* followed SRINIVASA v SESHA (1917)
I L R 41 Mad 197

———— 24—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 11 I L R 40 Bom 614
See CONTRACT 3 Pat L J 412

———— *Contract void—Consideration unlawful—Agreement to stifle criminal prosecution—Agreement against public policy* The plaintiff sued for specific performance of a contract whereby the defendant's husband had agreed to convey certain land to her (plaintiff) for Rs 150 subject to the condition that in the event of a criminal prosecution for criminal breach of trust instituted by the plaintiff against the said intending vendor not being withdrawn the contract was not to be enforced The defendants contended that the contract was void as being opposed to public policy *Held* dismissing the suit that the contract could not be enforced a part of the consideration was void on the ground of being opposed to public policy BANI RAMCHANDRA v JAYAWANTI GOVIND (1918) I L R 42 Bom 339

———— s 25—

See HATCHITTA. I L R 46 Calc 746
See HINDU LAW (JOINT FAMILY)
I L R 2 Lah 263

———— **to pay time barred debt—**

See LIMITATION ACT 1908 s 19
6 Pat L J 121

———— *Public policy—Agreement for future separation between husband and wife—Mahomedan law—Agreements void* An agreement for future separation arrived at between husband and wife (who are Mahomedans) is void as being against public policy under s 23 of the Indian Contract Act (IX of 1872) *Meherally* v *Sakerkhanoobai I L R 7 Bom L R 602* followed. BAI FATMA v ALIMAHOMED AIYEB (1912)
I L R 37 Bom 280

———— **Debt** *meaning of* A promise to pay the amount which may be found due by an arbitrator on taking accounts between the parties is not a promise to pay a debt within the meaning of s 25 of the Indian Contract Act (IX of 1872) the amount not being a liquidated sum The decision of SUBRAHMANYA AYYAR J in *Sabju Sahib* v *Noordin Sahib I L R 22 Mad 139 143* followed. DORAISAMI PADAYACHI v VAITHILINGA PADAYACHI (1916)
I L R 40 Mad 31

CONTRACT ACT (IX OF 1872)—*contd*

———— s 25—*contd*

———— **Agreement partly void**—*partly enforceable but indivisible* The defendant executed an agreement in favour of the plaintiff (who was his brother and for some time had managed his properties) to this effect I have been very much benefited by the works done by you and there is possibility of more good being done by you in future In consideration of these benefits I actuated by my sense of duty promise to grant you for your enjoyment a life long annuity of Rs 150 *Held* that the agreement so far as it related to past services was enforceable and void as regards future services but the agreement being one and indivisible and it being impossible to apportion the promised reward between the past and the future the whole agreement was void BASANTO KUMAR CHOUDHURY v MADAN MOHAN CHOUDHURY (1918) 23 C W N 609

———— **Time Barred debt**—*Not necessary that the agreement should in terms refer to the barred debt* A promissory note purported to be executed for cash received but the real consideration was proved to be a debt the recovery of which was barred by Statute of Limitations *Held* that the promissory note was a contract enforceable under s 25 cl (3) of the Indian Contract Act A party to a contract may prove that the actual consideration was something different from that recited in the document and effect must be given to the real consideration. A contract falling within s 25 cl. (3) of the Indian Contract Act is no exception to this rule The agreement will be enforced if the real consideration is shown to be a barred debt though no reference is made in the document to such debt *Appa Rao* v *Suryaprakasa Rao I L R 23 Mad 94* considered *Vasudeva* v *Narasimma I L R 5 Mad 6 8* referred to *Kumara* v *Srinivasa I L R* MOODELLY v MUNISAWMI MOODELLY (1909)
I L R 33 Mad 159

————*Debt barred promise to pay—Conditional promise—Suit to recover debt if lies* Acknowledgment of a barred debt cannot give a fresh start to limitation in favour of the creditor Under cl. (3) of s 25 of the Contract Act a barred debt is considered a good consideration for a promise to pay the new promise furnishing the measure of the creditor's right the whole of the promise whether free or clogged with a condition gives the cause of action Where *A* and *B* entered into an agreement of partnership wherein it was *inter alia* provided that 6 annas out of the profits of the business in the share of *A* would go toward liquidating a previous debt of Rs. 600 due by *A* to *B* which had become time barred at the date of the agreement *Held* that *B* could not recover the debt except in the manner provided in the agreement BINDAE DASYA CHUTIANI v CHOTA (1912) 16 C W N 636

———— s 26—

See CUSTOM (MARRIAGE)
I L R 1 Lah 574

CONTRACT ACT (IX OF 1872)—*contd*

——— s 26—*contd*

——— *Kabi namah—Authority given by Mahomedan husband to wife to divorce on husband marrying a second wife if valid* A provision in a *kabinnamah* by which a Mahomedan husband authorises his wife to divorce herself from him in the event of his marrying a second wife is not void under s 26 of the Contract Act It is lawful for a Mahomedan husband to delegate to his wife power to divorce on certain conditions and the husband marrying a second wife is such a condition. *Badarannissa* v *Mafiatala* 4 B L R 41 and *Ayatunnessa* v *Karam Ali* 12 C W N 907 referred to MAHARAM ALI v AYE A KHATUN (1915) 19 C W N 1622

——— s 27—

See s 23 I L P 34 All 487

I L R 34 All. 587

1 Pat L J 37

See CONTRACT I L R 48 Calc 1030

——— *Agreement in restraint of trade—Mutual agreement between two neighbouring landowners not to hold cattle markets on the same day* Held that an agreement entered into by an owner of land with the owner of adjoining land to the effect that a market for the sale of cattle should not be held on the same day on the lands of both of them is not an agreement to which the principle of s 27 of the Indian Contract Act 1872 applies POTHI RAM v ISLAM FATIMA (1915)

I L R 37 All 212

——— *Agreement in restraint of trade—Sale of goodwill with undertaking to abstain from business for a term—Goodwill what is—Buying off a newly started rival business if purchase of goodwill—Agreement not divisible wholly void—Compensation* Defendant had been carrying on business as a carrier of passenger by boats between certain terminal stations calling *en route* at certain intermediate stations Plaintiff started a rival business and having secured the terminal ghats could embark and re embark passengers at more central points After running it for a few months during which he did not acquire a name for punctuality safety or convenience he was bought off by defendant by an agreement by which for a consideration to be paid by defendant he purported to transfer his leases of ghats and his goodwill and bound himself not to exercise the business for a period of three years *Held* that plaintiff had no goodwill to transfer and the word good will was introduced into the agreement only to circumvent the provision of s 27 of the Contract Act which the undertaking to abstain from carrying on boat business for three years contravened. The provision of s 27 making agreements in restraint of trade not permitted by the exceptions to that section to that extent void implies that if the agreement can be broken up into parts it will be valid in respect of those parts which are not vitiated as being in restraint of trade *Held* that in the present case the agreement not being divisible was wholly void That the agreement being found void under s 65 of the Contract Act defendant should be made to compensate the plaintiff for the advantages he had received under it PARASULLAH MULLICK v CHANDRA KANTO DAS (1917) 21 C W N 979

CONTRACT ACT (IX OF 1872)—*contd*

——— s 27—*contd*

——— *Rival businesses in plying ferry boats—Sale of goodwill of one to the owner of the other—Agreement not to start similar business by vendor if in restraint of trade* The respondent plied passenger ferry boats on a river The appellant started a similar business and gained an advantage over the respondent by securing better landing places and negotiating facilities for collecting dues In 1910 the appellant purported to sell to the respondent the goodwill of his trade in plying the ferry boats and every description of interest and ownership which the appellant had acquired in the several landing places as well as settlements obtained for the collection of tolls By a separate document the appellant undertook to close the business of plying the particular ferry boats and that if he ever carried on the business again he would return the whole amount of consideration *Held* that the transaction amounted to a sale of a real goodwill within the meaning put on the expression in CHURTON v DOUGLAS (1) TREGO v HUNT (2) and INLAND REVENUE COMMISSIONER v MULLER (3) and as used in the same sense in s 27 of the Contract Act CHANDRA KANTA DASS v PARASULLAH MULLICK L R 48 I A 508

26 C W N 345

——— s 28—*Limitation Act (IX of 1908) s 3—Insurance—Agreement in restraint of legal proceedings—Modification of the law of limitation by agreement of the parties—Rights and remedies distinction between—Conditional release or forfeiture not invalid* The S Insurance Co granted a policy of insurance against fire to the B Co on certain property of the latter the policy containing a clause to the effect that if a claim were made and rejected and an action or suit were not commenced within three months after such rejection all benefit under the policy should be forfeited Damage was caused to the property of the B Co thus insured and a claim was made by that company of the S Insurance Co which was rejected by the latter More than three months after such rejection the B Co filed a suit against the S Insurance Co to recover the amount of their claim *Held* that there is a distinction between the extinction of a right and the loss of a remedy that s 28 of the Contract Act was aimed only at covenants not to sue at any time and at covenants not to sue for a limited time that a conditional release or forfeiture was a very different thing from a covenant not to sue although to avoid circuity of action a covenant not to sue had sometimes been held equivalent in effect to a conditional release and that the condition of forfeiture in the policy in question in the suit was not within the scope of s 28 of the Contract Act The correctness of the decision in *Hirabhai* v *Manufacturers Life Insurance Co* 14 Bom L R 741 doubted *Per* BATCHELOR J —As I understand the matter what the plaintiff was forbidden to do was to limit the time within which he was to enforce his rights what he has done is to limit the time within which he is to have any rights to enforce and that appears to me to be a very different thing BARODA SPINNING AND WEAVING COMPANY LTD v SATYANARAYEN MARINE AND FIRE INSURANCE COMPANY LTD (1913) I L R 38 Bom 344

——— s 30—

See PAKKA ADATIA.

I L R 45 Bom 242

CONTRACT ACT (IX OF 1872)—*contd*

——— s 23 65—*contd*

or of an agreement which is afterwards made void by circumstances which supervene LEDU COACHMAN *v* HIRALAL BOSE (1915)
I L R 43 Calc 115
19 C W N 919

———*Marriage brocage agreement—Money paid under when recoverable—Principle of English Law applicability of—Transfer ostensible or real whether a proper test* A marriage brocage agreement is unlawful and void *ab initio* and brokerage paid thereunder is recoverable if the agreement or substantial part of it is not performed. Such an agreement does not fall within s 65 of the Contract Act and the rule to be applied is the rule of English Law *Taylor* v *Bowers 1 Q B D 291 Kearley* v *Thomson 24 Q B D 742 Barclay* v *Pearson* [1893] *2 Ch 154* and *Petherperumal Chetty* v *Muniandy Servai I L R 35 Calc 551* referred to *Ledu Coachman* v *Hiralal Bose I L R 43 Calc 115* dissented from The rule applies whether the transfer of the property under the agreement was merely ostensible or real *In re Great Berlin Steamboat Company 26 Ch D 616* followed SRINIVASA *v* SESHA (1917)
I L R 41 Mad 197

——— s 24—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 11 I L R 40 Bom 614
See CONTRACT 3 Pat L J 412

——— *Contract void—Consideration unlawful—Agreement to stifle criminal prosecution—Agreement against public policy* The plaintiff sued for specific performance of a contract whereby the defendant s husband had agreed to convey certain land to her (plaintiff) for Rs 150 subject to the condition that in the event of a criminal prosecution for criminal breach of trust instituted by the plaintiff against the said intending vendor not being withdrawn the contract was not to be enforced The defendants contended that the contract was void as being opposed to public policy *Held* dismissing the suit that the contract could not be enforced as part of the consideration was void on the ground of being opposed to public policy BANI RAMCHANDRA *v* JAYAWANTI GOVIND (1918) I L R 42 Bom 339

——— s 25—

See HATCHITTA I L R 46 Calc 746
See HINDU LAW (JOINT FAMILY)
I L R 2 Lah 263

——— to pay time barred debt—

See LIMITATION ACT 1908 s 19
6 Pat L J 121

——— *Public policy—Agreement for future separation between husband and wife—Mahomedan law—Agreements void* An agreement for future separation arrived at between husband and wife (who are Mahomedans) is void as being against public policy under s 23 of the Indian Contract Act (IX of 1872) *Meherally* v *Sakerkhanoobai I L R 7 Bom I P 602* followed BAI FATMA *v* ALIMAHOMED AIYEB (1912)
I L R 37 Bom 280

——— Debt *meaning of* A promise to pay the amount which may be found due by an arbitrator on taking accounts between the parties is not a promise to pay a debt within the meaning of s 25 of the Indian Contract Act (IX of 1872) the amount not being a liquidated sum The decision of SUBRAHMANYA AYYAR J in *Sabju Sahib* v *Noordin Sahib I L R 22 Mad 139 143* followed DORAISAMI PADAYACHI *v* VAITHILINGA PADAYACHI (1916)
I L R 40 Mad 31

——— Agreement partly void—*partly enforceable but indivisible* The defendant executed an agreement in favour of the plaintiff (who was his brother and for some time had managed his properties) to this effect I have been very much benefited by the works done by you and there is possibility of more good being done by you in future In consideration of these benefits I actuated by my sense of duty promise to grant you for your enjoyment a life long annuity of Rs 150 *Held* that the agreement so far as it related to past services was enforceable and void as regards future services but the agreement being one and indivisible and it being impossible to apportion the promised reward between the past and the future the whole agreement was void BASANTO KUMAR CHOUDHURY *v* MADAN MOHAN CHOUDHURY (1918) 23 C W N 639

———Time Barred debt—*Not necessary that the agreement should in terms refer to the barred debt* A promissory note purported to be executed for cash received, but the real consideration was proved to be a debt the recovery of which was barred by Statute of Limitations *Held* that the promissory note was a contract enforceable under s 25 cl (3) of the Indian Contract Act A party to a contract may prove that the actual consideration was something different from that recited in the document and effect must be given to the real consideration. A contract falling within s 25 cl (3) of the Indian Contract Act is no exception to this rule The agreement will be enforced if the real consideration is shown to be a barred debt though no reference is made in the document to such debt *Appa Rao* v *Suryaprakasa Rao I L R 23 Mad 94* considered *Vasudeva* v *Narasimma I L R 5 Mad 6 8* referred to *Kumara* v *Srinivasa I L R* MOODELLY *v* MUNISAWMI MOODELLY (1909)
I L R 33 Mad 159

———*Debt barred promise to pay—Conditional promise—Suit to recover debt if lies* Acknowledgment of a barred debt cannot give a fresh start to limitation in favour of the creditor Under cl (3) of s 25 of the Contract Act a barred debt is considered a good consideration for a promise to pay the new promise furnishing the measure of the creditor s right the whole of the promise whether free or clogged with a condition gives the cause of action Where *A* and *B* entered into an agreement of partnership wherein it was *inter alia* provided that 6 annas out of the profits of the business in the share of *A* would go toward liquidating a previous debt of Rs 600 due by *A* to *B* which had become time barred at the date of the agreement *Held* that *B* could not recover the debt except in the manner provided in the agreement BINDAE DASYA CHUTIANI *v* CHOTA (1912) 16 C W N 636

——— s 26—

See CUSTOM (MARRIAGE)
I L R 1 Lah 574

CONTRACT ACT (IX OF 1872)—*contd*

——— s 26—*contd*

——— *Kabinnamah—Authority given by Mahomedan husband to wife to divorce on husband marrying a second wife if valid* A provision in a *kabinnamah* by which a Mahomedan husband authorises his wife to divorce herself from him in the event of his marrying a second wife is not void under s. 26 of the Contract Act It is lawful for a Mahomedan husband to delegate to his wife power to divorce on certain conditions and the husband marrying a second wife is such a condition. *Ladarannissa v Mafatala 7 B L R 442* and *Ayatunnessa v Karam Ali 12 C B N 907* referred to MAHARAM ALI v AYE A KHATUN (1915) 19 C W N 1622

——— s. 27—

See s 23 I L R 34 All 587

I L R 34 All 587

1 Pat L J 37

See CONTRACT I L R 48 Calc 1030

——— *Agreement in restraint of trade—Mutual agreement between two neighbouring landowners not to hold cattle markets on the same day* *Held* that an agreement entered into by an owner of land with the owner of adjoining land to the effect that a market for the sale of cattle should not be held on the same day on the lands of both of them is not an agreement to which the principle of s. 27 of the Indian Contract Act 1872 applies POTHI RAM v ISLAM FATIMA (1915)

I L R 37 All 212

——— *Agreement in restraint of trade—Sale of goodwill with undertaking to abstain from business for a term—Goodwill what is—Buying off a newly started rival business if purchase of goodwill—Agreement not divisible wholly void—Compensation* Defendant had been carrying on business as a carrier of passenger by boats between certain terminal stations calling *en route* at certain intermediate stations Plaintiff started a rival business and having secured the terminal ghats could embark and re embark passengers at more central points After running it for a few months during which he did not acquire a name for punctuality safety or convenience he was bought off by defendant by an agreement by which for a consideration to be paid by defendant he purported to transfer his leases of ghats and his goodwill and bound himself not to exercise the business for a period of three years *Held* that plaintiff had no goodwill to transfer and the word good will was introduced into the agreement only to circumvent the provision of s 27 of the Contract Act which the undertaking to abstain from carrying on boat business for three years contravened The provision of s 27 making agreements in restraint of trade not permitted by the exceptions to that section to that extent void implies that if the agreement can be broken up into parts it will be valid in respect of those parts which are not vitiated as being in restraint of trade *Held* that in the present case the agreement not being divisible was wholly void That the agreement being found void under s 65 of the Contract Act defendant should be made to compensate the plaintiff for the advantages he had received under it PARASULLAH MULLIK v CHANDRA KANTO DAS (1917) 21 C W N 979

CONTRACT ACT (IX OF 1872)—*contd*

——— s 27—*contd*

——— *Rival businesses in plying ferry boats—Sale of goodwill of one to the owner of the other—Agreement not to start similar business by vendor if in restraint of trade* The respondent plied passenger ferry boats on a river The appellant started a similar business and gained an advantage over the respondent by securing better landing places and negotiating facilities for collecting dues In 1910 the appellant purported to sell to the respondent the goodwill of his trade in plying the ferry boats and every description of interest and ownership which the appellant had acquired in the several landing places as well as settlements obtained for the collection of tolls By a separate document the appellant undertook to close the business of plying the particular ferry boats and that if he ever carried on the business again he would return the whole amount of consideration *Held* that the transaction amounted to a sale of a real goodwill within the meaning put on the expression in CHURTON v DOUGLAS (1) TREGO v HUNT (2) and INLAND REVENUE COMMISSIONER v MULLER (3) and as used in the same sense in s 27 of the Contract Act CHANDRA KANTA DASS v PARASULLAH MULLICK L R 48 I A 508

26 C W N 345

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——— s 30—

See PAKKA ADATIA

I L R 45 Bom 242

CONTRACT ACT (IX OF 1872)—*contd*

——— s 30—*contd*

See WAGERING I L R 37 Bom 261

See WAGERING CONTRACTS I L R 42 Bom 373

———*Contract collateral to a wagering contract not unenforceable* Where an agent has incurred losses on behalf of his principal he is not disentitled to recover as against the principal by reason of the contract in respect of which such losses were incurred being a wagering contract *Shibbo Mal* v *Lachman Das I L R 23 All 165* followed *Thacker* v *Hardy I L R 4 Q B D 685* referred to JAGAT NARAIN v SRI KISHAN DAS (1910) I L R 33 All 219

———*Wagering contract—Purchase of grain pit through agent—Intention of parties* The plaintiffs who were commission agents purchased for the defendants at their request a grain pit The defendants however did not pay the price agreed upon and the plaintiffs resold the pit at a loss They then sued the defendants to recover the loss on the resale of the pit and their commission *Held* that whether or not it might have been the intention of the parties that the grain pit should be resold as it was the defendants making a profit or bearing a loss on the transaction the transaction between the parties was not a wagering contract within the meaning of s 30 of the Contract Act *Forget* v *Ostigny [1895] A C 318* and *Jagat Narayan* v *Sri Kishan Das I L R 33 All 219* followed BISHESHAR DAYAL v JWALA PRASAD (1914) I L R 36 All 426

———*Bombay Act III of 1865 s 1—Lottery—Sanction of Government of India—Effect of sanction to save criminal prosecution—Sanction cannot override Imperial Acts or Acts of Indian Legislature defining civil law—Contract to purchase a ticket in a lottery though sanctioned by Government is void—Injunction cannot be granted in support of a void contract—Motion—Costs* In April 1917 the Western India Turf Club organised a War Loan Lottery having previously obtained the sanction of the Government of India for such undertaking as a special case The tickets in the said lottery from No 1 onwards were offered to the public at R 10 each The plaintiff being desirous of securing a particular ticket bearing the number 15315 purchased the same through one of the agents of the Club who had the disposal of such ticket A receipt for Rs 10 was passed to the plaintiff in which the number of the ticket was entered As the book containing the ticket had not been sold to that number the agent of the Club agreed actually to hand over the ticket itself when he got to the particular number in the book Through some mistake the book containing the particular ticket was sent to Calcutta where it was issued and delivered to defendant No 3 The plaintiff insisting on having the ticket purchased by him applied to the Club for its delivery to him The club thereupon decided to withdraw the ticket 15315 altogether to return the plaintiff's money paid in respect of that ticket and to issue a new ticket 15315 A to the 3rd defendant The 3rd defendant altered the number of the ticket to 15315 A but the plaintiff declined to abide by this arrangement The plaintiff then sued the Club and 3rd defendant for an injunction and order restraining the 1st defendant the Secretary of the Club and 2nd defendant a member of the Club on behalf of himself and all other members of the Club from withdrawing ticket No 15315 from the lottery and from paying the amount of any prize drawn by that ticket or any other ticket substituted in place thereof to the 3rd defendant *Held* (i) that the effect of the sanction of the Government of India being merely to save any prosecution under the criminal law so far as the civil law was concerned the Government had no power to overrule the Imperial Acts or the Acts of the Indian Legislature which determined the rights of parties (ii) that having regard to the first portion of s 30 of the Indian Contract Act which provided that agreements by way of wager are void the contract in question was an agreement by way of wager and was consequently void (iii) that the contract sued on was also one of the character mentioned in the first portion of s 1 of Bombay Act III of 1865 and was therefore null and void (iv) that no injunction could be granted in support of a void contract DORABJI JAMSETJI TATA v EDWARD F LANCE (1917) I L R 42 Bom 676

——— s 30 and 57—*Intention of the parties—Payment of differences—Contract Act (IX of 1872) s 57* There is no authority for the proposition that because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event the contract is void as a wager if that event does not happen Such a result would be *inconsistent with* the principle underlying s 57 of the Contract Act JOSHI NARBADASHANKAR v MATHURADAS (1910) I L R 34 Bom 519

——— ss 30 and 65—*Money advanced on account of satta transactions not recoverable* *Held* that no suit will lie or the recovery of money deposited with another on account of *satta* transactions *Dayabha Tribhovandas* v *Lakhmichand Panachand I L R 9 Bom 358* followed CHHANGA MAL v SHEO PRASAD I L R 42 All 449

——— s 32 34 56 and 65—*Guarantee—Contract construction of—Whether contingent or unconditional agreement—Inadmissibility of evidence of what took place after the execution of the contract on question of its construction* The question for determination in this appeal was the construction of the following letter dated 7th August 1909 which was signed by the defendant and given to the plaintiffs as security for the repayment of the loan of Rs 1½ lakhs mentioned therein.

In consideration of your having at my request acceded to the proposal of the Secretaries Treasurers and Agents of the Tricumdas Mills Company Limited to advance to the Mills Rs 1½ lakhs, I hereby bind myself to procure a loan *within two* weeks of Rs 11 lakhs on the first mortgage of the Mills block property and to pay you thereout the said sum of Rs 1½ lakhs agreed to be *advanced* by you to the Mills In a suit for damages for breach of the contract contained in *the letter the* Courts in India held in favour of the defendant that all he had undertaken to do was to procure the lending of Rs 11 lakhs if a first mortgage of the Mills was given and to pay thereout Rs 1½ lakhs to the plaintiffs *Held* (reversing that decision) that on its true construction the *document amounted* to a substantial undertaking by the defendant

CONTRACT ACT (IX OF 1872)—*contd*

———— s 32 34 56 and 65—*contd*

that a loan of Rs 11 lakhs should be procured and that out of that loan the sum of Rs 1½ lakhs should be repaid to the plaintiffs *Held* Evidence of what took place after the execution of the document was not admissible on the question of its construction. VISSANJI SONS & CO *v* SHAPURJI BURJORJI (1912) I L R 36 Bom 387

———— s 37—

See DAMDUPAT RULE OF I L R 42 Calc 826

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 54 I L R 29 Mad 462

———— ss 38 54—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXIII r 3 I L R 38 Mad 959

———— s 38—

See MORTGAGE 5 Pat L J 376

———— s 39—

See LESSOR AND LESSEE I L R 42 Mad 203

See MORTGAGE 2 Pat L J 168

———— *Contract—Mortgage—Part of consideration unpaid —Effect of such non payment* Where on execution and registration of a mortgage an interest in the mortgaged property has vested in the mortgagee the fact that part of the mortgage money as specified in the deed of mortgage has not been paid, neither renders the mortgage invalid nor entitles the mortgagor to rescind it at his option. *Gokal Chand* v *Rahman Punj Rec 1907 274* dissented from *Tatia* v *Balaji I L R 22 Bom 1 6 Subba Rau* v *Devu Shetti I L R 18 Mad 126 Bajranji Sahai* v *Udit Narain Singh 10 C W N 93?* and *Baij Nath Singh* v *Paltu All Weekly Notes 1908 38* referred to RASHIK LAL *v* RAM NARAIN (1912) I L R 34 All 273

———— ss 29 55 63 and 73—*Breach of contract to deliver goods at a particular time—Damages measure of—Time at which damages should be computed* A contract to deliver goods within a certain period is broken by non delivery before its expiry in the absence of an agreement between the parties to extend the time for performance The measure of damages in such a case is the difference between the contract rate and the market rate at the expiry of the period agreed upon as the time for delivery in the contract *Per* WHITE C J —S 63 of the Contract Act does not entitle a *promisee* for his own purposes and without the consent of the *promisor* to extend the time for performance which had been agreed to by the parties to the contract Nor does s 55 enable him to keep alive a broken contract in the hope of being able to recover heavier damages for its breach *Ogle* v *Earl Vane L R 2 Q B 275 281* and *Ashmore & Co* v *Cox & Co [1899] 1 Q B 43* explained *Nickoll & Knight* v *Ashton Edridge & Co [1900] 2 Q B 298* and *Roth* v *Taysen 1 Com. Cas 306 s c 73 L T 628* referred to *Per* AYLING J —S 63 deals only with concessions on the part of the *promisee* advantageous to the *promisor* and cannot be invoked to support an extension of time by the *promisee* for his own benefit S. 55 read with s. 2 (i) means nothing more than this on the *promisor's* failure to perform within the contract time the *promissor* loses the power to enforce the contract that is, to claim any advantage due to himself thereunder The *promisee* has the option of enforcing it or not as it may suit him and if he elects to enforce the contract he can under s 73 obtain only such damages as naturally arose in the usual course of things from the breach or the parties knew when they made the contract to be likely to result which cannot include any aggravation of damages caused by the *promisee's* action or inaction subsequent to the breach MUTTHAYA MANIAGARAN *v* LEKKU REDDIAR (1914) I L R 37 Mad 412

———— ss 29 55 64 65 73 74 and 75—*Vendor and Purchaser—Right to recover deposit forfeited by terms of a contract to sell* A entered into a contract on 24th February 1903 with *B* for the purchase of lands belonging to the latter for Rs. 41 000 Of this amount Rs 4 000 was paid in advance Rs 20 000 was agreed to be paid by means of a mortgage and the balance before the 24th May 1903 when the conveyance was to be executed The contract provided that the Rs 4 000 was to be forfeited if there was any delay on the part of the purchaser It was also stipulated that the vendor was to execute the conveyance either in favour of the purchaser or those nominated by him In part performance of this contract a sale of a portion of the lands was effected in favour of *M* on the 28th March 1903 Just before the day for payment *B* gave notice to *A* that if the sale was not completed on or before the agreed date the contract would be avoided *A* failed to perform the contract before that date Subsequently *B* sold the lands to third parties and realised Rs 1 500 in excess of the price stipulated by *A* *A* brought a suit for the specific performance of the contract or in the alternative to recover the Rs 4 000 paid by him The Subordinate Judge disallowed the claim for specific performance but decreed the return of the deposit of Rs 4 000 to *A* *B* appealed. *Held* by the Court (SADASIVA AYYAR, J dissenting) that *A* the plaintiff was not entitled to a return of the deposit Neither s 64 nor s 74 of the Indian Contract Act (IX of 1872) is applicable to such a deposit and a stipulation for its forfeiture in case of breach is not one by way of penalty The law of India on this subject does not differ from the English law A stipulation to forfeit 10 per cent of the consideration in case of breach is neither unreasonable nor extraordinary A vendor can be given relief by way of rescission of contract and at the same time in the absence of express stipulation to the contrary may be allowed to retain the deposit *Howe* v *Smith L R 27 Ch D 89* applied *Per* WHITE C J —(i) The last rule would apply *a fortiori* when as in this case there is an express agreement to forfeit the deposit (ii) Since the Judicature Acts the question whether time is of the essence of the contract must be governed by rules of equity and purchaser is entitled in such cases as here to fulfil his contract within a reasonable time after the agreed date *Per* MILLER J —(i) Time was of the essence of the contract in this case (ii) The agreement to forfeit is not wanting in consideration as the deposit is not made as part payment but as security for the purpose of binding the bargain. *Per* SADASIVA AYYAR, J —A was

CONTRACT ACT (IX OF 1872)—*contd*

——— ss 39 55 64 65 73 74 and 75—*contd*

entitled to recover the deposit under the Indian Contract Act which is exhaustive as regards the law of Vendor and Purchaser and the English law is not applicable A stipulation to forfeit a deposit is a stipulation to pay a penalty Time was of the essence of the contract in this case NATESA AIYAR v APPAVU PADAYACHI (1913)

I L R 38 Mad 178

——— ss 39 73 120—*Suit for price of goods bargained and sold—Cause of action—Indian Contract Act has not altered the law relating to recovery of debts and liquidated demands—Civil Procedure Code (Act V of 1908) s 128* Before the passing of the Indian Contract Act wherever a consideration was executed for which a debt payable at the time of action had accrued due either under an express promise or under one implied by law the debt might be sued for in an *indebitatus* count thus the count lay where the consideration moving from the seller of goods was executed by his providing goods and only the money debt due by the buyer remained The form of count in such a case both in England and in Bombay would have been for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant The cause of action was said to sound in debt and not in damages In s 128 of the Civil Procedure Code of 1908 there is legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act 1852 are still maintainable in British India The Indian Contract Act has not altered the law relating to the recovery of debts and liquidated demands The fact that a party to a contract may under s 39 of the Indian Contract Act when the other side has refused to perform it put an end to it and sue for compensation for the breach does not oblige him to take that course at his peril he may if he prefers to sue to recover any debt due to him which has arisen from his execution of his part of the contract *Per* BATCHELOR J —S 73 of the Indian Contract Act prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract which he for his part keeps on foot If that is so the mere absence from the Act of a specific provision giving the remedy of a suit to recover the price cannot be construed as the distinct legislative withdrawal of that remedy P R & Co v BHAGWANDAS (1909)

I L R 34 Bom 192

——— s 41—

See MORTGAGE. I L R 39 All 178

——— ss 41 and 47—

See SPECIFIC RELIEF ACT 1877 ss 41 & 34 4 Pat L J 682

——— s 43—

See CIVIL PROCEDURE CODE 1882 s. 43

I L R 33 Mad 317

See CO SHARER 15 C W N 332

See LANDLORD AND TENANT

I L. R 34 All 634

——— ss 43 68 69 70 72 146 222—

See CONTRIBUTION I L. R 38 Calc 1

CONTRACT ACT (IX OF 1872)—*contd*

——— s 44—

See JOINT JUDGMENT DEBTORS

I L R 39 Mad 548

——— ss 44 74—

See PENALTY I L R 44 Calc 162

——— s 45—*Partnership—Suit by surviving members to recover debt due to firm—Representatives of deceased members not necessary parties to suit* *Held* that the representatives of a deceased partner are not necessary parties to a suit for recovery of a debt which accrued due during the lifetime of the deceased partner *Held* also that s 45 of the Indian Contract Act does not apply to a suit to recover a debt due to a partnership firm *Gobind Prasad* v *Chandra Sekhar All Weekly Notes (1881) 133 Motilal Bechardass* v *Ghellabhai Hariram I L R 17 Bom 6* and *Debi Das* v *Narpat I L R 20 All 365* followed UGAR SEN v LAKHMI CHAND (1910) I L R 32 All 638

——— s 47—*Sale and purchase of cotton goods—Forward contract March delivery—Contract not to be cancelled on any account—Contract governed by the Rules of the Bombay Trade Association—Rule 17 of the Bombay Cotton Trade Association—Vendor bound to tender goods without demand from the purchaser—Railway receipt not a delivery order—Vendor committing a breach cannot sue for damages—Vendor not mulcted in costs breach being technical* By a contract dated the 25th January 1914 the defendant agreed to purchase from the plaintiff 200 bales of cotton—March delivery between the 15th and 25th The contract was expressed to be in all details governed by the Rules of the Bombay Cotton Trade Association subject to the exception that it was not to be cancelled on any account Under Rule 17 of the Rules of the Bombay Cotton Trade Association the vendor was bound to tender a delivery order backed by the goods before 1 P M of due date In the event of his failure to do so the buyer had three courses open to him (i) to cancel the contract (ii) to buy at seller's risk (iii) to close at the room rate of the day On the 19th March 1914 the plaintiff handed over to the defendant a railway receipt for 100 bales On the 25th March 1914 the defendant applied to the railway authorities for delivery of the goods and failing to get the same returned the railway receipt the next day to the plaintiff informing him that by reason of non performance on the plaintiff's part the contract had been cancelled by the defendant The plaintiff relying upon the clause of the contract precluding either party from cancelling the same in any event claimed the sum of Rs 2 279 13 0 the difference between the contract price and the market price in respect of 100 bales The plaintiff further contended that giving a railway receipt was tantamount to giving possession of the goods and that inasmuch as the defendant had accepted the railway receipt and did not notify the plaintiff that the goods had not come to hand before due date he was estopped from pleading that the plaintiff had not made a sufficient tender under Rule 17 of the Bombay Cotton Trade Association. *Held* (i) that it was the plaintiff's duty to satisfy himself that the goods covered by the receipt had actually arrived before due date and that if he failed to do so he would not be absolved from the obligation of tendering the delivery order backed by the goods according to the contract (ii) the plaintiff having shown himself to be in the breach could not approach the

CONTRACT ACT (IX OF 1872)—contd

—— s 56—contd

Court and sue for damages on the contract *Ianmali Harmand v Tarachand Ganeshamdi (1891) Chitty & Patell's Bom S C C Ca* 305 referred to. MUKUNCHAND PAJARAM v NIHALCHAND GURMUKHRAI (1915) I L R 40 Bom 517

—— s 54—

See O XXIII r 3

I L R 38 Mad 959

—— s 55—

See s 39 I L R 37 Mad 412

See SALE OF LAND

——*When time may be considered of the essence of a contract—Where intention to make time of essence of contract is not specifically expressed in unmistakable terms—Rule of equity to disregard letter of contract and take contract substantially as meaning completion of it within reasonable time—What takes place prior to signing of contract but nothing that takes place afterwards to be looked at in judging of intention* By an agreement dated 6th July 1911 the defendant (respondent) agreed to sell his interest in certain land which he held on lease from the Secretary of State for India to the plaintiff (appellant) for Rs 85 000 of which Rs 4 000 was paid on execution of the agreement and it was agreed that the title was to be made marketable and that Rs 80 500 should be paid on the execution of the deed of sale which was to be prepared and received within two months from the date of the agreement and Rs 500 on the transfer of the land after the conveyance should have been registered and there was a clause to the effect that if the purchaser did not pay the amount of the purchase money within the fixed period he should forfeit his right to the earnest monies and the vendor should be at liberty to re-sell the property On 3rd October 1911 requisitions as to title were made by the appellant The respondent did not comply with the requisitions, but on 6th October he asserted a right to put an end to the contract on the ground that time was of its essence and claimed to be entitled to the deposit of Rs 4 000 as the appellant had failed to complete his purchase within the time fixed. In a suit for specific performance *Held* (reversing the appellate judgment of the High Court) that time was not of the essence of the contract S 55 of the Contract Act (IX of 1871) did not lay down any principle which differed from those that obtained as regards contracts for the sale of land by which equity in such a case looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place really intended no more than that it should take place within a reasonable time *Lennon v Napper* 2 *Sch & Lef* 682 *Roberts v Berry* 3 *DeG M & G* 284 289 *Tilley v Thomas L R* 3 *Ch* 61 and *Stickney v Keeble* [1915] *A C* 386 referred to as laying down the doctrine adopted by and embodied in s 55 in reference to sales of land. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to it are to be taken as having really in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation that time is intended to be of the essence of the contract Equity will also infer an intention that time should be of the essence of a contract from what has passed between the parties prior to the signing of the contract the construction of which cannot in the contemplation of equity be affected by what takes place after it has once been entered into *Held* therefore that there was nothing in the language of the agreement or the subject matter to displace the presumption that for the purpose of specific performance time was not of the essence of the bargain. The subject matter or the character of the leasehold were not such as to take the case out of the class to which the principle of equity applies The appellant did not bind himself by his correspondence subsequent to the agreement to a new agreement that time if it was not originally of the essence should be made so As to the language of the agreement itself their Lordships agreed with the view of the Trial Judge that there was nothing said in it sufficient to exclude the equitable canon of interpretation and with his conclusion that the defendant had no justification in claiming in the circumstances to treat time as of the essence JAMSHED KHODARAM v BURJORJI DHUNJIBHAI (1915) I L R 40 Bom 289

——*Contract when time of the essence of—Contract for the assignment of leasehold property effect of the insertion of a definite date for completion and payment of the purchase money with conditions as to forfeiture of the earnest money and liberty for the vendor to re sell—Certificate of lessor that conditions of lease have been complied with not necessary* C agreed to sell to *I* his interest in a property held on lease from the Secretary of State for India on certain conditions as to improvement for cultivation etc and as to not assigning or underletting the lands until these conditions had been carried out without the consent in writing of the Collector of Thana for Rs 85 000 of which Rs 4 000 was paid on the execution of the agreement and it was agreed that Rs 80 500 should be paid on the signing of the conveyance which was to be prepared and received within 2 months from the date of the agreement and Rs 500 on the transfer of the land after the conveyance should have been registered It was further provided that should *I* not have paid the amount of the purchase money within the time fixed then he should forfeit his right to the earnest money and *C* should be at liberty to resell the property *Held* that under the agreement time was of the essence of the contract *Held* further that *I* could not insist on *C* procuring a certificate from the Collector of Thana that all the conditions of the lease from the Secretary of State for India had been complied with BURJORJEE DHUNJIBHOY v JAMSHED KHODARAM (1913) I L R 38 Bom 77

——*Contract for sale of land and machineries—Test as to time being of the essence of the contract—Unnecessary delay of purchaser causing forfeiture of right to specific performance* The Defendant entered into an agreement with the Plaintiff for the sale of certain land and machineries wherein it was stipulated that the purchase was to be completed within the time and in the manner stated in the agreement and on failure thereof the vendor would be at liberty to cancel the agreement forfeit the earnest money and claim damages or specific performance of the contract *Held* that it is well settled that the mere fact that a date has been me[illegible]d for the performance of the agreement do[illegible] [illegible]lusively prove that

CONTRACT ACT—*contd*

———— s 56—*contd*

contract because the contract had come to an end on the outbreak of war *Held* reversing the decision of Chaudhuri J that the contract of affreightment which was an integral part of the contract with the buyers became unlawful on the outbreak of war inasmuch as it was a contract with an alien enemy and under the provisions of s 56 of the Indian Contract Act the contract with the buyers became impossible of performance MADHORAM HURDEO DASS v G C SETT (1917)

21 C W N 670

———— **ss 56, 9 20**—

———— *A contract for sale of certain goods on arrival if enforceable when goods shipped from Germany were captured after the outbreak of war by a belligerent but after proceedings in a Prize Court arrived in a different ship two years after—Such arrival if comes within the meaning of arrival contemplated by the contracting parties—Doctrines of frustration applicability of* Defendant contracted to supply Plaintiffs with five cases of white shawl cloth The contract was made on 21st January 1914 and it was headed contract shipment and arrival The goods were to be shipped in July and August 1914 The Defendant had previously ordered 50 cases of white shawl cloth from sellers in London In part fulfilment of the Defendant s order 20 cases were shipped in July 1914 by his sellers in a Germany ship S S Spitzfels Hamburg to Calcutta The German ship was captured by the British in the Mediterranean shortly after the outbreak of the war and was condemned as prize Under Government orders the cargo was transhipped at Alexandria into a different ship which arrived in Calcutta in June 1916 delivery to the consignees being made conditional upon payment of extra charges in the nature of transhipping and forwarding expenses There was a provision in the contract that in case of loss of the ship the contract should stand cancelled. There was a further provision in the contract that if the goods did not arrive within the specified time the sellers should notify their buyers and the latter should declare whether they are prepared to grant an extension of time otherwise the contract should be considered as cancelled The Defendant did not inform the Plaintiff of the arrival of the cases in June 1916 and he similarly ignored his other buyers of 1914 and sold them to other dealers at a profit to himself the market having risen The Plaintiff in July 1917 in consequence of information which he had received tendered the contract price to the Defendant and brought the present suit for non delivery of the goods *Held*—That having regard to the capture of the ship and the transhipment the Plaintiff was not entitled to the delivery of the goods on thier arrival in June 1916 in the same way as if there had been no interruption GOURI SANKAR AGARWALLA v H P MOITRA

26 C W N 573

———— ss 56 65—

————*Contract of charter party—Contract impossible of performance—Freight paid in advance—Export of goods shipped on board prohibited by Government—Claim for refund of freight—Bills of lading—Shipping orders—Common carriers—Carriers by sea—Private carriers—Carriers*

CONTRACT ACT—*contd*

———— ss 56 65—*contd*

Act (III of 1865)—Carriers by sea excluded by the Carriers Act—Loss by way of demurrage On the 1st April 1915 the defendant Steamer Company entered into an agreement with C & Co a firm of freight contractors whereby the latter chartered the steamer *Heja* for a voyage Bombay to Naples Genoa and—or Marseilles any two discharging ports at charter s option Subsequently the *Jeddah* was substituted for the *Heja* The plaintiffs procured from C & Co freight for 2 500 bales of cotton on the said steamer and were given the shipping orders which they presented to the defendants The plaintiffs put 2 500 bales of cotton on board the *Jeddah* and the defendants issued twenty five bills of lading relating to them having received in advance Rs 32 610 6 2 for freight The import of cotton into Genoa being prohibited by orders of Government the *Jeddah* did not leave the harbour and the voyage had to be abandoned Eventually the steamer unloaded her cargo and the plaintiff before getting delivery of their goods were required to deposit Rs 12 500 to cover the expenses and loss incurred by the ship The said sum was deposited by the plaintiffs under protest The plaintiffs subsequently demanded the return of Rs. 32 610 6 2 paid by them for freight and on the defendants disputing their liability to return the amount filed the suit for the recovery of the freight paid and for an account of Rs 12 500 deposited to defray the costs of unloading The defendants pleaded (i) that money paid in advance for freight was irrecoverable at law (ii) that they were common carriers and that the rights and liabilities of common carriers were governed by the principles of English law as modified by the Common Carriers Act of 1865 (iii) that in any event they were not liable to return the freight money as they were ready and willing to perform their part of the contract and (iv) that they were entitled to retain Rs 5 038 3 7 out of the sum deposited with them for expenses and loss incurred by the ship *Held* (i) that the contract became impossible of performance under s 56 of the Indian Contract Act and that the defendants were bound under s 65 of that Act to restore the sum of Rs 32 610 6 2 being the advantage they had received under the contract (ii) that on the evidence before the Court the defendants could not be treated as common carriers they having let out and chartered the whole ship to C & Co for a private gain (iii) that carriers by sea in India are not entitled to the benefits of Act III of 1865 (iv) that the defendants were entitled to claim demurrage and expenses incurred for unloading the cargo *Nugent v Smith 1 C P D 423* referred to *The Irrawaddy Flotilla Company v Bagwandas I L R 18 Calc 620* considered BOGGIANO & Co v THE ARAB STEAMERS Co LTD (1915) I L R 40 Bom 529

———— *Contract with hostile firm—Hostile firm incorporated in alien territory and having a branch in Bombay—Contracts with enemy become illegal on the outbreak of war—Trading with enemy—Impossibility of performance owing to the outbreak of war—proclamations and Ordinances on the outbreak of war between Great Britain and Germany—Hostile Foreigners Trading Order—Extension of time of performance after breach—Waiver of breach* The defendants were a German Joint stock Company incorporated under the laws of

CONTRACT ACT—*contd*

——— ss 56 65—*contd*

Hanover having a branch in Bombay under the sole management of one C B a German subject By a contract in writing between the plaintiffs and the defendants by their manager dated the 18th of February 1914 the defendants agreed to purchase from the plaintiffs the total quantity of waste of the several descriptions specified in the contract produced in the plaintiffs mills during the year ending the 31st December 1914 at the respective prices specified in the contract and to take delivery of whatever waste might be ready at least once monthly The defendants deposited with the plaintiffs 3½ per cent Government Promissory Notes of the face value of Rs ° 200 to be retained by the plaintiffs against the fulfilment of the contract On the 4th August 1914 war was declared between Great Britain and Germany On the 18th August the plaintiffs wrote to the defendants calling upon them to take delivery of waste under the contract On the 22nd August the manager of the defendant company replied that on account of the existing political position the defendants were not allowed to do business in India and requested the plaintiffs to keep the delivery of waste standing over until business was allowed to be resumed On the 5th September the defendants manager was interned as an alien enemy the defendants local business ceasing for all practical purposes On the 11th November the plaintiffs again called upon the defendants to take delivery of the waste the defendants replying that they were unable to arrange for further delivery until the declaration of peace On the 14th November an order called the Hostile Foreigners Trading Order was issued by which an hostile foreigner or firm was prohibited from carrying on or engaging in any trade or business in British India except under a license issued by or under the authority of the Governor General in Council subject to such conditions restrictions and supervision as the Governor General in Council may direct On the 3rd December the plaintiffs again called upon the defendants to comply with their notice of the 11th November on or before the 8th December and subsequently extended the time for taking delivery until the 16th December The defendants replied on the 18th December referring to the internment of their manager and claimed that under s 56 ( ) o the Indian Contract Act the defendants were relieved from the performance of their part of the contract On the 8th February 1915 the defendants obtained a license limited to the winding up and liquidation of their local business under Government supervision On the 16th February the plaintiffs informed the defendants that they had sold the waste of which the defendants had been under contract to take delivery at a loss of Rs 4 ° 0 13 0 and after deducting the value of the deposit demanded payment of Rs 2 074 13 2 On the 11th March the plaintiffs filed the suit to recover the sum of Rs 4 ° 0 13 0 from the defendants and for a declaration that the plaintiffs were entitled to retain the 3½ per cent Government Promissory Notes and to set off their value in part satisfaction of the decretal amount The defendants pleaded (i) illegality of contract on the outbreak of war (ii) impossibility of performance and (iii) waiver on the part of the plaintiff granting extension of time of performance till the 16th December 1914 *Held* (i) that the contract in suit became illegal on the outbreak of war and was dissolved on the 4th August 1914 (ii) that it had become impossible for the defendants to perform their part of the contract owing to subsequent events arising from a state of war (iii) that assuming that it only became so after the 14th November 1914 the plaintiffs gave the defendants further time for taking delivery until the 16th December and so waived any breach committed before that date (iv) that the defendants were entitled to a return of their deposit under s 65 of the Indian Contract Act *Janson v Driefontein Consolidated Mines Limited* [1902] *A C 484 509* *Wolf & Sons v Carr Parker & Co Limited 31 T L R 407* and *Kreglinger & Co v Cohen 31 T L R 592* referred to TEXTILE MANUFACTURING CO LTD v SALOMON BROTHERS (1915)

I L R 40 Bom 570

——— s 57—

See s 30 I L R 34 Bom 519

——— s 59 60—

See SALE FOR ARREARS OF REVENUE

I L R 38 Calc 537
15 C W N 443

——— ss 59 61—*Appropriation of payments* An appropriation of payment must be made by the debtor at the time of paying and by the creditor at the time of receiving the money If neither of them makes the appropriation the law appropriates the payment to the earliest debt Ss 59 to 61 of the Indian Contract Act enacted the rule of the Civil Law as laid down in *Clayton s Case 1 Mer 572 604* with certain modification KUNDAN LAL v JAGANNATH (1913)

I L R 37 All 649

——— s 60—*Appropriation—Decree for principal and interest payable by instalments—Instalment paid if may be applied first to discharging interest* Where a certain amount was decreed with interest at a certain rate and the defendant was directed to pay in regularly yearly instalments of a certain amount and he did pay the instalments as they fell due but did not say how the payment was to be appropriated and the decree holder claimed that he was at liberty to appropriate out of each payment as it was paid sufficient to satisfy the interest due at the date of payment and to credit the balance only to principal *Held* that he was entitled to do so *Per* RICHARDSON J (WALMSLEY J *dubitante*)—Where both principal and interest are payable under a contract or a decree in the absence of provision in the contract or decree and of appropriation by the debtor the creditor has the right to pay himself the interest first BISWANATH BHATTACHARYA v SOMESHWAR SARMA (1917) 21 C W N 1055

——— s 60 and 61—*Appropriation power of Court to make when neither party has done so* In making a payment to his creditor a debtor has the right to appropriate the payment to any particular debt or to any particular portion of a running account If he omits to make an express appropriation the right to do so devolves on the creditor Where neither party has exercised the right s 61 of the Contract Act 1872 which is an enabling section [illegible] the Court to apply the payments to [illegible] the debts in the order in which they were [illegible] Ss 60 and 61 of

CONTRACT ACT—*contd*

——— ss 60 and 61—*contd*

the Contract Act 1872 provide a procedure analo gous in all particulars to the English Law of appro priation In order to create a fresh period of limitation under the proviso to s 20 of the Limita tion Act 1908 the fact of part payment of a debt must appear in the handwriting of the per on making the part payment BISHUN PERKASH NARAYAN SINGH *v* MD SIDDIQUE

1 Pat L J 4"4

——— s 62—*Sale deed registered—Stipulation by vendee for benefit of vendor s creditor if enforcible by latter—Creditor informed of arrange ment by purchaser and purchaser acknowledged as debtor—Purchaser if trus ee—Novation—Limitation Act (IX of 1908) Sch I Art 116—Consideration definition of in Contract Act and in English law—Justice equity and good conscience rul of Courts in India to be guided by* Where a sum is payable by *A B* for the benefit of *C D C D* can claim under the contract as if it had been made with himself Defendants Nos 1 to 4 had executed a bond in favour of the plaintiff defendants No 1 to 4 on 18th August 1903 sold all their properties to defendant No 5 by a registered deed which pro vided that a part of the consideration money was to remain with d fendant No 5 for payment of the debt of the plaintiff The same day this arrangement was communicated to plaintiff by defendant No 5 whom plaintiff accepted as his debtor On the 25th of January 1908 plaintiff brought a suit again t the defendants for re covery of the money *Held* that there was no novation of contract within the meaning of s 62 of the Contract Act That plaintiff was entitled to sue and recover from defendant No 5 on the registered deed of sale although he was not a party to the contract and the suit was not barred by limitation *Tweedle* v *Atkinson I B & S 393* commented on and held to be no authority in India *Muhammad Khan* v *Husaini Begum I L R 32 All 410 14 C W N 865 Gregory* v *Williams 3 Merivale 582 Touche* v *Metropolitan Railway Warehousing Co L R 6 Ch App 677 Gandy* v *Gandy 30 Ch D 57* referred to and followed Consideration as defined in the Indian Contract Act is wider than the requirements of the English law In India the Courts are to be guided in matters of procedure by the rule of justice equity and good con cience DEBNARAIN DUTT *v* RAM SADHAN MONDAL (1913) I L R 41 Calc 137

17 C W N 1143

——— *Novation—where d btor has disabled himself from performing his promise under the new contract—Rescission—right to revert to old consideration* Plaintiff sued to recover from defen dant *N S* the money due to him on a bond executed in 1914 In 1916 *N S* executed a lease of land for 14 years in favour of one *A O* and on the same day sold to plaintiff and other creditors the right to recover the lease money from Amir Chand in payment of their debts *N S* however refused to perform his contract with *A C* and to deliver possession of the land The whole scheme there fore for payment of the debts fell through Not withstanding this defendant contended that there had been a novation of contract and that plaintiff could no longer sue on the bond *Held* that under the circumstances of the case the plaintiff was entitled to rescind his sale contract and to revert to his previous consideration s 62 of the Contract Act being no bar to the suit *Raja Ram* v *Mehr Khan (66 P R 1888)* followed *Bhagat Ram Ganpat Rai* v *Chajju Ram (15 P W R 1916)* Mussammat *Bhag Bhari* v *Gujar Mal (63 P R 1917)* *Allah Ditta* v *Naunar Din (56 P R 1916 F P)* *Dwarka Nath* v *Priya Nath (22 Calc W N 279)* and *Debnarayan Dutt* v *Chuni Lal Ghose (I L R 41 Calc 137 146)* distinguished NAJAI SHAH *v* RANGU RAM

I L R 2 Lah 323

——— ss 62 63—

See ARBITRATION I L R 41 Calc 85

——— s 63—

See s 4 I L R 38 Bom 355

See s 39 I L R 37 Mad 412

See s 55 I L R 43 All 257

——— *Release conditional on a future event valid—Evidence Act s 95—Evidence aliunde admissible to prove claim released* It was not the intention of the Legi lature in enacting s 63 of the Contract Act to depart from the Engli h law under which releases contingent on the hap pening of a future event are valid Such relea es are valid under the Contract Act Unlike the English law requires consideration in the ca e of relea es not under seal the Contract Act requires no consideration in the case of releases When a deed of release is silent as to the claim released, evidence *aliunde* is admissible under s 95 of the Evidence Act to show what claim was intended to be released MATHEW HENRY ABRAHAM *v* THE LODGE GOOD WILL NO 465 BELLARY (1910)

I L R 34 Mad 156

——— *Time extension of if creates new contract—Delivery after expiry of extend ed time acceptance of if amounts to new contract—Contract varied by introduction of fresh terms effect of—Plaint statements in when merely descriptive* By mere exten ion of time for delivery of goods a contract is not wiped out and no new contract arises only the promisee gets certain rights under s 63 of the Contract Act But in a case where subsequent to the contract a new term was introduced for the in pection of goods by the defendants in the plaintiff s godowns b fore deli very and after the time for delivery had long expired the defendants took delivery of 375 bales of jute the original contract being for much more and there being nothing to show what was the new agreement or arrangement under which such delivery was taken *Held* that the old contract had been superseded and the defendant could rely on the arbitration clause in the old contract and compel the plaintiff to submit the matter to arbi tration in terms of such contract and a suit would lie for the recovery of the price of the goods so delivered LUCHMI NARAIN BHAIYADAH *v* HOARE MILLER & Co (1913) 17 C W N 1098

——— s 64—

See s 39 I L R 38 Mad. 178

See s 55 I L R 33 Mad. 675

——— *Benefit meaning of—Sale by guardian of wards lands—Sale not for bind ing purposes—Purchase of other lands for wards out of sale proceeds—Suit by vendee for possession of portion of lands—Right of wards to avoid sale—Duty of wards to convey purchased lands or their value—*

CONTRACT ACT—*contd*

——— s. 64—*contd*

Suit by wards to set aside sale held barred by limitation—Competency of wards to set up plea of invalidity of sale in defence in vendee's suit—Limitation Act Art 44—Form of decree Where a guardian sold lands belonging to her wards for purposes not binding on them and, with the sale proceeds purchased subsequently other lands for them but the purchase of the specific lands was not in the contemplation of the parties at the time of sale and did not form part of the same transaction as the sale the lands so purchased did not constitute a *benefit* arising out of the sale under s 64 of the Indian Contract Act and the wards were not bound to convey them to the vendee before they avoided the sale Where the vendee from the guardian under a voidable sale having obtained possession of a portion of the lands, sued to recover the remainder after a suit by one of the wards who had attained majority to set aside the sale had been dismissed as barred by limitation under art 44 of the Limitation Act it is open to the wards to set up the plea of invalidity of the sale in defence in the vendee's suit in respect of the portion of the lands in their possession The vendee will be entitled in such suit to a decree for the value of the lands and in default of payment to a decree for possession CHINNASWAMI PEDDI v KRISHNASWAMI PEDDI (1918) I L R 42 Mad. 36

——— ss 64 66—

See LIMITATION ACT 1877 SCH II ART 91 I L R 38 Mad 321

——— ss 64 and 65—

See s 11 I L R 32 All 25

——— *Written contract—Material alteration by one party effect of—Breach of contract—Damages—Repayment of advance*] If a written contract is materially altered by one party without the knowledge and consent of the other the former is not entitled to damages for breach of contract but is entitled to a repayment of the advance made by him ANANTHA RAO v SURAYYA (1920) I L R 43 Mad 703

——— s 65—

See s 23 I L R 43 Calc 115

I L R 40 Mad 197

See s 27 21 C W N 979

See s 56 I L R 40 Bom 529 570

See s 32 I L R 37 Bom 387

See AGRA TENANCY ACT (II OF 1901) s 19 AND 20 I L R 32 All 383

See BHAGDARI AND NARWADARI TENURES ACT (BOM V OF 1862) s 3 I L R 39 Bom 358

See BROACH AND KAIRA INCUMBERED ESTATES ACT (XXI OF 1881) 28 I L R 41 Bom 546

See CONTRACT] I L R 45 Bom 225

See HINDU LAW JOINT FAMILY 5 Pat L J 622

——— *Void agreement party to it must restore and advantage gained under it—Indian Evidence Act (I of 1872) s 92—Oral evidence to show the real transaction evidenced by document if admissible* Where the plaintiff claimed the consideration money mentioned in a *kobala* and the defendant pleaded that the real consideration for the *kobala* was the service rendered to the plaintiff in inducing a third person to sell a certain property to the plaintiff and that there was no contract for payment of money *Held* that oral evidence to show the real nature of the transaction was rightly admitted S. 65 of the Contract Act does not apply when the object of the agreement is illegal to the knowledge of both parties at the time when it was made Where a *kobala* was executed mainly in consideration of the services rendered by the defendant in inducing his employer to sell a property to the plaintiff and was thus void the contract could not be regarded as having been discovered to be void or become void within the meaning of s 65 of the Contract Act *Held* further that in the circumstances of the case both the parties being in *pari delicto* no relief should be granted NATHU KHAN v SEWAK KOERI (1911) 15 C W N 403

——— *Agreement discovered to be void—Compensation payment of—Bhagdari Act (Bom Act V of 1862)—Alienation of unrecognised subdivision of a bhag—Talaidana patta* In 1902 the plaintiff executed a *talaidana patta* of lands forming an unrecognised sub division of a *bhag* in favour of defendants who were put in possession The deed contained a personal covenant whereby the plaintiff bound himself to give compensation to the defendants in case their possession was obstructed In 1910 the plaintiff sued to recover possession of the property by redeeming the *talaidana patta* which he alleged was a mortgage The lower Courts held that the alienation was void under the provisions of the Bhagdari Act (*Bom Act V of 1862*) and following the decision of *Jijibhai v Nagji 11 Bom I R 693* ordered that the plaintiff could recover possession on payment of moneys he had received from the defendants The plaintiff having appealed *Held* that the order of compensation against the plaintiff was justified inasmuch as the agreement was discovered to be void within the meaning of s 65 of the Indian Contract Act (IX of 1872) long after the transaction and as there was a personal covenant in the agreement *Per* SHAH J —Neither under s 65 of the Indian Contract Act nor under the ruling in *Jijibhai v Nagji 11 Bom L R 693* is the Court bound to award compensation in all cases as a matter of course where a document is found to be void in consequence of the provisions of the Bhagdari Act It has to be considered in each case whether the agreement is discovered to be void and whether any person has received any advantage under such agreement as required by s 65 or whether the covenant in each particular case justifies the order of compensation. The amount of compensation also has to be determined with reference to the circumstances of each particular case HARIBHAI HANSJI v NATHUBHAI RATNAJI (1913) I L R 38 Bom 249

——— *Minor—Minority successfully pleaded as a defence to a suit—Disallowance of costs —Appeal—Competence of Appellate Court to interfere with the discretion of the Court below as to the allotment of costs* Where the Judge has given his reasons and all the circumstances are before the Court of Appeal, the Court of Appeal can if

CONTRACT ACT—*contd*

———— s 65—*contd*

satisfied that the Judge s discretion has not been judicially exercised interfere with it and make the order which the court below ought to have made It is no ground for giving costs against a successful defendant that the defendant pleaded that he was a minor at the time when the transaction upon which the suit was based was entered into there being nothing to suggest that the plaintiff had been misled as to the real age of the defendant by any action or statement on the part of the latter RADHE SHIAM *v* BEHARI LAL (1918)
I L R 40 All 558

———— *Vendor and purchaser —Failure of purchaser to obtain possession of the subject matter of his contract—Suit for recovery of consideration paid—Execution of decree—Civil Procedure Code (1908) O XXI r 89* The judgment debtors interest in certain immovable property was attached in execution of a decree and sold Before confirmation of the sale the judgment debtors sold the same property privately with the condition *inter alia* that if the purchaser failed to get possession of the property sold owing to any act or omission on the part of the vendors the purchaser should have the right to recover the sale consideration with interest An application to have the execution sale set aside was made by the purchaser and failed and the sale was confirmed The purchaser under the private sale then sued his vendors to recover the consideration paid by him *Held* that the plaintiff was entitled to recover by virtue of the provisions of s 65 of the Indian Contract Act 1872 notwithstanding that the case was not provided for by the terms of his contract *Isardas v Asaf Ali Khan I L R 34 All 186* and *Pandurang Laxman Uphade v Govind Dada Uphade I L R 40 Bom 587* referred to MAHABIR PRASAD PANDE *v* GANGA DIHAL RAI
I L R 42 All 7

———— ss 65 73—

See CONTRACT
I L R 42 Bom 499

———— s 68—

See CONTRIBUTION I L R 38 Calc 378

———— Debt by minor—*Necessaries—Hindu Law—Joint Hindu Family—Money borrowed to defray expenses of sister s marriage* One of the brothers in a joint Hindu family consisting of two brothers and a sister all minors the sister being about 13 years of age borrowed a sum of money to provide for the expenses of the sister s marriage After the death of the borrower the lender sued the surviving brother to recover the sum so advanced from the property of the joint family in his hands *Held* that the suit was maintainable notwithstanding that the deceased brother was a minor at the time that the money was advanced *Tulsha v Gopal Rai I L R 6 All 632 Vaikuntam Ammangar v Kallapiran Ayyangar I L R 23 Mad 51 Sham Charan Mal v Chowdhry Debya Singh I L R 21 Calc 872* and *Chappel v Cooper 13 M & W 252* referred to MADAN PRASAD *v* AJUDHIA PRASAD (1910)
I L R 32 All 325

———— *Agreement by minor to immovable property validity of—Suit for recovery of money—liability of property for money advanced* Where a minor in order to secure funds to meet his marriage expense entered into an agreement for the sale of certain immovable property *held* that the minor was bound to repay the amount received and that the minor s property was liable for such amount The plaintiff s claim being for Rs 134 10 0 only *held* that no second appeal lay from the decision of the lower appellate court dismissing the plaintiff s suit PATHAK KALI CHARAN RAM *v* RAM DENI RAM
2 Pat L J 627

———— ss 68 to 72—

See CONTRIBUTION
I L R 38 Calc 1

———— s 69—

See ADVERSE POSSESSION
I L R 45 Bom 638

See CONTRIBUTION 14 C W N 361
I L R 38 Calc 1
I L R 45 Calc 691.

See PATNI REGULATION s 13
15 C W N 404

See REVENUE RECOVERY ACT ss 3 35
I L R 33 Mad 41

———— Interested in paying ' meaning of—*When payment not voluntary* A person is interested in making a payment within the meaning of s 69 of the Contract Act when there is an apprehension of any loss or inconvenience or of any detriment capable of being assessed in money A person whose immoveable property is attached for a debt due by another is interested in paying the debt to save the property and can recover from the person by whom it is due Payment under such circumstances is not a voluntary payment SUBRAMANIA IYER *v* RUNGAPPA REDDI (1909)
I L R 33 Mad 232

———— *Interest in the payment meaning of—Decree against Hindu widow and sale of husband s estate—Sale set aside by reversionary heir by deposit under s 310A Civil Procedure Code (XIV of 1882)—Suit to recover deposit from widow—Payment if voluntary if decree in law appears to bind widow personally* Whereby a deposit duly made under s 310A of the Civil Procedure Code of 1882 the reversionary heir expectant upon the death of a Hindu widow in possession of her husband s estate as his heiress had a sale in execution of a decree for arrears of rent of properties other than the defaulting tenure set aside and then sued the widow for recovery of the amount deposited *Held* that as the decree holder professed to sell the entire interest in the properties sold and the auction purchaser also claimed to have acquired the entire interest the reversionary heir was interested in the payment of the decretal amount which the widow was bound by law to pay —within the meaning of s 69 of the Contract Act Until the sale is confirmed the judgment-debt remains unsatisfied and it is in satisfaction of the judgment debt that the payment under s 310A (excluding the portion which represents damages payable to the execution purchaser) is made The question whether in point of law the reversionary interest was or was not touched by the sale being a matter for serious controversy the

CONTRACT ACT—*contd*

——— s. 69—*contd*

payment could not be viewed as a voluntary payment The words interested in the payment of money which another is bound by law to pay may include the apprehension of any kind of loss or inconvenience and not merely the actual detriment capable of assessment in money S 69 thus lays down a more comprehensive rule than is supported by English authority PANKHABATI CHAUDHURANI v NANI LAL SINGH (1913)
18 C W N 78

——— *Payment by a person interested which another is bound by law to pay—Gift of land by donor who undertakes to pay judi on the land—Another donee taking gift of the rest of the donor's property with full notice of the obligation but the gift deed containing no stipulation to that effect—Obligation of the second donee to pay the judi* K who owned considerable property gave a portion of it to his daughter's husband (plaintiff) in 1878 the deed of gift expressly providing that *K* undertook to pay the *judi* in respect of the portion In 1902 *K* made a gift of the residue of his property to *B* the gift deed containing special reference to the previous gift of 1878 and enjoining the donee to act according to that gift The *judi* was regularly paid by K first and *B* afterwards In 1905 *B* in his turn made a gift of the property to the defendant the deed of gift in this case contained a reference to the gift of 1878 but it contained no words requiring the donee defendant to abide by the terms of that gift The defendant having failed to pay the *judi* to Government the plaintiff was required to pay it He sued to recover the amount from the defendant *Held* that the plaintiff was entitled to recover the amount from the defendant under s 69 of the Indian Contract Act (IX of 1872) because the defendant was bound in law to pay the money in the payment of which the plaintiff was interested and which the plaintiff had paid SOMASHASTRI v SWAMIRAO KASHINATH (1917) I L R 42 Bom 93

——— *Decree for rent against recorded tenant who had sold his share before the whole of the amount sued for fell due—Sale in execution set aside by deposit by a co sharer—Latter's right to recover from recorded tenant—Contribution suit for—Suit brought after recorded tenant ceased to own any interest in the tenure if suit of Small Cause Court nature—Provincial Small Cause Courts Act (IX of 1887) Sch II Art 41—Second appeal—Civil Procedure Code (Act V of 1908) s 102 O XXI r 89* Plaintiff owned a 4th and the defendant No 1 a 4th share in a tenure In the beginning of 1308 *B S* the latter transferred his share to a stranger Thereafter the landlord sued defendant No 1 who was the sole recorded tenant for arrears of rent for the years 1307 and 1308 and had the tenure sold The sale was set aside under s 310A Civil Procedure Code 1882 upon the application of the plaintiff who deposited the whole amount within the statutory compensation to the purchaser Subsequently he sued for recovery of two-sevenths of the sum deposited from the defendant No 1 without making the latter's vendee a party or asking any relief from him *Held* that the defendant as the recorded tenant was bound by law to pay the amount of the decree passed against him within the meaning of s. 69 Contract Act and the plaintiff as a person interested in the payment of the debt within that section was entitled to be reimbursed by the defendant No 1 and the fact that he had transferred his share before the arrears for 1308 accrued due was no defence against the portion of the claim which related to that year *Held* further that the fact that at the date of the institution of the suit the defendant No 1 had no interest in the tenure did not put the case outside the scope of Art 41 of the Second Schedule of the Provincial Small Cause Courts Act and the provisions of s 102 of the Civil Procedure Code of 1908 restricting the right of second appeal did not apply to it *Krishna v Gopi I L R 15 Calc 652* explained and distinguished *Quære* Whether the plaintiff was in law entitled to recover more than th from the defendant No 1 BATUK NATH MANDAL v BEPIN BEHARI CHAUDHURI (1912)
16 C W N 975

——— ss 69 and 70—

See CIVIL PROCEDURE CODE 1908 O XXI R. 89 2 Pat L J 676

See CO SHARER 15 C W N 332

See CONTRIBUTION I L R 38 Calc 1
I L R 45 Calc 691

See NEGOTIABLE INSTRUMENTS ACT 1881, s 30 I L R 39 Mad 965

See VOLUNTARY PAYMENT
I L R 40 Calc 598

——— *Contribution suit for—Co sharer under raiyats—Sale by one to the other not recognised by landlord—Decree for rent against both discharged by vendor—Right to recover* *A* and *B* were under raiyats in respect of a non transferable holding *B* transferred his share to *A* in 1904 The transfer was not recognised by their landlord The landlord obtained a decree in a suit for arrears of rent against *A* and *B* in respect of the years 1902 05 whereupon *A* satisfied the decree and brought a suit for contribution against *B* *Held* that s 69 of the Contract Act is applicable to the present case and *B* is bound to make compensation to *A* *Held* further even assuming that s 69 has no application s. 70 undoubtedly covers the case PROSUNNO KUMAR BOSE v JAMALUDDIN MAHOMED (1912) 18 C W N 327

——— *Suit for contribution—Co-owners—Purchasers of different portions of zamindari—Attachment for arrears of revenue—Payment by a purchaser of the whole amount of arrear —Suit by him for the entire amount against the zamindar and the other purchaser—Personal liability of registered holder only—Liability of share of the other purchaser—Zamindar liable only for proportionate share—Sale-proceeds of zamindari liability of—Property partly in Agency Tracts—Defendant purchaser resident therein—Jurisdiction of Subordinate Court* The plaintiff was a purchaser in an auction sale held in execution of a decree of some villages in a zamindari of which the first defendant was the registered holder The sixth defendant was a similar purchaser of some other villages therein within the jurisdiction of the Agency Court For default in payment of revenue accruing due subsequent to the plaintiff's purchase one of the villages purchased by

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——— ss 69 and 70—*contd*

him was attached by the Government the plaintiff paid the full amount due on the entire zamindari to save his village from revenue sale The plaintiff brought the suit in the Subordinate Judge s Court *against the first defendant defendants Nos 2 to 5 (who were his undivided brother sons and nephew respectively)* and the sixth defendant to recover the full amount paid by him from all the defendants p rsonally and from the sale proceeds of the rest of the zamindari kept in deposit in the Government treasury The defendants pleaded non liability in law for the full amount while the sixth defendant raised the furth r plea that the Subordinate Judge s Court had no jurisdi tion to entertain the suit as against him *Held* (a) that the only person who is p rsonally bound to pay the revenue to the Government is the registered holder (b) that a co owner who pays to the Government the whole revenue due on an estate is not entitled to a personal decree against the other co owners who not being registered holders are not under a personal obligation to pay the revenue though it may be a charge on the lands in their holding (c) that s 70 of the Indian Contract Act does not apply to such a case (d) that the Subordinate Judge s Court had no jurisdiction to entertain the suit as against the sixth defendant to enforce the charge on the villages purchased by him as the lands did not lie within its jurisdiction (e) that s 69 of the Indian Contract Act do s not apply to a suit for contribution as *the person interested in the paym nt of money* must be a person who is not himself bound to pay the whole or any portion of the amount (f) that the plaintiff was entitled to sue the first defendant only for contribution and to recover from him and from the sale proceeds in deposit only the share of revenue payable on account of the property in the hands of the first defendant *Subramania Chetti* v *Mahalingasami Sivan I L R 33 Mad 41 Prayyky* v *Pakaram Haji 15 I C 262 Narain Pai* v *Appu 28 I C 456* and *Futteh Ali* v *Gunganath Roy I L R 8 Calc 113* followed *Raja of Vizianagaram* v *Raja Setru cherla Somasekhara I L R 26 Mad 713* distinguished *Gajapathi Kistna Chendra Deo* v *Srinivasa Charlu 25 Mad L J 433 Raja of Pittapuram* v *Secretary of State 16 Mad L T 375 Yogambal Boye Ammani Ammal* v *Naina Pillai Markayar I L R 33 Mad 15 Mangala thammal* v *Narayanaswami Ayyar 17 Mad L J 259 Manindra Chandra Nandy* v *Jamahir Kumari I L R 32 Calc 643* and *Moule* v *Garrett 7 Ex 101 104* referred to JAGAPATI PAJU *v* SADRUSAN NAMMA ARAD (1915) I L R 39 Mad 795

——— *Darputnidar of a co sharer putnidar depositing decretal amount to prevent sale of the putni in execution of a decree obtained against only some of the putnidars if a person legally "interested in the payment —Suit by putnidar not party to the decree for declaration and injunction to restrain darputnidar taking pos ession under s 171 of the Bengal Tenancy Act (VIII of 1885)—Power of Court to grant conditional injunction—Condition that plaintiff should pay his share of rent paid by defendant* The payment made by the *darputnidar* of a share of a p tni of the whole rent due on the *putni* to save it from being sold in execution of a decree obtained by the landlord in a suit for arrears of rent brought against some only of the *putnidars* comes within ss 69 and 70 of the Contract Act Where after an order under s 171 of the Bengal Tenancy Act was made in favour of such a *darputnidar one of the putnidars* who was not a party to the landlord s suit for rent sued for a declaration and injunction that his right in the property was not affected thereby and the Court below decreed the suit and granted the injunction but made it conditional on the *putnidar* paying to the *dar putnidar* the amount of rent proportionate to his share of the *putni* *Held* that the order making the injunction conditional was proper PAJANI KANTO MONDAL *v* HAJI LAL MAHOMED (1917) 21 C W N 628

——— *Lawful payment what is— Interested in paying who are—Deposit of decretal amount to prevent rent sale by person claiming under a forged mortgage bond—Sale set aside—Tenant if liable to repay by reason of benefit received—Bengal Tenancy Act (VIII of 1885) s 171 (3)— Interest voidable on sale* Plaintiff alleging to be mortgagee of a tenancy which was about to be sold in execution of a rent decree proceeded to deposit the decretal amount under s 170 cl. (3) of the Bengal Tenancy Act whereupon the tenant challenged his right to do so on the ground that the alleged mortgage was a forged do um nt The executing Court accepted the deposit but without deciding the question of the genuin ness of the mortgage In a suit by the plaintiff to recover the amount paid it was found that the mortgage was not genuine *Held* that the plaintiff was not a person having an interest in the tenancy which was voidable on the sale within s 170 cl (3) of the Bengal Tenancy Act nor was he interested in the payment of the money within the meaning of s 69 of the Contract Act nor was the paym nt lawful within the meaning of s 70 of that Act That the plaintiff was also not entitled to recover on the ground of defendant having benefited by the payment since it is not in every case in which a man has benefited by the money of another that an obligation to repay that mon y arises there must be an obligation express or implied to repay PANCHKORE GHOSE *v* HARIDAS JATI (1916)

21 C W N 394

——— *Putnidar s suit for rent against som darputnidars—Sale thereunder set aside by deposit of decretal money and statutory compensation to auction purchaser by co sharer not made party—Suit for contribution if lies* The Plaintiff who was part owner of a *darputni* which had been sold by the *putnidar* in execution of a decree for rent obtained by him in a suit in which the Plaintiff had not been made a party had the sale set aside by depositing the decretal money and the statutory compensation of five per cent of the purchase money due to the auction purchaser and then sued the other cosharers for contribution *Held* That though the decree was not binding on the Plaintiff as the entire *darputni* had been put up to sale Plaintiff had the right to sue under s. 70 of the Contract Act though not under s 69 and that not merely in respect of the decretal amount but also of the statutory compensation money intended for the auction purchaser *Suchand* v *Balaram I L P 38 Calc 1 (1910) Jognarain* v *Badri Das 16 C L J 1 6 (1911)* and *Batuk*

CONTRACT ACT—contd

—— s. 69—contd

Nath v Bepin Behary 16 C W N 9 5 (191) referred to KANGAL CH. PAL v GOPI NATH PAL. 24 C W N 1068

—— s 70—

See s 11 I L R 32 All 25

See s 69

See CIVIL PROCEDURE CODE O XXI 83 2 Pat L J 676

See RENT DECREE 14 C W N 699

—— *of the Contract Act does not apply where the party sought to be made liable though benefited had no option but to enjoy the benefit* In order to enable a party to recover money paid by him from another under s 70 of the Indian Contract Act it is necessary that the party sought to be made liable must not only have benefited by the payment but must also have had the opportunity of accepting or rejecting such benefit Where no such option is left to him and the circumstances do not show that he intended to take such benefit he cannot be said to have enjoyed such benefit within the meaning of the section. When the person paying is interested in making the payment he cannot be presumed in the absence of evidence to show that he intended to act for the other party also to have acted for such other party S 70 of the Contract Act reproduces the English Law as laid down in *Lampleigh v Brathwait 1 Sm L C 163 Abdul Wahid Khan v Shaluka Bibi I L R 21 Calc 496 504* followed *Damodara Mudaliar v Secretary of State for India I L R 18 Mad 88* considered. A person paying money into Court under s. 310A of the Civil Procedure Code of 1882 to set aside a sale in execution cannot recover such money from the defendant who has obtained possession of the property when he has made the payment to protect his own interest and the circumstances do not show that he would not have made the application if the defendant had not consented. YOGAMABAL BOYEE AMMANI AMMA v NAINA PILLAI MARKAYAR (1909) I L R 33 Mad 15

—— *Applicability of regardless of English decisions* Plaintiff s father made a gift of a village to the defendant the condition being we (the plaintiff's father) should get the village sub divided in your (donee s) name you should pay to the Government the peshkash fixed thereupon according to the said sub division *Held* that the defendant was bound to pay his portion of the peshkash only from the time of the sub division when alone the exact amount due by the defendant was ascertained and that plaintiff who had paid the whole peshkash was entitled to recover from the defendant under s. 70 of the Indian Contract Act whatever the defendant was liable to pay after the sub division. S 70 of the Indian Contract Act should be applied in all cases where the requirements of the section are fulfilled, whatever might be the English Law on the subject A person must be said to have enjoyed the benefit of an act within the meaning of s 70 of the Indian Contract Act when he in fact enjoyed the benefit by accepting or adopting it without objecting to it S 70 does not require that the defendant must have an option of declining the benefit if that means that before

CONTRACT ACT—contd

—— s 70—contd

the benefit is conferred he must be given the choice of accepting or declining it *Per* MILLER J—The fact that plaintiff's interest also might have suffered if the act was not done will not make the act any the less one done for the defendant *Narayanaswami Naidu v Sri Rajah Vellanki Sreenivasa Jagannatha Rao I L R 33 Mad 189*, and *Yogambal Boyee Ammani Ammal v Naina Pillai Markayar I L R 33 Mad 15* referred to *Per* SADASIVA AYYAR J *Obiter* If the benefit conferred is inseparably accompanied by onerous obligations that a reasonable man would refuse to accept s 70 will not apply *Damodara Mudaliar v Secretary of State for India I L R 18 Mad 88* and *Jonnarain v Badri Das 16 C L J 156* followed. *Yogambal Boyee Ammani Ammal v Naina Pillai Markayar I L R 33 Mad 15* dissented from. *Abdul Wahid Khan v Shaluka Bibi I L R 21 Calc 496* and *Ram Tuhul Singh v Bissessur Lall Sahoo 2 I A 131* distinguished *Rajah of Vizianagaram v Rajah Setucherlla Somasekara I L R 26 Mad 686* referred to SRI SRI SRI CHANDRA DEO v SRINIVASA CHARLU (1913) I L R 38 Mad 235

—— *Payment made for another—Non gratuitous payment—Obligation of person enjoying the benefit—Mortgage—Stranger paying off a subsisting mortgage—Subrogation* The defendant No 1 mortgaged his lands in 1893 In 1904 the mortgagee sued on the mortgage and obtained a decree for the mortgage amount or in default the sale of the property The mortgagee applied in 1905 for sale of the mortgaged property About that time the plaintiff went into possession of the lands on a ten years lease from defendant No 1 Shortly afterwards defendant No 2 who held a money decree against defendant No 1 brought the property to sale and purchased it himself In 1907 the property was put up to sale in execution of the mortgagee s decree But defendant No 1 borrowed a sum of Rs 2 463 from the plaintiff and paid off the mortgagee Subsequently defendant No 1 sold a portion of the property mortgaged to plaintiff for Rs. 4 000 the consideration being made up of Rs 2 463 with other sums lent to defendant No 1 personally In 1908 defendant No 2 sued plaintiff to recover possession of the land and obtained possession The plaintiff filed the present suit to recover the amount of Rs 4 000 from the defendants personally or by sale of the property *Held* that defendant No 2 was not personally liable to re pay Rs. 2 463 to the plaintiff under s 70 of the Indian Contract Act (IX of 1872) for it could not be said that the payment was made for defendant No 2 the plaintiff having without reference to the second defendant intruded himself in order to make the payment without the second defendant s knowledge. *Held* further that the land in possession of defendant No 2 was chargeable with the sum of Rs. 2 463 because the plaintiff being a stranger who paid off a subsisting mortgage was entitled to be subrogated to the position of the [illegible] *Held* also that defendant No 1 was liable to make good the deficiency [illegible] J— S 70 of the Indian C[illegible] kes provision for compensation to be [illegible] enjoying the benefit of a non [illegible] but for the operation of the section [illegible] are prescribed. They are that

CONTRACT ACT—*contd*

———— **s 74 as amended by Act VI of 1899)**—*concld*

stances to exact one fifth of the penalty SECRETARY OF STATE FOR INDIA v PERES
I L R 45 Bom 1213

———— **s 81**—

See JUTE I L R 44 Calc 98

———— ss 81 82 83—*Usage of jute trade at Chandpur—Jute brought by fariahs and stored in Companies godowns burnt before weighment—Jute insured by Company—Incidence of loss—Title passing of—Unascertained goods—Intention—English law* Plaintiffs who were *fariahs* used to purchase loose jute from dealers (*beparis*) and sell them to amongst others defendants firm at Chandpur The jute brought by the *fariahs* used to be stored in a godown called the *fariahs* godown and according to the usage of trade at Chandpur sale was not complete until the jute had been examined selected and weighed by the purchasing firm The goods were however kept subject to the firm s lien for advances to the *fariah* and it appeared that once the goods were stored in the godown the *fariahs* were not allowed to remove or sell them to other persons Some jute which was stored by plaintiffs in defendants godown, and was insured by the latter as belonging to the firm caught fire before it had been tested selected and weighed and was burnt *Held* that title in the jute had not passed to the defendants and the loss fell on the plaintiffs That the contract being one for the sale of unascertained goods what remained to be done by the buyer to the goods appropriated to the contract by the seller was not merely for the purpose of ascertaining the price but was also for the purpose of placing the buyers in a position to say whether and to what extent they would for their part accept the goods offered to them That the fact that the seller could not remove or sell the goods from the godown did not show that the property in the jute had passed to the firm That the defendants who had an interest in the goods were justified in insuring them to protect that interest and were entitled to receive the whole amount of the policies of insurance to indemnify themselves against their loss and were not bound to apply any portion of it to the plaintiff s benefit When nothing remains to be done to the goods by the seller for the purpose of ascertaining the price then *primâ facie* the property in them passes although they have not been weighed by the buyer It would be otherwise in England if the parties intended that property in the goods should not pass until the goods had been weighed The Indian law is the same and the provisions of s 81 do not exclude the question of intention which is laid down in the English case as the determining factor ABDUL AZIZ BEPARI v JOGENDRA KRISHNA RAY (1916) I L R 44 Calc 98
20 C W N 1224

———— **s 88**—

See CONTRACT I L R 47 Calc 458

———— **s 93**—

See JURISDICTION I L R 34 Bom 13

———— **ss 99 102**—

See CONTRACT (39) I L R 46 Calc 831

———— **s 103**—

See s. 4 I L R 38 Bom 255

CONTRACT ACT—*contd*

———— **s 103**—*contd*

———— *Transfer of Property Act (IV of 1882 as amended by Act II of 1900) s 4 and 137—'Instrument of title to goods—Railway receipt —Stoppage in transit—Assignment of railway receipt effect of* On this appeal their Lordships of the Judicial Committee (upholding the decision of the High Court in *Amerchand & Co* v *Ramdas Vithaldas Durbar I L R 38 Bom 255*) *held* that the railway receipt in question in the case was an instrument of title within the meaning of s 103 of the Contract Act (IX of 1872) RAMDAS VITHALDAS v AMERCHAND & Co (1916) I L R 40 Bom 630

———— **s 107**—

See DAMAGES I L R 43 Calc 493

———— **s 108**—

See CONTRACT I L R 46 Calc 831

See HYPOTHECATION—
I L R 42 Mad 59

See RAILWAY RECEIPT
I L R 38 Mad 664

See SHARES I L R 46 Calc 331 342

See VENDOR AND SUB VENDOR
I L R 38 Calc 127

———— The expression *goods* in s 108 of the Contract Act includes all moveable property HAZARIMULL SHOHANLAL v SATIS CHANDRA GHOSH (1918)
22 C W N 1036

———— **s 108 178**—

See LIMITATION ACT (IX OF 1872)
ARTS 48 49 I L R 40 Mad 678
I L R 38 Mad 783

———— *Possession—Hire purchase agreement—Pledge by the hirer how far valid —Indian Contract Act (IX of 1872) ss 108 178* Under a hire purchase agreement dated 9th August 1913 the plaintiffs the owners let on hire a machine at Rs 150 per month the hirer first defendant having the option of purchasing it at any time during the hiring by paying Rs 2 100 Cl. 9 of the agreement provided that if the hirer made default in punctually paying any hire or instalment it should be lawful for the owners to immediately put an end to the hiring and to seize and take away the same On 2nd December 1914 the first defendant pledged the machine to the second defendant who was a *bonâ fide* pledgee for value On 17th May 1916 the plaintiffs by letter determined the agreement of hiring under cl 9 a sum of Rs 50 being due from the first defendant on account of hire on that date The plaintiffs brought this action to recover the machine or in default Rs 2 100 being the value of the machine The first defendant did not contest the suit *Held* that the possession of the first defendant was not possession under s 178 of the Indian Contract Act and so the plaintiffs were entitled to recover the machinery from the second defendant or its value There is no distinction between possession under s 108 Except (1) and s 178 of the Contract Act SAUBOLLE v R V SETNE (1918) 23 C W N 352

———— **s 114**—

See CONTRACT 15 C W N 931

CONTRACT ACT—*contd*

——— s 118—

See s 1 I L R 41 Bom 518

——— s 120—

See s 39 I L R 34 Bom 192

——— ss 124 126 and 132—

See HINDU LAW 3 Pat L J 396

——— ss 126 128—

See PRINCIPAL AND SURETY

I L R 44 Calc 978

———*Contract of guarantee—Time-barred debt guaranteed—Liability on principal contract not enforceable at law—Contract of guarantee not valid* In 1883 a sum of money was deposited by the trustees of a certain temple with the father of one *M* In 1895 there was a demand for the return of the money and a refusal thereof by *M's* father In 1897 on another demand being made one *B* by an oral contract of guarantee undertook to repay the temple trustees in case *N* failed to pay In 1900 the temple trustees brought a suit against *M* and *B* to recover the deposit The Subordinate Judge decreed the claim against both Against this decree *M* alone appealed and in appeal it was held that the deposit with *M s* father was proved but that the suit was time barred in 1895 The suit was therefore dismissed as against the appellant *M* but the trial Court s decree as against *B* was confirmed In 1912 the plaintiffs temple trustees executed their decree against *B* In 1915 *B* having died his sons brought a suit to recover from *M* the sum which had been paid by them in execution. Both the lower Courts decreed the claim. On appeal to the High Court *Held* that it being ascertained that the debt due to the trustees of the temple was barred by time in 1895 and the contract of guarantee was not made until 1897 there was not in law any valid contract of guarantee The foundation of the contract of guarantee was wanting inasmuch as there was not any enforceable liability in the third person *Hajarimal* v *Krishnarao* *I L R 5 Bom 647* distinguished *Per* BATCHELOR *Ag C J* By the word liability used in ss 126 and 127 of the Indian Contract Act 1872 is intended a liability which is enforceable at law and if that liability does not exist there cannot be a contract of guarantee MANJU MAHADEV *v* SHIVAPPA MANJU (1918) I L R 42 Bom 444

——— ss 126 and 140—*Mortgage—Payment of mortgage debt by surety and subsequent suit for sale brought by the surety upon the mortgages redeemed—Limitation—Act No IX of 1908 (Indian Limitation Act) Sch I Art 135* *B* at the request of her sister *L* agreed to guarantee payment of the amount due under two mortgages executed by *L s* deceased husband *B* paid up the mortgage money and thereafter sued the representatives of *L* who had since died, to recover the amount due under the mortgages by sale of the mortgaged property *Held* that *B* was entitled to the benefit of the securities held by the mortgagees but she was in no better position than they had been and as to one of the mortgages it was found that the suit would have been barred by limitation had the plaintiff been the original mortgagee and was therefore barred as regards the surety BARKAT UN NISSA BEGAM *v* MAHBUB ALI MIAN I L R 42 All 70

CONTRACT ACT—*contd*

——— ss 126 140 141 145 69 70—

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881) ss 30 47 59 74 94 I L R 39 Mad 965

——— ss 127 128—

See PROMISSORY NOTE

I L R 38 Mad 680

——— s 128—

See CRIMINAL PROCEDURE CODE 1898 s 514 I L R 2 Lah 204

——— ss 129 and 131—

See CONTRACT L R 47 I A 164

——— s 131—*Surety—Liability of heirs of surety for default occurring after surety s death—Construction of document* Two persons engaged themselves as sureties in behalf of a peon in the Postal department The bond which they executed was in a prescribed form of general application It bound both the sureties personally and their representatives after their death but the bond further provided that a surety could terminate his liability in respect of the future by giving six months notice to the prescribed postal authority The bond in the present case was executed in 1902 In 1910 one of the sureties died In 1916 the person on whose behalf the bond was given embezzled a sum of money which was recovered by the Postal department from the surviving surety The surviving surety then sued the heirs of the deceased surety for contribution *Held* that the plaintiff was entitled to recover MUHAMMAD UBED ULLAH *v* MUHAMMAD INSHA ALLAH KHAN I L R 43 All 132

——— s 133—*Surety—Written agreement by surety that he would not claim his legal rights in suretyship—Variation in terms of contract without consent of knowledge of surety—Discharge of surety* Defendant No 1 was appointed by the plaintiffs as their sub agent to sell their goods for which he was to be paid commission at the rate of 7½ per cent on the sale proceeds and to get at office expenses At the same time defendant No 2 agreed to be surety for defendant No 1 and wrote a letter of indemnity whereby he expressly waived all or any of the rights as surety (legal equitable statutory or otherwise) which may at any time be inconsistent herewith and which he might be otherwise entitled to claim and enforce and that the guarantee shall not be revocable by him at any time but shall continue during the employment of the sub agent At a later date the plaintiffs and defendant No 1 varied the contract without the knowledge of defendant No 2 by providing that defendant No 1 was to be paid commission at the rate of 22 per cent inclusive of all office expenses The contract of sub agency having come to an end the plaintiffs sued both defendants to recover money due from defendant No 1 under the sub agency Defendant No 2 pleaded that the contract having been varied by the plaintiff and defendant No 1 without his knowledge he was absolved from liability as a surety under the provisions of s 133 of the Indian Contract Act 1872 —*Held* that the variation of the contract involved the result that the surety (defendant No 2) was discharged as to transactions subsequent to the variation under s. 133 of the Indian Contract Act, 1872 *Held* further that the [illegible] in the letter

CONTRACT ACT—contd

——— *s* 133—*contd*

of indemnity whereby defendant No 2 waived all rights under the statutes could not be read as implying any consent to the variation within the meaning of s 133 or as entitling the plaintiffs to enforce the liability against the surety even though according to *law he was discharged from* such liability CHITGUPPI & Co *v* VINAYAK KASHINATH (1920) I L R 45 Bom 157

——— ss 134 137—*Suit against principal and surety—Removal of principal s name as summons could not be served on him—Suit can proceed against surety alone if suit against principal be still in time—Civil Procedure Code (Act V of 1908) O IX R 5 O XXIII P 1* A suit was brought in 1913 on *a promissory* note passed *in* 1912 by defendant No 1 as principal and defendant No 2 as surety No summons could be served on defendant No 1 his name was therefore struck out and the suit proceeded against defendant No 2 alone The lower Court dismissed the suit on the ground that as the principal was discharged by an act of the creditor (plaintiff) in having his (defendant No 1 s) *name struck out the surety* also was thereby discharged On plaintiff s application under extraordinary jurisdiction *Held* reversing the decree and remanding the suit that the mere omission of the plaintiff to pursue his suit against one of *the defendants* with the result that that defendant s name was struck off and the suit dismissed against him under O IX P 5 of *the Civil* Procedure Code (Act V of 1908) did not discharge the surety provided the suit was still in time against the principal NATHABHAI TRICAMLAL *v* RANCHHODLAL PARJI (1914)
I L R 39 Bom 52

——— ss 134 151—

See HINDU LAW I L R 33 Mad 308

——— s 135—

See CIVIL PROCEDURE CODE 1908
s 135 AND O XXXVII R 3
I L R 43 Mad 272

See PRESIDENCY TOWNS INSOLVENCY ACT 1909 *s* 30 I L R 44 *Mad* 381

——— ss 135 139—*Surety when is discharged* Mere forbearance on the part of the creditor in the absence of his doing or *omitting to do* any thing whereby the surety s eventual remedy against the principal debtor is impaired would not discharge a surety The surety was not discharged when the creditor merely gave the debtor time to pay up *without entering* into a binding contract with that object BAHADUR SING *v* BASUNTA KUMAR ROY (1913)
17 C W N 695

——— s 137—

See s 134 I L R 39 Bom 52

——— s 139—*Discharge of surety by act of creditor detrimental to surety—Banker deposit with—Banker must allow specific direction of depositor even if he be indebted—Debtor specific appropriation by to be observed by creditor* The defendant s brother had *an* account at the plaintiff Bank which being considerably over drawn the Bank called for additional security and the defendant gave a guarantee to the Bank agreeing to pay to them on a specified date to the extent of a specified amount all money then due to the Bank from his brother on current account or otherwise howsoever including all interest charges and other expenses which the Bank might charge After the date of payment mentioned in the *agreement of guarantee* and when there remained due to the Bank a large sum so guaranteed the defendant s brother opened a separate account with the Bank *by depositing* a *certain* amount on condition that the Bank would allow him to draw this sum by cheques and not take it in payment of the amount due to them on the guaranteed over draft account but that any profits of the business carried on by him with the money deposited on the second account would be paid to credit of the over drawn account The Bank *did not inform the defendant of the opening* of this new account and certain sums were transferred from this account to the previo[illegible] drawn account purporting to be pr[illegible] said After this second account ca[illegible] *the Bank* claimed from the *defen*[illegible] of the balance on the over drawn[illegible] a copy of the account of the defen[illegible] was *supplied to the defendant show*[illegible] due to the Bank on acco[illegible] interest as also the second[illegible] defendant s brother Th[illegible] puting his liability assure[illegible] *due from his brother* [illegible] the case the defendant [illegible] his liability to the Bank[illegible] arrangement made by the[illegible] in opening the second acco[illegible] dant *was* not entitled to [illegible] opened and the Bank enti[illegible] the date mentioned in the ag[illegible] *for payment* at the rate us[illegible] but not at any higher rate [illegible] *C J*—That in opening the se[illegible] Bank did not act inconsistent[illegible] of the defendant as surety wit[illegible] *of s* 139 of the Contract Act und[illegible] to discharge the surety it must be[illegible] *only* has the *creditor omitted* [illegible] which his duty to the surety req[illegible] but al o that the *eventual remed*[illegible] himself has thereby been *impair*[illegible] not shown to be the case here Th[illegible] within the *power of the* Bank to a[illegible] amount in the second account to[illegible] over drawn account inasmuch as [illegible] deposited that *amount on* condition[illegible] allowed to draw against it That *Clayton s Case 1 Mer 572* applies[illegible] items in one current account and wh[illegible] specific appropriation by the debto[illegible] present case [illegible] was a specific[illegible] by the deposito[illegible] when he opened th[illegible] *and there were in fact two accoun*[illegible] and the rule in *Clayton s Case 1 Me*[illegible] apply That it was no duty of th[illegible] municate with the defendant w[illegible] the opening of the new account w[illegible] contrary to the nature of the defendant[illegible] ment but in accordance with the arra[illegible] made by the defendant with the Ban[illegible] MOOKERJEE J—That in the absence of [illegible] agreement a guarantor has no right to appropriation *by* Customer or Banker of m[illegible] paid in subject to the qualification that the B[illegible]

CONTRACT ACT—co td

——— s 139—concld

is bound to deal with the accounts in the ordinary way of bu iness Any specific direction regarding the appropriation of a deposit must be ob erved by the Bank In the pre ent case the agreement between the Bank and the depositor made it impo ible for the Bank to apply the deposit in reduction of the over draft on the first account con equently the fact that the deposit was not so applied did not justify the contention that the Bank were a fault and the surety must be deemed discharged there was thus no room for the appli cation of the rul in *Clayton s Case 1 Mer 572* That the Bank did not fail in their duty to the defendant when they carried on transactions with his brother under the second account without any intimation to him The true rule is that if there i any agreement between the principal with re erence to the contract guaranteed the surety ought to be consulted and that if there is father in tion which is not obviously either one *B* by ai ial or for the benefit of the surety he to repay the sole judge whether he remains liable pay In 190 stantially in accord with s 139 of the against *M* a tract Act GHUZNAVI v THE NATIONAL Subordinate J DIA LTD (1916) 20 C W N 562
Against this decree 140 141 and 145—
it was held that t I L R 42 All 70
proved but that t
The suit was th TIABLE INSTRUMENTS ACT 1881
appellant *M* but th I L R 39 Mad 965
B was confirmed
trustees execute
1915 *B* having RIBUTION I L R 38 Calc 1
recover from *M* 150 152—*Bailment—Machine use*
them in execution *for which hired—Liability of bailee*
the claim. On ap is ordinarily bound to return the
that it being ascer the end of the period for which
trustees of the te when an article is hired out for use
and the contract rpose there is an implied warranty
1897 there was r be used for that purpose and if
guarantee The ach of this warranty the bailee is
guarantee was wi ay the hire and need take no steps
any enforceable article to the bailor *Chew v Jones*
Hajarimal v *231* followed ISUFALLI HASSAN
distinguished HIM DAJIBHAI (1920)
the word liab I L R 45 Bom 1017
the Indian Co ss 151 152—
liability whi h
liability does RAILWAY COMPANY
of guarantee I L R 39 Bom 191
MANJU (1918) ss 151 152 and 161—
——— e RAILWAY I L R 37 Bom 1
of mortgage s 162—*Son s liability for jewellery*
sale brought with father—The son as an involuntary
redeemed—Leth r comes within the category of a deposi
Limitation Ac lation Act (IX of 1908) Art 49 or
of her sister *applies in a suit for recovery from son*
the amount *deposited with his deceased father—*
by *L* a decease *unlawful possession of the son of*
money an l *ation of Art 49—Statement in a Will*
of *I* who hac *dence* All actions for the recovery
due under the t of moveable property are by the
prop rty *Held* s of Art 145 comprised within it and
of the e ption is made as regards deposits where
she was d and refusal make the continuance of
an l as ssion unlawful The fact of the possession
the s he depository after demand becoming wrong
her *I* does not make Art 49 applicable Notwith
standing the provisions of s 162 of the Indian Contract Act (whi h is not an exhaustive Code)

CONTRACT ACT—contd

——— s 162—concld

the relation of depositor and depository does not cease on the latter s death The relation of the depositor and depository is that of a volun tary bailor and voluntary bailee and when the latter dies his succes or becomes and remains an involuntary PROMOTHO NATH MULLICK v PRODYMNO KUMAR MULLICK

26 C W N 772

——— ss 172 173 176—*Pawn nature of security—Conditions necessary to fulfil contract of pawn—Right of pawnee to sue independently of the pawn—Government securities pledge of—Mere deli very without endorsement effect of* The guardian of the plaintiffs who were minors with the leave of the District Judge lent a sum of money to the major brother the defendant on his undertaking to pledge his share in Government securities which stood in the names of himself and the plaintiffs and also his share in the *ezmali* ornaments as security for the advance The securities were in the hands of the guardian and the ornaments were in a room to which locks had b en separately put by the guardian and the defendant On receipt of the loan the defendant except executing a pro note did nothing further *Held* that a pawn is not an equitable mortgage but a security inter mediate between a simple loan and a mortgage which wholly passes property in the thing con veyed It is es ential to the contract of pawn that the property should be actually or cons tructively delivered to the pawnee n ither of which was done in this case That the plaintiffs were entitled to have their remedy on the pro-note independently of the alleged pledge under s 176 of the Contract Act which gives a clear right to the pawnee to institute a suit indepen dently of the pawn That s 172 of the Contract Act which defines a pledge deals with goods and certain classes of documents are specifically referred to in s 173 which do not include Govern ment securities That Government securities are by statute not negotiable or transferable without endorsement on the back by the transferor and mere delivery of Government securi ies without endorsement gives no property in them for pur poses of negotiation or sale JYOTI PRAKASH NANDI v MUKTI PRAKASH NANDI (1910)

22 C W N 297

——— s 176—*Pledge—Sale by pawnee of property pledged—Notice of sale* The words—
He may sell the things pledged on giving the pawnor reasonable notice of the sale —as used in s 176 of the Indian Contract Act 187 mean that the pawnee must give reasonable notice of his intention to sell it does not necessarily mean that a sale should be arranged beforehand and that due notice of all details should be given to the pawnor KUNJ BEHARI LAL v THE BHARGAVA COMMERCIAL BANK JUBBULPUR (1918)

I L R 40 All. 522

——— s 178—

See s 108

See BAILMENT I L R 37 Bom 122

——— *Person authorised to take delivery of goods on behalf of consignee pledging receipt—Pledgee if acquires title in the goods—Fraud of third party—Upon which of two innocent persons loss should fall* Defendant No 1 who has despatched by railway goods consigned to

CONTRACT ACT—*contd*

———— s 178—*concld*

himself made over the railway receipt without endorsement to the defendant No 2 for the pur po e of obtaining delivery The defendant No 2 thus having implied authority to do all that was necessary for the purpose including authority to endorse the receipt in the name of defendant No 1 fraudulently and without defendant No 1 s authority offered the receipt to plaintiff as a pledge for an advance which he asked plaintiff to make to him but plaintiff having insisted on the receipt being endorsed by defendant No 1 defendant No 2 later on presented the receipt again to plaintiff having an endorsement written by himself and purporting to be signed by defen dant No 1 authorising the delivery of the goods to a servant of the plaintiff Plaintiff thereupon made the advance which defendant No 2 fraudu lently appropriated and took delivery of the goods from the Railway Company *Held* that defendant No 2 had possession within the meaning of s 178 of the Contract Act of the rail way receipt and of the goods it represented and that the plaintiff had acted in good faith within the meaning of the first proviso to the section and that the defendant No 2 had not obtained the goods by means of an offence of fraud within the meaning of the econd proviso so tha plaintiff had good title in the property It is unsafe to employ as a separate and indepen dent ground of decision the principle that where one of two innocent persons must suffer through the fraud of a third the loss should fall on him who enabled the third party to commit the fraud PROFULLA KUMAR BOSE *v* NABO KISHORE RAI (1919) 23 C W N 907

———— ss 178 179—*Goods consigned by up country merchant to muccadum and agent for sale in Bombay—Pledge of goods by the Agent—Principal knowing of the pledge and receiving money raised by pledge from agent—Pledgee entitled to entire moneys due on pledge—Pledgee s claim not limited to the interest of the pawner in the goods pledged—Custom of up country cotton merchants* The plaintiffs up country cotton merchants consigned cotton until the 29th of September 1913 to their usual consignees and agents for sale in Bombay D H and Co In the course of their dealings the plaintiffs frequently called upon D H and Co to remit money to them in large sums on the security of the cotton in their hands and D H and Co used to raise money by pledge of the plaintiffs cotton to the 3rd defendants firm Th plaintiffs representatives in Bombay knew of this course of dealing On the 30th September 1913 D H and Co were adjudicated insolvents The accounts at that date showed that the 3rd defendants had advanced Rs 83 000 to D H and Co against which they held 7?7 bales of the plaintiffs cotton and that D H and Co had remitted to the plain tiffs Rs 50 000 The plaintiffs sued to recover their cotton from the 3rd defendants unencum bered by the loans raised on the security thereof alleging that D H and Co were merely their warehousemen and *muccadums* and as such had no right to create any charges on their cotton At the trial the plaintiffs contended that in any event D H and Co had no authority to charge the plaintiffs cotton beyond Rs ?0 000 which was the sum remitted by them to the plaintiffs *Held* that the plaintiffs having urged D H and Co to pledge their cotton when necessary and having

CONTRACT ACT—*contd*

———— ss 178, 179—*concld*

known through their representatives of the manner in which their cotton was being dealt with the 3rd defendants were entitled to claim the entire moneys advanced by them on the pledge of the plaintiffs cotton S 179 of the Indian Contract Act does not limit the scope of s 178 but saves a pledge to the extent of the pledgor s own interest notwithstanding the presence of invalidating conditions falling under one of the provisions to s 178 In other words whenever he has an interest the person in possession of the goods or documents has unconditional authority to charge at least that interest LAKHAMSEY LADHA & Co *v* LAKHMICHAND PADAMSEY (1916) I L R 42 Bom 205

———— s 180—

See PARTNERSHIP I L R 43 Calc 733

———— s 194—

See PRINCIPAL AND AGENT I L R 44 Bom 139

———— ss 196 to 200—

See MADRAS IRRIGATION CESS ACT (VII OF 186?) s 1 I L R 38 Mad 997

———— s 201 —*Termination of agency—S 209—After the principal s death if agent is to be treated as a trustee—Indian Limitation Act (IX of 1908) Art 89 or 120 applicability of where an agent is sued for accounts after the principal s death* *C* acted as gomastha under *J* until the latter s death in July 1912 and then he acted as agent under *J s* widow The widow more than three years after her husband s death brought a suit against the agent for accounts from 1894 to 1915 *Held*—That Art 89 of the Limitation Act applied to the case and the claim for accounts for the period up to the death of *J* was barred by limita tion as under s 201 of the Contract Act the agency was terminated on *J s* death and as the suit was brought more than three years after *J s* death *Madhu Sudan Sen* v *Pakhal Chandra I L R 43 Calc 248* followed. That as *C* was not sued for any act done by him after the death of his late Principal which he might have done as trustee s 209 of the Contract Act or Art 120 of the Limi tation Act did not apply SREEMATI SARASHIBALA DASI *v* CHUNI LAL GHOSH 26 C W N 321

———— ss 207 253 cl (10)—

See PRINCIPAL AND AGENT I L R 43 Calc 248

———— ss 208 209—*Suit to recover money (agent—Acknowledgment by defendant s gumasta (agent) after his death—Death of the defendant not known to plaintiff—Limitation Act (XV of 1877) s 19* Plaintiffs firm had dealings with one Haji Usman from the 5th January 1901 till the 2?th October 1903 Haji Usman s bu iness managed by a *gumasta* (agent) Haji Usman died in or about March 1903 and the plaintiffs had no knowledge of his death On the 2nd June 1903 the *gumasta* wrote to the plaintiffs a postcard stating you mention that there are moneys due as to that I admit whatever may be found on proper accounts to be owing by me you need not entertain any anxiety On the 30th May 1906 the plaintiffs brought a suit against the managers of Haji Usman s estate to recover a certain sum of money on an account stated The d fendants pleaded

CONTRACT ACT—contd

——— ss 208 209—*concld*

the bar of limitation on the ground that there was no acknowledgment of the debt by a competent person *Held* that the suit was not time barred The *gumasta s* letter of the 2nd June 1903 was an acknowledgment within the meaning of s 19 of the Limitation Act (XV of 1877) The case fell within the provisions of ss 208 and 209 of the Contract Act (IX of 1872) The termination of the *gumasta s* authority if it did terminate did not take place before the 2nd June 1903 as the plaintiffs did not know of the principal s death and the *gumasta* was bound under s 209 to take on behalf of his late principal all reasonable steps for the protection and preservation of *the interests entrusted to him* EBRAHIM HAJI YAKUB v CHUNILAL LALCHAND (1911)

I L R 35 Bom 302

——— s 212—

See CIVIL PROCEDURE CODE 1908 s 20 (c) I L R 34 All 49

——— ss 215 216—**Principal and Agent**—*Construction of Contract—Agent appointed to sell goods buying them on his own account* S 216 of the Indian Contract Act is merely enabling and confers upon the principal the right to claim from his agent the benefit of the transaction to which the agency business related where the agent without the knowledge of the principal has dealt with the business on his own account instead of on account of the latter The principal is free to exercise that right or not The law is that where a party elects to adopt a transaction he must take its benefit with his burden He cannot as is said both approbate and reprobate But both the benefit and the burden must for that purpose be attached to and incidents of the transaction which the principal has affirmed by election Where an agent appointed *to sell his principal s goods for a fixed price buys* them on his own account without the previous consent of the latter it is competent for the principal either to repudiate the transaction under the circumstances mentioned in s 215 of the Contract Act or to affirm it If he elects to affirm the principal will be liable to pay to the agent such charges only as are incidents of the transaction of purchase that is such as the vendor under the contract would have been liable to pay to the purchaser because what is affirmed is the relation of vendor and purchaser But if those charges are annexed by the terms of the contract to the agency so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser the agent is not entitled to recover them *Salomons v Pender 3 H & C 639* and *Andrews v Ramsay & Co (1903) 2 K B 635* referred to JOACHIMSON v MEGHJEE VALLABHDAS (1909) I L R 34 Bom 292

——— s 222—

See CONTRACT (44) I L R 41 Mad 1060

See CONTRIBUTION I L R 38 Calc 1

See LIMITATION ACT 1877 ARTS 61 63 116 I L R 34 Mad 167

——— s 226—

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881) s 27 I L R 40 Mad 1171

CONTRACT ACT—contd

——— ss 227 and 237—*Principal and agent—Agent acting in course of his employment beyond scope of authority—Third party misled and damnified thereby—Company—Special damages* Plaintiff on the 30th of May 1917 tendered at the East Indian Railway Parcels office at Collectorganj Cawnpore for consignment to himself at Allahabad by *passenger train four boxes of Chinese crackers* There was some discussion at the parcels office amongst the employes of the Company as to whether the consignment could be sent by passenger train but in the end it was accepted the sender paid the freight at parcels rates and was given a receipt which he took away After the sender had left the office however the employes there came to the conclusion that they could not after all send these goods by passenger train and accordingly detained them When the consignment did not arrive the plaintiff who urgently needed the goods for the *shabbarat* festival on the 5th June started a correspondence by telegram and letter with various officers of the Railway Company which however only ended in his being told that the goods could not be sent by passenger train and they continued to remain at Cawnpore Ultimately the goods were despatched by goods train on the 23rd of June and reached Allahabad on the 28th The plaintiff was asked to pay Rs 19 9 as freight and take delivery of the goods He refused to do either and the goods were in consequence sold by the Railway Company on the 28th September 1917 *for Rs 31 The plaintiff then sued the Railway* Company to recover Rs 905 5 0 this sum consisting of damages value of the goods and various expenses connected with the transaction *Held* that even if the Company s employes at Cawnpore had exceeded their authority in accepting the consignment to be sent by passenger train there was a valid contract with the Company and it was their duty when it was found that the consignment could only be sent by goods train to despatch it by this means with all reasonable speed But the Company was not liable for special damages for not delivering the goods before the 5th June as the plaintiff had not given notice that they were particularly required for that date *Held* also that as the Company s agents had rightly or wrongly accepted the consignment on a freight *of Rs 3 8 the Company was not justified in demand*ing a further sum of Rs 16 1 and in detaining the goods in default of payments FAZAL ILAHI v EAST INDIAN RAILWAY COMPANY

I L R 43 All 623

——— s 230 (2)—

See SALE OF GOODS I L R 42 Calc 1050

——— s 230 (2) 236—

See PRINCIPAL AND AGENT I L R 39 Calc 802

——— ss 231 232—

See IMMOVEABLE PROPERTY I L R 34 Mad 143

——— s 233—

See EVIDENCE ACT 1872 ss 91 AND 92 I L R 45 Bom 1242

See PRINCIPAL AND AGENT 14 C W N [illegible]

CONTRACT ACT—*contd*

——— s 235—

See LIMITATION ACT (XV OF 1877) SCH II ARTS 36, 115 AND 120
I L R 38 Mad 275

——— *Principal and Agent —Untrue representation by agent as to extent of his authority—Liability of agent* *Held* that s 235 of the Indian Contract Act 1872 applies as much to the case of a person who untruly represents the extent of the authority given to him by another as to that of a person who represents himself to be the agent of another when in fact he had no authority from him whatever *Collen v Wright 27 L J Q B 215 7 E & B 301*, referred to GANPAT PRASAD *v* SARJU (1911)
I L R 34 All 168

——— s 236—*Contract of sale—Person purporting to contract for undisclosed principal where no such principal exists if entitled to enforce performance* A person who purports to contract for an undisclosed principal where no such principal exists is not entitled to enforce the performance of it PAMJI *v* JANKI DAS (1912)
18 C W N 263

——— s 237—

See COMPANIES ACT (VI OF 1882) ss 76 77 I L R 26 All 416

——— ss 239 266—

See PARTNERSHIP

——— ss 239 247 248—*Hindu Law—Joint Hindu family—Family business started during minority of undivided son—Business continued after son became major—Debts incurred in business —Son whether partner and personally liable and for what debts—Adjudication as insolvent—Son whether liable to adjudication—Partner whether son becomes by helping during minority or taking part in business after majority—Admission of minor to benefits of partnership meaning of* A Hindu father of the Nattukottai Chetti caste started a business during the minority of his undivided son it was continued after the son became a major no public notice of repudiation of partnership (if the son were a partner) was given by the son on his becoming a major it was found that the son was helping in the business during his minority and was taking an active part in the business after attaining majority In respect of the debts incurred in the business both the father and the son were adjudicated insolvents the son applied to set aside the order of adjudication passed against him contending that he was not liable to adjudication *Held* (by the Court) that the business should be held to be joint family business of the father and the son *Held* (by WALLIS C J and SPENCER J SADASIVA AYYAR J dissenting) that the members of a joint Hindu family on attaining majority do not necessarily by virtue of ss 247 and 248 of the Contract Act or otherwise become personally liable for and liable to adjudication in respect of debts contracted in the joint family business during their minority Meaning of admitted to the benefits of the partnership in s 247 considered The fact that the minor helped in the joint family business is not enough to show admission within the meaning of the section *Samalbhai Nathubhai v Someshwar I L R 5 Bom 38*, *In the matter of Haroon Mahomed*

CONTRACT ACT—*concld*

——— ss 239 247, 248—*concld*

I L R 14 Bom 189 and other cases considered *Lutchmanan Chetty v Sivaprakasa Modeliyar I L R 26 Calc 349* followed *Per* SADASIVA AYYAR J Both by the rules of Hindu Law and by s 48 of the Contract Act (which also applies to this case) the son was personally liable for all the debts in respect of non payment of which he was adjudicated an insolvent Partnership in a family business does not depend upon the consent of the partners in many cases but upon the family being a trading family and the business being conducted for the benefit of the family persons born into the family from time to time becoming partners as a matter of course THE OFFICIAL ASSIGNEE OF MADRAS *v* PALANIPPA CHETTY (1918) I L R 41 Mad 82

——— ss 239 illus (*a*) 249 251 252—

See PARTNERSHIP I L R 39 Bom 261

——— s 247—

See SALE OF GOODS
I L R 40 Calc 523

——— *Insolvency—Position of minor partner in a firm* A minor partner of a firm cannot as such be adjudged an insolvent The creditors of the firm are not entitled to proceed against him personally but are restricted to his interest in the property of the firm *Sanyasi Charan Mandal v Asutosh Ghosh I L R 42 Calc 225* followed JAGMOHAN NARAIN *v* GRISH BABU I L R 42 All 515

——— ss 247 248—

See HINDU LAW 23 C W N 500

——— ss 247, 253 254—

See MINOR
I L R 43 Calc 225

——— s 251—

See LIMITATION ACT (IX OF 1908) ss 19 20 I L R 37 Mad 146

——— ss 252 254 sub s (6)—

See PARTNERSHIP
I L R 42 Bom 380

——— 253—The stoppage of business or refusal of a partner to supply Capital whenever demand is made cannot be treated as desolution of a partnership The question whether there has been an abandonment by a partner is a matter of inference to be drawn of the facts of each case HARAMOHAN PODDAR *v* SUDARSON PODDAR 25 C W N 847

——— *Dissolution of partnership by death of a partner—Execution of a trust deed by a partner the other partner affixing his signature as an attesting witness if can be treated as a contract to the contrary —Representatives of deceased partner if entitled to profits of the business continued by the surviving partner* A partnership business was carried on by two persons one of whom died in August 1915 On the day previous to his death he executed a trust deed for continuance of the business after his death and the other partner affixed his signature thereto only as an attesting witness but after the execution of the deed said that he would not carry on the business unless his remuneration was fixed The trustees too subsequently refused to carry on the business The surviving partner continued the

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—— s 253—concld

business alone *Held*—That by the execution of the trust deed and the signature of the other partner as an attesting witness there was no concluded contract to the contrary within the meaning of s 253 of the Contract Act and the partnership was dissolved by the death of one of the partners in August 1910 by virtue of the operation of cl (10) of the section *Held* further—That as to the profits made out of the business by the surviving partner subsequently the latter was bound to share them with the representatives of the deceased partner after making all just allowances including fair remuneration for his management in accordance with the maxim accessorium sequitur suum principale MAHAMED KAMAL v HAJI HEDAYETULLA

26 C W N 463

—— s 254 (3)—*Suit for dissolution of partnership by a partner who has himself been guilty of misconduct* Plaintiff sued defendant for dissolution of partnership on the ground of disputes between the partners and also misconduct and dishonesty on the part of the defendant It was found that the plaintiff himself had been guilty of gross misconduct that he had destroyed the old account book had falsely prepared a balance sheet had made false entries in the books and had tried to deprive the firm of a valuable account *Held* that a partner who is himself guilty of misconduct is not entitled to sue for dissolution of partnership *vide* s 254 of the Contract Act and that this suit must accordingly be dismissed. Civil Appeal No 8 of 1903 decided by a Division Bench of the Chief Court (unpublished) referred to—Also Lindley on Partnership VII edition pages 615 617 *Atwood v Maude 3 Ch 373 dictum* of Lord Cairns not followed RAM SINGH v RAM CHAND

I L R 1 Lah 8

—— ss 254 252——

See PARTNERSHIP I L R 42 Bom 380

—— ss 261 263—*Partners—Death of one of the partners—Debt incurred after his death by surviving partner to pay off price of goods ordered by both—Liability of estate of deceased partner* The estate of a deceased partner is not liable to a creditor for a debt incurred by the surviving partner subsequent to the death of the former although the debt was incurred to take up bills of lading for and obtain delivery of goods which had been ordered by the partners during the life time of the deceased partner but did not come forward until after his death S 263 of the Indian Contract Act cannot override the express provisions of s 261 of the same Act The creditor will be entitled in respect of such a debt to a decree against the surviving partner personally and against the assets of the partnership in his hands *Bagel v Miller* (1903) 2 K B 212 referred to SESHI AMMAL v VAIRAVAN CHETTIAR (1918) I L R 42 Mad 15

CONTRACT C I F

See CONFISCATION I L R 42 Calc 334

See C I F CONTRACTS
I L R 42 Bom 473

See CONTRACT

CONTRACT C I F—contd

See CONTRACT TO PURCHASE AND SHIP GOODS I L R 41 Mad 1060

See SALE OF GOODS
I L R 40 Bom 11
I L R 12 Bom 16
I L R 45 Calc 28
I L R 1 Lah 22

—— *To purchase and ship goods—C I F contracts nature of—C I F contract with ordinary vendor and with commission agent difference between—Outbreak of war effect of—Liability of vendor and vendee—Special terms as to risk in contract effect of—Indian Contract Act s 222* E & Co who were commission agents entered into a contract with the defendants under which they undertook to purchase and ship certain goods on account and risk of the defendants and did ship them under a C I F contract on board a German ship Owing to the outbreak of war during their transit the goods did not arrive at their destination until long after due time On defendants refusal to accept the goods they were sold by the plaintiff the liquidator of E & Co who sued the defendants for damages for breach of contract the defendants denied the liability *Held* that E & Co being commission agents of the defendants were entitled both under the special terms of the contract and under the general law of agency embodied in s 222 of the Indian Contract Act to recover damages for breach of contract In an ordinary C I F contract between vendors and vendee the tender of a bill of lading after the contract of affreightment has been dissolved by the outbreak of war is not such a tender as the vendees are bound to accept and they are not bound to pay for the goods *Arnhold Karberg & Co v Blythe Green Jourdain & Co* (1916) 1 K B 495 followed Where however goods are purchased from a commission agent though he is regarded for some purposes as a principal as any other vendor under a C I F contract yet the relationship of principal and agent still subsists for all other purposes the true principle is that the assimilation is only to be carried so far as is necessary to give necessary efficacy to the transaction *Ireland v Livingston L R 5 H L 395 Cassaboglou v Gibb 11 Q B D 797 Williamson v Barbour 9 Ch D 529* referred to HARRY MEREDITH v V K ABDULA SAHIB (1918) I L R 41 Mad 1060

—— *Addition of C I to C I F in indent form—Bill of Exchange presented along with shipping documents and accepted by the merchant in India—Goods shipped on an alien ship—War between the Governments of the shipper and the shipmaster—The alien ship seized as a prize—Bill not paid at maturity the acceptor not receiving goods—Release of the alien ship and delivery of the goods to the acceptor—Acceptor refusing to pay interest and notarial charges held liable to pay the same—Bill of Exchange presented without shipping documents after the outbreak of war—Shipping documents becoming void after the outbreak of war—Consequent failure of consideration for the acceptance of the bill—Acceptance conditional—Non liability of the acceptor to pay the principal amount of the bill interest and notarial charges—The Indian Contract Act (IX of 1872) s 56 ... egotiable Instruments Act (XXVI of 1881)* ... plaintiffs were merchants doing ... Glasgow The

CONTRACT C I F—*contd*

defendant merchants in Bombay ordered through the plaintiff's agent in Bombay fifty cases of aluminium circles to be delivered at Madras on C I F C I terms The first shipment was to be of fourteen ca es and the remaining ones of twelve cases each The first consignment of fourteen cases was in due cour e received and paid for by the defendants The second and third con ign ments of twelve cases each were shipped from a German port on the 16th and 25th July 1914 respectively on two German vessels S S Barenfels and S S Kybfels Hansa Line The shipping documents in respect of the Barenfels goods were duly delivered to the defendants along with the bill of exchange which the defendants accepted on 31st July 1914 On the 9th October 1914 the plaintiffs drew another bill of exchange in respect of the Kybfels goods which the defendants accepted on the 10th November 1914 The shipping documents for the said goods were not however received by the defendants at the time of the acceptance of the bill but were tendered by the plaintiffs some *time after the filing of the suit* The two bills became payable on the 2nd October 1914 and 12th January 1915 respectively but were not met by the defendants by payment War being declared b tween Great Britain and Germany S S Barenfels was in August 1914 seized on the voyage as a prize and on her release by the Prize Court allowed to proceed to Madras where she unloaded her cargo on 8th June 1915 when the defendants obtained possession of their goods on payment of the principal amount due under the first bill but not the interest from the date of maturity to the date of payment The plaintiffs sued on 2nd February 1915 to recover from the defendants (i) the interest due on the first bill from the date of maturity to the date of payment together with notarial charge and (ii) the amount due on the second bill with interest *Held* (i) that under the first bill inasmuch as the defen dants obtained all that they were entitled to obtain under the C I F contra t when the bill was presented to them for acceptance that is to say good shipping documents the risk after the accep tance was entirely their own and that having refused payment on maturity they were liable to pay over due intere t after that date and the notarial charges incurred by the plaintiffs (ii) that under the econd bill inasmuch as the bill of lading had become a void contract before it was tendered to the defendants on the 10th November 1914 there was at that time a failure of consideration for the acceptance of the bill and they were not bound to pay at maturity *Arnhold Kerberg & Co* v *Blythe Green Jourdian & Co Theodor Schneider & Co* v *Burgett & Newsam* (1915) 2 K B 379 followed It is an accepted principle of the maritime law that all contracts of affreightment are put an end to by the outbreak of hostilities between the Govern ments of the shipper and the shipmaster *Esposito* v *Bowden* 7 *El & Bl* 763 followed MAR HAL & Co v NAGIN CHAND FULCHAND (1916)

I L R 42 Bom 473

——— *Breach—Suit for difference—Plaintiff s failure to prove freight insurance etc—Award of nominal damages if justified* Where under a c i f. contract it was agreed between S and J that if S failed to take delivery of certain timber in time J was to dispose of the same locally and S was to pay him the difference in price and S having failed to take delivery J sold the timber by auction in a regular manner and sued for the difference but did not give clear evidence of the freight the insurance the loading charges and certain Port or Customs duties which had to be deducted *Held* that as S called no evidence on those points at all and there was no suggestion on his side that these expenses would have wiped out the differ ence the Appellate Court in India was not justi fied in awarding to J nominal damages of Re 1 only A. V JOSEPH v P SHEW BUX (1918)

23 C W N 601

——— Defendants accepted shipping documents and drafts for the amount due but refused to take delivery on the ground that the goods were not in accordance with the description on the indents which however shewed the Contract C I F and that the indentors were bound to pay the drafts at maturity and if they had any claim in regard to the nature of the goods they would bring it in manner laid down in the indent *Held* that the defendants could not in answer to the claim upon the draft plead failure of consideration because what they contracted for were shipping documents not the goods STIRLING MASON AND CO v JAWALA NATH BHAGWAN DAS

I L R 1 Lah 22

CONTRACT FOR SALE

See CONTRACT

See SALE OF GOODS

See EVIDENCE ACT (I OF 1872) s 92
I L R 38 Mad 514

See SALE I L R 41 Calc 148

——— By Co parcence of hi inter s —

See HINDU LAW I L R 44 Bom 967

——— of cotton under *Bombay Cotton* Trade As ociation Rules—

See AWARD I L R 44 Bom 780

——— *Vendor s interest in the property sold ceasing to exist by Government Resolution—Vendor becoming entitled to other interest—Vendee cannot sue to recover the other right—Pre emption—Personal right—Transfer—Transfer of Property Act (IV of 1882) s 6* The defendant who was occupant of certain Survey Numbers had under a Government Resolution a right of pre emption in stumps of trees standing on the lands sold the stumps to the plaintiff After the date of the sale Government issued another Resolution by which the right of pre-emption was abolished and the occupant was awarded only 20 *per cent* of the net proceeds of the sale of the stumps by the Forest Depart ment This percentage was stated to be "a gift from Government and subject to no tribunal The plaintiff sued to recover the percentage from the defendant which the latter received from Government in respect of the stumps sold by him *Held* that the plaintiff was not entitled to recover anything from the defendant for what the plain tiff was claiming was a gift or bonus from Govern-ment to the defendant under a Government Resolution which gift or bonus was not and could not have been in the contemplation of the parties when the contract was entered into and which by itself was not transferable The right

CONTRACT FOR SALE—*concld*

——— of cotton under Bombay Cotton Trade Association Rules—*concld*

of pre emption is a purely personal right which cannot be tran ferred to any one except the owner of the property affected thereby JASUDIN v SAKHARAM GANE u (1911) I L. R 36 Bom 139

——— *Construction—Computa ion of time— Up to Wednesday— Until —Evidence Act (I of 18 ?) s 91—Oral evidence* On 1.th May 191" the defendant offered to sell his motor car to the plaintiff company in these words Nevertheless I am willing to hand over the car to you against a cheque for R 3 120 As I intend advertising the car unless you wish to have it please under stand that my offer only holds good *up to Wedne day* next as the time I have is limited The plaintiff company sometime on Wedne day, the 16th May tend red Rs 3 1?0 to the defen dant and a ked for delivery of the car in accord ance with the offer of the 1?th May The defen dant however refused the tender contending that his offer expired on Tuesday the 1.th May *Held* that upon the true construction of the letter of the 1 th May and the words up to Wedne day the offer remained open until mid night on Wednesday and did not expire at mid night on Tuesday *The King v Steven 5 East 244 Bellhouse v Mellor 4 H & N 116 Isaacs v Royal Insurance Co L R 5 Ex 296* and *Rogers v Davis 8 Ir L R 399* con idered METRO POLITAN ENGINEERING WORKS v DEBRUNNER (191") I. L R 45 Calc 481

CONTRACT OF CARRIAGE

See COMMON CARRIER LIABILITIES OF I L R 38 Calc 28

CONTRACT OF EMPLOYMENT

See BROKER I L R 42 Calc 1050

CONTRACT OF MARRIAGE

See MARRIAGE CONTRACT OF I L R 39 Bom 682

See CONTRACT (24) I L R 42 Bom 499

——— breach of—

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887) SCH II ART 3? (g), I L R 38 Mad 274

CONTRACT OF GUARANTEE

See CONTRACT ACT 18 2 ss 1?4 TO 147

See PRINCIPAL AND SURETY

CONTRACT OF SERVICE

See SCHOOLMASTER I L R 44 Calc 917

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See WORKMEN S BREACHES OF CONTRACT ACT ss 1 2 4 15 C W N 15

CONTRACT TO ASSIGN DOCUMENT

——— *Damages awardable though no loss is proved—Measure of damages* A as the agent of B, took from D a debtor of B for

CONTRACT TO ASSIGN DOCUMENT—*concld*

the debt due a bill in favour of C A undertook to get the bill endorsed in favour of B by C A having failed to do so for more than a year B sued A claiming as damages the amount of the bill with interest At the settlement of issues A produced the promissory note endorsed in favour of B *Held* that B s suit was maintainabl and that the endorsement after the suit was filed could not defeat B s claim. The contract to obtain the assignment not having been performed within a reasonable time the contract was broken and the right to sue accrued before the suit was brought It could not be said that B had sustained no damage which he was entitled to recover as the bill standing in the name of a third party pre vented him from suing on the original obligation A promissory note in consideration of a pre existing debt is only a conditional payment and if the promissory note remains in the hands of the original payee when it is dishonoured the original debt revives If however the promissory note had been endor ed to a third party a suit on the original debt would not be maintainable *A debtor In re (1908) 1 K B 344* referred to It is not necessary that B should prove that D had become insolvent or that the money could not be recovered if a suit had been brought against D The amount recoverable will be the amount for which the promissory note was executed SUBRAMANIAN CHETTY v MUTHIA CHETTY (191?) I L R 35 Mad 639

CONTRACT TO LEND OR BORROW

See SPECIFIC PERFORMANCE. I L R 43 Calc 59

CONTRACT WITH ENEMY

——— *Status of hostile firms —Common law doctrine—Trading licenses granted to hostile firms their effect—Licenses granted to manager of a firm not ultra vires—The Hostile Foreigners Trading Order of 1914—The Indian Councils Act of 1861 s ?3—Act I of 191.—Interest made payable under contracts entered into before war—Suspension of interest after war—American cases though not authoritative noted on a novel point* The existence of a state of war between the respective countries of the debtor and the creditor suspends the accrual of interest when it would ordinarily be recoverable as damages and not as a substantive part of the debt the reason being that a party should not be called upon to pay damages for retaining money which it was his duty to withhold. The accrual of interest is equally suspended, even when the alien enemy creditor remains in the country of the debtor until the debtor has actual notice that the principal can safely be paid without the possibility of its enuring for the benefit of the enemy during the continuance of hostilities PADGETT v JAMSHETJI HORMUSJI (1916) I L R 41 Bom 390

——— *Forward cotton con tracts—Manager of an Indian branch of enemy firm entering into contracts prior to war—Pledge of goods as security by manager before and after war—Settlement by manager of pre war contracts by cross-contract.—Agreement by Liquidator of an Indian branch firm valid—Liquidator acting under Controller of Hostile Trading C of war—Contract of*

CONTRACT C I F —*contd*

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See CONTRACT

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See SALE I L R 41 Calc 148

——————— By Co parcener of his interest—

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——————— of cotton under Bombay Cotton Trade Association Rules—

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——— breach of—

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887) SCH II ART 35 (g), I L R 38 Mad 274

CONTRACT OF GUARANTEE

See CONTRACT ACT 1872 ss 1?4 TO 147

See PRINCIPAL AND SURETY

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CONTRACT TO LEND OR BORROW

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CONTRACT WITH ENEMY

——— *Status of hostile firms —Common law doctrine—Trading licenses granted to hostile firms their effect—Licenses granted to manager of a firm not ultra vires—The Hostile Foreigners Trading Order of 1914—The Indian Councils Act of 1861 s 23—Act I of 1915—Interest made payable under contracts entered into before war—Suspension of interest after war—American cases though not authoritative noted on a novel point* The existence of a state of war between the respective countries of the debtor and the creditor suspends the accrual of interest when it would ordinarily be recoverable as damages and not as a substantive part of the debt the reason being that a party should not be called upon to pay damages for retaining money which it was his duty to withhold. The accrual of interest is equally suspended even when the alien enemy creditor remains in the country of the debtor until the debtor has actual notice that the principal can safely be paid without the possibility of its enuring for the benefit of the enemy during the continuance of hostilities PADGETT v JAMSHETJI HORMUSJI (1916) I L R 41 Bom 390

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CONTRACT WITH ENEMY—*contd*

agency whether terminated by war—Payment made by Liquidator in settlement of a claim cannot be recovered—Mistake of law—Pleadings—The Indian Contract Act (IX of 1872) ss 21 65 and 72—The Royal Proclamations of August 1914 Nos 1 and 2—Treasury Announcements—Hostile Foreigners (Trading) Order of November 1914—The Enemy Trading Act (X of 1916) ss 4 5 and 13—Controller can exercise all powers conferred on Official Liquidators by s 179 of the Indian Companies Act without sanction of Government—Counter claim The plaintiffs W and Sons were a German firm with its head office in Germany and a branch office at Bombay managed by a German named Zoller Prior to the outbreak of war between Great Britain and Germany on 4th August 1914 the plaintiffs had employed the defendants an Indian firm in Bombay as their guaranteed brokers and muccadums on the latter depositing with them Rs 50 000 by way of guarantee In July 1914 certain cotton contracts were entered into between the plaintiffs and the defendants for January to March 1915 delivery On 3rd August 1914 the plaintiffs returned to the defendants Rs 40 000 out of their deposit amount On the 5th August 1914 the plaintiffs and the defendants entered into a written agreement (in pursuance of an arrangement arrived at between them the previous day) by which the plaintiffs pledged 799 bales of blankets belonging to them to defendants as security for the balance of the deposit amount and the differences on the forward contracts On the 27th August 1914 Zoller further pledged certain cotton bales to the defendants by way of additional security On 3rd September 1914 the forward contracts were closed by Zoller by cross contracts with the defendants at the prevailing market rates On 5th September 1914 Zoller was interned and one Tombroff was appointed Liquidator by Government who in the course of his duties took directions from the Controller of Hostile Trading Concerns. In July 1915 the Liquidator with the assent of the Controller agreed with the defendants that they should sell the blankets and apply the sale proceeds towards the payment of their debt for the cotton differences In or about September 1915 the Liquidator after communicating with the Controller entered into a further agreement with the defendants which in effect was that the Liquidator was to sell the cotton and the defendants were to give delivery to the purchasers and to allow the Liquidator to receive the purchase money on the express condition that the balance of the defendants claim remaining after the realisation of the blankets was to be paid out of the proceeds of the cotton. The sales of the blankets and the cotton were duly effected. The sale proceeds of the blankets sold by the defendants being insufficient to pay off the whole amount of the debt due to them the defendants sent to the Liquidator on 10th March 1916 a final statement of account showing a balance of Rs. 47 194 due to them and asked to be paid out of the sale proceeds of cotton in the hands of the Liquidator On 12th April 1916 the Liquidator repudiated his liability to pay that amount or any alleging that the original pledge of the blankets on the 5th August 1914 was illegal and void and that he on the other hand was entitled to the sale proceeds in the hands of the defendants as pledgee after deducting therefrom Rs. 10 000 being the balance of the deposit due to them and certain expenses incurred by them On 6th August 1917 the plaintiffs by their Liquidator sued the defendants for the amount of the sale proceeds of the blankets contending *inter alia* that the pre war contracts of July 1914 and the pre war pledge (if any) of the 4th August 1914 became *ipso facto* void on the outbreak of war that the further pledges given on the 5th August and the 27th August 1914 were similarly void that the cross contracts of the 3rd September 1914 being tainted with the illegality of the pre war contracts were also void or amounted to the settlement of a nullity that Zoller s agency terminated *ipso facto* on the outbreak of war and that therefore he had no power to enter into any of the subsequent transactions and that under s 65 or s 72 of the Indian Contract Act they were entitled to recover payments made towards the satisfaction of the defendants debt the illegality of the transactions not being discovered by them till November 1915 The defendants resisted the plaintiffs claim for refunding the money paid and counterclaimed a *large amount due at the foot of the account between* the parties On the figures agreed at the trial the plaintiffs claim was for Rs 69 467 9 0 and the defendants counterclaim for Rs 58 440 9 0 (the plaintiffs admitting their liability for Rs. 10 000 being the balance of the *guarantee* amount deposited by the defendants) *The trial* Judge MACLEOD J dismissed the plaintiffs suit and decreed the defendants counterclaim *holding (i) that although the* pre war contracts and the two pledges became void on the outbreak of war the settlement of the contracts by cross contract was a legitimate transaction as merely fixing the damages for the breach of contracts of purchase which both parties mistakenly believed could still be legally enforced *(ii) that* Zoller s agency did not terminate on the outbreak of war and (iii) that the Liquidator having agreed that the *amount realised by the sale of the* blankets and the cotton bales be set off against the satisfaction of the debt due to the defendants that amounted to a payment which the plaintiffs were not entitled to recover either under s 65 or s 72 of the Indian Contract Act *the latter section not applying* to a mistake of law *The plaintiffs appealed* —*Held* confirming the decision of the trial Judge (1) that assuming but without deciding that the plaintiffs contentions as *to the effect* of the war on the transactions in question were correct the legal position of the Indian branch of an enemy firm up to November 1915 was in view of the Proclamations and orders then in force sufficiently *doubtful as to afford some justification for the* view that the transactions were valid (2) that the Liquidator in the course of the winding up was entitled to enter into binding *agreements* with the defendants for the sale of the blankets and cotton and the *application of the sale proceeds* in discharge of the defendants debt irrespective of any disability attaching *to Zoller* (3) that the acts of the Liquidator done *with the* approval of the Controller were validated under s 13 of the Enemy Trading Act X *of 1916* (4) that assuming that there was a *mistake of law* which was neither pleaded nor proved the agreements entered into by the *Liquidator with the* defendants were contracts within the meaning of the Indian Contract Act and *could not be* avoided under s 21 of the Act as *being made* under any mistake of law and that accordingly

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the payments made to the defendants were made under the binding contract and could not be recovered under s 72 of the Act (5) that s. 65 of the Indian Contract Act did not apply as the payments were made under valid agreements but assuming that the payments were made under the pre-war contracts and pledges ending 3rd September 1914 the word agreement as used in the section did not apply to the pre war contracts, for they were contracts and not agreements, and that the words discovered to be void were not applicable to the subsequent agreements as the parties knew all the material facts (6) that no advantage within the meaning of s 65 was received by the defendants under the pre war contracts when *ex hypothesi* they became void on the outbreak of war and payments were made to the defendants in 1915 under subsequent agreements with the Liquidator (7) that the defendants were entitled to succeed on their counterclaim inasmuch as they changed their position with regard to the cotton in their possession on the faith of a promise made to them by the Liquidator and that promise was binding in law *W L Ingle Limited* v *Mannheim Insurance Company (1915) 1 K B 227*, *Halsey* v *Lowenfeld (1916) 2 K B 707* *Schaffenius* v *Goldberg (1916) 1 K B 284* *Holsworthy Urban Council* v *Holsworthy Rural Council (1907) 2 Ch 62* referred to WOLF & SONS v DADYBA KHIMJI & Co (1919)

I L. R 44 Bom 631

CONTRACT WITH GOVERNMENT

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887) SCH. II ART 3
I L R 37 Mad. 533

CONTRADICTORY STATEMENT

See SANCTION FOR PROSECUTION
I L R 37 Calc 618

CONTRIBUTION

See COMPANY I L R 40 All 45

See CONTRACT ACT (IX OF 1872) ss 69 AND 70 I L R 39 Mad 795

See CO SHARER 15 C W N 332

See COSTS I L R 40 All 672

See HINDU LAW—(DEBT)
I L R 37 Mad 458

See LIMITATION
I L R 39 Mad 288

See MORTGAGE I L R 40 Mad 968
I L R 38 All 92
I L R 43 All 42

See SALE FOR ARREARS OF REVENUE.
I L R 44 Calc 573

See TORT 4 Pat L J 486

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 82
I L. R 33 All 387 708
I L R. 36 All 272
I L R 37 All 101
I L R 43 All 589

———— cause of action for—

See LIMITATION I L R 39 Mad 288

———— suit for—

See LIMITATION I L. R 39 Mad 288

CONTRIBUTION—*concld*

———— suit for—*concld*

See RENT DECREE 14 C W N 699

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887) s 25 SCH. II ART 41 I L R 41 All 51

———— suit for in respect of repairs to a jointly owned well—

See LIMITATION ACT 1908 SCH ARTS 61 AND 116 I L R 44 Bom 591

1 ———— Attachment—*Purchase of part of attached property by a third party who satisfies the whole claim—No right of contribution against the remainder acquired by the purchaser* An attaching creditor does not obtain by his attachment any charge or lien upon the attached property Where therefore a third party purchased a portion of certain property under attachment and satisfied the whole of the creditor s claim *Held* that the purchaser acquired no right of contribution as against the remainder of the attached property *Moti Lal* v *Karrabuldin I L R 25 Calc 179* *Peacock* v *Madan Gopal I L R 29 Calc 428* and *Miller* v *Lukhimani Debi I L R 28 Calc 419* referred to LALTA PRASAD v ZAHUR UD DIN (1910) I L R 32 All 479

2 ———— Mortgage sale—*Sale set aside by consent on one of co mortgagors paying off decree—Liability of other co mortgagors to contribute—Equity—Contract Act (IX of 1872) s 69—Charge* Where a mortgage decree having been passed against several persons a sale of the mortgaged property took place and then one of the mortgagors paid off the decree holder and by consent the sale was set aside *Held* in a suit by him against the other mortgagors for contribution that although the defendants were not liable under s 69 of the Contract Act the plaintiff not having paid the money to prevent the sale the defendants who kept the property were bound in equity to pay their share of the money which the plaintiff had paid to release the property The amount was declared to be a charge on the shares of the defendants PARBHU NARAIN SINGH BAHADUR v BABU BENI SINGH (1909)

14 C W N 361

3 ———— Purchasers of mortgaged property—*Mode of calculating amount as between purchasers of different items of mortgaged property* *M* mortgaged 3 items of property to one *S* for Rs 1 300 Two of these items were sold to two persons for Rs 1 200 and the deeds of sale provided that the amounts for which the profits were sold should be paid to the mortgagee The sale of the third item was for cash but the property was not sold free of encumbrance and there was no contract between *M* and the third purchaser that the lands sold to the other purchasers should be liable for the Rs 1 200 of the mortgaged money *S* assigned his mortgage and the assignee obtained a decree for the full amount due on the mortgage and in execution the properties sold to the third purchaser were brought to sale and the third purchaser paid up the amount to avoid the sale In a suit by the third purchaser for contribution it was contended by the third purchaser that the amount of Rs 1,200 should be borne by the other two purchasers and the rateable contribution on all the properties should be only [illegible] respect of the balance left after deducti[illegible]

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avail himself of other peoples industry Nor will he be allowed to take quotations from judgments or facts obtained by another from the records of a case The principle is that whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men s works subject to copyright and entitled to protection *Lewis v Fullerton 2 Beav 6 8* followed JOGESH CHANDRA CHAUDHURI *v* MOHIM CHANDRA RAI (1914) 18 C W N 1078

———— *Preparation by a member of the Board of Studies Allahabad University of a list of graduated selection from different authors for certain examinations—Publication by the Syndicate of a syllabus containing amongst other items the selection already referred—Publication of same in book form by a book seller—Infringement of copyright* *A* a member of the Board of Studies of the Allahabad University prepared at the request of the convener a list of graduated selections from standard Persian authors for the use of candidates for certain examination of the Univer ity In preparing these lists he spent considerable labour learning and skill The Board of Studies after due consideration adopted with slight modifications the selections shown in the list as the subject for those examinations in Persian and published the lists for the information of the public generally and of the candidates concerned specially Subsequently to this *B* a firm of publishers compiled books from the original authors according to these lists *Held* that *A* had no copyright in the lists as by laying the result of his labours before the Board of Studies he placed the lists unreservedly at the disposal of the University authorities MUHAMMAD ABDUL JALIL *v* RAM DAYAL (1916) I L R 38 All 484

———— *Reasons for acquisition of copy right in a compilation like a grammar—Novel mode of arrangement—Joint Hindu family —Inheritance of copy right in a work compiled by the father* There is no reason why a copy right may not be acquired by the compiler of a book like a grammar if the arrangement of the subject matter is novel and has not been employed in previous books of the same nature Plaintiff compiled a book of this nature whereupon defendant produced a similar work He adopted special arrangement of the plaintiff s book copied a large number of pages verbatim from it added a small amount of matter of his own and slightly altered the title *Held* that the infringement of plaintiff s copy right extended to the whole of the book and could not be limited to the pages actually copied from plaintiff's compilation *Held also* that whether or not a copy right would in a joint Hindu family pass by survivorship the sons of a Hindu father who had acquired the copy right were entitled to sue respecting its infringement GHAFUR BAKHSH AND SONS *v* JWALA PRA AD SINGHAL I L R 43 All 412

COPYRIGHT ACT (XX OF 1847)

———— ss 7 and 12—*Copyright—Suit for damages for infringement of copyright—Jurisdiction* A suit to recover damages for infringement of copy right does not lie in the Court within the jurisdiction of which the plaintiff but not the defendant resides Neither is the possessor of a pirated copy of a copyright work bound to deliver it to the owner of the copyright whenever he (the owner) may happen to reside RAM KISHAN *v* PIARI LAL (1910) I L R 33 All 24

COPYRIGHT ACT (III OF 1914)

See COPYRIGHT 18 C W N 1078

CO RESPONDENT

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XL R 22 I L R 37 Bom 511

———— absence of—

See DIVORCE I L R 45 Calc 525

CORPORATION

See GURNISHEE 4 Pat L J 141

See SALE I L R 43 Calc 790

———— Senate of a University—

See UNIVERSITY LECTURESHIP I L R 41 Calc 518

———— suit against—

See PLAINT I L R 43 Calc 441

CORPORATION SOLE

See MUTT HEAD OF I L R 38 Mad 356

CORROBORATION

See ACCOMPLICE I L R 38 Calc 559

See CONFESSIONS OF CO ACCUSED I L R 42 Calc 789

———— necessity of—

See ACCOMPLICE I L R 38 Calc 96

CORRUPTION

See OFFICIAL CORRUPTION

CO SHARER

See ACQUIESCENCE I L R 37 All 412

See AGRA TENANCY ACT 1901 s 159 I L R 42 All 311

See BENGAL TENANCY ACT s 171 15 C W N 512 782

188 I L R 38 Calc 270

See DISPUTE CONCERNING LAND I L R 40 Calc 982

See EXPROPRIETARY TENANT I L R 35 All 27

See HINDU LAW (PARTITION) L R 41 I A 217

See IJARDAR I L R 43 Calc 1078

See MAHOMEDAN LAW—PRE EMPTION I L R 39 Calc 915

See CO OWNER

See CO PARCENER

See PARTITION 15 C W N 375

See PARTITION ACT (IV OF 1893) 15 C W N 552 555 (foot note)

CO SHARER—*contd*

See PENAL CODE s 447
I L R 36 All 474

See PRE EMPTION I L R 33 All 260

See SALE FOR ARREARS OF REVENUE
I L R 44 Calc 573

See UNITED PROVINCES LAND REVENUE ACT (III OF 1901) s 118
I L R 39 All 707

——— liability of—

See PENAL CODE s 225B
I L R 32 All 116

——— payment by—

See SALE FOR ARREARS OF REVENUE
I L R 41 Calc 1092

——— suit by—

See BENGAL TENANCY ACT s 188
I L R 38 Calc 270

1 ——— Injunction—*Co sharer exclusive enjoyment of portion of property by—Injunction if may be granted where no injury to other co sharers found* Where a co sharer had taken possession of a small plot of unoccupied land and had erected a tinshed thereon and it was found that by such exclusive possession his other co sharers had not suffered any substantial injury *Held* that no mandatory injunction should be issued requiring him to restore the land to its original condition. *Watson & Co v Ram Chand Dutt L R 17 I A 110 s c I L R 18 Calc 10 Dilbar Sardar v Hosein Ali Bepari I L R 26 Calc 553 Atarjan Bibee v Sheikh Ashak 4 C W N 788 Lachmiswar Singh v Manowar Hosein I L R 19 Calc 253* referred to BRAHMOMOYI CHOWDHURANI *v* GOPI MOHAN ROY CHOWDHURI (1910)
15 C W N 188

2 ——— Right to contribution—*Contract Act (IX of 1872) ss 43 69 70—Rent paid by co sharer in wrongful possession of entire jote—Payment in good faith—Deduction on account of mesne profits—Payment whether gratuitous* Defendant s title to an eight annas share in a *jote* having been declared in a suit brought by him against the plaintiff the latter sued the former for a moiety of the rent recovered from him by the landlord when he was in exclusive possession of the *jote* *Held* that in such cases the principle in *Dakhina Mohan v Sarada Mohan I L R 4 Bom 643* applies and the plaintiff would be entitled to recover if the payment was made by him in good faith, subject however to a deduction on account of mesne profits realised by him in respect of the defendant s share. If the payment was made with a view to creating title in the entire *jote* it could not have been made in good faith It would be a voluntary payment and one not made lawfully within s 70 of the Contract Act *Desai Himat Singhji v Bhavabhai I L R 4 Bom. 643 Bamasundari v Adhar Chandra I L R 22 Calc 28 Tiluck Chand v Saudamini I L R 4 Calc. 566* referred to JINNAT ALI *v* FATEH ALI MATBAR (1911)
15 C W N 332

Cf CONTRIBUTION
I L R 45 Calc. 691

3 ——— *Co-sharer landlord if may sue for his share of rent when no separate collection—Suit for apportionment if lies—prayer for apportionment in rent suit if entertainable—Parties—Decree for entire rent in favour of all co sharers when may be made* A co sharer landlord can maintain a suit for his share of the rent separately if there is an arrangement for separate collection without a division of the lands amongst the co sharers The case of *Raj Narain Mitter v Ekadasi Bag I L R 27 Calc 479* does not lay down that there must be a division of the lands before a co sharer can maintain a separate suit for his share of the rent A sale of a share in an estate which has been let out in its entirety to a tenant does not of itself necessarily effect of a severance of the tenure or an apportionment of rent but if the purchaser desires such severance or apportionment he must give the tenant due notice to that effect and then if an amicable apportionment cannot be made by arrangement between all the parties concerned the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned making all the co sharers parties to the suit Such an apportionment can be asked and effected in the rent suit itself But where in such a suit the plaintiff did not ask for an apportionment though he made all his co sharers parties the plaintiff was entitled to ask for a decree for the entire rent in favour of all the co-sharers SHYAMA CHURN DAS *v* JOGES CHANDRA RAY (1912)
16 C W N 774

4 ——— Suit to recover joint possession *Exclusive possession by a co-sharer—Where possession wrongful at its inception co sharers if may recover joint possession* The defendant was in wrongful occupation as a tenant of a plot of land belonging to the plaintiffs and other co-sharers Subsequently the defendant purchased the share of one of these co sharers and thus became interested in the land as a proprietor In a suit by his co sharers for joint possession of of the land in suit *Held* that the plaintiff's occupation being originally wrongful the subsequent acquisition of joint title did not entitle the defendant to resist the plaintiff s claim for joint possession *Watson & Co v Ram Chand Dutt I L R 18 Calc 10* distinguished. SHAIKH SAMARADDI *v* SHYAMA CHURN SEN (1911)
16 C W N 251

5 ——— *Ouster by other co sharer what amounts to—Claim and exercise of exclusive title under a lease from a stranger—When co-sharer in possession may keep exclusive possession—Change of case in second appeal—Remand prayer for* The five sixths owners of an estate A sued the remaining one sixth owners for recovery of joint possession with the latter of certain lands within the estate The latter in defence stated the lands in suit were part of estate *B* which the owners of that estate had given them in lease This having been found against in the Court of first appeal the defendants in second appeal prayed to be allowed to set up the defence that they had been in occupation of the lands as co sharers and were cultivating the same as such with the consent of the plaintiffs The prayer was disallowed and *held* that this was a case of exclusion of co sharers by other co-sharers and the plaintiffs were entitled to a decree for joint possession. *Watson & Co. v Ram Chand Dutt L R 17 I A 110 s c I L R 18 Calc. 10 Lachmeswar Singh v Manowar Hosein,*

CO SHARER—*contd*

L R 19 I A 48 s c I L R 19 Calc 253 and *Mohesh Narain v Naubut Pathak I L R 32 Calc 837 s c 1 C L J 437* distinguished MOOKERJEE J The rule laid down in *Watson & Co v Ram Chand Dutt L I 17 I A 110 s c I L R 18 Calc 10* is a rule of justice equity and good conscience and must be applied with reference to the circumstances of the individual case before the Court *Primâ facie* co owners are entitled to hold joint possession of joint property and consequently if one co sharer seeks to defeat the claim of another co sharer to joint possession special circumstances must be alleged and established to justify exclusive occupation by one of them The principle deducible from the cases is that a co sharer who has been ousted from joint property is entitled to recover joint possession To constitue ouster a physical eviction is not essential if a co owner is in possession on behalf of or under an adverse claimant under such circumstances as to evidence a claim of exclusive right and title and a denial of the rights of the other co sharers there is an ouster in law When one co owner accepts a deed of the whole property from one who has no title and claims and exercises the rights of sole ownership under a denial of any other person s right in the premises he is in adverse possession to the exclusion of his co sharers NARENDRA BHUSAN ROY v JOGENDRA NATH ROY (1916) 20 C W N 1258

6 ———— Lease by majority of common land—*Validity of lease—Lease whether binding on minority—Suit by minority in ejectment—Remedy whether limited to partition only—Form of decree* A majority of co sharers in samudayam or common land cannot grant a perpetual lease of the common property Where a lease by some of the co sharers is found to be invalid, the lessee is not entitled to be maintained in his possession leaving it to those co shares objecting to his lease to sue for partition as their only remedy Where the lease is by some of the co harers to a person who is also a co sharer and the suit is by other co sharers to eject the lessee the proper decree to be passed is one declaring that the lease is not binding on the plaintiffs and directing recovery of possession by the latter on their own behalf and that of the other co sharers *Palaniappa Chetty v Sreemath Debasikamony Pandara Sannadhi I L R 40 Mad 709* applied *Watson and Company v Ramchund Dutt I L R 18 Calc 10* explained RAGHAVACHARYULU v GOVINDASARI (1918) I L R 41 Mad 1068

CO SHEBAITS

See PARTIES I L R 46 Calc 877

COSTS

See APPEAL I L R 43 Calc 857
See ARBITRATION I L R 40 Calc 219
See ATTORNEY I L R 43 Calc 932
See ATTORNEY AND CLIENT
I L R 40 Calc 386
See BOMBAY MUNICIPAL ACT (BOM ACT III 1888) ss 307 301
I L R 43 Bom 181
See CIVIL PROCEDURE CODE 1882 s 20
14 C W N 556

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See CIVIL PROCEDURE CODE 1908—
s 35 I L R 43 Mad 61 284
O XXV r 1 I L R 35 Bom 421
O XXXIV rr 4 5 AND 10
I L R 40 All 109
I L R 41 All 473
r 14 I L R 35 All 518
I L R 41 Calc 173
See CONTEMPT OF COURT—15 C W N 791
See CONTRACT ACT (IX OF 1872)—
s 47 I L R 40 Bom 517
s 65 I L R 40 All 558
s 70 I L R 42 Bom 556
See CONTRIBUTION I L R 32 All 585
1 Pat L J 201
I L R 43 All 77
See COURT FEE 3 Pat L J 443
See CRIMINAL PROCEDURE CODE—
s 148 15 C W N 811
s 344 I L R 42 Bom 254
See DECREE I L R 38 Calc 125
See DIVORCE ACT (IV OF 1869) ss 2 4 7 AND 45 I L R 38 Bom 125
See EASEMENT I L R 39 Calc 59
See EXAMINATION ON COMMISSION
I L R 45 Calc 492
See EXECUTION OF DECREE (48)
—4 Pat L J 330
See OUDH ESTATES ACT (I OF 1869)
I L R 33 All 344
See PAKKI ADAT SYSTEM
I L R 39 Bom 1
See PLEADER S FEE
I L R 41 Calc 637
See PRACTICE I L R 35 Bom 339
See PRE EMPTION
I L R 2 Lah 294
See PRINCIPAL AND AGENT
I L R 41 All 254
See PRIVY COUNCIL
I L R 36 Mad 501
See REMAND I L R 43 Calc 1104
See SECURITY FOR COSTS
I L R 42 Bom 5
See SHAWLS MEANING OF
I L R 39 Calc 1029
See SOLICITOR S LIEN FOR COSTS
I L R 34 Bom 484
I L R 35 Bom 352
See SUMMONS SERVICE OF
I L R 43 Calc 447

———— Against Secretary of State—
See CRIMINAL PROCEDURE CODE s 4
5 Pat L J 321

———— appeal courts powers regarding—
See DAMAGES 29 C W N 352

———— apportionment of—
See PUNITIVE POLICE
I L R 40 Calc 4 2

COSTS—*contd*

———— decree against wife—

See RESTITUTION OF CONJUGAL RIGHTS
I L R 44 Bom 454

———— due to mistake—

See LETTERS PATENT 1865 CL. 36
I L R 45 Bom 718

———— in pre-emption suit—

See PRE-EMPTION
I L R 2 Lah 294

———— of reaping crops—

See CLAIM 15 C W N 817

———— of wife—

See DIVORCE I L R 44 Calc 35

———— of restitution of suit dismissed for plaintiff's non appearance—

See CIVIL PROCEDURE CODE 1908 O IX R 8
I L R 44 Bom 82

———— successful litigants deprived of—

See DAMAGES
24 C W N 352

———— security for—

See CIVIL PROCEDURE CODE 1908 O XXV R 1 AND O XXXIII R 1
I L R 36 Bom 415

OS XLI R. 10 XXV R 2 AND XLIII R 1
I L R 42 All 626

———— wife's claim for matrimonial suit—

See PRESIDENCY SMALL CAUSE COURTS ACT 1882 I L R 45 Bom 318

———— when not to be disallowed—

See CUSTOM—SUCCESSION
I L R 2 Lah 368

———— Where ejectment proceedings could have been taken in Small Cause Court—

See BOMBAY RENT (WAR RESTRICTION) ACT 1918
I L R 45 Bom 1236

———— Liability of Guardian ad litem of a lunatic—*Personal liability of guardian to pay costs incurred by unnecessary appeal* The guardian *ad litem* appointed by the Court usually gets his costs out of the estate of the defendant whom he represents if he does not recover them from the plaintiff but when a guardian *ad litem* takes it upon himself to appeal against a decree he puts himself in the position of a next friend initiating proceedings and no longer is in the position of a passive guardian *ad litem* SHAPURJI HORMASJI *v* MONO SEN JACOB (1909)
I L R 34 Bom 374

———— Partition—*Civil Procedure Code (Act V of 1908) s 107 O XLI r 4 application of—Appellate Court power of* It is not necessary for the application of O XLI r 4 of the Code of Civil Procedure that the decree should proceed on every ground common to all the plaintiffs or defendants It is quite sufficient if it proceeds on any ground common to the party to which the appellant belongs Under s 107 of the Code the Appellate Court has the same power as the Court of first instance *Shama Soondure Debia v Jardine Skinner & Co 19 W R 160 Dildar Ali Khan v Bhawani Sahai Singh I L R 34 Calc 878* and *Ram Kamal Saha v Ahmad Ali I L R 30 Calc 49* referred to AMBIKA PRASAD SINGH *v* PERDIP SINGH (1914)
I L R 42 Calc 451

———— Application for Registration as share holder in *a Company—Indian Companies Act (VI of 1882) s 254—High Court Rule R 704—High Court Manual of Circular Ch VIII* To regulate costs incurred in obtaining an order from the District Court to register the applicant as a shareholder of a Company recourse must be had to the High Court Manual of Civil Circulars 1912 Ch VIII and not to High Court Rules (Original Side) R 704 framed under s 254 of the Indian Companies Act (VI of 1882) DAMODAR MOHOLAL GINNING AND MANUFACTURING COMPANY LD *v* NAOINDAS MAGANLAL (1915)
I L R 39 Bom 783

———— Security for costs The fact that the appellant has no money of her own is not in itself a sufficient ground for demanding security for cost When it appeared that the appeal was not merely vexatious (the appellant's suit having been decreed by one Court) the fact that the appellant had relations who had money to pay was not a sufficient ground for demanding security MATHURA NATH SINGH *v* PRIYA SHASHI DEBI (1914) 19 C W N 446

———— Discretion of court as to *costs—Accounts suit for against manager—Costs against manager for default or dishonest conduct in accounting—S 22 Presidency Small Cause Courts Act (XV of 1882)* A person who takes up the management of another's estate and collects and disburses moneys has to be ready with his account His failure to perform the obvious duty necessitates a suit and he must pay the plaintiff's cost *Collyer v Dudley 2 L J Ch 15* followed This is all the more so when he makes a dishonest defence submits a false account and keeps back books of account or documents *Hurrinath v Krishna Kumar I L R 14 Calc 147 159* referred to Where the manager sued the principal for arrears of salary in the Presidency Court of Small Causes and the principal sued the manager in the High Court for accounts and the two suits were heard together in the High Court and an amount less than Rs 1 000 was found due from the manager to the principal costs were awarded against the manager on High Court scale No 11 having regard to the circumstances above stated SURTIBALA GHOSH *v* GOPI MOHAN GOSWAMI (1915)
19 C W N 880

———— *Appellate Court when should interfere with order of primary Court as to costs* Where costs are in the discretion of the judge the Court of Appeal will assume that he has exercised his discretion unless it is satisfied that he has not exercised it Also the Appellate Court will not interfere with an exercise of the discretion of the lower Court unless it has proceeded on a manifestly wrong ground SARADINDU MUKERJI *v* CHARU CHANDRA DUTT (1917)
22 C W N 372

———— Between Principal and Agent in a suit for account—*Manager liability of for costs—Presidency Small Cause court Act (XV of 1882) s 2—Practice* In the matter of costs the Court's

COSTS—*contd*

discretion is to be exercised with special reference to all the circumstances of the case including the conduct of parties. *Sheo Dayl Tewari Chowdhury* v *Bishunath Tiwari Chowdhury 9 W R 61* referred to If a person takes up the management of another s estate and collects and disburses moneys he must be ready with his account and if his failure to perform this obvious duty necessitates a suit then he must pay the costs *Collyer* v *Dudley 2 L J Ch 15* referred to So where a manager has deliberately set up a false defence and on being ordered to render an account submits a false account and suppresses important documents thereby hampering and prejudicing the inquiry it is only right that he should pay the full costs of and incidental to the suit *Ram gopaul Chatterjee* v *Bhoban Mohan Banerjee Coryton s Rep 126* and *Hurrinath Rai* v *Krishna Kumar Bakhshi I L R 14 Calc 147* referred to Because in a suit for an account a sum of money less than Rs 1 000 was found due by the defendant it does not follow that such a suit should have been instituted in the Presidency Small Cause Court and that the provisions of s 22 of the Presidency Small Cause Courts Act apply SUKUMARI GHOSH v GOPI MOHAN GOSWAMI (1915)
I L R 43 Calc 190

———— Solicitor's lien for costs—*Minor—Next friend—Attorney s costs for proceedings under taken on the next friend's instructions—Whether attorney is entitled to a charge on the minor s property for his costs so incurred—Practice* Where a suit has been brought by a minor through his next friend for declaration of the infant s title to and possession of property the attorney is entitled to have a charge declared on the properties for the amount of costs incurred by him and he is entitled to recover the same in a suit *Shaw* v *Neale 6 H L C 581 Baile* v *Baile L R 13 Eq 497 Pritchard* v *Roberts L R 17 Eq 222 In re Howarth 8 Ch App 415 Helps* v *Clayton 17 C B (N S) 553 Ex parte Tweed (1899) 2 Q B 167 Narendra Nath Sircar* v *Kamalbasini Dasi I L R 23 Calc 563 Devkabai* v *Jefferson Bhaishankar* and *Dinsha I L R 10 Bom 248 Khetter Kristo Mitter* v *Kally Prosunno Ghose I L R 25 Calc 887 In re Wright s Trust (1901) 1 Ch 317 Watkins* v *Dhunnoo Baboo I L R 7 Calc 140 Sham Charan Mal* v *Chowdhry Debya Singh Pahraj I L R 21 Calc 872 Ispahani* v *Chundi Churan Pal 9 C W N* cxcvii and *Branson* v *Appasami I L R 17 Mad 257* referred to KUMAR KRISHNA DUTT v HARI NARAIN GANGULY (1915)
I L R 43 Calc 676

———— Costs of the Secretary of State for India to be taxed in the ordinary way—*Profit costs of the Government Solicitor and brief fees to the Advocate General to be allowed on taxation—Application to review the certificate of the Taxing Master* Where the Secretary of State for India is a party to a suit filed in the High Court in its Ordinary Original Civil Jurisdiction and costs are awarded to him he is entitled to have his bill of costs taxed in the ordinary way although the Government Solicitor and the Advocate General employed on his behalf are paid fixed salaries for the conduct of all Crown cases. Hence all profits costs of the Government Solicitor and brief fees to the Advocate General should be allowed on taxation NUSSERWANJI & Co v S S WARTENFELS (1916)
I L R 40 Bom 583

COSTS—*contd*

———— Costs to abide the "r e s u l t" *meaning of—Discretion of lower Court if fettered—Costs to abide and follow the result and costs to follow the event distinction between* Where the High Court in remanding a case to the lower Court ordered that the costs should abide the result *Held* that the words abide the result only connote that the order as to costs is to await the passing of the final decision in the case and have not the effect of fettering the discretion of the trying Judge Distinction between abide the result and abide and follow the result' or follow the event pointed out PERIAH v LAKSHMIDEVAMMA (1915) I L R 39 Mad 476

———— Trustees—*Discretion as to costs of—Appeal against order for costs—Trustees when entitled to costs of legal proceedings out of estate* Although costs of a suit are discretionary with the Judge the Court of Appeal will interfere with the discretion of the Court of first instance where it is found that that discretion was not exercised on correct principles Persons who are in the position of trustees ought to have their costs out of the trust estate when a question of legal proceedings is concerned unless they have unreasonably carried on or resisted such proceedings. The Court of first instance having come to the conclusion that the *mutwallis* were really trustees ought to have applied this principle in making order as to costs Where disputes had arisen between the *mutwallis* of a *wakf* estate and the trustees supervising their management and by mutual consent the matter was referred by Court to the Assistant Referee of the Court for report and upon the report being made the *mutwallis* took exceptions to the report which were rejected by Court and the report was confirmed and the Court allowed only one set of costs to the trustees out of the estate and none to the *mutwallis* *Held* on appeal that the *mutwallis* were entitled to get the costs of the reference out of the estate but not the costs of the proceedings resulting from their taking exceptions as the exceptions were rightly rejected by the Court of first instance as unreasonable As the *mutwallis* succeeded in their appeal to a material extent they as well as the respondent trustees were allowed costs out of the estate AGA MD SHERAZI v SYED ALI MD SHOOSTRY (1916) 21 C W N 339

———— On appeal for orders—*General rules of the High Court (Civil) rr 21 25—Pleader s fee—Order on objection as to jurisdiction raised by defendant returning plaint for presentation to proper Court* *Held* that r 21 of the General Rules (Civil) and not r 25 applied to a case where a question as to the jurisdiction of the Court having been raised by the defendant was decided against the plaintiff and the plaint returned for presentation to the proper Court GAURI SAHAI v BAHRKE (1918)
I L R 40 All 515

———— Joint decree for costs against defendants claiming under separate titles *defendants being also wrong doers—Suit for contribution—Suit not maintainable* Two persons each holding by a separate title a half share in certain property were arrayed as co defendants to a suit for recovery of a share in the said property The plaintiffs obtained a decree with costs the order for costs being as against the defendants jointly The plaintiffs decree holders executed the decree for costs against one of the judgment debtors and he then sued the other judgment-debtor for

COSTS—*contd*

contribution *Held* that the suit would not lie *Falire* v *Tasadduq Husain I L R 19 All 46* followed NAND LAL SINGH v BENI MADHO SINGH (1918) I L R 40 All 672

———— Successful party not to be deprived of costs unless guilty of misconduct omission or neglect—*Discretion of lower Court interfered with when facts were misapprehended and the established principle violated—Costs occasioned by unnecessary printing at the instance of attorneys payable by attorneys personally* A Hindu Maratha by caste died possessed of property worth about Rs 3 000 His widow the plaintiff sued the defendant claiming to be another widow of the deceased for a declaration that the latter though living with the deceased was not entitled to the rights of a Hindu wife but was according to the custom of the community entitled to maintenance out of the estate of the deceased The trial Judge decided against the defendant and referred the suit to the Commissioner to take an account of the estate of the deceased and for an inquiry as to the proper amount to be allowed to the defendant for maintenance Before the Commissioner the quantum of maintenance was agreed by consent of parties but the defendant put in a claim for ornaments which was disallowed The Commissioner made his report and the suit then came up for further directions and costs before a Judge who was not the trial Judge It was represented to him on behalf of the defendant that the suit was necessary and that costs should come out of the estate The plaintiff submitted that the estate was small that the defendant never had any case and had lost all along the line and that although the plaintiff would be justified in asking for costs against the defendant she would not do so as nothing could be got from the defendant The learned Judge thought that the plaintiff was more in fault than the defendant and ordered the costs to come out of the estate The plaintiff appealed *Held* (i) that there had been a misapprehension of facts on the part of the learned Judge who made the order of costs and a violation of the established principle by throwing upon the plaintiff the costs of the unsuccessful defendant where the plaintiff had been guilty of no misconduct (ii) That the order as to costs out of the estate must be deleted and the defendant be made to bear her own costs *Cooper* v *Whittingham 15 Ch D 501 Kuppuswami Chetty* v *Zamindar of Kalahasti I L R 27 Mad 341* and *Panchordas Vithaldas* v *Bai Kasi I L R 16 Bom 676* referred to Costs occasioned by the unnecessary printing of certain matter at the instance of parties attorneys were made payable by the attorneys personally and not allowed to fall upon the clients LAXMIBAI v PADHARA (1917) I L R 42 Bom 327

———— When part only of claim allowed The Subordinate Judge having decreed the plaintiff's claim for less than half the amount should have allowed the plaintiffs costs to the extent of their success KHAGARAM DAS v RAM SANKAR DAS PRAMANIK (1914) 19 C W N 775
I L R 42 Calc 652

———— Costs of Record—Inclusion of unnecessary matter—*Disallowance of costs* Their Lordships directed that the Registrar of the High Court should disallow to the successful appellants the actual costs of printing 331 pages of unnecessary matter wastefully included in the record and such consequential costs as he might think right in proportion and that the costs to be taxed in England should also be reduced by such amount as the Registrar of the Privy Council might consider attributable to the insertion of the superfluous matter GOPAL CHANDRA CHAUDHURI v RAJANI KANTA GHOSH (1919)
L R 46 I A 299

———— Security for *costs—Insolvent plaintiff—Cause of action arising after insolvency—Practice* In a suit by an undischarged insolvent for a sum of money larger than his liabilities in the insolvency and due in respect of a transaction subsequent to the insolvency the defendant applied for security for costs —*Held* that the plaintiff ought not to be ordered to give security for costs *Rhodes* v *Dawson 16 Q B D 548 Cook* v *Whellock 24 Q B D 658* and *Cowell* v *Taylor 31 Ch D 34* referred to E D MURRAY v EAST BENGAL MAHAJAN FLOTILLA CO LD (1918)
I L R 46 Calc 156

———— Solicitor's lien *enforcement of—Direct order for payment to solicitor—Jurisdiction of Court—Proper case* On an application by a solicitor made in a suit in which certain costs had been awarded to his client against the opposite party the Court has jurisdiction to enforce in a proper case the solicitor's lien by making a direct order for payment to the solicitor by the opposite party of such costs *Khetter Kristo Mitter* v *Kally Prosonno Ghose 2 C W N 508* followed Where the original client was dead and it appeared that his legal representatives were not people of substance and that they were unable to pay —*Held* that this was a proper case in which the Court in the exercise of its discretion would make a direct order for payment of such costs to the solicitor by the opposite party *Harrison* v *Harrison L R 13 P D 180* and *Jackson* v *Smith 53 L J Ch 972* explained HARNANDROY FOOLCHAND v GOOTIRAM BHUTTAR (1919) I L R 46 Calc 1070

———— Witness examined under Presidency Towns Insolvency Act—*(III of 1909) s 36—Practice* In Insolvency proceedings mortgagee was examined under s 36 of the Presidency Towns Insolvency Act for the purpose of challenging the mortgage At the time of such examination attorney and counsel appeared on his behalf Subsequently when the mortgagee was not challenged he applied to Court for an order for costs against the creditor *Held* that a witness examined under s 36 of the Presidency Towns Insolvency Act (III of 1909) was not entitled to the costs of employing attorney or counsel *In re Waddel 6 Ch D 3 8* referred to *In re Appleton French and Scrafton Ld (1905) 1 Ch 749* distinguished ANSHU PROKASH GHOSE, *In the matter of* (1919) I L R 46 Calc 795

———— Magistrate's power to order—Under s 148 of the Criminal Procedure Code the Magistrate who makes the order without any direction as to costs has the power to make same later and it does not amount on review or alteration of his first order NAFAR CHANDRA PAL CHOWDHURY v SIDDHARTHA KRISNA MAJUMDAR
I L R 47 Calc 974

———— Record Containing Superfluous matter—In this case the Privy Council ordered that the costs of printing certain matter they considered superfluous should be disallowed.

COSTS—*contd*

GOPAL CHANDRA CHOWDHURI v. RAJANIKANTO GHOSH I L R 47 Calc 415

——— Appearance of a third party in Administration actions—*Creditor of heir* In an administration action a creditor of the heirs of the deceased was allowed to intervene *Held* that the unsuccessful claimant should not be made liable for the costs of such intervener *Williams v Buchanan 7 T L R 226 Harbury v Upper Inny Drainage Board L R 12 Ir 214 In re Salmon Priest v Uppleby 42 Ch D 351 In re Watt Smith v Watts 22 Ch D 5 In re Schwabacher Stern v Schwabacher (1904) 1 Ch 719* referred to SOURENDRA MOHAN SINHA v MURARILAL SINHA (1920)

I L R 48 Calc 352

——— On vendors—Covenant to indemnify against defective title—*Attack on title—Liability of vendor to pay not merely taxed costs but all reasonable costs as between vakil and client* Upon a covenant by a vendor of lands to indemnify the purchaser against all losses that the latter might be put to in defending his title or enjoyment of the lands from adverse claim the vendor is bound to pay the purchaser not merely taxed costs as between party and party of a suit in which he had to defend his title but the actual costs which he had to pay to his legal advisers and which are reasonable in the circumstances of the case *Smith v Compton (1832) 3 B & Ad 40* followed VENKATARANGAYYA APPA RAO v VARAPPASADA RAO (1920)

I L R 43 Mad 898

——— Reference—The costs of a reference under s 51 of the Income Tax Act 1918 made at the instance of the Chief Revenue Authority of Bombay within the local limits of the Original Jurisdiction should be taxed as on the Original Side AURANGABAD MILLS LIMITED IN RE (1921)

I L R 45 Bom 1286

——— Taxation —*R 514 High Court Rules —Counsel's fees—Opinion of Taxing Master on quantum of fees paramount—Principle regulating Court's interference—Practice* Where the Taxing Master had exercised his discretion in accordance with the principles laid down in r 517 of High Court Rule *Held* that the Court ought not to interfere in taxation unless the master was wrong in principle or very clearly wrong in detail On a question of the quantum of fees the Court always allows the opinion of the Taxing Master to be paramount Observations of Bovill C. J in *Hill v Peel (1870) L.R 5 C P 1 at page 180* referred to and followed SADASUKH GAMBHIRCHAND v BAIJNATH HARNANDRAI (1921)

I L R 45 Bom 1234

COSTS OF REAPING CROPS

——— wrongfully attached—

See CLAIM

See CIVIL PROCEDURE CODE 1908 s 60 70 O 21 rr 58 AND 60

15 C W N 817

CO-TENANTS

See BENGAL TENANCY ACT s 171

15 C W N 782

CO TRUSTEE.

See PUBLIC TRUST

I L R 42 Mad. 335

COTTON GAMBLING

See WAGERING CONTRACT

I L. R 39 Calc. 968

COTTON TRADES ASSOCIATION RULES (BOMBAY)

See AWARD I L. R 44 Bom 780

COUNCILLOR

See BOMBAY DISTRICT MUNICIPALITIES ACT (BOM ACT III OF 1901) s 42

I L R 40 Bom 166

COUNSEL

See BARRISTER

See MALICIOUS PROSECUTION

14 C W N 86

——— Bar Council Resolutions of—

See LIMITATION I L R 40 Calc 898

——— duties of—

See BARRISTER I L R 44 Calc 741

See EX PARTE CASE

I L R 44 Calc 573

——— professional conduct of—

See COUNSEL AS WITNESS

See LIMITATION I L R 40 Calc 898

——— telegram from—

See BAIL I L. R 38 Calc 293

——— Mr *X* a Counsel on direct instructions from client inserted a ground in the memo of appeal which constituted a libel on the Judge in the Court below *Held* that the conduct of *X* was highly improper It is no disqualification for a Judge trying a case that before his appointment he was Counsel in other matters for one of the parties JACOB AND COMPANY v RASH BEHARI GHOSE

I L R 47 Calc 828

COUNTER CLAIMS

——— *Counter claims by defendant against plaintiffs individually—Original Side Rule No 47—English Supreme Court Rule O XIX r 3 construction of* Where two or more plaintiffs sue for a joint claim a defendant may set up counter claim against the plaintiffs individually The Court has a discretion under r 47 of the Original Side rules in such a case to decline to allow the counter claims to be set up on the ground of inconvenience RAMANADAN CHETTY v ABDUL KARIM SAHIB (1910)

I L R 34 Mad 226

COUNTERFEIT COIN

See PENAL CODE ss 235 243

4 Pat. L J 525

——— *Possession—Custody — To become possessed whether conscious possession —Possession with knowledge—Penal Code (Act XLV of 1860) ss 7 2 413—Misdirection—Review—Powers of High Court—Letters Patent 1865 cl 26—Criminal Procedure Code (Act V of 1898) s 537* PER CURIAM To constitute an offence under s 243 of the Penal Code it is essential to prove that at the time the accused became possessed of the coin he knew it to be counterfeit whether he was in possession of the coin himself or his wife clerk or servant was in possession of the coin on his account As

COUNTERFEIT COIN—*contd*

there was a misdirection to the Jury in a part of the Judge s summing up which related to a material and essential element of the charge the conviction should be set aside in review under cl 26 of the Letters Patent *Per* MOOKERJEE *J* The term possession has to be interpreted in the light of s 2 Indian Penal Code which by virtue of s 7 is applicable wherever the term is used in the Code S 2 abolishes the distinction recognized in English law between possession and custody S 53 of the Criminal Procedure Code has no application to a case reviewed under cl 26 of the Letters Patent Mere non direction is not necessarily misdirection *Per* v *Stoddart 2 Cr App Rep 217* followed The Judge s note of his charge to Jury is conclusive *King Emperor* v *Upendra Nath Das 21 C L J 36 19 C W N 653* referred to *Per* FLETCHER *J* The point of time to be considered was the time when the accused had actual or conscious possession of the counterfeit coins for determining whether he had knowledge at the time that the coins were spurious *Per* CHAUDHURI *J* There is a clear distinction in law between custody and possession Custody means possession on account of another S 27 Indian Penal Code does not express the complete thought of the legislature on the question of possession and it is competent to the Court to interpret the words to become possessed in accordance with the meaning that the general law has given to them *In re Proceeding 22nd December 1866 3 Mad H C R App* xi referred to EMPEROR v FATEH CHAND AGARWALLA (1916) **I L R 44 Calc 477**

COUNTERFEITING TRADE MARK

See TRADE MARK **I L R 40 Calc 281**

COURT

See PRACTICE **I L R 34 Bom 408**

See WORDS AND PHRASES

———— duty of—

See INTEREST **I L R 42 Calc 690**

———— inherent powers of—

See EXECUTION OF DECREE **I L R 34 All 518**

———— not closed if the officer on tour—

See MADRAS ESTATES LAND ACT (I OF 1908) s 192 **I L R 38 Mad 295**

———— power of—

See INTEREST **I L R 43 Calc 632**

See PENALTY **I L R 44 Calc 162**

———— *Offence brought under the notice of the Court in the course of a judicial proceeding—Proceeding instituted by one Munsif for resistance to attachment of moveables in execution —Preliminary inquiry and final order by successor—Legality of order— Judicial proceeding —Execution proceedings—Criminal Procedure Code (Act V of 1898) ss 4 (m) 476* The word Court in s 476 of the Criminal Procedure Code includes the successor of the Judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of a judicial proceeding Where therefore the judgment creditor brought to the notice of the Munsif on the 23rd December 1908 the fact of resistance to the attachment of moveables in execution of his decree and the Munsif called upon the opposite party to show cause but his successor after holding a preliminary inquiry under s 476 of the Code ordered their prosecution on 6th October 1909 for offences under ss 183 186 and 353 of the Penal Code *Held* that the order was not without jurisdiction Action under s 476 should as far as possible be prompt and expeditious and not unduly protracted The definition of a judicial proceeding in s 4 (m) of the Criminal Procedure Code is not exhaustive It includes an execution proceeding and the resistance to the attachment of moveables is when reported or complained of to the Court an offence brought under its notice in the course of a judicial proceeding within the meaning of s 476 of the Code BAHADUR v FRADATULLAH MALLICK (1910) **I L R 37 Calc 642**

———— *Limitation Act (XV of 1877) s 14—Interpretation—Court in British India—Court in a Native State in India not included* The word Court as used in s 14 of the Indian Limitation Act (XV of 1877) means a Court in British India and not a Court in a Native State of India CHANMALAPA CHENBASAPA v ABDUL VAHAB (1910) **I L R 35 Bom 139**

COURT FEE

See AD VALOREM COURT FEE

See APPEAL IN FORMA PAUPERIS **I L R 40 Mad 687**

See CIVIL PROCEDURE CODE 1882 s 411 **I L R 34 All 223**

ss 268 278 283 **I L R 38 Bom 631**

See CIVIL PROCEDURE CODE—

s 115 **I L R 39 All 723**

s 47 O XXI **4 Pat L J 166**

O XXXIII r 13 **I L R 35 Bom 448**

O XXXIV r 6 **I L R 40 All 553**

See COURT FEES AMENDMENT ACT 1899 **I L R 41 Calc 556**

See COURT FEES ACT (VII OF 1870)—

s 5 AND 12 **I L R 32 All 59**

s 7 **I L R 35 All 92 94**

s 7 (ii) SCH II ART 17 **I L R 42 All 353**
I L R 36 All 500

s 7 (IX) SCH I ART 1 **I L R 36 All 40**

SCH I ART I **I L R 40 All 93**
I L R 36 All 322

See DECLARATIONS AND INJUNCTIONS **I L R 38 Mad 923**

See GHATWALI TENURES **I L R 41 Calc 812**

See MADRAS CIVIL COURTS ACT (III OF 1873) ss 12 13 **I L R 39 Mad 447**

See MESNE PROFITS **3 Pat L J 116**

COURT-FEE—*contd*

See SUCCESSION ACT (X OF 1865) s 187
I L R 38 Mad 988

———— acceptance of, by Deputy Registrar—

See APPEAL, VALUATION OF
I L R 37 Calc 914

———— Appeal from order disallowing interest—

See DECREE
6 Pat. L J 676

———— deficit—

See JURISDICTION I L R 41 Calc 520

———— non payment of—

See RES JUDICATA I L R 35 Bom 38

———— Whether High Court will revise interlocutory order—

See CIVIL PROCEDURE CODE 1908
5 Pat L J 400

See EXECUTION OF DECREE
5 Pat L J 235

———— *deficit not due to mistake—Extension of time if proper—Limitation* When an order allowing a plaintiff to deposit deficit court fees has been made and complied with no question of limitation can be raised But it is not proper for a Court to extend the period of limitation allowed by law to the prejudice of defendants by giving the plaintiff time to deposit deficit court fees when there is no question of any mistake merely to suit the convenience of the plaintiff SAMBHO KUOR *v* HARIHAR PERSHAD (1914) 18 C W N 1071

———— *Court fee on memorandum of appeal—Appeal from Order under s 144 of the Civil Procedure Code (Act V of 1908)—Order if comes under s 47 (1) of the Code—Government Notification prescribing Court fee of Rs 2* An order under s 144 of the Civil Procedure Code comes under 47 (1) of the Code Cl (6) of the notification of the Government of India No 4650 dated 10th September 1889 applies to appeals from such orders and a Court fee of Rs 2 is chargeable on such appeals MADAN MOHAN DE *v* NOGENDRA NATH DE (1917)
21 C W N 544

———— *Declaratory suit—Consequential Relief* S 42 of the Specific Relief Act does not sanction every form of declaration but only a declaration that the Plaintiff is entitled to any legal character or to any right as to property —Court fee of Rs 10 is not sufficient for declaratory suits in strict sense—An injunction is consequential relief DEOKALI KOER *v* KEDAR NATH I L R 39 Calc 704

———— *Appeal for appellate order—Court fee payable* Where a suit for possession was dismissed by the first Court and the appellate Court holding that the Plaintiff was entitled to possession sent the case back to the first Court for ascertainment of the mesne profits *Held* that the appellate Courts order amounted to a reversal of the decision of the first Court and the Plaintiff should have been given a decree for possession *Held* further that an appeal presented by the defendants against the order of the appellate Court was an appeal from an appellate decree and should have been made on an *ad valorem* Court fee RAGHUNATH DAS *v* JHARI SINGH 3 Pat L J 99

———— *Mesne Profits—Appeal as to* A memorandum of appeal from an order dismissing an application for ascertainment of mesne profits must be stamped with an *ad valorem* stamp on the amount claimed NARAIN PRASAD *v* SHEO KAMESWAR PRASAD SINGH
3 Pat. L. J 101

———— *Suit for redemption of mortgage—Preliminary decree passed in two parts—Appeal* The Court of first instance in a suit for redemption of a mortgage passed in effect two preliminary decrees It first passed a decree declaring the plaintiffs right to redeem which was denied by the defendants against which the defendants filed an appeal and then whilst the appeal was pending, a second preliminary decree deciding the amount for which redemption might take place Against that decree also the defendants appealed *Held* that the two appeals were not to be regarded as separate appeals for the purpose of assessing the Court fee but should be counted as one LALTA PRASAD *v* SHEORAJ SINGH (1917) I L R 39 All 452

———— *Appeal— Decree — Civil Procedure Code (1908) O XXXIV r 6—Order rejecting application for a decree over against the mortgagor* An order on an application for a decree under O XXXIV r 6 of the Code of Civil Procedure is a decree as that term is defined in the Code An appeal therefore from such an order must bear an *ad valorem* court fee stamp and not merely a stamp of Rs 2 MUHAMMAD ILTIFAT HUSAIN *v* ALIM UN NISSA BIBI (1918) I L R 40 All 553

———— *Appeal—Memorandum of appeal insufficiently stamped—Conditional admission by Division Bench effect of—Whether deficit can be paid after expiration of limitation—Negligence of Vakil effect of—Court fees Act VII of 1870 s 4—Limitation Act (IX of 1908) ss 2 (7) and 5* Where the mortgagee of property which had been sold for arrears of revenue instituted a suit on the mortgage against the mortgagor the transferees from him and the revenue sale purchasers and obtained a decree the lower Court holding that the revenue sale purchasers were *benamidars* for the transferees from the mortgagor *held* that an appeal the valuation of which was fixed at Rs 20 000 by the revenue sale purchasers and which was declared to relate to a declaration that the revenue sale is not a *far* i transaction and that properties purchased by the appellants (the revenue sale purchasers) are not liable for the mortgage should have been stamped with an *ad valorem* Court fee as the real object of the appeal was to release the properties purchased by the appellants at the revenue sale from liability under the mortgage It appeared that on the 20th August the deficit in Court fee had been brought to the notice of the appellants Vakil and that in November he expressed his willingness to pay the deficit The matter then went before a Divisional Bench. In the meanwhile the period of limitation had expired The Divisional Bench passed the following order Subject to any objection that may be taken at the hearing let the deficit Court

COURT FEE—*contd*

fee be received if paid by Monday next *Held* (i) that the order of the Divisional Bench was not a definite order condoning the delay in filing the deficit (ii) that under s. 4 of the Court fees Act 1870 the Court could not receive an appeal which was not properly stamped and (iii) that the filing of the appeal on a Court fee of Rs 10 with an explanation that this sum was paid as it is not possible to estimate at a money value the subject matter in dispute was not done in good faith within the meaning of s 2 (7) of the Limitation Act 1908 and that the conduct of the Vakil when the deficit in Court fees was brought to his notice was want only negligent and that therefore the appellants were not entitled to the benefit of the Court s clemency under s 5 of that Act JODHAN PRASAD SINGH v NANHKU PRASAD SINGH 3 Pat L J 484

——— *Suit for avoidance of a registered deed of gift* In a suit for the avoidance of a registered deed of gift the Court is bound if the Plaintiff proves his case to send a copy of the Court s order to the officer in whose office the instrument has been registered This is consequential relief for which the Plaintiff must pay ad valorem Court fee MUSSAMMAT KOOWOOAYAR OJAIN v SHIDAR JHA 3 Pat L J 194

——— *dismissal of suit for possession—decision reversed by appellate Court and suit remanded for ascertainment of mesne profits—appeal from appellate order Court fee payable on* Where a suit for possession was dismissed by the first Court and the appellate Court holding that the plaintiff was entitled to possession sent the case back to the first Court *held* that the Court for ascertainment of Where an appeal against costs is distinct and separate from other parts of the appeal court fees must be paid *ad valorem* on the costs decreed Where an appellant has failed to pay sufficient fees in the courts below his appeal will not be heard till the deficiency is made good Where it is the respondent who was in default no decree shall be executed in his favour until the deficiency has been made good T K ROWLINS v LACHMI NARAIN JHA 3 Pat L J 443

——— *Suit for declaration and possession—Court fees Act (VII of 1870) s 7 (4) (c)* Where the holder of an eight anna *mukarrari* interest in an estate which was sold for arrears of Government revenue sued for a declaration that the sale was invalid by reason of fraud and irregularity in its conduct and prayed for confirmation or restoration of possession *held* that the plaintiff must pay an *ad valorem* court fee on the value of the whole estate sold and was not entitled to calculate an *ad valorem* fee on ten times the amount of the Government revenue RAJA DHAKESWAR PRASAD SINGH v JIVO CHOUDHRY 3 Pat L J 448

——— *Power of High Court to order refund of excess—Code of Civil Procedure (Act V of 1908) s 151* In the exercise of its inherent powers the High Court has power to make an order directing the Taxing Officer to issue the necessary certificate to enable an appellant to apply to the Revenue authorities to obtain a refund of excess court fee paid on a memorandum of appeal CHANDRADHAR SINGH v TIPPAN PRASAD SINGH 3 Pat L J 452

COURT FEE—*contd*

——— *Declaratory suit—Consequential relief—Injunction prayer for—Endowments—Valuation of suit—Jurisdiction—Specific Relief Act (I of 1877) s 42—Court fees Act (VII of 1870) s 7 (iv) (c)—Suits Valuation Act (VII of 1877) s 8* The plaintiff brought a suit for declaration that he was the sole *shebait* of the family deity and was entitled as such to exclusive possession of the disputed properties on behalf of the deity and also for a declaration that the registration of the name of the principal defendant as joint owner of the endowed properties with the plaintiff in the books of the collector was improperly made He valued the suit for purposes of jurisdiction at Rs 11 005 and paid Rs 10 as court fee under Sch II Art 17 (iii) of the Court fees Act subsequently on an objection taken under s 42 of the Specific Relief Act by the principal defendant at the hearing of the suit a prayer was added in the plaint for an injunction prohibiting the principal defendant from interfering with the plaintiff performing his duties as *shebait* and managing the *debutter* properties and a further *ad valorem* fee was paid by the plaintiff under Sch I read with s 7 (iv) (d) of the Court fees Act for the injunction The Court of first instance having heard the suit and dismissed it on the merits the plaintiff appealed to the High Court and upon the memorandum of appeal he paid Court fees in the same manner as in the Court of first instance *Held* that the prayer for injunction was arbitrarily undervalued, that its value was the value of the relief claimed and that the plaintiff was bound to pay *ad valorem* Court fees upon the plaint and memorandum of appeal on the basis that the value of the relief claimed was Rs 11 005 *Umatul Batul* v *Nanji Koer 11 C W N 705 6 C L J 427 Dayaram Sagjivan* v *Gordhandas Dayaram I L R 31 Bom 72* and *Boida Nath Adya* v *Makhanlal Adya I L R 47 Calc 680* referred to RAJ KRISHNA DEY v BIPIN BIHARY DEY (1912) I L R 40 Calc 245

——— *Declaratory decree suit for—consequential relief—Plaint rejection of—Civil Procedure Code (Act V of 1908) O VII r 11—Valuation of suit—Court Fees Act (VII of 1870) s 7 paras iv cl (c) v cl (a)—Valuation for purpose of jurisdiction—Suits Valuation Act (VII of 1887) s 8* In a suit for declaration that a decree amounting to Rs 2 794 and odd should be declared forged illusory and unfit for execution and also for a declaration that a family property valued at Rs 7 000 was not liable to be sold in execution of that decree the plaintiff paid Court fee ten times the Government Revenue payable on the land worth Rs 7 000 The court below rejected the plaint —*Held* that the real value of the reliefs claimed was Rs 2 794 and odd the value of the decree and that the plaintiff not having paid court-fee on that amount the plaint was rightly rejected. A plaintiff cannot value his case for the purpose of Court Fee and for the purpose of jurisdiction at different amounts HARIHAR PERSAD SINGH v SHYAM LAL SINGH (1913) I L R 40 Calc 615

——— *Administration Suit—* Held that an Administration Suit by a creditor is an action for account and in such a suit the Plaintiff is entitled to place his own valuation on the relief claimed—After preliminary decree has

COURT-FEE—*contd*

been made other creditors invited establish their claims may be required to pay *ad valorem* fees. SHASHI BHUSAN BOSE *v* MANINDRA CHANDRA NANDY **I L R 44 Calc 893**

———————— *Suit for declaration that entry in Record of Rights a nullity* Where a Court Fee of Rs 10 was paid in a suit under s 111A of the Bengal Tenancy Act but the plaintiff prayed for a declaration (*a*) that they were Occupancy Ryots and (*b*) that the entry in the Record of Rights showing them as tenure holders was a nullity and plaintiffs on being applied to for the deficit of Court fee on the second head of relief failed *Held* (1) that the second prayer being for consequential relief was not such a declaration as was contemplated by the proviso to s 111A (2) that the judge had no alternative but to reject the plaint (3) that the plaintiff could not be allowed to strike out the second prayer MIDNAPUR ZEMINDARY CO LD *v* THE SECRETARY OF STATE FOR INDIA **I L R 41 Calc 352**

———————— In a suit for a declaration that a decree for over Rs 22 000 was bad and might be set aside the plaintiffs who were interested in only three annas share of the property which was valued at Rs 9 000 were required to pay a court fee for the whole of the decretal amount *Held* that the plaintiffs must value their suit according to the extent of their claim and the court fee was payable on that amount GANESH BHAGAT *v* SARADA PRASAD MUKERJEE **I L R 42 Calc 371**

———————— *Suit for administration or account* In an administration suit valued at Rs 30 000 for purpose of jurisdiction and Rs 100 for adjustment of accounts and wherein court fees were paid on the latter sum only together with Rs 10 for the approximate value of the claim for account *Held* that such a suit was in essence a suit for account within s 7 (iv) of the Court Fees Act and that adequate court fees had been paid SARAJU BALA DASI *v* JOGEMAYA DASI **I L R 45 Calc 634**

———————— *Suit to set aside mortgage decree court fees payable on—Practice—power of High Court to interfere with interlocutory orders* Where the plaintiffs sued to set aside a mortgage decree for Rs 12 200 and it was shown that their share in the property affected by the decree was Rs 1 300 *held* that they were liable to pay court fees on the latter sum only Where the record of a case is before the High Court and there appears on the record an obvious error the Court will dispose of the matter at whatever stage it may happen to be BANKEY BEHARI *v* RAM BAHADUR **4 Pat L J 191**

———————— *Suit by several raiyats for declaration of rent payable* Where 78 *raiyats* instituted a suit in respect of 78 holdings (1) for a declaration that the rents entered in the *khatian* were higher than the rents actually payable and (2) for a declaration that 59 rent decrees which the landlord had obtained at the higher rates were contrary to law *held* that a court fee of Rs 10 should have been paid in respect of each of the 137 causes of action namely 78 declarations that the rents entered in the *khatian* were wrong and 59 declarations that the decrees obtained were contrary to law CHETHRU MAHTO *v* KHAJA MUHAMMAD KARIM NAWAB **4 Pat L J 297**

———————— *Suit for possession—decree on condition that plaintiff pays off encumbrances—appeal against condition court fees payable on* Where a suit for possession was decreed conditionally on the plaintiff paying off all encumbrances on the property and the plaintiff appealed against that part of the decree which required him to pay off the encumbrances *held* that court fees on the memorandum of appeal were payable *ad valorem* on the value of the encumbrances KISHUN DUT MISIR *v* KASI PANDEY **5 Pat L J 455**

———————— *Deficiency due from respondent on account of fees paid in lower court——appeal summarily dismissed whether deficiency recoverable—Procedure—Court Fees Act (VII of 1870) ss 10 and 12* When an appeal has been dismissed by the High Court under O XLI r 11 of the Code of Civil Procedure 1908 the court has no power to recover from the respondent who was appellant in the court below a deficiency in court fee due on the memorandum of appeal filed by him in that court *Semble*—That if in such a case the second appeal resulted in a decree in the respondent s favour the High Court would be competent under its inherent powers to refrain from signing the decree until payment of the deficit Whenever it is intended to recover a deficit from a respondent before the High Court in respect of something due in the lower court the proper procedure is to admit the appeal for hearing and to take action under s 12 read with s 10 of the Court Fees Act 1870 RAJDEO NARAIN SINGH *v* RAMDIL SINGH **5 Pat L J 508**

———————— Where in a suit for partition the plaintiff prays for a declaration of his title and confirmation of possession in order to disperse a cloud cast on his title by reason of an entry in the Record of Rights stating that defendant was in exclusive possession of part of the land which formed the subject matter of the suit an *ad valorem* court fee is payable on the value of the plaintiff s share in the land in respect of which his name has not been entered in the Record of Rights in addition to the fixed fee for partition PACHHYA RAUT *v* MUSAMMAT CHANDO **6 Pat L J 662**

———————— *Two appeals from one decree—Subsequently two second appeals filed by the same party the subject matter being the same—Consolidation of appeals* The Court Fees Act 1870 does not provide for consolidation of appeals If therefore there are two appeals in the same suit and then one party files two second appeals—one against each decree in first appeal—the appellant will have to pay the full court fee on each of his appeals SHIB DAYAL *v* MEHARBAN **I L R 43 All 56**

———————— *Appeal from a decree for redemption of a mortgage on payment of Rs 6? 293 the principal amount of which was Rs 6 400—Court Fees Act VII of 1870 s ? cl IX and Sch I Art I—whether Court should allow appellant time to make up deficiency in Court fee—Civil Procedure Code Act V of 1908 s 149* The plaintiff sued for redemption of 3 mortgages of which

COURT FEE—contd

th principal amount totalled to Rs 6400 He alleged that nothing remained due by him under the mortgage The Court decreed redemption on payment of Rs 2,903 Plaintiff appealed to the Court so far as the payment of money was concerned and valued his appeal for purposes of Court fees at Rs 6400 and paid Court fee accordingly At the hearing of the appeal it was objected that the appeal was not properly stamped *Held* that Art 1 Sch I of the Court Fees Act applied to the appeal and not cl IX of s 7 and that the proper Court fee was therefore ad valorem on the amount of the subject matter in dispute in the appeal *Panwari Das v Nek[illegible]* ... followed ... and *Ram Sahai ... Narain* ... *Tara ... Chand* ... and Civil appeal No ... (unpublished) referred to ... Ram ... I L R 1 Lah 234

———— To bring a case within cl xi of Art 17 of Sch II of the Court Fees Act it must be established that it was not possible to state even approximately the money value of the subject matter in dispute TRIVAYANI DASI v KRISHNALAL DE I L R 39 Calc 906

COURT FEE STAMP

———— s 4 of the Code of Civil Procedure ... Book keeping The removal of new Court fee stamps for documents and substitution of used ones is not within the section EMPEROR v BIBHUDHANANDA CHAKRAVARTI I L R 47 Calc 71

COURT FEES ACT (VII OF 1870)

———— s 4—

See COURT FEES 3 Pat L J 481

———— ss 4 6 and 28—*Appeal filed on insufficient stamp—Jurisdiction of Court to entertain—Code of Civil Procedure (Act XIV of 1882) ss ... and ...—(Act XII of 1879) s 149 and O VII r 11—Limitation Act (IX of 1908) s 5—sufficient cause—whether difficulty in obtaining stamps is* Where an appellant has deliberately and to suit his own convenience paid on his appeal an insufficient court fee the court is not bound to receive the appeal and give the appellant time to make good the deficiency Even if the court has power to receive such an appeal and allow time for the deficiency to be made good it would be an unreasonable exercise of its jurisdiction to do so *Semble*—that an appellant who is prevented from filing an appeal within time by difficulties encountered procuring the necessary court fee stamps may possibly rely upon those difficulties as constituting sufficient cause within the meaning of s 5 of the

COURT FEES ACT (VII OF 1870)—contd

———— s 4—contd

Limitation Act 1908 RAM SAHAY RAM PAN[illegible] v KUMAR LACHMI NARAYAN SINGH 3 Pat L J [illegible]

———— s 5—Taxing officer—finality of order Where in an appeal to the High Court from an order ... a suit for insufficiency of court fee the Taxing Officer held that the court fee demanded by the lower court was correct and ordered the plaintiff appellant to pay such fee on his memorandum of appeal *Held* that the Taxing Officer's order was final and not open to question before the appeal was admitted MUSAMMAT CHANDRAWATI KUER v CHEDY LALL SINGH 4 Pat L J [illegible]

———— ss 5 and ..—*Court fee—Objection by mortgagee asking for sale of a portion of the mortgaged property exempted by the Court from sale—Reference by Taxing Judge to a Division Bench—Jurisdiction* Held that where a party objects by way of appeal or under the provisions of O XLI r 22 of the Code of Civil Procedure to a decree of a subordinate court excluding from liability a portion of certain property the whole of which he claims to be liable for a mortgage debt and while accepting the correctness of the amount found due asks that the excluded portion of the property may be also declared liable court fees shall be paid with reference to the value of the property sought to be rendered liable *Kesavaraju v Kotta ...* followed Where the Taxing Judge referred to a Division Bench a question relating to court fees referred to him by the Taxing Officer *Held* that the Bench had no authority to entertain such reference KACHERA v KHARAG SINGH (1910) I L R 33 All 2[illegible]

———— ss 5 12—

———— *Court fee—Decision of Taxing Officer final as to category* The decision of the Taxing Officer as the proper amount of court fees payable on a memorandum of appeal as also incidentally his decision as to the category within which the suit falls is final and binding upon the Court under s 5 of the Court Fees Act 1870 KUNWAR KARAN SINGH v COPAL RAI (1909) I L R 32 All 5[illegible]

———— *Whether appeal lies from decision of Taxing Officer—Suit for possession where it is necessary to obtain a declaration that a document or order is void Court fee payable in* An order of the Registrar of the High Court, as Taxing Officer prescribing the court fee to be paid on a memorandum of appeal is final and no appeal lies therefrom The only case in which a Divisional Bench has authority to question the correctness of the court fee paid by the appellant is where there has been no difference of opinion between the appellant and the Stamp ..., and therefore no reference to the Taxing Off[illegible] Where in order to succeed in a suit for p[illegible] it is necessary for the plaintiff to ... [illegible] tion that a document or decree is ... tive the court fee to be paid ... on the actual value of the property ... KUER v ... SINGH

———— s 5 Sch I Art 1 [illegible] cl (6)—

See APPEAL, VALUATION I L

COURT-FEES ACT (VII OF 1870)—*contd*

——— s 6—

See s 4 3 Pat L J 74

——— s 7—

See s 5 I L R 33 All 20

——— s 7 (II) and (IV) (c)— *other sums payable periodically whether rent is* A sum of money payable as rent does not come within the meaning of the words other sums payable periodically in s 7 (*IV*) (*c*) of the Court Fees Act 1870 The landlord sued for assessment of rent and recovery of a certain specific sum of money as damages for use and occupation of the land and the first court fixed Rs 10 2 per bigha as the rent and awarded damages calculated at that rate for six years The tenants appealed and paid a court fee on the memorandum of appeal calculated in accordance with s 7 (*IV*) (*c*) The appellate court rejected the appeals on the ground that the court fee should have been calculated in accordance with s 7 (*II*) *Held* that the suits were suits to obtain declaratory decrees or orders where consequential relief was prayed for and came within 7 (*IV*) (*c*) KALI CHARAN ROY v MAHARAJA BAHADUR KESHO PRASAD SINGH 4 Pat. L J 581

——— s 7 (ii) Sch II 17 (ii)—*Court fee—Suit for a sum payable periodically the reliefs claimed being first a declaration of plaintiff's title and secondly a specified amount of arrears* Plaintiff sued for a declaration of her right and that of her descendants to receive a certain annuity as also for arrears of the same The reliefs prayed for were thus stated in the plaint —(a) It may be declared as against the defendants that the plaintiff and her descendants generation after generation are entitled to receive from the defendants and their representatives Rs 100 per mensem which is a charge on the property mentioned in Schedule A (*b*) A decree awarding Rs 1 800 on account of the monthly allowance at the rate of Rs 100 per mensem for 18 months may be passed. A court fee of R 10 was paid in respect of relief (*a*) and an *ad valorem* fee in respect of relief (*b*) *Held* that the suit was one to which s 7 cl (*ii*) of the Court Fees Act 1878 applied and the court fee payable in respect to relief (*a*) was consequently to be assessed on a valuation of ten times the amount claimed to be payable for one year SHAHZADI BEGAM v MAHBUB ALI SHAH I L R 42 All 353

——— s 7 IV (a)—

See COURT FEE 3 Pat L J 448

——— *Suits Valuation Act (VII of 1887) s 8—Suit for injunction—Valuation of claim* The plaintiff in a suit for injunction valued his claim for Court fee purposes at Rs. 10 and for purposes of jurisdiction at R 500 The lower appellate Court accepted the valuation for both purposes at Rs 500 and asked the plaintiff to pay Court fees for that amount On appeal to the High Court *Held* reversing the order that under s 7 cl. 4 (*a*) of the Court fees Act 1870 the plaintiff was entitled to value his claim at Rs 10 for Court fee purposes and that it was wholly unnecessary for him to fix any value for the purposes of jurisdiction as by s 8 of the Suits Valuation Act the value determinable for the computation of Court fees and the value for the purposes jurisdiction shall be the same GOVINDA v HANMAYA (1920) I L R 45 Bom 567

COURT-FEES ACT (VII OF 1870)—*contd*

——— s 7 (IV) B—

See CIVIL PROCEDURE CODE s 2 I L R 2 Lah 114

——— s 7 (IV) C—

See s 7 (V & VI)
See s 10
See SCH III
See COURT FEE.
I L R 40 Calc 245 615
3 Pat L J 194, 448
I L R 42 Calc 370
I L R 44 Calc 352

See DECLARATION I L R 38 Mad. 922

See JURISDICTION 15 C W N 823

See LIMITATION ACT 1905 SCH. I ACT 152. I L R 43 Bom 376

——— In a suit for an injunction by way of consequential relief the plaintiff has the right to value his claim for the purpose of Court Fees and the value for the purpose of jurisdiction is the same BALKRISHNA NARAYAN v JANKIBAI. I L R 44 Bom 331

——— *Declaratory suit—Consequential relief prayer for—Injunction if consequential relief—Specific Relief Act (I of 1877) s 42* S 42 of the Specific Relief Act does not sanction every form of declaration, but only a declaration that the plaintiff is entitled to any legal character or to any right as to any property A court fee of Rs. 10 is not sufficient for suits that are not declaratory suits in the proper sense of the expression. An injunction is a consequential relief *Marsh* v *Keith 1 Dr & Sm 342 62 E R 410* followed. The law as to declaratory decrees discussed. DEOKALI KOER v KEDAR NATH (1912) I. L R 39 Calc 704

——— *Court fee—Suit for declaration and consequential relief—Valuation for purposes of court fee* A prior mortgagee brought a suit upon his mortgage and obtained a final decree for sale to realize Rs 6 818 12 5 A puisne mortgagee of part of the property covered by this decree who had not been made a party to the prior mortgagee's suit subsequently brought a suit against the prior mortgagee asking *first* for a declaration that the defendant was not entitled to bring to sale in execution of his decree the property comprised in the plaintiff's mortgage and *secondly* for an injunction restraining the defendant from bringing the said property to sale. The first relief was valued at the amount of the defendant's decree, namely Rs. 6 818 12 5 and a court fee of Rs 10 was paid in respect of it The second relief was valued at Rs 100 only and a court fee of Rs 7 8-0 was paid. *Held that the* plaintiff was bound to pay an *ad valorem* fee on the amount at which the suit was valued namely, on Rs 6 818 12 5 JAGESHAR v DURGA PRASAD SINGH (1914) I L R 36 All 500

——— *Declaratory suit—Consequential relief—Injunction prayer for—Endowment—Valuation of suit—Jurisdiction—Specific Relief Act (I of 1877) s 42—Court fees Act (VII of 1870) s 7 (iv) (c)—Suits Valuation Act (VII of 1877) s 8* The plaintiff brought a suit for a declaration that he was the sole *shebait* of the family deity and was entitled as such to exclusive possession of the disputed properties on behalf of

COURT FEES ACT (VII OF 1870)—*contd*

——— s. 7 (IV) C—*contd*

the d e and a n for a declaration th the pre mat ne th name of t ppn paid plant a n t owner f the and ard properties with the p a in th book f th Collector was improperly mad He va u l th s for purpose of jur on at 1 11 0) a d p l Rs 10 a court fee under Sch II Art 1 (c)) of th Court fees Act. Subsequently on an objection taken under s 4 f t e Spec R l f Act by th ppn pal d endant at the h aring f th suit a prayer was added in th p t for an injunction prohibiting the principal efendant from interfering with t p a tiff per ersn h duties as al f t and managing th d f e property and a further ad valorem fee was paid by the plaintiff under Sch I I read with s 7 (iv) (d) of the Court fees Act, for the injunction Th Court of first in ance having heard th suit and dismissed it on the merits, the plaintiff appealed to th High Court and upon the memorandum of appeal he paid Court fees in the same manner as in the Court of first instance *Held* that the prayer for injunction was arbitrarily undervalued that its value was the value of th relief claimed and that the plaintiff was bound to pay *ad valorem* court fees upon the plaint and memorandum of appeal on the basis that the value of the relief claimed was Rs 11 00. *Umatul Batul* v *anji Koer* *11 C W N* 0) 6 *C L J 4* *Dayaram Jag* *van* v *Gordhandas Dayaram I L R 31 Bom. 73* and *Pollyn Nath Adya* v *Makhan Lal Adya* *I L R 1 Calc 659* referred to RAS KRISHNA DEY v PIPIN BIHARI DEY (1912)

I L R 40 Calc. 245

——— *Declaratory decree suit for—Consequential relief—Plaint rejection of—Civil Procedure Code (Act V of 1908) O VII r 11—Valuation of suit—Court fees Act (VII of 1870) s 7 paras iv cl. (c) v cl. (a)—Valuation for purpose of jurisdiction—Suits Valuation Act (VI of 1887) s 8* In a suit for declaration that a decree amounting to Rs. 2 794 and odd should be declared forged illusory and unfit for execution and also for a declaration that the family property valued at Rs. 7 000 was not liable to be sold in execution of that decree the plaintiff paid Court fee ten times the Government revenue payable on the land worth Rs 7 000 The Court below rejected the plaint: *Held* that the real value of the reliefs claimed was Rs 2 794 and odd the value of the decree and that the plaintiff not having paid Court fee on that amount the plaint was rightly rejected. A plaintiff cannot value his case for the purpose of Court fee and for the purpose of jurisdiction at different amounts HARIHAR PRASAD SINGH v SHYAM LAL SINGH (1913) I L R 40 Calc 615

——— *Plaint —Valuation of Suit—Court Fees Act (VII of 1870) s 7 sub s (4) cl (c)* In a suit for a declaration that a decree for over Rs 29 000 was bad and might be set aside the plaintiffs who were interested only in three annas share of the property which was valued at Rs 9 000 were required to pay Court fee for the whole of the decretal amount —*Held* that the *plaintiffs must value their suit according to the* extent of their claim and the Court-fee need therefore be paid only upon the amount *Phul Kumari* v *Ghanshyam Misra I L R 35 Calc 202* and *Harihar Prasad Singh* v *Shyam Lal Singh I L*

COURT FEES ACT (VII OF 1870)—*contd*

——— s 7 (IV) C—*contd*

R 40 Calc 615 referred to GANESH BHAGAT v SARADA PRASAD MUKERJEE (1914)

I L R 42 Calc 370

——— In a suit for a declaration of title the value of the property stated in the plaint determines the Court fee payable KHETRA MOHAN MOHOPATRA v GANESH LAL PANDIT (1921) 6 Pa L J 101

——— Suits Valuation Act (VII of 1887) s 8—*Suit for declaration and injunction—Valuation of claim —Valuation for purpose of Court fees—Valuation for purpose of jurisdiction* In a suit for a declaration and for an injunction by way of consequential relief the plaintiff has the right to value his claim for the purpose of Court fees and value for the purpose of jurisdiction is the same The plaintiff brought a suit for a declaration and injunction in the Court of the First Class Subordinate Judge under his special jurisdiction and valued his claim for the purpose of Court fees at Rs. 135 and for the purpose of jurisdiction at Rs. 16 000 The trial Court having dismissed the suit the plaintiff preferred an appeal to the High Court At the hearing he raised a preliminary point that the appeal lay to *the District Court and prayed for the return of* memorandum of appeal so that it could be presented to that Court *Held* overruling the preliminary point, that on the special facts of the case the plaintiff should be taken to have filed the suit properly in the Court below under its special jurisdiction and to have filed the appeal properly in the High Court. BALKRISHNA NARAYAN v JANKIBAI (1919) I L R 44 Bom 331

——— *consequential relief —mortgage—suit for sale—sale ordered subjects to incumbrance—appeal* In a suit by a mortgagee for sale of the mortgaged property defendant *No 3 was impleaded on the ground that he held* a deed of conditional sale in which there was a recital of a mortgage prior to the plaintiff's mortgage in respect of the same properties The first Court decreed the suit but the lower appellate Court held that the property could only be sold subject to defendant No 3's deed which was for *Rs 14 000 The* plaintiff appealed and valued his appeal at Rs 14 000 but paid a court fee of Rs 10 only He prayed that the decree should be modified " by removing the condition as to priority of the defendant No 3 and its redemption by the appellant *Held* that an *ad valorem* court fee on Rs 14 000 should have been paid PREMSUKH DAS v SHAH GOPI SARAN

4 Pat L J 323

——— *Declaratory suit with consequential relief basis of valuation in—suit to set aside mortgage decree and sale and to obtain possession fees payable in* When consequential relief is sought in addition to a declaration the plaintiff is bound to fix a reasonable valuation upon the consequential relief and if he puts a ridiculous value upon it the court must fix a reasonable value for him dealing with each case on its own merits Two *Mitakshara* sons filed two suits to set aside decrees made upon mortgages executed by their father and sales held under such decrees and to obtain possession of their individual shares in the joint family property *Held* that suits were not for recovery of ir declarations

COURT-FEES ACT (VII OF 1870)—*contd*

———— s 7 (IV) C—*concld*

with consequential relief and that therefore the court fee payable in each case was not a sum equal to ten times the Government revenue but an *ad valorem* fee calculated on the value of the plaintiff's share in the joint family property SHAMA PRASAD SAHI v SHEOPERSAN SINGH 5 Pat L J 394

———— s 7(IV) (C) and (V)—*Suit for possession as adopted son—validity of adoption contested—court fees payable* In a suit for possession of an estate on the ground that he had been validly adopted by the widow of the last male owner under the authority of the latter the plaintiff valued the suit for purposes of court fees at ten times the Government revenue as if it were a suit for possession only The validity of the adoption was contested by the defendants *Held* that the suit was in effect a suit for declaration that the plaintiff was the adopted son of the last male owner and for consequential relief namely possession and that therefore *ad valorem* court fees were payable under s 7 (iv) (c) of the Court Fees Act 1870 UGRAMOHAN CHAUDHRY v LACHMI PRASAD CHOUDHRY 5 Pat L J 339

———— s 7 cls (iv) (c) and (v)—*Suit for declaration of the invalidity of a decree as against the plaintiff or his properties and for possession of some of those properties sold under the decree—Relief for possession only consequential on grant of declaration—No liability to value the declaration as on the amount of the decree—Plaintiff's right to give a combined valuation for both reliefs* In a suit for (i) a declaration that a certain decree was of no legal effect against the plaintiffs or the properties in their hands and (ii) possession of part of those properties which had been sold in execution of the decree *Held* (a) that the two reliefs were connected and were to be taken together the relief for possession being consequential on the grant of declaration (b) that the plaintiff was entitled to put in respect of both the reliefs a combined valuation for the purpose of court fees (iii) that the whole suit was not governed by s 7 cl 4 (c) of the Court Fees Act (VII of 1870) as there was a prayer for possession also which was to be valued as per s 7 cl 5 notwithstanding that the declaration was asked for and (iv) that the prayer for declaration was not liable to be valued for purposes of court fees as upon the amount of the decree sought to be set aside as invalid RAJAGOPALA v VIJAYARAGHAVALU (1914) I L R 38 Mad 1184

———— s 7 (IV) (c) and Sch II, Art 17—
See COURT FEE I L R 44 Calc 352
I L R 40 Calc 245 815

———— s 7 (IV) (f)—
See ADMINISTRATION SUIT
I L R 44 Calc 890
See COURT FEE I L R 45 Calc 634

———— *Suit for accounts—Preliminary decree—Appeal by the defendant against the whole decree—Valuation* In a suit coming under cl (iv) s 7 of the Court Fees Act when the plaintiff has valued the relief prayed for and obtained a decree in this instance a preliminary decree for an account and the defendant appeals against the whole decree he is bound by the valuation in the plaint *Samiya Mavali* v *Minammal* I L R 23 Mad 490 approved and followed *Delroos Banoo Begum* v *Nawab Syud Ashgur Ally Khan* 15 B L R 173 and *Buncari Lal* v *Daya Sunker Misser* 13 C W N 815 referred to SRINIVASACHARLU v PERINDEVAMMA (1915) I L R 39 Mad 725

———— *Suit for administration or account—Valuation for purposes of Court fees—Jurisdiction—Court Fees Act (VII of 1870) s 7 cl IV (f)* In an administration suit valued at Rs 30 000 for purposes of jurisdiction and at Rs 100 for adjustment of account and wherein court fees were paid on the latter sum only together with Rs 10 for the approximate value of the claim for account *Held* that such a suit was in essence a suit for account within the meaning of s 7 cl IV (f) of the Court fees Act and that adequate court fees had been paid on the plaint which could not be rejected *Khatija* v *Shekh Adam Husanally Vasi* I L R 39 Bom 545 *Sasi Bhushan Bose* v *Maharaja Sir Manindra Chandra Nandy* 21 C L J 448 *Satya Kumar Banerjee* v *Satya Kripal Banerjee* 10 C L J 503 followed SARAJU BALA DASI v JOGEMAYA DASI (1917) I L R 45 Calc 634

———— s 7 (IV) (f) and s 11—*Suit for accounts and administration—Valuation of the suit for purposes of court fees* In a suit for accounts and administration of the estate by the Court the claim was valued at Rs 130 for purposes of Court fees and at Rs 30 00 000 for purposes of jurisdiction and pleader's fees It was contended on behalf of the defendants that the suit had not been properly valued for purposes of court fees inasmuch as the suit was not an administration suit but was in effect a claim by the plaintiff for her share in the estate This contention found favour with the lower Courts which held that the suit was not for administration and the stamp duty was payable on the value of plaintiff's share in the property which amounted to Rs 67 968 12 0 On appeal to the High Court *Held* that having regard to the statements in the plaint an administration suit was maintainable and that it could be treated as a suit for account The plaintiff would therefore be at liberty to value it at Rs 130 or any other sum under s 7 cl IV (f) of the Court Fees Act In the event of a decree being passed for a larger amount than that covered by the fees already paid the plaintiff would be precluded by the provisions of s 11 of the said Act from executing such decree until fees liable on the whole amount of the decree had been paid KHATIJA v SHEKH ADAM HUSENALLY (1915) I L R 39 Bom 545

———— s 7 (IV) (f) 11 Sch II Art 17 (vi)—
See ADMINISTRATION SUIT
I L R 44 Calc 890

———— s 7 (V) (a)—
See COURT FEE—
I L R 40 Calc 815

———— s 7 V (a) c) (d)—
See GHATWALI TENURES
I L R 41 Calc 812

———— s 7 V (b) Appeal—*Court fee—Suit for possession—Decree for qualified possession—Appeal seeking to remove the qualification con*

COURT FEES ACT (VII OF 1870)—*contd*

——— s 7 (V) (b)—*contd*

[illegible] Plaintiff brought a claim for possession of certain property as transferee from a Musammat [illegible] whom the property had been bequeathed by [illegible] Musammat [illegible] [illegible] which [illegible] [illegible] the court of first instance granted him a decree for possession but limited [illegible] Musammat [illegible] The defendant appealed and the plaintiff also appealed seeking to have the condition removed from the decree and paid a court fee of Rs 10 on his memorandum of appeal. *Held* that the court fee was sufficient the plaintiff appellant being in the position of a person in possession of property who [illegible] and to obtain a declaration that he had the full right of ownership to the property. [illegible] FATEH CHAND (1911)

I L R 33 All 705

——— s 7 cl V (b) and (e)—*Cocoanut* [illegible] *land*—*Cocoanut* [illegible] [illegible] *Garden* [illegible] In a suit to recover possession of assessed land on which cocoanut trees [illegible] and the valuation should be under s 7 cl (v) (b) and not under cl (v) (e) of the Court fees Act (VII of 1870) The word garden in s 7 cl (v) (e) of the Court fees Act (VII of 1870) should be taken as referring primarily to garden in the English sense that is an ornamental or pleasure or vegetable garden attached to a house *Indobala* [illegible] *v* [illegible] *Mamally I L R* [illegible] *Mad* [illegible] referred to The conversion of an assessed arable field into a cocoanut tope does not affect the application of cl (v) (b) of s 7 of the Court fees Act *Venkayya v Ramasawm I L R* [illegible] *Mad* [illegible] and *Muniyandi* [illegible] *Chetti v Ch*[illegible] [illegible] *I L R* [illegible] *Mad* [illegible] referred to [illegible] GOUNDAN v ABDUL RAHIM (1910)

I L R 40 Mad 824

——— s 7 cl V (d)—Suit to recover a two third share in certain specific plots sold—*Court fee*—*Court fee payable on market value* Where a Hindu widow possessed of certain zamindari property of the total area of 17 bighas 6 biswas assessed to a revenue of Rs 10 7 0 sold 11 bighas and [illegible] was out of the same which was practically two thirds of what she possessed and specified the actual plots sold *Held* in a suit by two out of three reversioners to recover two thirds of the property thus alienated that the claim being for specified plots and not a definite share of the whole estate paying revenue the court fee should be paid on the market value of the property in suit and not on five times the Government revenue CHANDHAN v BISHAN SINGH (1911)

I L R 33 All 630

——— s 7 cl V sub-cl XI (cc)—*Court Fees Amendment Act (VI of 1905)*—*Suit to recover immovable property from tenant*—*Valuation for purposes of jurisdiction and for court fee same*—*Madras Civil Courts Act (III of 1873) s 14*—*Suits Valuation Act (VII of 1887) s 8* Although suits for recovery of immovable property from tenants have not been expressly withdrawn from the operation of s 14 of the Madras Civil Courts Act (VII of 1887) the effect of the amendment of s 7 of the Court Fees Act (VII of 1870) by adding to it cl (xi) (cc) is to bring such suits also under the operation of s 8 of the Suits Valuation Act (VII of 1887) and not under s 14 of the Madras Civil Courts Act so that in the case of such suits the valuation for purposes of jurisdiction is the same as for court fee NARAYANA [illegible] NAIDU v [illegible] ROW (1916)

I L R 39 Mad 873

——— s 7 (V) & (VI)—

See MADRAS CIVIL COURTS ACT (III OF 1873) s 14 I L R 41 Mad 721

——— *Court fee*—*Suit for pre-emption of sale of mortgaged property*—*Property in possession of usufructuary mortgagee*—[illegible] *not claimed* *Held* that in a suit for pre-emption of a sale of land the fact that the land is subject to a usufructuary mortgage and immediate possession cannot be obtained or is not in fact sought does not prevent the application of s 7 (vi) of the Court Fees Act to the suit but the plaintiff must pay court fees upon the value of the land computed in accordance with s 7 (v) of the Act *Ram Pal Tewari v Cirnandan Prasad I L R 15 All 63* distinguished DARYAO SINGH v BHARAT SINGH (1909)

I L R 32 All 19

——— s 7 (V) (X)—*Court fee*—*Suit for specific performance of contract to sell and for possession* The plaintiffs alleged that the defendants Nos 2 and 3 having contracted to sell certain property to them and received part of the price thereafter sold the same property to defendant No 1 who had notice of the agreement with the plaintiff and they asked (a) that the defendants 2 and 3 might be compelled to complete the sale to the plaintiffs and (b) for possession of the property *Held* that the suit was really one for specific performance of a contract and the court fee thereon was assessable under s 7 cl X of the Court Fees Act 1870 *Mohi-ud-din* [illegible] *Khan v Majlis Rai I L R* [illegible] *All* [illegible] referred to NIHAL SINGH v SERA RAM (1910)

I L R 8 All 292

——— s 7 (VI)—*Suit for pre-emption*—*Suit partly decreed and partly dismissed*—*Appeal raising questions both as to the price and as to right to pre-empt*—*Court fee* Five villages were transferred by means of one sale deed the consideration set forth in the deed being Rs 44 000 In respect of this transaction a suit for pre-emption was brought but the plaintiff alleged that the true consideration was Rs [illegible],000 only As to two of the villages the suit was decreed on payment of Rs 21 000 which was found to be the proportionate part of the Rs 44 000 assignable to these villages as to the other three villages the suit was dismissed The plaintiff appealed (a) as to the price to be paid for the two villages in respect of which the decree was in his favour and (b) in respect of the disallowance of his claim to pre-empt the other three villages A question having arisen as to the proper court fee payable on this appeal it was *held that the appeal* was divisible into two clear and distinct parts and that in respect of (a) the appellant should pay an *ad valorem* fee on the difference between 21 44 of Rs 2 500 and Rs 1 000 while in respect of (b) the appellant should pay a Court fee calculated according to s 7 (vi) of the Court Fees Act 1870 on five times the Government Revenue of the three villages claimed ABINASH CHANDRA v SHEKHAR CHAND (1918)

I L R 40 All 353

——— *Suit for declaration that the plaintiffs are not* [illegible] *fees and that survey entries are not b*[illegible] The Court fee

COURT-FEES ACT (VII OF 1870)—*contd*

——— s 7 (VI)—*contd*

payable in a suit in which the plaintiffs pray for a declaration that they are *occupancy tenants* and not tenure holders and that an entry in the Record of Rights describing them as tenure holders is wrong and is not binding on them is Rs 10 TEWARI KORA *v* BHUPAT MANDAR
4 Pat L J 302

——— s 7 (IX)—

See MADRAS CIVIL COURTS ACT (III OF 1873) ss 12 13
I L R 39 Mad 447

See JURISDICTION
I L R 38 Mad 795

——— *Decree on mortgage—Separate liabilities of distinct properties Appeal in respect of distinct properties* In a suit for sale on a mortgage a decree was passed declaring the separate liabilities of the different properties mortgaged One of the defendants whose property was held liable for specific sums of money appealed *Held* that the proper Court fee payable on the memorandum of appeal was a fee calculated on the sums of money for which the defendant s property was held liable and not one calculated on the full amount of the decree CHHABRAJI KUNWAR *v* THE COURT OF WARDS (1912)
I L R 35 All 92

——— *Suit for sale on mortgage—Court fee payable in appeal—Value of the subject matter—Amount declared due on date fixed for payment* A decree for sale on a mortgage declared that on the date fixed for payment a specified sum would be due from the mortgagor which included interest *pendente lite* *Held* that the Court fee payable in appeal from such decree was to be assessed not on the amount claimed in the suit but upon the amount with interest *pendente lite* found due by the Court of first instance at the date fixed for payment BALDEO SINGH *v* KALKA PRASAD (1912) I L R 35 All 94

——— s 7 (IX) Sch I Art 1—

——— *Suit for redemption or foreclosure of mortgage—Appeal—Court fee* The criterion laid down in s 7 (*ix*) of the Court fees Act 1870 for determining the court fee payable in respect of a suit for redemption or foreclosure of a mortgage does not apply to the appeal in such a suit In the case of appeals or cross objections in suits for redemption or foreclosure in all cases in which the amount declared by he Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree it is that amount at which the appeal or cross objections should be valued and future interest should not be taken into account The rule in *Baldeo Singh* v *Kalka Prasad I L R 35 All 94* modified RAGHUBIR PRASAD *v* SHANKAR BAKHSH SINGH (1913)
I L R 36 All 40

——— s 7 (X)—

See DECREE 3 Pat L J 67

——— s 7 (XI)—

See SCH II ART 5
I L R 40 All 358

See JURISDICTION
I L R 38 Mad 795

COURT-FEES ACT (VII OF 1870)—*contd*

——— s 7 (XI)—*contd*

——— *Suit for possession against tenant holding on after expiry of lease and others who had not been inducted on land as tenants—Court fee* In a suit for *khas* possession against three Defendants Defendant No 1 admitted that he had been holding the land as a tenant under the Plaintiff under a lease which had expired The other two tenants established their plea that there was no relationship of landlord and tenant between the Plaintiff and them *Held* that the suit could not proceed as against Defendants other than Defendant No 1 on a plaint stamped with Court fee under s 7 cl. 11 of the Court Fees Act PRAMATHA NATH GANGULY *v* AMIRADDI SHEIKH 24 C W N 151

——— ss 7 11—

See SECOND APPEAL 15 C W N 454

See COURT FEE I L R 44 Calc 890

——— ss 7 11 Sch II Art 17 (6)—*Suit for partition of immoveables moveables and funds of joint family business*—In a suit for partition the plaintiff has to include the whole of his claim that is to say the whole of the properties which are alleged by him to be properties of the joint family immoveable properties moveable properties and funds which according to him have resulted from joint business carried on by members of the family on behalf of all and such a suit cannot be treated as one for recovery of possession of both immoveable and moveable property requiring for their joinder Court s leave under O II r 4 of the Civil Procedure Code An order passed in such a suit requiring the plaintiff to elect to proceed either with his claim for recovery of immoveable properties or with that for recovery of the moveables and funds is erroneous *Held* that the plaint in the suit was properly stamped as required by s 7 and Sch II Art 17 cl. (6) of the Court Fees Act Should the amount due upon taking accounts prove on investigation to exceed the approximate value given in the plaint the course to be pursued was that under s 11 of the Court Fees Act BENI MADHAB SARKAR *v* GOBIND CHANDRA SARKAR (1916) 22 C W N 669

——— ss 7 12 17—*Suits Valuation Act—Suit for declaratory decree in respect of property worth over Rs 60 000 valued erroneously at Rs 1 0—Court which should entertain suit—Objection on the ground of jurisdiction when to be taken—Court fee objection as to to whom open and how corrected.* Plaintiff brought this suit in respect of property all of which excepting a house in Plaintiff s possession was in the possession of the Collector The house was worth about Rs 250 the value of the rest of the property being over Rs 60 000 He prayed for declaration of Plaintiff's title to the properties in suit and for an injunction to restrain obstruction to Plaintiff s possession of the house The Court fee payable in respect of the former relief being fixed by law at Rs 10 irrespective of the value of the property the Plaintiff according to an erroneous practice commonly followed in Bombay valued the prayer for a declaratory decree at Rs 130 as being the value on which the fee nearest to Rs 10 would be leviable and he valued the prayer for an injunction at Rs 5 the fee paid on his plaint being thus Rs. 10 6 0 The suit was instituted in the First Subordinate Judge s Court which in the circum

COURT-FEES ACT (VII OF 1870)—contd

——— ss. 7 12, 17—contd

Rupees would have jurisdiction to entertain the suit or if the value involved was over Rs. 5,000 and though Plaintiff had in fact though erroneously valued the suit at Rs. 13 the Defendant raised no objection on the ground of jurisdiction A decree having been passed in Plaintiff's favour the Defendant appealed to the District Judge but though no ground was taken in the memorandum of appeal on the question of jurisdiction the District Judge was of opinion that the First Court had no jurisdiction to entertain the suit but acting under s. 21 of the Civil Procedure Code heard the appeal on the merits and reversed the decree of the First Court On second appeal to the High Court it was held that the suit was instituted in the proper Court and appeal lay to the High Court and not to the District Court The High Court in consequence heard the appeal as a first appeal and confirmed the decree of the original Court *Held* by the Judicial Committee that the objection as to jurisdiction which was not taken at the trial should not have been allowed to be taken at the hearing of the appeal. That the Court Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State and under s. 12 of the Court Fees Act the detriment shown only to the revenue is to be corrected by the Appellate Court and a judgment not shown to have wrongly decided to the detriment of revenue cannot be set aside at the instance of a party on the ground of jurisdiction BALCHAPPA SUBRAO JADHAV DESAI v. SHIDAPPA VENKATRAO JADHAV DESAI

24 C W N 33

——— ss 7 and 17— *subject meaning of —claim for possession of land mesne profits and malikana whether plaintiff entitled to add the three claims together for the purpose of assessing court fee—interlocutory order re interference by High Court with* The word subject in s 7 of the Court Fees Act 1870 means cause of action In a suit for recovery of possession of land and for malikana and mesne profits the plaintiff is entitled to add together the value of the three claims for the purpose of assessing the court fees payable He is not bound to assess the court fee separately on each item of his claim It has been the established practice in the Calcutta High Court to interfere with interlocutory orders and that practice has been adopted by the Patna High Court NAURATAN LAL v. WILLFORD JOSEPH STEPHENSON 4 Pat. L J 195

——— s 7 Sch II cls 3 4—*Suits for dissolution of partnership—Preliminary decree—Appeal —Court fee* In a suit for dissolution of partnership the defendants appealed against the preliminary decree pleading that they had no interest in the partnership and that they sought only a declaration to that effect *Held* that the appellants ought to pay an *ad valorem* fee according to the amount at which the relief sought was valued in the memorandum of appeal BHOLA NATH v. PARSOTAM DAS (1910) I L R 32 All 517

——— s 8—

See LAND ACQUISITION ACT 1874 s 3
I L R 45 Bom 277

COURT FEES ACT (VII OF 1870)—contd

——— s 8 Sch II Art 17 (VI)—

——— *Court fees Act (VII of 1870) s 8 and Sch II Art 17 cl vi—Land Acquisition Act (I of 1894) s 32—Land Acquisition Judge order of—Appeal—Debutter property—Memorandum of appeal—*Ad valorem *fee—Award* A certain *debutter* property having been acquired under the Land Acquisition Act the compensation money allowed by the Collector was deposited in Court One *T* applied to withdraw that amount on the ground that she was entitled to it as executrix to the will of her late husband On objection by one A that the money in deposit should be invested in Government securities and only the interest should be paid over to the *shebait* the Land Acquisition Judge passed an order under s 32 of the Act directing the payment of interest only to the applicant Against this order *T* preferred an appeal to the High Court on a Court fee stamp of ten rupees only *Held* that the case came under the provisions of s 8 of the Court fees Act and an *ad valorem* court fee ought to have been paid *Sheorattan Rai v Mohri I L R 21 All 354* and *Kasturi Chetti v Deputy Collector Bellary I L R 21 Mad 269* referred to *Held also* that to bring a case under the provisions of cl (vi) of Art 17 of Sch II of the Court fees Act it must be established that it was not possible even to state approximately a money value for the subject matter in dispute but where the claim to receive the full amount of compensation money was disallowed and the only relief allowed by the Court was to withdraw the interest on the said money there it was possible to state approximately the money value of the relief claimed and therefore in such a case the provisions of Sch II Art 17 cl (vi) of the Court fees Act would not apply *Banwari Lal v Daya Sunker Misser 13 C W N 815* followed TRINAYANI DASI v. KRISHNA LAL DE (1912)

I L R 39 Calc 906
17 C W N 933

——— ss 10 and 12—

See COURT FEES 5 Pat L J 508

——— *deficiency in court fee paid on plaint—appeal by defendant—respondent called upon to pay deficiency—failure to comply—suit dismissed effect of—Code of Civil Procedure (Act V of 1908) O VII r 11—Res judicata—suit to set aside ex parte decree and sale thereunder whether court fee payable on amount of decree or value of property sold* If a plaintiff respondent fails to make good a deficiency in the court fee paid on the plaint it is competent to the appellate Court to call upon him to pay the deficit, and in the event of his failure to pay to dismiss the suit The procedure of O VII r 11 of the Code of Civil Procedure 1908 is not applicable to a case in which an appellate Court acts under s 12 of the Court Fees Act 1870 In such a case rejection of the plaint is an inappropriate remedy and the law *enjoins a dismissal without option* thought it may be that the result of the dismissal from the point of view of *res judicata* is the same as that of a rejection The valuation for the purpose of court fees of a suit under s 7(iv) (c) of the Court Fees Act must be in accord with the value of the subject and must not be an arbitrary valuation Wher[e] [p]laintiff asks for a declaration and conseq[uential relief] he is bound to pay *ad valorem* fees [...] to the loss from

COURT-FEES ACT, (VII OF 1870)—contd

——— ss 7 and 12—*contd*

which he seeks to be relieved In a suit in which *the plaintiff asks for a declaration that a decree* obtained against him and a sale held thereunder are void on the ground of fraud he is bound to pay an *ad valorem* court fee on the value of his share in the property sold and not merely an *ad valorem* fee on the amount of the decree PANDIT BRIJ KRISHNA DAS *v* CHOWDHURY MURALI RAI

4 Pat L J 703

See s 7 (IV) (F) **I L R 39 Bom. 545**

——— s 11—

See BENGAL N W P AND ASSAM CIVIL COURTS ACT (XII OF 1887) *s* 21 **I L R 32 All 222**

——— s 12—

See s 5 **I L R 32 All 59**
3 Pat L J 92

See APPEAL **14 C W N 343**

See CIVIL PROCEDURE CODE 1908 ss 2 115 AND 151 **4 Pat L J 57**

See COURT FEES **3 Pat L J 443**

See COURT FEES ACT ss 10 12 AND 17 **4 Pat L J 703**

——— *Court fees paid in Lower Appellate Court insufficient—Appeal to High Court dismissed—whether High Court has power to restrain execution of decree until realisation of deficiency* Where an appeal to the High Court has been dismissed owing to the appellants failure to pay the deficit due in respect of the court fee payable by him on a memorandum of appeal or for other good and sufficient reasons the High Court has no power after dismissal of such appeal to call on the respondent to make good any deficiency in the court fee due in respect of the court fee payable by him in the Lower Appellate Court and consequently the High Court has no power in such circumstances to restrain the respondent from executing the decree obtained by him KUMAR RADHIKA RAMAN PRASAD SINGH *v* MUSAMMAT JANKI KUER **4 Pat L J 472**

——— s 13—

See CIVIL PROCEDURE CODE (ACT V OF 1908) ss 115 151 O XLI R 23 **I L R 42 Bom 363**

——— s 17—

See s 7 **4 Pat L J 195**

See COURT FEE **3 Pat L J 443**

——— *Suit to obtain a declaration as adopted son and to establish title to property—Injunction with respect to a house—Declaration with respect to other property—Valuation of the plaint—Valuation for pleader s fees—Special jurisdiction of the first Class Subordinate Judge—Appeal to the District Court—Second Appeal—Return of the memorandum of appeal for presentation to the High Court—Jurisdiction* In a suit for a declaration that the plaintiff was the adopted son of V and as such was entitled to his property the plaint was valued at Rs 130 for a declaration of the rights and at Rs 69 016 9 0 for pleader s fees *The plaintiff prayed for an injunction restraining* the defendant from interfering with plaintiff s rights in respect of a house which was already in

COURT-FEES ACT (VII OF 1870)—contd

——— s 17—*contd*

his possession and the injunction was valued at *Rs 5 With respect to the other property* which was attached by the Collector after V s death the plaintiff sought for a bare declaration of his rights as V's adopted son The suit was tried by the First Class Subordinate Judge of Belgaum in his special jurisdiction and he allowed the claim The defendant appealed to the District Judge and he *notwithstanding the plaintiff's* preliminary objection that the appeal lay to the High Court and not to his Court, held that the First Class Subordinate Judge had no jurisdiction to try the suit under his special jurisdiction because the suit was for a declaration and consequential relief which was valued at Rs 6 of the purposes of Court fees, and the valuation for the purposes of jurisdiction being the same as for the purposes of Court Fees that valuation was less than Rs 5 000 The District Judge therefore entertained the appeal and having found that the plaintiff s adoption was not proved disallowed the claim On second appeal by the plaintiff *Held* reversing the decree that the First Class Subordinate Judge was entitled to try the suit under his special jurisdiction and his decree was appealable to the High Court The plaint distinctly laid claim to two subjects namely two kinds of properties First there was property in the possession of the Collector and its value exceeded Rs 5 000 and that property having been *in the possession of the Collector it was not* necessary for and allowable to the plaintiff to ask for an injunction He was only entitled to a declaration of his title The other subject matter of the suit was the house as to which the plaintiff was entitled to ask for a declaration and consequential relief and to put his own valuation on the plaint SHIDAPPA VENKATRAO *v* RACHAPPA SUBRAO (1912) **I L R 36 Bom 628**

——— *Subject — suits against several tenants for correction of Record of Right—Court fees payable on* In a suit by a landlord against 25 sets of tenants in respect of 25 holdings for a declaration that their several lands were held under the *batai* system and that they were wrongly recorded as paying cash rent *held* that a court fee of Rs 10 should have been paid in respect of each of the 25 sets of tenants LACHMAN SAHU *v* SHEIKH ABDUL KARIM **4 Pat L J 299**

——— s 19 — *Property held in trust not beneficially —Undivided share of deceased co parcener and property held in trust not beneficially —Surviving co parcener applying for Letters of Administration liable to pay court fees on the value of share of deceased co parcener* Under the Mitakshara Law as administered in this part of India an undivided co parcener has power to mortgage or alienate his undivided share and he can at any time enforce partition of his own share He can not therefore be said to hold *his own share of* the undivided property as trust property not beneficially or with general power to confer a beneficial interest in it within the meaning of these words as used in Annexure *B* of the form for valuation in Sch III of the Court Fees Act although as regards the shares of others he may *be said to so hold them Where a surviving co parcener governed by the Mitakshara Law applies* for Letters of Administration in respect of property

COURT FEES ACT (VII OF 1870)—*contd*

—— s. 19—*contd*

[illegible] standing in the name of a d[illegible] sed [illegible] which was joint family property [illegible] appellant [illegible] deceased [illegible] [illegible] tion of the property [illegible] the [illegible] share to which [illegible] entitled at the moment of the death and [illegible] under [illegible] 19 I (1) of the Court Fees Act [illegible] Administration [illegible] the joint family property [illegible] his share in the valuation and pay the proper *ad valorem* court fees upon it *In the goods of* [illegible] I L R [illegible] 3 Calc 95 referred to [illegible] followed *In the goods of* [illegible] 11 B L R App [illegible] followed *In the matter of* DR [illegible] MANAVALA CHETTY (1910)

I. L. R 33 Mad 93

—— *Court fee—Computation of duty [illegible] administration* *Held* [illegible] construction of the Court Fees Act 1870 that no fee is payable in respect of a grant of probate or letters of administration where the value of the estate after making the deductions specified in annexure B of the third schedule is less than Rs 1000 *In the goods of* MR E. E. W MEIK (1916)

I. L. R. 40 All. 279

—— s. 19C—

See PROBATE I. L. R. 43 Calc 625

—— *Probate of Will—full court fees paid—[illegible] necessary [illegible] full court fees [illegible] Will* The estate referred to in s 19 (C) of the Court Fees Act 1870 means the property of a deceased person S 19 (C) merely means that when fees have already been paid in respect to the whole or part of the property comprised in the estate of a deceased person the fees so paid shall not be payable over again on the grant of a fresh probate of a Will or Letters of Administration of the estate of the same person *e g* when probate is revoked or a portion of an estate remains unadministered A person who applies for probate of his wife s Will is bound to pay the full court fees due even though the bulk of the property dealt with in the Will was included in the wife s father s Will of which probate had been granted on full payment of court fees BHAGWATI SARAN SINGH *v* THE SECRETARY OF STATE FOR INDIA IN COUNCIL 5 Pat L J 36

—— s 19 (D)—*Hindu Will—deduction of property which passes by survivorship validity of* Where a Hindu by a Will left the residue of his property to his son and the executors when applying for probate claimed exemption from the payment of court fees on the residue on the ground that the son was entitled to the property by survivorship *Held* that they were not entitled to the exemption *In re* ESTATE OF RAM KUMAR PRASAD 5 Pat L J 510

—— s 19E—

See PENALTY I L R 43 Calc 230

—— s 28—

See s 4 3 Pat L J 74

See CIVIL PROCEDURE CODE 188 s 54

14 C W N 882

Sch I Art —

See APPEAL VALUATION OF

I L R 43 Bom 507

COURT FEES ACT (VII OF 1870)—*contd*

—— s 28—*contd*

Sch I (IX)

I L R 36 All 40

—— *Court fee—Cross objection [illegible] in appeal* Under art 1 of sch I to the Court Fees Act 1870 a party filing cross objections must pay an *ad valorem fee* according to the value or amount of the subject matter in dispute LAKHAN SINGH *v* RAM KISHAN DAS (1917)

I L R 40 All 93

—— Sch I Art I Sch II Arts I and 11 —A memo of cross objection filed in the High Court relating to costs only does not fall within Sch II Art II or under Sch. II Art I and a Court fee of Rs 2 is leviable thereon KAMAL KUMARI DEBI *v* I[illegible] NORTH BENGAL BANK LIMITED 25 C W N 934

—— Sch I Art 1 Sch II Art 11

—— *Civil Procedure Code 1908 O XXXIV r 5—Court fee—Appeal from final decree in a mortgage suit Held* that an appeal from the final decree passed under O XXXIV r 5 of the Code of Civil Procedure 1908 requires an *ad valorem* court fee and cannot be stamped as an appeal from an order BAJRANGI LAL *v* MAHABIR KUNWAR (1913)

I L R 35 All 476

—— *Court fee—Subject matter in dispute in appeal—Suit for possession—Defence of lien for dower—Appeal by defendant* In a suit for recovery of property in the possession of a Mahomedan lady the defendant pleaded *first* that the plaintiff had no title and *secondly* that she was not entitled to a decree for possession without payment to the defendant of Rs 80 000 the amount of dower due to the defendant The Court of first instance decreed the suit for possession holding that payment of the defendant s dower whatever it might amount to was not a condition precedent to the plaintiff s obtaining a decree The defendant appealed paying court fees on the value of the property On a reference by the taxing officer as to whether she was liable to pay court fees on Rs 80 000 as well *Held* that the subject matter in dispute in the appeal was the property of which possession was sought and that the court fee paid was sufficient HAIDARI BEGAM *v* GULZAR BANO (1914)

I L P 36 All 322

—— Sch I Art 11 Sch III—

See s 19 (I) I L R 40 279

See PROBATE DUTY

6 Pat L J 411

Probate and Letters of Administration court fees payable on—Gross or net value—Court fee error as to valuation revision by High Court Where the gross value of the property in respect of which application has been made for probate or letters of administration exceeds Rs 1 000 but the net value after deducting the liabilities against the estate is below that amount Court fee is payable under Sch I Art 11 of the Court Fees Act though it is payable on the said net value under the provisions of Art 11 of Sch I read with Sch III of the Act The exemption from liability to pay Court fees provided [illegible] (till) and Art 11 of Sch I of the Ac[illegible] in cases where the gross value [illegible] one thousand

COURT-FEES ACT, (VII OF 1870)—*contd*

———— **Sch I Art 11 Sch III**—*contd*

rupees Where the Court below decided that no Court fee was payable on an erroneous view of law the High Court could interfere in revision under s 15 of the Indian High Courts Act THE COLLECTOR OF MALDAH *v* NERODE KAMINI DASSY 1912) **17 C W N 21**

———— *Probate duty assessment — Value of property meaning of—Construction of Statute* Sch III Annexures A and B of the Court Fees Act make it clear that the duty payable at an application for probate or letters of administration under Sch I Art 11 of the Act is to be calculated upon the net value of the estate obtained by the deduction of the amount of debts from the gross value of the estate *Collector of Maldah v Nerode Kamini Dassy 17 C W N 21*, may require re examination and further consideration The interpretation of the expression value of property in Sch I Art 11 as the market value of property or the value of the entire property less the amount of encumbrance is the reasonable construction of the expression The true mode of interpreting a Statute like the Court Fees Act which has been repeatedly amended is not to consider individual sections but to take them as a whole and to give effect to the legislative intent upon a particular matter *In the goods of* KERR (1913) **18 C W N 121**

———— *Estate of which gross value over Rs 1 000 but deducting debts net value less than that of chargeable with death duty* The expression amount or value of the property' in Art 11 of Sch I of the Court Fees Act signifies what is described as the net total in Annexure A in Sch III obtained by the deduction of the amount shown in Annexure B as not subject to duty from the gross valuation of the movable and immovable property left by the deceased *Held* therefore that no fee was leviable under the article upon the estate of the deceased the gross value of which was shown to be Rs 1 244 11 0 and the amount of the debts Rs 522 leaving a net balance of Rs 722 11 0 *Collector of Maldah v Nerode Kamini 17 C W N 21* not followed *In the goods of Harriett Tevior Kerr 18 C W N 121 s c 18 C L J 308* referred to *In the goods of* QUININGBOROUGH (1915)] **20 C W N 591**

———— **Sch I Arts 11 12**—*Succession certificate—Grant to widow—Death of widow—Fresh certificate application by daughter for—Court fee if must be paid again—Analogy of administration d bonis non if applies—Fiscal statute interpretation of —Succession Certificate Act (VII of 1889) s 14* Whenever a fresh succession certificate is taken even though it is to collect debts for which a succession certificate has already been taken out and the duty paid the duty prescribed by the Court Fees Act must be paid R the widow of a deceased Hindu took out a succession certificate in respect of certain debts due to the deceased After her death S the daughter of the deceased applied for a succession certificate in respect of the same debt and urged that stamp duty upon the debts having once been already paid by P she was not bound to pay duty again *Held* that it was an application for a certificate within the meaning of s 14 of the Succession Certificate Act and Court fee was payable on it as such One fiscal Act cannot be construed by another fiscal Act *In re* SAROJEBASHINI DEBI (1916) **20 C W N 1125**

COURT-FEES ACT (VII OF 1870)—*contd*

———— **Sch I, Arts 11 12**—*contd*

———— **Sch II Art 5**—*Suit for declaration that plaintiff is an occupancy tenant—Agra Tenancy Act (II of 1901) s 95—Court fee* In a suit under s 95 of the Agra Tenancy Act 1901, to declare the plaintiffs status as an occupancy tenant the plaint or memorandum of appeal should bear a court fee of eight annas as provided in art 5 of sch II to the Court Fees Act s 7 cl xi of the Act does not apply to such a suit PATAN SINGH *v* KHEM KARAN (1918) **I L R 40 All 358**

———— **Sch II Art 6**—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 269 **I L R 37 Mad 17**

See STAMP ACT 1899 s 2 ARTS 15 AND 40 **I L R 43 Mad 363**

———— *Stay of execution security bond for how stamped—Court fee or non judicial stamp—Indian Stamp Act (II of 1899) Sch I Art 15* Bonds given as security in pursuance of the order of the Court for stay of execution must be written on paper properly stamped under the Indian Stamp Act (II of 1899) Such bonds cannot be written on plain paper bearing a Court fee stamp of annas 8 only as they are not made by order of the Court within the meaning of Art 6 of Sch II of the Court fees Act DWARKA NATH DEY *v* SAILAJA KANTA MULLICK (1916) **21 C W N 1150**

———— **Sch II Art 11**—

See COURT FEES **3 Pat L J 99 101**

———— **Sch II Art 12**—*Caveat what is a—Probate proceeding—Persons upon whom citations issued preferring objections—Objections if must be stamped as caveat* A petition by which a party upon whom citation has been issued opposes the grant of probate is not a caveat and need not be stamped as such A caveat which is in the nature of a precautionary measures intended to assure that there shall be no proceeding in the matter of the estate of the deceased without notice to the person who files a caveat is not necessary where persons interested in the estate of the deceased appear upon citation BHABATARINI DEBI *v* HARI CHARAN BANERJEE (1916) **20 C W N 787**

———— **Sch II Art 17**—*Value of suit under judgment debtor s title disputed—Cancelling of attachment—Suits Valuation Act (VII of 1887) s 4 valuation under* Where the prayer in a plaint is not only to cancel an attachment but also for a declaration that the judgment-debtor has no interest in the property the value of the suit is the value of the entire property claimed by the plaintiff NARAYANAN SINGH *v* AIYASAMI REDDI (1915) **I L R 39 Mad 602**

———— *Court fee payable in suit by person whose claim in respect of property attached in execution of decree has been rejected for default* Under Art 17 Sch II of the Court Fees Act a court fee of Rs 10 is payable upon the plaint in a suit by a person whose claim to properties attached in execution of a decree has been dismissed for default to set aside the decision An order dismissing a claim for default is an order within the meaning of Or XXI r 63 of the Civil

COURT FEES ACT (VII OF 1870)—contd

——— Sch. II Art. 17—contd

Procedure Code ar 1 subject to the result of a regular suit its conclusive SATINDRA NATH BANERJEE v SHIVA PRASAD BHAKAT
26 C W N 126

——— Sch II 17 (3)—

See s 7 (11) **I L R 42 All. 353**

See s 7 (IV c)

See COURT FEE **I L R 44 Calc 352**

See APPEAL VALUATION OF **I L R 37 Calc 914**

See VALUATION OF SUIT **I L R 43 Bom 507**

——— *Declaratory decree —Suit to have declared ... decree not binding ... consequential relief—Court fee amount of* A suit by the plaintiff to have it declared that a decree passed in a previous suit declaring that certain alienations were not valid was not binding on her is properly instituted on a Court fee stamp of Rs 10 only because no consequential relief is needed or sought for in it JAGALA SUNDARI DEBI v PROSANNA NATH MUKHERJI (1916) **21 C W N 375**

——— *Suit for declaration that entry in record-of-rights a nullity whether one for consequential relief—Specific Relief Act (I of 1877) ... Bengal Tenancy Act (VIII of 1885) s 111A—Amendment or rejection of plaint —Civil Procedure Code (Act V of 1908) O VII r 11—Court fee Act (VII of 1870) Sch II Art 17 cl (iii) s ( ) 1 (c)* Where a court fee of rupees ten was paid in a suit purporting to be under s 111A of the Bengal Tenancy Act but the plaintiffs prayed for a declaration (a) that they were occupancy ryots and (b) also that the entry in the record of rights showing them as tenure holders was a nullity and the plaintiffs on being required to supply the deficit court fee on the second relief claimed failed to do so within the time fixed by the Court *Held* (i) that the second prayer being for a consequential relief was not such a declaration as was contemplated by the proviso to s 111A (ii) that the learned Judge had *no alternative but to reject the plaint* and (iii) that the plaintiffs could not be allowed to amend the plaint by striking out the second prayer for relief as the provision of O VII r 11 of the Civil Procedure Code was mandatory MIDNAPUR ZEMINDARY COMPANY LTD v SECRETARY OF STATE FOR INDIA (1916) **I L R 44 Calc 352**

——— Sch II Art 17 (6)—

See ADMINISTRATION SUIT **I L R 44 Calc 69**

See APPEAL **I L R 37 Calc 914**

See CIVIL PROCEDURE CODE 1908 s 2 **4 Pat L J 57**

See VALUATION OF SUIT **I L R 43 Bom 507**

See s 7 **I L R 44 Calc 890**

See s 8 **I L R 39 calc 906**

———Suit for restitution of conjugal rights—*Court fee* *Held* that the court *fee payable in respect of a suit for restitution of* conjugal rights is a fee of ten rupees under art 17 cl VI of the second schedule to the Court Fees Act 1870 *Zair Husain Khan v Khurshed Jan I L R 28 All 51* referred to AHMAD v FAIYAZ HUSAIN (1911)
I L R 33 All 767

——— *Court fee payable on plaint—Suit by plaintiff in joint possession to have share partitioned—Fixed fee ten rupees* In a suit for partition where the plaintiff alleges that he is in possession and merely claims partition of the property and separate possession of his share a court fee stamp of 10 rupees is sufficient *... v Lachhman All Weekly Notes 1900 90 ... v Durga Prasad I L R 28 All 340* and *Lakshmi ... v ... Charitar ...* (W N 3 followed TARA CHAND MUKERJI v AFZAL BEG (1911) **I L R 34 All 184**

——— *Suit for partition by ... in common possession* A suit for partition of immoveable property by a person who alleges he is in possession of it as co tenant on behalf of himself and others is governed by Sch II art 17 (6) of the Court Fees Act (VII of 1870) *Referred Case No ... of 1891 (1891) 4 M L J 110* not followed *Tara Chand Mukerji v Afzal Beg (1911) I L R 34 All 184* and *Hamudhin ... v Amiruddin (1918) 44 I C 216 (Cal)* followed CILL v VARADARAGHAVAYYA (1920) **I L R 43 Mad 396**

——— Sch III—

See s 19(1) **I L R 33 Mad. 93**
I L R 40 All 279

——— *Trusts created by testator's Will liability of to probate duty* The trusts referred to in item (1) of Annexure B of Sch III to the Court fees Act 1870 are trusts held beneficially by the testator during his life time and not trusts created by the testator's Will CHANDRABATI KUER v THE COLLECTOR OF DARBHANGA
2 Pat L J 611

COURT FEES AMENDMENT ACT (XI OF 1899)

——— *Limitation for proceedings of Collector where he thinks the value of an estate has been under estimated —Form of inventory of estate to be exhibited and filed in Court— Full and true estimate of property —Probate and Administration Act (V of 1881) S 98—Inventory accepted as sufficient by former Judges of Court* In the matter of an application for letters of administration with the Will annexed the period of limitation in the proviso to sub s 4 of s 19H of Act XI of 1899 (amending the Court Fees Act 1870) for the proceedings of a Collector who has reason to believe that the valuation of an estate has been under estimated does not begin to run until an inventory under s 98 of the Probate and Administration Act (V of 1881) has been exhibited and filed in the proper Court and according to the last named section the inventory required is declared to be a full and true estimate of the property in possession of the person applying for letters of administration *Held* that such an estimate was not furnished by the exhibition and filing of a ... cument (in this case a list of the immovea... ...y of the deceased) which required t... ...ted by a reference

COURT FEES AMENDMEMT ACT (XI OF 1899)—*contd*

to various other documents in order to ascertain the valuation of the property notwithstanding it had been accepted as such an inventory as the *law required by previous holders of the office of* Judge of the Court in which it was filed BHUBANESWARI KUMAR *v* COLLECTOR OF GAYA *(1913)*
I L R 41 Calc 556

COURT FEES AMENDMENT ACT (VI OF 1905)

See COURT FEES ACT (VII OF 1870) s 7 CL (V) SUB CL XI (CC)
I L R 39 Mad 873

COURT MARTIAL

——————— *Trial by under Ordinance I (Government of India) of 1919 if competent to try persons under s 124A Indian Penal Code—Privy Council appeal to—Conviction under s 124A Indian Penal Code (Act XLV of 1860)—Conclusion of local tribunal in the nature of findings of fact—Privy Council if should interfere—Free pardon by Crown if bar to appeal—Conviction by Court Martial Commissioners—Jurisdiction—Ordinance I of 1919* The Appellant was convicted by a Court of Commissioners sitting at Lahore under Ord I of 1919 and having the powers of a summary Court martial of an offence under s 124A of the Penal Code in respect of certain articles which were published in the issues of the 6th 7th 8th 9th 10th and 11th April 1919 of the Newspaper *Tribune* of Lahore during disturbances which occurred at Lahore on the 6th 10th 11th and 12th April 1919 *Held*—That the Commissioners had jurisdiction to try him *Bugga* v *King Emperor L R 47 I A 128 s c 24 C W N 650* followed That the question whether on a reasonable construction of the articles complained of the Appellant was or was not guilty of the offence was one which partook so much of the nature of a question of fact being necessarily dependent not only on the construction of the written matter but also on the local conditions obtaining at the time of publication and a just appreciation of the effect which the publication under those conditions of the articles in question would be calculated to produce that the Board could not revise the conclusions of the local tribunal without putting themselves into a position which they have repeatedly declined to assume viz that of a Court of Appeal in criminal proceedings A free pardon by the Crown granted to the Appellant subsequently to his obtaining special leave if proved would itself have been a sufficient reason for not entertaining the appeal *Levien* v *The Queen L R 1 P C 5 6 (1887)* referred to KALI NATH ROY *v* THE KING EMPEROR (P C)
25 C W N 701

COURT OF RECORD

See CONTEMPT OF COURT
I L R 41 Calc 173
I L R 45 Calc 169

COURT OF SESSION

————— committal to—

See CRIMINAL PROCEDURE CODE s 213
I L R 38 Bom 114

COURT OF WARDS

See ADVERSE POSSESSION
14 C W N 317

See BOMBAY COURT OF WARDS ACT (I OF 1905) I L R 37 Bom 313

See CENTRAL PROVINCES GOVERNMENT WARDS ACT s 18
I L R 40 Calc 784

See CIVIL COURTS ACT (XIV OF 1869) s 32 I L R 38 Bom 882

See COMPLAINT I L R 46 Calc 854

See COMPROMISE I L R 44 Calc 829

See COURT OF WARDS ACT

See DEKKHAN AGRICULTURISTS RELIEF ACT (XVII OF 1879) s 2
I L R 37 Bom 97

See EXECUTION OF DECREE
I L R 38 Bom 662

See LIMITATION I L R 43 Calc 211
I L R 46 Calc 694

See OUDH LAND REVENUE ACT (XVII OF 1876) ss 173 174
I L R 38 All 271

See SPECIFIC RELIEF ACT ss 45 46
15 C W N 503

See UNITED PROVINCES COURT OF WARDS ACT

————— alienation by—

See HINDU LAW—ADOPTION
I L R 40 Mad 846

————— management of widow's estate by—

See HINDU LAW—ADOPTION
I L R 40 Mad 846

————— sanction of—

See MAHOMEDAN LAW—PRE EMPTION
I L R 39 Calc 915

————— Suit in respect of property taken by—

See COURT OF WARDS (PUNJAB) ACT 1903 ss 8 AND 19 I L R 2 Lah 151

————— whether manager entitled to grant of probate—

See PROBATE AND ADMINISTRATION ACT 1881, s 41 5 Pat L J 347

COURT-OF-WARDS ACT

See UNDER THE VARIOUS PROVINCES

COURTS (COLONIAL) JURISDICTION ACT (37 & 38 VICT C 27)

————— s 3—

See HIGH COURT JURISDICTION OF
I L R 39 Calc 487

COURT SALE

See CIVIL PROCEDURE CODE 1882 ss 263 264 318 AND 319
I L R 36 Bom 373

s 317 I L R 35 Bom 342

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 47 I L R 42 Bom 411

s 47 O XXI R 2
I L R 43 Bom 240

COURT SALE—*contd*

S 70 O XXI r. 72
I L. R 42 Bom 621

O XXI r 91 I L. R 35 Bom 29

O XXI r 5 I. L. R. 36 Bom. 37

O XXI rr 9 90
I L. R 43 Bom 559

See COMPANIES ACT (VII OF 1913) s 35
I. L. R 41 Bom. 78

See MORTGAGE I. L. R 38 Calc 923

See MORTGAGOR AND MORTGAGEE
I L. R 41 Bom. 357

See PRE-EMPTION I. L. R 34 Bom 567

See SUBSTITUTION OF PROPERTY AND SECURITY I. L. R 39 Mad. 283

See TRANSFER OF PROPERTY ACT (IV OF 188) s 3 I. L. R 39 Bom 507

See VATAN I. L. R 37 Bom 81

———— appeal for application to recover deficiency—

See SECOND APPEAL
I. L. R 45 Bom 223

———— validity of—

See DECREE AGAINST A MAJOR AS MINOR
I L. R 39 Mad 1031

———— when leave of Court to bid not obtained—

See CIVIL PROCEDURE ACT 1908 ss 47 AND 66 O 11 r 2
I L. R 44 Bom. 352

————*Stranger purchaser* bona fide *effecting improvements—Subsequent eviction right to val e cf—Improvements* A purchase in a Court auction who was not a party to the decree is entitled to the value of the improvements *bond fde* effected by him on being evicted from the property owing to some defect or irregularity in the proceedings leading up to the sale The time of his making the improvements is immaterial provided he had then an honest belief in the validity of his title *Bona fides* in this connection mean only honest belief in the validity of his title and does not extend to the necessity of making proper enquiries as to the title and regularity of the prior proceedings S 51 of the Transfer of Property Act is inapplicable to a purchaser at a Court-sale *Per* CURIAM There is a great distinction between stranger purchasers and decree holder purchasers The principle of *caveat emptor* has no application to a Court purchase There is no covenant for title implied in a Court sale and the purchaser takes only the right title and interest of the judgment debtor *Quære* Whether *Zain ul Abdin Khan* v *Muhammad Asghar Ali Khan I L R 10 All 166* lays down that stranger purchasers in order to be entitled to protection should make their purchases *bonâ fide*? *Kanjappa Gounden* v *Peruma Gounden I L R 3? Mad 630 Kundarpa Nath Ghose* v *Jogendra Nath Bose 12 C L J 391 Stocl* v *Starr 1 Sawyer 15 2. (India) Fed Cases 1084* and *Bright* v *Boyd 1 Story 478* and *Dharma Das Kundu* v *Amulyadhan Kundu I L R 33 Calc 1119* followed 24 American Cyclopædia of Law and Procedure page 70 referred to MOTTHEENSA POWTHAN v APSA BIVI (1913)
I L. R 36 Mad 194

COTTON GOODS

———— sale and purchase of—

See CONTRACT ACT (IX OF 1872) s 47
I L R 40 Bom 51?

COVENANT ?,

See MORTGAGE.
I L R 35 Bom 327 371
I L R 39 Calc 8°8

See REGISTRATION
I L R 45 Bom 170

———— breach of—

See EJECTMENT I L R 45 Calc 469

———— Binding on Purchaser of Land—

See AGREEMENT I L R 41 All 417

———— For Renewal or Pre emption—Difference between—

See LEASE FOR A YEAR
I L R 44 Mad. 230

———— in a mining lease—

See TENANTS IN COMMON
I L R 39 Mad. 1049

———— not to sue—

See CONTRACT ACT s 28
I L R 38 Bom 344

———— personal covenant by mortgagor—

See LIMITATION ACT 1908 s 20 SCH. I ART 110 I L R 44 Bom 500

———— *to give mortgagee possession in* lieu of interest—

See MORTGAGE I L R 46 Calc 448

———— Covenant to re purchase purely personal—*Sale with an option of re purchase—Suit by vendor s grandson against the vendee s daughter in law* A deed of sale with an option of re purchase contained the following clause — I have given the land into your possession if perhaps at any time I require back the land I will pay you the aforesaid Rs 600 and any money you may have spent on bringing the land into good condition and purchase back the land. In a suit brought 35 years after execution of the deed by the grandson of the vendor against the daughter in law of the vendee to exercise the option of re purchase —*Held* that the convenant to re purchase was purely personal and the suit was not maintainable GURUNATH BALAJI v YAMANAVA (1911) I L R 35 Bom 258

———— *Covenant in Kabuliyat for payment of Salami on transfer—Involuntary sale and voluntary sale difference in cases of* A *kabuliyat* stipulated that at every transfer a certain *salami* should be paid The tenure in respect of which this *kabuliyat* was given was sold in execution of a money decree The landlord subsequently sued for recovery of ... d *salami* ... *Held*—That the covenant ... olun tary sale A condition ... restraining transfer is not applicable of involuntary transfer unless there are ... the covenant which clearly make it ap ... a transfer The transfer in ... money decree cannot be treated as on ... footing as a voluntary sale KUMAR ... MITRA v CHUNI ... OSE ... W N 173

———— *Property and its sale proceeds—Charge relating to property but conviction of misappropriation of the sale proceeds—Legality of conviction—Absence of dishonest intention at the date of the sale—Penal Code (Act XLV of 1860) ss 405 409* S 405 of the Penal Code does not cover misappropriation by a person of the sale proceeds of the property entrusted to him. A person charged with criminal breach of trust of certain property entru ted to him cannot be convicted of embezzling not the property but the amount obtained by dealing with it *Bipra Das Giri* v *Nirodamoni Bena 12 C W N 577*, followed But assuming that property in s 405 of the Penal Code includes the value thereof viz. its sale proceeds a person cannot be said to have disposed of the property or the sale proceeds in violation of his contract dishonestly unless it is shown that he had the intention of di honestly appropriating the sale proceeds on the date of the sale of which there was no evidence in the case An auctioneer is not liable for criminal breach of trust merely because he does not punctually carry out every term in the agreement *e g* as to the date of the sale and the time of payment of the proceeds Balthasar *v* Emperor (1914) I L R 41 Calc 844

———— *Misappropriated money suit for—Jurisdiction—Provincial Small Cause Courts Act (IX of 1887) Sch II Art 35 (ii)* A suit for recovery of money with regard to which defendant has committed criminal breach of trust is not triable by a Court of Small Causes Cherakuddin *v* Ram Siraman (1920) I L R 48 Calc 879

CRIMINAL CASE—*contd*

——— appeal in—

See PRIVY COUNCIL, PRACTICE OF
I L. R. 41 Calc. 568
I. L. R 42 Calc. 739

CRIMINAL CONTEMPT

See CONTEMPT OF COURT
I L. R 41 Calc. 173

CRIMINAL CONSPIRACY

See CHARGE I. L. R 42 Calc. 957

——— proof of—

See MISJOINDER OF CHARGES
I L. R 42 Calc 1153

CRIMINAL COURT—

——— verdict of principle governing interference by Privy Council—

See PRIVY COUNCIL
I L. R. 38 Mad. 501

——— *Duty of Criminal Court in respect of a case before it distinguished from the duty of a Civil Court trying a civil case—Relevant documents in existence but on file of a connected case—Refusal of Court to send for record* Whatever attitude may be taken up by a Civil Court trying a civil suit, where it is the duty of the parties to place their case as they think best before the Court it is the duty of every Criminal Court to get to the bottom of a case and to bring all relevant evidence upon the record and to see that justice is done EMPEROR *v* JANKI PRASAD
I L. R 43 All 283

CRIMINAL HOUSE TRESPASS

See CRIMINAL PROCEDURE CODE, ss 145 AND 146 3 Pat L J 147

CRIMINAL INTENT

See CRIMINAL TRESPASS.
I L R 43 Calc 1143

CRIMINAL INTERCOURSE

See MAINTENANCE I L. R 34 Mad 86

CRIMINAL INVESTIGATION DEPARTMENT

See CONTEMPT OF COURT
I L R 41 Calc 173

CRIMINAL JURISDICTION

——— *Criminal Procedure Code s 195—Revision of order of Civil Court under—Civil Procedure Code s 115* A Civil Court in making an order under *s* 195 of the Criminal Procedure Code does not exercise criminal jurisdiction The Criminal Revisional Bench of the High Court has therefore no jurisdiction to interfere with such an order *Salig Ram v Ramji Lal I L R 29 All 551 In the matter of a petition of Bhup Kunwar I L R 26 All 249 Ram Prosad Roy v Sooba Roy I C W N 400 Guru Churn Saha v Girija Sundari Dasi 7 C W N 112 Kali Prosad Chatterjee v Bhuban Mohini Dasi 8 C W N 73 Eranholi Athan v King Emperor I L R 26 Mad 98* But the High Court can interfere with such order under *s* 115 of the Civil Procedure Code The jurisdiction of the High Court to interfere under *s* 115 is not ousted by *s* 195 sub *s* (6) of the Criminal Procedure Code inasmuch as an application under the latter is not an appeal but a substantive application. *Hardeo Singh v Hanuman Dat Narain I L R 26 All. 244 247* referred to. LANDHIN BANIA *v* SEWBALAK SINGH (1910) I L R 37 Calc 714
14 C W N 806

CRIMINAL LAW

——— *Trial under Ordinance I of 1919—Accused not named in Order for trial—Construction of Ordinance IV of 1919—Exciting Disaffection—Indian Penal Code s 124 A—Effect of Pardon* The appellant who was the Editor of a newspaper called the *Tribune* published at Lahore was convicted by a Court of Commissioners sitting at Lahore under the Martial Law Ordinance I of 1919 of an offence under s *124 A* of the Indian Penal Code namely of having by written words excited or attempted to excite disaffection towards His Majesty or the Government established by law in British India. The order of the Lieutenant Governor made under Ordinance IV of 1919 did not name the accused who were to be so tried but referred to all persons charged with offences connected with the recent disturbances *Held* (1) that the validity of the Ordinance being established by the decision of the Board in *Bugga v The King Emperor (I L R 1 Lahore 3 6 L R 47 I A 1 8)* the Commissioners Court had jurisdiction although the order of the Lieutenant Governor did not name the accused persons (2) that the Court having applied the right principles of law in considering whether an offence under s. *124 A* had been committed their Lordships would not advise an interference with the conclusion arrived at It being stated by counsel for the Crown that since leave to appeal had been given a free pardon had been granted their Lordships observed that that would be a sufficient ground (as held in *Levien v The Queen L R 1 P C 536*) for not entertaining the appeal but as the pardon was disputed and direct evidence of its having been granted was not forthcoming their Lordships had not stopped the appeal on that ground KALI NATH ROY *v* KING EMPEROR
I L R 2 Lah 24
25 C W N 701

——— *Sentence exceeding legal maximum—Transportation for term of years—Practice of Judicial Committee—Remitted to High Court to revise sentence—Indian Penal Code (Act XLV of 1860) ss 59 304* S 59 of the Indian Penal Code authorizes a sentence of transportation for life but not one of transportation for a term of years exceeding the maximum term of imprisonment which can be awarded for the offence The appellants were convicted by a Sessions Judge under the Indian Penal Code s. 304, of culpable homicide not amounting to murder and were liable under that section to a sentence of imprisonment for a term not exceeding ten years They were sentenced to three years rigorous imprisonment Upon appeal to the High Court the conviction was affirmed and upon a petition for revision the sentences were enhanced to fourteen years transportation. *Held* that ten years was the maximum term of years to which the appellants could be sentenced to transportation and that the cases should be remitted to the with instructions to

CRIMINAL LAW—*contd*

pass sentences according to law SATYAPUREDDI CHINNAYYA v KING EMPEROR (1921)
I L R 44 Mad 297

CRIMINAL LAW AMENDMENT ACT (XIV OF 1908)

See EVIDENCE ACT 1872 ss 25 114 133 157 I L R 35 Mad 397

——— ss 12 14 (1)—

See BAIL I L R 37 Calc 412 & 429

CRIMINAL MISAPPROPRIATION

See CRIMINAL PROCEDURE CODE s 179 I L R 34 All 487

See JURISDICTION I L R 44 Calc 912

See PENAL CODE (ACT XLV OF 1860) ss 403 AND 22 I L R 40 All 119

s 409 I L R 33 All 249

CRIMINAL OFFENCE

——— whether a mere personal matter—

See PENAL CODE 1860 ss 304 and 323 I L R 2 Lah 27

CRIMINAL PROCEDURE CODE (ACT V OF 1898)

——— s 4 (h)—

See COMPLAINT

See s 526 4 Pat L J 656

——— *Penal Code (Act XLV of 1860) ss 193 210—Sanction to prosecute—Complaint—Letter from trying Magistrate to his official superior asking merely for direction as to procedure* The holder of a decree for rent passed by an Assistant Collector of the second class took out execution for a larger sum than was in fact due and also gave in his application a wrong date as the date of the decree The judgment debtor paid the amount claimed under compulsion and thereafter applied for sanction to prosecute the decree holder Upon receipt of this application the Assistant Collector wrote a letter to the District Magistrate forwarding it through his immediate superior the Sub divisional Magistrate in which he stated all the facts of the case and concluded by soliciting orders in the case The Sub divisional Magistrate instead of forwarding this letter to the District Magistrate himself passed orders for the prosecution of the decree holder He tried the case himself and convicted the decree holder of offences under ss 193 and 210 of the Indian Penal Code On appeal the conviction and sentence were upheld by the Sessions Judge *Held* that the letter written by the Assistant Collector to the District Magistrate in which the former did not ask that any action should be taken by the Magistrate but merely for direction as to how he should proceed did not amount to a complaint within the meaning of s 4 of the Criminal Procedure Code and there being no complaint the trial was illegal EMPEROR v SHEO SAMPAT PANDE (1918)
I L R 40 All 641

——— *Complaint Allegation made in writing to a Magistrate—with a view to his taking action—Examination of complainant before issue of process—Quashing of proceedings*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 4 (h)—*contd*

Where one N M wrote a letter to the Sub Divisional Magistrate in which he stated that the petitioner had used insulting language towards him and asked the Magistrate to take action and the Magistrate on receipt of that letter issued process against the petitioner without examining the said N M *Held* that the letter in question certainly comes within the definition of complaint given in s 4 Cr P C and the Magistrate should have examined the complainant and then proceeded in accordance with law KHETRO MOHAN MITRA v EMPEROR (1913) 17 C W N 448

——— *Obstruction of public servant—Complaint—Sanction want of—Quashing of proceedings* The Petitioner was summoned under s 186 Penal Code for obstructing a peon in the execution of a warrant under the Cess Act The report of the peon on which the proceedings were started was merely a report of what took place and contained no express or implied request to the Magistrate to take any action *Held* that the report did not come within the meaning of a complaint under s 4 cl (h) Cr P C *Held* further The report not being a complaint and there being no sanction by the public officer concerned *viz* the peon the prosecution under s 186 Penal Code was bad AHMED HUSAIN v EMPEROR (1913) 17 C W N 980

——— ss 4 (h) 173 200 190—*Charge presented to Magistrate by Police officer in a non cognizable case if complaint or police report — Complaint if must have personal knowledge of the facts—Complaint —Reproduction of the language of section without a statement of fact if proper complaint—Complaint before Presidency Magistrate—Written record of facts constituting offence if required — Police report in s 190 (1) (b) if has wider significance in the Town of Calcutta* The definition of complaint does not require any statement of facts beyond an allegation that some person has committed an offence but if that definition is read into s 190 (1) (a) of the Criminal Procedure Code it is clear that before a Magistrate takes cognizance he must have before him an allegation of facts constituting the offence a mere repetition of the words of a section of the Penal Code is not a proper compliance with the provisions of the sub section The object of s 200 of the Criminal Procedure Code requiring a Magistrate to examine the complainant possibly is that the facts constituting the offence may be ascertained when in a written complaint they are not given When a written complaint presented to a Presidency Magistrate does not contain an allegation of facts constituting the offence if the Magistrate examining the complainant does not reduce the examination to writing there may be no written record of the facts constituting the offence But he is not bound by law to do so And where a Presidency Magistrate merely noted the fact that he had examined the complainant the High Court in revision must presume that before he issued process he had before him an allegation of facts constituting the offence *Quære* — Whether the term Police report in s 190 (1) (b) of the Criminal Procedure Code has a wider significance in the town of Calcutta in view of the fact that s 173 of the Code does not apply to the Police in Calcutta The definition of com

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

—— ss. 4 (h) 193 200 190—contd

plaint" in s 4 (h) does not contain any limitation such as that the person lodging the complaint must have personal knowledge of the facts nor does s 190 of the Criminal Procedure Code If a complainant is not speaking from personal knowledge a Magistrate taking cognizance would exercise a wise discretion in making the enquiry which he is authorised to do by s 202 of the Criminal Procedure Code but he is not compelled to do so SURENDRA CHATTERJEE v MOHIUDDIN AHMED 25 C W N 267

—— ss 4 (h) 190 200 and 537—Complaint Chalan—Committal sheet issued by Superintendent of Salt Revenue Department A Committal Sheet sent to a magistrate in accordance with paragraph 18 of the Instructions issued by the Commissioner of Salt Revenue for the guidance of officers of the Salt Revenue Department containing a definite request to the Magistrate to try the accused for the offences set out in the sheet is a complaint within the meaning of s 4 (h) of the Code of Criminal Procedure 1898 Where a Magistrate on receipt of a complaint issued process before examining the complainant on oath as required by s 200 of the Code of Criminal Procedure 1898 but it was not shown that the accused had been in any way prejudiced by the irregularity *held* that the conviction of the accused should not be set aside on account of the irregularity which was covered by s 537 of the Code IMAGU SAHU v KING EMPEROR 1 Pat L J 592

—— ss 4 (h) 190 200 202 528—

See FALSE INFORMATION TO POLICE I L R 46 Calc 807

—— s 4 (h) 195 (1)— *Complaint — Information of the supposed commission of an offence communicated by the District Judge to the District Magistrate with a view to the latter taking action as a Magistrate* A Munsif being of opinion that a document filed in a case before him had been tampered with communicated his suspicions to the District Judge who thereupon wrote to the District Magistrate requesting him to take action in the matter *Held* that the letter of the District Judge to the District Magistrate amounted to a complaint within the meaning of s 195 (c) of the Code of Criminal Procedure *Emperor v Sundar Sarup I L R 36 All 514* followed EMPEROR v DEBI PRASAD (1912) I L R 35 All 8

—— ss 4 (h) 195 (1) (b) 476—

See SANCTION FOR PROSECUTION I L R 43 Calc 1152

—— ss 4 (h) 199 238 (3)—

See PENAL CODE (ACT XLV OF 1860) s 498 I L R 38 All 276

—— ss 4 (h) 476— *Complaint —Statement made to Magistrate in his executive capacity —(Indian Penal Code) Act XLV of 1860 s 211* *Held* that it was not competent to a Magistrate to treat as a complaint and found thereon such procedure as would naturally follow on a complaint including a prosecution under s 211 of the Indian Penal Code a statement which was made to him extra judicially and without any intention or desire that it should be taken as a complaint but merely

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

—— ss. 4 (h) 476—contd

in reply to a question asked by the Magistrate LATTEROO v BHOLE SINGH (1915) I L R 38 All 32

—— s 4 (k)—

See ss. 202 AND 203 5 Pat L J 47

—— s 4 (m)—Complaint—*Petition asking for Police warning if complaint—Petition before Magistrate making charges against accused and asking for an order on Police to warn accused if complaint* A petition in which the petitioner made certain allegations against a person and asked for an order on the Police to warn him is not a complaint in a criminal case and no sanction to prosecute the petitioner under s 211 Indian Penal Code for those allegations can be granted PURNO CHANDRA GHOSE v HEMANTA CHANDRA GHOSH (1911) 15 C W N 1051

—— ss 4 (m) 125 476—

See MAGISTRATE POWERS OF I L R 37 Calc 72

—— ss 4 (m) 476—

See COURT MEANING OF I L R 37 Calc 642

See JUDICIAL PROCEEDING I L R 37 Calc 52

—— ss 4 (1) (o) 236 237 403 (1)—

See AUTREFOIS ACQUIT I L R 45 Calc 727

—— s 4 (p)—*Officer in charge of a police station meaning of—Search of a house by an authorised officer—Assistance by an unauthorised person whether unlawful* Where an officer in charge of a police station has gone on duty to a place outside his local jurisdiction the police officer next in rank deputed to act for him even though he is absent from the station so long as he is within the jurisdiction is an officer in charge of a police station If a police officer entitled to conduct a search enters a building for such a purpose the association with him of another having no local jurisdiction does not make the other's entry an unlawful trespass *Morris v Wise 2 F & F 51* and *Sadagopa Charlu v Satrughna Behara 23 M L J 445* followed ASSAN ALLIAR MARAIKAYAR v MASILAMANI NADAR (1918) I L R 42 Mad 446

—— s 4 (r) 340—

See MUKHTEAR I L R 38 Calc 483

—— ss 4 (t) 195 476 and 492—

See SANCTION FOR PROSECUTION I L R 41 Calc 446

—— ss 4 (t) 417 and 492—

See PUBLIC PROSECUTOR I L R 41 Calc 425

—— s 5—

See CALCUTTA RENT ACT 1920 s 24. 25 C W N 661

—— *Several concurrent sentences each by itself non-appealable if appealable taken collectively* An accused who has been sentenced to concurrent terms of imprisonment no one of [illegible] dividually appealable has no right [illegible] inst them collectively

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 5—*contd*

Abdul Khalek v The King Emperor 17 C W N 72 not followed *Suknandan Singh v King Emperor 16 C W N* cclxxxiv referred to SHABIJAN SHEIKH v EMPEROR (1913)

17 C W N 825

——— ss 6 435 439—

See HIGH COURT

I L R 37 Calc 287

——— ss 10 and 406

See APPEAL I L R 48 Calc 874

——— ss 12 202 203, 476 529 (f)—

See MAGISTRATE JURISDICTION OF

I L R 39 Calc 1041

——— ss 14 15 154 161, 164 241 285 2 295 364 465 and 533 and Sch III (4) (5) and (13)—*Trial of a lunatic investigation into unsoundness of mind—Subsequent trial by different Judge and assessors validity of—Confession power of Honorary Magistrate to record—Construction of Statutes* The subsequent trial of an accused person whose trial has been postponed by reason of unsoundness of mind is not illegal merely on account of the fact that the Judge and assessors at the subsequent trial are not the same as at the time of the preliminary investigation under s 465 of the Code of Criminal Procedure 1898 The word postponed in s 465 is not fortuitous but has been deliberately chosen to indicate something different from an adjournment as used in other sections of the Code Sub s (2) of s 465 is merely an enabling enactment giving the Court if any which subsequently tries the accused persons power to take into consideration the earlier proceedings as if they were a part of the record in the trial without the necessity of formal proof An Honorary Magistrate recording a confession under s 164 is not performing a judicial act as such A confession recorded by an Honorary Magistrate of the third class is legal even though such Magistrate has not been empowered to sit singly The power granted to a Magistrate of the third class in sch III (13) is not confined to cases judicially before him The fact that the Magistrate had no authority to carry on a preliminary enquiry or to act in a judicial capacity in the case in which the confession was recorded does not affect the validity of the confession If there is any ambiguity as to the meaning of a statutory provision the Court is entitled to consider what consequences would result from such an interpretation with a view to ascertain what the real intention of the Legislature was GHINUA ORAON v KING EMPEROR

3 Pat L J 291

——— s 15—*Bench of Magistrates—Judgment and conviction by only some legality of* The hearing of a case of assault was commenced by six members of a Bench of Magistrates whose legal *quorum* was only two On adjourned hearings of the case sometimes four and sometimes only two took part These two who took part in the proceedings of the case throughout concluded the trial and delivered judgment convicting the accused *Held* that the conviction was legal *Kuruppana Nadan v Chairman Madura Municipality I L R 21 Mad 246* followed There is no analogy between trial by a Bench of

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 15—*contd*

Magistrates and trials by arbitrators or jurors VENKATARAMA v SAMINATHA (1914)

I L R 38 Mad 797

——— ss 15 16 350—*Honorary Magistrates—Effect of variations in the composition of Bench during the course of a trial—Local Governments power to make rules* By rules framed by the Local Government under s 16 of the Code of Criminal Procedure it was provided (i) that when a Bench of Honorary Magistrates consisted of three members any two of them should form a quorum and (ii) that if the Bench held an adjourned sitting for disposal of a part heard case and the members of the adjourned session were not the same as sat at the first hearing of the case the provisions of s 350 of the Code of Criminal Procedure would be held to apply to the case A Bench of Honorary Magistrates consisted of three members *J N* and *P* A case under the Gambling Act came before the Bench and was partly heard by *J* and *N* The case was then adjourned and at the next hearing came before *J* and *P* The accused waived their right under s 350 of the Code of Criminal Procedure. The prosecution witnesses were cross examined the defence witnesses were heard the accused were examined and arguments were heard The case was then again adjourned and on the next occasion the Bench consisted of *J* and *N* who proceeded to deliver judgment *Held* that the rules framed by Local Government were not *ultra vires* but inasmuch as the course followed by the trial had probably been prejudicial to the accused, the trial so far as the last day s proceedings were concerned was set aside and the case remitted for disposal to *J* and *P* *Hardwar Sing v Khega Ojha I L R 20 Calc 870* discussed. EMPEROR v MATHURA (1918)

I L R 41 All 116

——— s 16—*Difference of opinion between Magistrates forming Bench settlement of by casting vote of Chairman—Act VII of 1912 s 3 effect of on notifications in force in Eastern Bengal and Assam—Act VII of 1905 s 3 effect of—Notification of Local Government issued prior to 1905 application of to Districts formerly in Eastern Bengal and Assam* The notification issued by the then Government of Bengal under s 16 Criminal Procedure Code prior to 1905 that a difference of opinion between two Honorary Magistrates forming a Bench is to be settled by the casting vote of the Chairman which was one of the notifications which were kept in force in the Province of Eastern Bengal and Assam by s 3 of Act VII of 1905 still applies to the District of Faridpur under s 3 of Act VII of 1912 ULFAT SHEIKH v THE KING EMPEROR (1913) 18 C W N 394

——— s 16—Rules 1 2 4 of—*the rules framed for the guidance of special Magistrates Bench in the Municipal District of Satara—Bench of three Magistrates commencing a trial—Absence of one Magistrate—The remaining two Magistrates hearing the rest of the case—Trial illegal* A Bench of three Special Magistrates heard the prosecution evidence but owing to the absence of one of the Magistrates the remaining two went on with the trial heard the defence evidence and convicted and sentenced the accused A question having arisen whether the trial was void in view of r 4

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

—— s. 16—Rules 1, 2, 4 of—*contd*

of the rule for the guidance of the Special Magistrates. *Held* that the trial was void inasmuch as it contravened the provisions of r. 4. LAKER *v.* MOHI... (1919)

I L R 44 Bom 400

—— s. 17—*District Magistrate—Powers of ... distribution of criminal work ... Held* that s 17 of the Code of Criminal Procedure does not empower a District Magistrate to delegate to the senior Honorary Magistrate of the District the duty of distributing cases for disposal amongst the other Honorary Magistrates and Benches. LAL ... *v.* SIRAJI LAL (1914) I L R 36 All 468

—— s 29—A Presidency Magistrate has jurisdiction in respect of offence committed outside Calcutta but within the limits of the Port. GUNPAT RAI KHETRIKA *v.* W J WOOD

I L R 47 Calc 147
24 C W N 79

—— ss 21 cl (2) and 526 cl. (8)—

See PRESIDENCY MAGISTRATES

I L R 35 Mad 739

—— s 35

See APPEAL I L R 40 Calc 631

——*Scope of—Section ... cases when different kinds of sentences are passed* S 35 of the Code of Criminal Procedure is not restricted to cases where the several punishments are all of the same kind that is are all sentences of imprisonment or all sentences of transportation but covers cases where both kinds of punishment are inflicted. KHOHILA MOHAN *v.* KING EMPEROR (1916)

21 C W N 608

—— *Sentences when may be ordered to run concurrently* S 35 (1) Criminal Procedure Code authorises a Court to direct that several punishments passed on an accused for two or more distinct offences do run concurrently only when such sentences have been passed on him at one trial. It is not competent to a Court to give such a direction when the sentences have been passed in different trial. BEJOY GOPAL GHOSE *v.* KAMAL MANDAL (1916) 20 C W N 1300

—— When a conviction is had before a Magistrate of the first class of several offences and the concurrent sentence is passed for each offence which in itself is not appealable an appeal does not lie to the Sessions Judge. ABDUL JABBAR *v.* THE KING EMPEROR

25 C W N 614

—— ss 35 and 408—

See SEDITION I L R 38 Calc 214

—— *Appeal— Aggregate sentences —whether concurrent sentences are aggregate* The term aggregate sentences in s 35 (3) of the Code of Criminal Procedure 1898 applies only to consecutive and not to concurrent sentences. Therefore no appeal lies to the High Court where the whole sentence to be served does not exceed four years. GUR SAHAY RAM *v.* KING EMPEROR 3 Pat L J 138

—— *Appeal— Aggregate sentences —Concurrent sentences not aggregate* the term aggregate sentences as used in

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

—— ss 35 and 408—*contd*

sub (3) of s 35 of the Code of Criminal Procedure applies only to consecutive and not to concurrent sentences. Where therefore an Assistant Sessions Judge passes concurrent sentences and the whole term to be served by the convict does not exceed four years the appeal under s 408 of the Code does not lie to the High Court but to the Sessions Judge. *Sher Mohammad v Emperor of India* Punj Rec 1901 Case 8, *Emperor v Tulshidas Lakshman 11 Bom L R 511* and *Peinta v Gulam Abas 1 Bom H C R 14* approved and followed. *Abdul Khalek v King Emperor 17 C W N ...* dissented from EMPEROR *v.* TULSI RAM (1913)

I L R 35 All 154

—— ss 35 235—

See PENAL CODE ACT (XLV OF 1860) ss 71 147 323 I L R 39 All 623

—— ss 35 (3), 413—

See APPEAL. I L R 40 Calc 631

—— ss 36 94 96 105 Sch III (8)—

See TRESPASS I L R 39 Calc 953

—— s 42—*Penal Code s 187—Omission to give assistance to the police—Extent of powers of police to require assistance* A sub inspector of police having received information that persons who had been concerned in a number of dacoities in the neighbourhood and who recently committed a dacoity at a village about two miles off had been seen in a forest tract near by called upon the zamindar's agent to lend him a gun belonging to the zamindar who was absent and on two villagers to join him in a search for the dacoits. The agent refused to lend the gun and the two villagers refused to join the expedition in search of the dacoits. *Held*, that the circumstances of the case were not covered by the provisions of s 42 of the Code of Criminal Procedure and the persons in question could not therefore rightly be convicted under s 187 of the Indian Penal Code. EMPEROR *v.* JOTI PRASAD

I L R 42 All 314

—— s 49—

See HABEAS CORPUS

I L R 44 Calc 459

—— s 54—*Penal Code (Act XLV of 1860) ss 225 332—Cognizable offence—Issue of warrant of arrest—Arrest by a police officer without warrant—Legality of arrest—Obstruction of such officer by third parties if an offence* A police officer is justified in making an arrest under s 54 of the Criminal Procedure Code of a person against whom a charge of having committed a cognizable offence has been preferred although the warrant issued for the purpose had not been entrusted to him and a person obstructing and beating such officer while he is attempting to arrest the offender is guilty of offences under ss 225 332 of the Indian Penal Code. *In the matter of Charu Ch Majumdar 20 C W N 1233* distinguished. RATNA MUDALI *v.* KING EMPEROR (1917)

I L R 40 Mad 1028

—— *Credible information* A police constable having knowledge that a warrant in respect of a cognizable ... against a cer-

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— s 54—contd

tain person attempted to arrest such person and in so doing was assaulted and prevented from effecting the arrest *Held* that the existence of the warrant was equivalent to credible informa tion that the person in question had been con cerned in a cognizable offence within the mean ing of s. 54 (*1*) of the Code of Criminal Procedure and that the persons preventing the arrest were properly convicted under s 353 of the Indian Penal Code *Queen Empress* v *Dalip I L R 18 All 246* distinguished EMPEROR v GOPAL SINGH (1913) I L R 36 All 6

——— ss 54, 160 491 498—

See HABEAS CORPUS I L R 44 Calc 76

——— ss 55 53 110—*Arrest of suspected person—Warrant—Procedure* S 55 of the Code of Criminal Procedure is independent of Chapter VIII of the Code although proceedings under that chapter may follow an arrest under s 55 as a natural sequence An officer in charge of a police station can therefore arrest or cause to be arrested without a warrant or an order of a Magistrate any person who is by repute an habitual robber house breaker or thief or otherwise comes within the scope of s 110 EMPEROR v NEPAL (1913) I L R 35 All 497

——— ss 55 57—*Acquittal of accused by Sessions Judge—Re arrest by police* S 55 of the Code of Criminal Procedure cannot legally be made use of for the purpose of re aiming under arrest a person whom a Court having acquitted him of the offence with which he was charged has ordered to be set at liberty *Empress* v *Madar All Weekly Notes, 1885 59* referred to EMPEROR v MAIKU (1919) I L R 41 All 483

——— s 59—

See ARREST BY PRIVATE PERSON I L R 41 Calc 17

See PENAL CODE s 107 5 Pat L J 129

——— s 75 (1)—

See WARRANT VALIDITY OF I L R 42 Calc 708

——— *Presiding officer — Warrant of arrest signed by other than presiding officer —resistance to arrest* Where a warrant for the arrest of an accused person who failed to surrender on the day named in his personal recognizance was signed not by the Magistrate who had cognizance of the case but by an Honorary Magistrate of the same town *held* that the warrant was signed by an unauthorized person and was therefore invalid and that resistance to a constable endeavouring to effect an arrest on the warrant did not amount to an offence under s 353 of the Indian Penal Code 1860 *Held also* that the accused having surrendered before the warrant was executed and having been again released on his personal recognizance should not have been re arrested JAGAPAT KOERI v KING EMPEROR 2 Pat L J 487

——— ss 75 77 79 80 537 and 555—

See WARRANT OF ARREST 3 Pat L J 493

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— s 88—*Absconding person a member of an undivided Hindu family—Undivided interest of his in the family property or any portion thereof whether liable to attachment under s 88* The undivided interest of an absconding person who is member of an undivided Hindu family in the family property or any portion thereof can be attached under s 88 of the Criminal Procedure Code (Act V of 1898) *Mussamut Golab Koonwar* v *The Collector of Benares and Raja Odit Narain Sing 4 Moo I A 216* and *Juggomohon Buksh* v *Roy Mothooranath Chowdry, 11 Moo I A 223*, followed *Re Umayan 2 Weir s Cr R 43* approved *Re Chinniyan 2 Weir s Cr R 43* overruled SECRETARY OF STATE FOR INDIA v RANGASAMY AYYANGAR (1915) I L R 39 Mad 831

——— ss 88 89—

See s 524 5 Pat L J 321

——— ss 90 501 and 537—*Arrest under s 90—Bond for appearance—S 501 applicability of* A warrant purporting to be issued under s 90 of the Criminal Procedure Code (Act V of 1898) for the arrest of an accused person who has been let out on his own bond is illegal unless the Court records its reasons as required by the section The omission to do so is an irregularity not cured by s 537 of the Code S 501 of the Code applies only to cases where there are sureties and where through mistake fraud or otherwise insufficient sureties have been accepted it does not apply to a case where there are no such grounds *R* KARUTHAN AMBALAM (1914) I L R 38 Mad 1088

——— s 90 Sch V Form VII—

See WARRANT I L R 38 Calc 789

——— s 94—

See SUMMONS TO PRODUCE DOCUMENTS I L R 47 Calc 647

See TRESPASS I L R 39 Calc 953

——— *Summons may be issued under to accused to produce document or thing* Under s 94, Criminal Procedure Code a Magistrate has power to issue a summons to an accused person to produce a document or other thing even when its production might tend to incriminate him *Mahomed Jackariah and Co* v *Ahmed Mahomed I L R 15 Calc 109* followed *Ishwar Chandra Ghosal* v *The Emperor 19 C W N 1016* dissented from KONDAREDDI *Re* (1914) I L R 37 Mad 112

——— The Chief Presidency Magistrate of Calcutta issued a search warrant in execution of which the books of the Petitioner s firm were taken possession of by the police The Magistrate s order was set aside by the High Court in revision and thereupon the Magistrate issued a notice on the Petitioner calling upon him to be present in his Court to take delivery of books personally or by agent The books were made over to the Petitioner s agent and simultaneously a notice was served on the Petitioner s agent under s 94 Cr P C and the books were taken possession of *Held* on a consideration of the circumstances of the case that the order under s 94 Cr P C was properly made T R PRATT v KING EMPEROR 24 C W N 410

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— ss 94 96 192, 202—

See MAGISTRATE, POWER OF
I L R 38 Calc 68

——— ss. 94 165—

See SEARCH I L R 41 Calc 261

See SEARCH WITHOUT WARRANT
I L R 38 Calc 304

——— ss 94, 165—*Scope of—Search for specified article only—Article in possession of accused if can be searched for—General search for stolen property if authorised* Where a Sub Inspector of Police searched the house of one S who had been charged with criminal breach of trust in respect of a sum of money and the object of the search was to discover the money and a bag in which it was contained and in the course of the search one of the petitioners cut the Sub Inspector with a sickle on the hand and the other knocked him down and they were convicted under ss 332 353 Penal Code *Held* that the search was covered by s. 165 Cr P C and the convictions under ss. 332 353 were right That under ss. 94 165 Cr P C a search can be made for a stolen article or incriminating document or thing in the possession of an accused person but one of the safeguards which the Legislature provides against abuse is that the search must be for a specified article or thing and not a search for stolen property generally BISAR MISSER v EMPEROR (1913) 17 C W N 1209

——— s 96—

See s. 36 I L R 39 Calc 953

——— *General search warrant issue of when justifiable.* Under orders of the Government the officer appointed for the purpose was holding an investigation into the dealings with the Munitions Board with a view to find out what offence if any was committed and by whom in connection with the said dealings On the application of this officer to the effect that the books and accounts of the Petitioner's firm among others mentioned in the petition were necessary for the purpose of the said investigation the Magistrate issued a general search warrant in respect of the books and documents of the Petitioner's firm specified in the petition *Held*—That there was no enquiry or trial or other proceeding under the Code and there were no materials before the Magistrate on which he could decide that a search warrant should be issued and the order issuing the warrant was illegal *Per* NEWBOULD *J*—When the law requires the sanction of a Magistrate before the issue of a search warrant that means that the Magistrate should apply his mind to the facts and he ought not to issue a search warrant simply because the police officer asks him to do so T P PRATT v KING EMPEROR I L R 47 Calc 597
24 C W N 403

——— *General search warrant issue of when justifiable* *Per* CHAUDHURI *J*—An order under s 96 Cr P C cannot be made to further a police investigation which may or not result in an enquiry The Magistrate has to form his own opinion upon the materials placed before him He is not relieved from his duty by stating that he believed that the officer of government holding the investigation for the purposes of which the books were wanted had formed a correct opinion The form of the search warrant in the Code refers to an enquiry now being made or about to be made There are separate provisions in the Code for investigation and large powers are given to the police in cognizable cases for seizing of documents The word investigation is defined in the Code and is differentiated from an enquiry There is no express provision requiring the Magistrate to make a record or keep notes of the examination of the person on whose application the Magistrate issues the search warrant but some record ought to be kept to enable the High Court to form an opinion as regards the materials upon which the Magistrate acted *Per* NEWBOULD *J*—S 96 Cr P C empowers a Magistrate to issue a search warrant before any proceedings of any kind are initiated and in view of an enquiry about to be made JAGANNATH AGARWALLA v KING EMPEROR 24 C W N 405

——— ss 96 98—*Search warrant issue of long after application* Where in a case of criminal trespass and theft the complaint at the time of applying for process prayed for the issue of a search warrant but the Magistrate after repeated applications made an order for the issue of the warrant more than three weeks after *Held* that although the procedure was not contrary to the actual letter of ss 96 and 98 Criminal Procedure Code it was so dilatory that it could only tend to defeat the object for which such a warrant is issued. BILAS ROY CHOWDHURY v RAM GOPAL KHEMKOR (1917) 22 C W N 719

——— s 100—

See SEARCH WARRANT
I L R 45 Calc 905

——— *Warrant under legality of when drawn up on a printed form under s 98—Penal Code (Act XLV of 1860) ss 147 and 353—Resistance to the execution of warrant* There being no printed form for search warrants under s 100 Criminal Procedure Code printed form is issued under s 98 are always used with the necessary modifications for that purpose When a warrant under s 100 Criminal Procedure Code was drawn up on a printed form for use under s 98 Criminal Procedure Code and the warrant was snatched away and destroyed by the persons accused of resisting the execution of the warrant *Held* that as the accused destroyed the warrant it must be presumed that the warrant under s 100 was properly drawn up on a form under s 98 Criminal Procedure Code with the necessary modifications That the error if any in the warrant supposing that the necessary modifications had not been made would be one of form only *Bisu Haldar* v *Probhat Chandra* 6 *C L J* 127 distinguished GURANEAH v KING EMPEROR (1911) 16 C W N 336

——— *Custody of child by natural father—Court s power to make over child to adoptive father* A complaint was filed before the Magistrate alleging that the Petitioner had removed his son whom he had given in adoption to the complainant s son s widow from the complainant s custody without her consent As soon as the was filed and before the issue of any which was ordered

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 100—*contd*

the boy was produced in Court and the Magistrate adjourned the case directing the Petitioner to move the High Court on failure of which the boy was to be made over to the complainant *Held*—That it was very doubtful if s 100 Cr P C applied to the case That under the circumstances the order of the Magistrate was not a proper order and should be set aside CHAGAN RAI *v* HERA LAL DOOSAJ **24 C W N 104**

——— ss 100 552—

See MAGISTRATE JURISDICTION OF **I L R 39 Calc 403**

——— s 103—*Right of investigating officer to search a house—Search made without witnesses—Resistance on the part of householder—Act No XLV of 1860 (Indian Penal Code) ss 332 and 503* A sub inspector of police investigating a charge of theft requires no warrant to enable him to search a house which he suspects to contain stolen property But in making such a search he is bound to comply with the provisions of s 103 of the Code of Criminal Procedure and if he attempts to make a search without any search witnesses being present the owner or occupier of the house is justified in resisting the attempt so far as to exclude him from the house The owner or occupier is not however justified in using any more force than is necessary for such purpose EMPEROR *v* NIRMAL SINGH **I L R 42 All 67**

——— *Evidence of search apart from search list—Evidence Act I of 1872 s 91—Matter required by law to be reduced to the form of a document* When a search has been conducted under s 103 Criminal Procedure Code evidence can be given regarding the things seized in the course of the search and regarding the places in which they were found in addition to the evidence of the list which the law directs to be drawn up relating to the particulars of the property found The words in s 91 Indian Evidence Act I of 1872 any matter required by law to be reduced to the form of a document could not have been intended by the legislature to mean observations of physical facts which under the ordinary law has to be proved by the testimony in Court SOLAI NAIK *v* EMPEROR (1910) **I L R 34 Mad 349**

——— ss 103 309 423—

See DACOITY **I L R 41 Calc 350**

——— s 105—

See TRESPASS **I L R 39 Calc 953**

——— s 106—

See SECURITY TO KEEP THE PEACE **I L R 43 Calc 671**

——— *Offences involving breach of the peace —Offence punishable under s 504 of the Indian Penal Code (Act XLV of 1860) is such an offence—Security for keeping the peace on conviction* On a conviction for an offence punishable under s 504 of the Indian Penal Code the accused was ordered to furnish security to keep the peace for a period of one year under s 106 of the Criminal Procedure Code The accused having applied to the High Court to have the order set aside *Held* that the order was properly made for the expression " other offences involving a breach of the peace in s 106 of the Criminal Procedure Code included offences which were offences because a breach of the peace had occurred or because a breach of the peace was likely to occur EMPEROR *v* SAYAD YACOOB (1918) **I L R 43 Bom 554**

——— *Security to keep the peace—' Offence involving a breach of the peace —Mischief by removing land mark—Penal Code (Act XLV of 1860) s 434* *Held* that an offence involving a breach of the peace ' mentioned in s 106 of the Code of Criminal Procedure does not mean only an offence which necessarily involves a breach of the peace or of which a breach of the peace forms an ingredient but includes such an offence as in common knowledge is ordinarily or very probably the occasion of a breach of the peace as for example the removal of a land mark *Baidya Nath Majumdar* v *Nibaran Chunder Gope I L R 30 Calc 93 Arun Samanta* v *Emperor I L R 30 Calc 366 Raj Narain Roy* v *Bhagabat Chunder Nandi I L R 35 Calc 315* and *Muthiah Chetti* v *Emperor I L R 28 Mad 190* dissented from EMPEROR *v* MANIK RAI (1911) **I L R 33 All 771**

——— *Security for keeping the peace—Criminal trespass with intent to commit a breach of the peace* Upon a conviction for criminal trespass where the intention of the trespass is to commit a breach of the peace an order under s 106 of the Code of Criminal Procedure may lawfully be passed in the discretion of the Magistrate *Empress* v *Manik Rai I L R 33 All 771 Emperor* v *Kundan Singh Weekly Notes 1885 p 303* and *Queen* v *Jhapoo 20 W R Cr r 37* referred to EMPEROR *v* DHARAM RAJ **I L R 42 All 345**

——— *Accused convicted of offences under ss 297 and 143 —Indian Penal Code and ordered to furnish security to keep the peace—legality of such order* Petitioner was found to have been one of a crowd of people who intimidated a burial party abused them and threatened them with violence unless the body was taken to the Jama Masjid for a decision of the question whether the deceased was a *Mussalman or Kaffir* He was convicted of offences under s 297 and 143 of the Penal Code and was also ordered to furnish security to keep the peace for one year *Held* that the order to furnish security under s 106 of the Code of Criminal Procedure was illegal as the accused had not been convicted of the offence of criminal intimidation or of an offence involving a breach of the peace An offence involving a breach of the peace is one in which a breach of the peace is an ingredient and not merely an offence provoking or likely to lead to a breach of the peace *Arun Samanta* v *Emperor (I L R 30 Calc 366)* followed An order under s 106 of the Code cannot be passed on conviction for an offence under s 143 or s 297 of the Penal Code as these offences do not necessarily involve the use of force *Raj Narain* v *Bhagabat Chunder (I L R 35 Calc 315)* and *Kannookaran* v *Emperor (I L R 26 Mad 469)* followed ABDULLA *v* CROWN **I L R 2 Lah 278**

——— s 106 (3)—*Security to keep the peace —Powers of appellate court not limited by juris*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

—— s 106 (3)

d n of conviction P l Code (Act XLV of 1860) s 114 119 353 s ... Th power conferred upon an appellate court by cl (3) of s 106 of the Criminal Procedure is not limited in any way by the powers exerciseable by the original Court which tried the case. Emperor v Dhan ... 31 Bom 53 followed Muthiah Chetty v Emperor I L R 29 Mad 190 Pramanik Lalit v Emperor I L R 30 Mad 48 Ibrahim Naidu v Emperor I L R 31 Mad 18 and Emperor v Mohan ... I L R 35 Calc 434 dissented from. Held also that where in the course of a trial the Court had committed the accused he might be lawfully convicted of separate offences under ss 147 and 352 read with 141 of the Indian Penal Code and sentenced separately for each offence. Queen Empress v ... I L R 9 All 645 followed EMPEROR v DHARAM DAS (1910) I L R 33 All 48

—— Security power of appellate court to order when first court incompetent Under s 106 (3) of the Code of Criminal Procedure 1898 an appellate court is competent to pass an order binding down an accused person to give security even though the court of first instance was not competent to do so BACHA SINGH v EMPEROR 2 Pat L J 21

—— Security for keeping the peace—Powers of appellate court to order security not limited by jurisdiction of trial court The power conferred on an appellate court by cl (3) of s 106 of the Code of Criminal Procedure is not limited by the fact that the court whose decision is under appeal had no power to direct security to be taken Emperor v Dharam Das I L R 33 All 48 followed EMPEROR v TILAK PAT I L R 43 All 372

—— On conviction for an offence punishable under s 504 of the Indian Penal Code the accused was ordered to furnish security to keep the peace for a period of one year under s 106 of the Criminal Procedure Code The accused having applied to the High Court to have the order set aside Held that the order was properly made as the expression other offences involving a breach of the peace in s 106 of the Code included offences which were offences because a breach of the peace had occurred or was likely to occur EMPEROR v SAYAD YACOOB I L R 43 Bom 554

—— Appellate Court jurisdiction of defined The jurisdiction of an Appellate Court to order a person who has been convicted of one of the offences mentioned in sub s (1) of s 106 Criminal Procedure Code is not restricted to cases where the conviction was by one of the Courts specified in the sub section The words an Appellate Court are quite general and the word also indicates that the powers given by that section may be exercised by the Courts mentioned in sub s (1) and by an Appellate Court The words under this section in sub s (3) have reference to the powers given by that section and not to the Courts by which the powers are in the first instance exercisable Muthiah Chetty v Emperor I L R 29 Mad 190 overruled SOLAI COUNDEN In re (1914) I L R 37 Mad 113

—— ss 106 and 32—Security to keep the peace Power of Sub-divisional Magistrate A Sub-divisional Magistrate is as such competent to pass an order under s 106 of the Code of Criminal Procedure binding over a person to keep the peace for period exceeding six months notwithstanding that but for his being a Sub-divisional Magistrate he would have only second class powers EMPEROR v RAJA SINGH (1915) I L R 37 All 230

—— s 107

See SECURITY TO KEEP THE PEACE I L R 38 All 463
See TRANSFER I L R 41 Calc 719

—— Security to keep the peace Security demanded for the prospect of an act which was legal although others might thereby have been led to break the peace To justify an order under s 107 of the Criminal Procedure Code the Magistrate must believe that the person against whom he makes the order is about to commit a breach of the peace or to disturb the public tranquillity or to do some wrongful act that may occasion a breach of the peace The fact that a Mahomedan in the exercise of his legal right to kill cows may perhaps give offence to his Hindu neighbours and induce them to commit a breach of the peace is no ground for binding over the Mahomedan Shah La Khan v Umrao Puri I L R 30 All 181 referred to EMPEROR v MUHAMMAD YAKUB (1910) I L R 32 All 571

—— Security to keep the peace—Circumstances in which the performance of religious ceremonies may amount to a wrongful act likely to occasion a breach of the peace Held that persons who performed religious ceremonies in a place not set apart for the purpose and where no such ceremonies had been performed before and who did so with the deliberate intention of triumphing over insulting and wounding the religious feeling of their neighbours committed a wrongful act and one which might probably occasion a breach of the peace or disturb the public tranquillity within the meaning of s 107 of the Code of Criminal Procedure EMPEROR v MUPLI SINGH (1911) I L R 33 All 775

—— Security to keep the peace—S 40 —Autrefois acquit—S 495 withdrawal from prosecution section inapplicable to security proceedings—No conviction or acquittal under s 107 —Ss 11 117 118 119 203—S 145 order under no bar to order under s 107 on same facts A preliminary charge sheet under s 107 Criminal Procedure Code was withdrawn by the police before the parties mentioned therein were ordered to appear The Magistrate endorsed the charge sheet to the effect that the accused were acquitted A fresh charge under the same section was subsequently put by the police against certain of the same persons who had been previously charge sheeted Held that the withdrawal of the first charge sheet was no bar to proceedings under the second Neither an order of discharge nor of acquittal can properly be made in a case where the accused has not been directed to appear at all S 495 Criminal Procedure Code is not applicable to security proceedings An order passed by a Magistrate under s 145 Criminal Procedure Code is no ... the same Magistrate binding over the ... the same facts

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s. 107—*contd*

under s 107 Criminal Procedure Code *In re* MUTHIA MOOPAN (1913) I L R 36 Mad 315

——— *Security for keeping the peace—Action for damages for malicious prosecution* *Held* that an action for damages for malicious prosecution may be founded upon the initiation against the plaintiff maliciously and without reasonable and probable cause of proceedings under s 107 of the Code of Criminal Procedure just as much as upon the institution of a criminal prosecution in the ordinary acceptation of that term MUHAMMAD NIAZ KHAN v JAI RAM (1919) I L R 41 All 503

——— *Security for keeping the peace—Whether person who does not go to the place where breach of peace is apprehended can be bound down* The petitioner and another both claimed the right to take offerings from pilgrims alighting at Gaya Railway Station They both sent servants armed with *lathis* to the station to accost pilgrims with the result that there were disturbances The petitioner never went to the station himself *Held* that as he was in fact asserting a claim likely to cause a breach of the peace and making preparation for the enforcement of that claim through an armed servant he was liable to be bound down to keep the peace BALALAI MAHTON v KING EMPEROR 1 Pat L J 361

——— *Security for keeping the peace—Action for damages for malicious prosecution* An action for damages for malicious prosecution may be founded upon the initiation against the plaintiff maliciously and without reasonable and probable cause of proceedings under s 107 of the Code of Criminal Procedure just as much as upon the institution of a criminal prosecution in the ordinary acceptation of that term. *Muhammad Niaz Khan* v *Jai Ram* *I L R 41 All 503* and *Crowdy* v *Reilly 17 C W N 554* followed CHIRANJI SINGH v DHARAM SINGH I L R 43 All 402

——— *Evidence Act (I of 1872) s 74—Notice under s 107 Criminal Procedure Code if a public document—Proof necessary for admission of such document in evidence* A notice under s 107 Criminal Procedure Code is a public document within the meaning of s 74 of the Evidence Act but it cannot come in without proof that the parties mentioned in it are the parties concerned in the question at issue about which it is produced as evidence AMJAD v LACHMI KANTA JHA (1914) 18 C W N 644

——— *Security to keep the peace—Evidence—Nature of findings required to justify a Magistrate in passing an order under s 107* In proceedings under s. 107 of the Code of Criminal Procedure it is not enough for the Magistrate to find that unless the persons before him are bound over to keep the peace there is likely to be a breach of the peace or disturbance of the public tranquillity He has to find in respect of each and all of such persons that they are likely to commit a breach of the peace or disturb the public tranquillity or that they are likely to do some wrongful act which may occasion such a disturbance *Queen Empress* v *Abdul Qadir I L R 9 All 452* and *Jagat Narain* v *Emperor 7 All L J 161* referred to EMPEROR v BRIJNANDAN PRASAD (1914) I L R 37 All 33

——— s 107 and 117—*Security to keep the peace—Evidence—Record of previous trial—Inquiry* It is not competent to a Magistrate in proceedings under s 107 *et seq* of the Code of Criminal Procedure to dispense with the inquiry provided for by s 117 of the Code and to base his order merely on the results of a riot case recently tried by him EMPEROR v MUL CHAND (1914) I L R 37 All 30

——— ss 107 117 118 526—*Security for keeping the peace—Transfer—Jurisdiction* S 526 of the Code of Criminal Procedure enable the High Court to transfer criminal proceedings initiated under s 107 of the Code once they have been properly instituted to any other criminal court of equal or superior jurisdiction (and which otherwise would have no jurisdiction) and the order of the High Court will give jurisdiction to the Court to which the case has been so transferred to make an inquiry under s. 117 and to pass an order under s 118 *In the matter of the petition of Amar Singh I L R 16 All 9* not followed. EMPEROR v WAHID ALI KHAN (1910) I L R 32 All 642

——— s 107 125—*District Magistrate of means the Magistrate of the district to which proceedings transferred from another district* Where a proceeding under s 107 Cr P C started in one district was transferred to another the District Magistrate of the latter district has alone jurisdiction under s 125 in respect of the said proceedings GURUPRASANNA ROY v HARI KINKAR MUKHERJI (1919) 23 C W N 953

——— s 107 125 438—*Security to keep the peace—Revision—Jurisdiction of High Court and Sessions Judge* A Magistrate of the first class ordered certain persons to give security for keeping the peace The persons to be bound over applied to the Sessions Judge to revise the order The Sessions Judge was of opinion that the applicants should not have been bound over and accordingly referred the case to the High Court with a recommendation that the order should be set aside *Held* the order having been passed by a Magistrate subordinate to the District Magistrate the record should under s 125 of the Code of Criminal Procedure have been laid before the District Magistrate to deal with the matter Where a Code gives a particular Court jurisdiction to act in certain matters it is that Court which should be applied to and not the High Court *Banarsi Das* v *Partab Singh I L R 35 All 130* referred to EMPEROR v LALJI (1917) I L R 40 All 143

——— ss 107 and 144—*Renewal of expired order validity of* Where an order restraining the petitioners from entering certain land expired on the 28th April 1917 and a similar order was passed against the same parties on the 6th June 1917 *held* that the Magistrate should not have made the second order but should have proceeded under s 107 if there was a likelihood of a breach of the peace by one clearly in the wrong S 144 should not be used for anything in the nature of a permanent expedient without the sanction of the Local Government RASHBEHARI SINGH v JAGANARAIN ROY 3 Pat L J 130

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 107 144 145 and 146 *D spute regarding possession of immovable property—Duty of Magistrate—Con is po ers of Magistrate* Use of s. 144 is a suitable m thod of avoiding a breach of the peace only if it is clear upon a reading of the police report that the claim of the party creating the disturbance is not a claim made in good faith. The practice of issuing notices purporting to be notices under s 144 of the Criminal Procedure Code calling upon both parties to attend on a fixed date and submit statements is a mere evasion of the law The notices are in effect notices under s. 145 (1) and (4) of the Criminal Procedure Code and where such notices have been issued, the High Court will direct that the procedure prescribed in Chapter XII of the Code be followed. KAMIL AHMAD v. THE KING-EMPEROR 3 Pat. L J 233

——— ss 107 145 146—

See JALKAR I L R 39 Calc 469

——— ss 107 145—

See DISPUTE CONCERNING LAND I L R 39 Calc 150

——— *Security to keep the peace—D spute concerning land likely to lead to a breach of the peace—Procedure* Where there exists a dispute relating to immovable property which is likely to lead to a breach of the peace the magistrate concerned is not necessarily bound to proceed under s. 145 but can take action—and this may sometimes be the better course—equally under s 107 of the Code of Criminal Procedure *Sharat Roy v Chatter Roy I L R 30 Cal 866* and *Emperor v Ram Baran Singh I L R 28 All 406* followed *Mahadeo Kunwar v Lila I L R 25 All 531* distinguished *Bidant Singh v Bhoja I L R 35 Calc 117* not followed EMPEROR v THAKUR PANDE (1912)
I L R 34 All 449

——— *Procedure— Appointment of chaudhris by traders using a market—Dispute as to chaudhri's dues between him and the servants of the zamindar* The traders who frequented a certain market in a village of the Azamgarh district which was owned by a lady residing in Benares agreed amongst themselves to appoint a certain person as *chaudhri* of the market and to pay him for his services by means of a small contribution for each beast of burden which brought goods to the market The servants of the owner on the other hand wished to obtain these payments for themselves and it was found that they were ready to commit a breach of the peace in order to make good their alleged right thereto *Held* that the circumstances were not such as would warrant the taking of action under s 145 of the Code of Criminal Procedure but that s 107 of the Code was the more appropriate section under which to proceed. EMPEROR v. I AM LOCHAN (1913) I L R 36 All. 143

——— *D spute over possession of fishery—Likelihood of breach of the peace—Proceeding under s. 107 against one party—Application by that party for changing 107 proceedings into proceedings under s. 145, refusal of, by Magistrate—Discretion of Magistrate, High Court if competent to interfere with discretion of Magistrate and proceedings to be instituted under s 145 instead of s 107—Jurisdiction* Where a dispute likely to lead to a breach of the peace was over the possession of a fishery and the Magistrate drew up a proceeding under s 107 Cr P C. *Held*—That the Magistrate had jurisdiction to proceed under s 107 Cr P C and he having exercised his discretion it was not open to the High Court to direct that the Magistrate must *proceed under s 145 and not under s 107 Cr P C* AMULYA CHARAN SIRKAR v AMRITALAL MUKERJI 24 C W N 1075

——— ss 107 192 528—*Previous proceedings under s 107 and prosecution under the Penal Code—Discharge—Subsequent proceedings under s 107 on the same facts, if maintainable—Jurisdiction of Magistrates—Transfer by District Magistrate to a Magistrate without local jurisdiction before issue of notice to accused—Order of such Magistrate validity of—Notice to accused vague—Effect of notice* A Magistrate is not entitled to institute proceedings under s 107 of the Criminal Procedure Code upon facts and information which have already been the subject of enquiry under that section or in connexion with charges under the Penal Code brought against persons who have been discharged in those proceedings A District Magistrate cannot be said to have taken cognizance of a case under s 107 in which he has not issued notice to the accused to show cause why they should not be proceeded against and has no power under s 192 of the Criminal Procedure Code to transfer such a case to another Magistrate A District Magistrate has no power under s. 528 of the Criminal Procedure Code to make over the initiation of proceedings in a case under s 107 of the Criminal Procedure Code to a Magistrate who has no local jurisdiction in the matter A Magistrate who has no local jurisdiction to initiate proceedings in a matter under s 107 Criminal Procedure Code acquires none by the transfer of a case to him from a Magistrate who has jurisdiction but has not taken proceedings and his proceedings are void and should be quashed *Proceedings under s 107 of* the Criminal Procedure Code should be quashed if the notice issued to the accused under that section is so vague as not to give the accused particulars of the offence charged *Nirbeelal Chandra Mukerjee v The Emperor 13 C W N 580 Surjya Kanta Roy Chowdhry v Emperor I L R 31 Calc 550* and *King Emperor v Munna I L R 24 All 151* followed KONDA PEDDY v KING EMPEROR (1917) I L R 41 Mad. 246

——— ss 107 and 250—*Frivolous or vexatious complaint—Compensation—Application to Magistrate to bind over certain persons to keep the peace* A person in respect of whom information has been laid before a Magistrate to the effect that he is likely to commit a breach of the peace or is otherwise liable to the provisions of s 107 of the Code of Criminal Procedure is not a person accused of any offence An order for payment of compensation cannot therefore be made against a man who has petitioned a Magistrate to take action under s 107 of the Code BINDHACHAL PRASAD RAI v LAL BIHARI RAI (1914)
I L R 36 All 382

——— ss 107 350—*Transfer* [illegible] *strate—Trial de novo—Right of accused* [illegible] *Pro*[illegible] vision (a) Criminal Procedure Code [illegible] proceedings under s. 107 Criminal [illegible]

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— ss 107 350—contd

and the accused is entitled in a security case to a trial de novo on the Magistrate being transferred VENKATACHINNAYYA v KING EMPEROR (1920)
I L R 43 Mad (F B) 511

——— ss 107 and 514—*Forfeiture of bond to keep peace—Person bound over having brought a Civil suit to enforce his right* The Hindus and Muhammadans of Charuanda were disputing about the location of the latter's slaughter house The District Magistrate selected a new site but on appeal by the Hindus the Commissioner changed this for another place Some of the Hindus had meanwhile been bound down to keep the peace in this connection They were dissatisfied with the place chosen by the Commissioner and brought a civil suit claiming that the site was in the *shamilat deh* and that it was chosen without the consent of all the proprietors and prayed for an injunction restraining the Muhammadans from building the slaughter house The District Magistrate then passed an order of forfeiture of their bonds holding that the institution of the civil suit was likely to cause a breach of the peace *Held* that it was not the intention of the Legislature to prevent persons even though bound over under s 107 of the Code of Criminal Procedure from seeking to enforce their rights in the Civil Court and that the order of forfeiture was consequently illegal SITAL v THE CROWN I L R 1 Lah 310

——— ss 107 445 and 435—

See REVISION 3 Pat L J 302

——— ss 107 496—Bail—*ss 344 and 167 s 107 cl (4)* Criminal Procedure Code makes an exception to the general rule laid down in s 496 which enacts that bail shall be given in all cases in which a person is not charged with a non bailable offence S 107 cl (4) compared with s. 344 and 167 Criminal Procedure Code *Re* NARAYANASAMI NAICKEN (1913)
I L R 36 Mad 474

——— ss 107 526 (8)—

See TRANSFER I L R 41 Calc 719

——— s 108 (b)—

See SECURITY FOR GOOD BEHAVIOUR
I L R 43 Calc 591

——— ss 108 110 114—

See SECURITY FOR GOOD BEHAVIOUR
I L R 46 Calc 215

——— s 109—

See OSTENSIBLE MEANS OF SUBSISTENCE
I L R 40 Calc 702

See SECURITY FOR GOOD BEHAVIOUR
I L R 39 Calc 456

——— *Security for good behaviour from vagrant and suspected person* Petitioner a *Kaviraj* by profession and a dealer in cocoons was found at midnight in a location with two others who had in their possession house breaking implement On being discovered he fled and when arrested remained silent and the explanation he subsequently gave to the Magistrate of his presence at the time and place in question was false *Held* that the facts found did not bring the petitioner within either clause of s 109 of the Code *Per* SHAMS UL HUDA J That cl (a) of s 109 Criminal Procedure Code refers to a continuous act and does not therefore apply to a case where there is a momentary effort at concealment to avoid detection or arrest nor can it apply to the case of a person brought under arrest for it cannot be said of such a person that he is taking precautions to conceal his presence PESHU KAVIRAJ v KING EMPEROR (1917)
22 C W N 163

——— ss 109 and 110—*Binding over under both sections illegal* A person cannot be bound over under both the ss 109 and 110 Criminal Procedure Code (Act V of 1898) *Re* PANGASAMI PILLAI (1913) I L R 38 Mad 555

——— ss 109 123 397—*Penal Code (Act XLV of 1860) s 379—Concurrent sentence—Consecutive sentences* The accused was proceeded against under s 109 of the Criminal Procedure Code and sentenced on the 6th July 1909 under s 123 of the Code to rigorous imprisonment for nine month in default of security for good behaviour He was then tried for an offence of theft committed by him in November 1908 and was on the 17th August 1909 sentenced to suffer rigorous imprisonment for three months the second sentence was directed to take effect on the expiry of the first sentence *Held* that the two sentences ought not to run consecutively but must run concurrently EMPEROR v ARJUN (1909)
I L R 34 Bom 226

——— s 110—

See ... I L R 35 All 407

See SECURITY FOR GOOD BEHAVIOUR
I L R 43 Calc 153 1128
I L R 46 Calc 215

——— Order for security passed upon failure of charge of a substantive offence—*Against the persons bound over* Eight persons were sent up for trial on a charge of dacoity and were acquitted and an attempt to prove a case against them under 400 of the Indian Penal Code was also unsuccessful *Held* that these circumstances were not in themselves a bar to proceedings being shortly afterwards initiated against the person acquitted under s 110 of the Code of Criminal Procedure *Alep Pramanil v King Emperor 11 C W N 113* distinguished EMPEROR v ... KAPAN (1909) I L R 32 All 55

——— Evidence of general repute—*Inadmissible to prove charge under s 117* Where a person is solely charged under s 110 cl (f) Criminal Procedure Code Act V of 1898 evidence of general repute is inadmissible to prove that he is a desperate and dangerous character A provision of law which is an exception to the general rule of evidence must be only applied to the cases to which it is confined by the legislature No argument can therefore be deduced from the admissibility of evidence of general repute under s 117 Criminal Procedure Code MUTHU PILLAI v EMPEROR (1910) I L R 34 Mad 255

——— Fresh proceedings after expiration of an order under section—*if can be based on material antecedent to the expiration of the previous order* When after the expiration of the period of a bond for good behaviour taken under s 110 Criminal

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— s 110—contd

Procedure [illegible] fresh proceedings are taken against the accused such proceedings must be confined to facts and circumstances alleged against him after release from [illegible] security LAM DEO [illegible] v THE EMPEROR (1914) 19 C W N 223

——— **Appeal**—Judgment of Court of Appeal [illegible] dismissing an appeal summarily is not bound to write a judgment but an appeal from an order requiring a person to furnish security to be of good behaviour is distinguishable from an appeal against a conviction in respect of an offence specifically charged And in such case a District Magistrate should not dispose of an appeal otherwise than by judgment showing on the face of it that he has applied his mind to a consideration of the evidence on the record and of the pleas raised by an appellant [illegible] the [illegible] Court below and in his memorandum of appeal EMPEROR v LAL BEHARI (1916)

I L R 38 All 393

——— **Bad livelihood case**—Revision by High Court [illegible] The petitioner were bound over by a Sub Divisional Magistrate under s 110 Cr P C to be of good behaviour for one year In appeal the District Magistrate affirmed the order of the Sub Divisional Magistrate The High Court in revision set aside the order on a consideration of the evidence on the ground that as to some important evidence the lower Courts in their judgments failed to consider it at all while as to others they were accepted and relied on without any critical examination NIZAMUDDI v KING EMPEROR (1918) 23 C W N 488

——— **Within local limits meaning of Residence** *of person proceeded against not material* In order to give jurisdiction to a Magistrate to proceed under s 110 of the Code of Criminal Procedure it is not necessary that the person proceeded against should be residing within the local limits of his jurisdiction The meaning of the expression any person within the local limits in s 110 is any person who is within the local limits at the time the Magistrate takes action under the section *In re K Pangan I L R 36 Mad 96* followed *Ketabdi v Queen Empress I L R 27 Calc 993* dissented from EMPEROR v MUNNA (1916) I L R 39 All 139

——— The word within the local limits of his jurisdiction are not equivalent to residing within the local limits It is sufficient to give the Magistrate jurisdiction if the evil habits of the accused were practised and evil reputation acquired within the local limits of his jurisdiction KING EMPEROR v DURGA HATWA (1915) I L R 43 Calc 153
19 C W N 1022

——— *Residence within local limits of Magistrate's jurisdiction if necessary* S 110 Cr P C does not require that the person proceeded against should reside within the local limits of the Magistrate empowered to take action under that section It is sufficient that the person should be within those limits at the time when proceedings are taken LAKHI NARAIN DAS v KING EMPEROR (1918) 23 C W N 100

——— *Jurisdiction of Magistrate over outsiders found within local limits—Object of the section* In order to give jurisdiction to a Magistrate to proceed under s 110 Criminal Procedure Code it is not necessary that the person proceeded against should be residing within the local limits of his jurisdiction The meaning of the expression any person within the local limits in s 110 is any person who is within the local limits at the time the Magistrate takes action under the section *Ketabdi v Queen Empress I L R 27 Calc 993* not followed A contrary view would defeat the object of the section *ie* prevention of crime as then it would be impossible to deal under the section with wandering gangs of criminals having no fixed residence or with habitual thieves or desperate characters belonging to foreign territories who infest British India In re RANGAN (1913) I L R 36 Mad 96

——— **Proceeding if may be quashed by High Court at initial stage**—Mala fide allegations that proceedings [illegible] police report of complete answer to—High Court's duty of to prevent abuse of provision of Statute—Scope and object of proceedings under s 110—Zemindar [illegible] management and bad relations [illegible] with tenants if justifies proceeding—Revival of proceeding once dropped if proper—proof of bad character—Criminal proceedings terminated by compromise or ending in acquittal if admissible—District Collector's extract from admissibility of [illegible] to prove reporting officer's attitude towards accused MOOKERJEE J—The object of s 110 Cr P C is preventive and not punitive and the purpose the Legislature had in view was to afford protection to the public against the repetition of crimes in which the safety of property is menaced and not the security of persons alone is jeopardised *Nasib v Queen I L R 2 All 835* referred to *Held* by MOOKERJEE J (agreeing with IMAM J) that extracts from the Magistrate's Administration Report appearing in the District Gazetteer and which contained reflections on the petitioner's conduct as landlord and upon which he relied to show that his treatment by the Magistrate leading up to the institution against him of proceedings under s 110 Cr P C was in harmony with the views expressed in the Administration Report were relevant and admissible in evidence *Jnanendra Deb v Priyanath Das I L R 11 Calc 463 I L R 12 I A 7* referred to A judgment of acquittal fully establishes the innocence of the accused and a criminal proceeding which ended in the acquittal of the accused cannot be relied upon the Crown as evidence of bad character in a subsequent proceeding under s 110 Cr P C against him *King v Plummer (1902) 2 K B 339 Emperor v Nand Gopal 15 C W N 593 Pulin Behari Dass v King Emperor 15 C L J 517 16 C W N 1105* referred to No inference adverse to an accused ought to be drawn from criminal proceedings which terminated in compromise RAJENDRA NARAIN SINGH v EMPEROR (1912) 17 C W N 238

——— **Court limiting the number of defence witnesses**—*Is that of witnesses on the other side—Indian Evidence Act (I of 1872) s 30—Applicability of to bad livelihood proceedings—Admissibility of confession in proceedings of dacoity case against co-accused* In a proceeding under s 110 Criminal Procedure Code the trying Magistrate declined to examine on behalf of the defence more than the same number [illegible] as were examined

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 110—*concld*

for the prosecution and relied on the confession of one of the petitioners implicating himself and two other petitioners in a case of dacoity *Held* that it is not open to the trying Magistrate to put such an arbitrary limit on the witnesses whose evidence the defence desires to adduce That the confession was inadmissible against the two co accused the provisions of s 30 of the Evidence Act not being applicable to a case like the present AMIRULLA PRAMANIK v KING EMPEROR (1917)
22 C W N 408

——— *Joint trial Legality of* The legality of a joint trial depends on what is alleged for the prosecution not on the facts actually found to be true JOGENDRA KUMAR NAG AND ORS v KING EMPEROR **25 C W N 334**

——— **ss 110 and 112**—*Security for good behaviour—Procedure* Two persons who had been arrested under s 5 of the Code of Criminal Procedure were brought before a Magistrate on the 6th of September On that date they were remanded in custody until the 19th of September for the production of evidence presumably with the object of issuing a notice under s 112 On the 19th of September the Magistrate treating the evidence given by the Sub Inspector as evidence at a hearing under s 110 fixed a further date for the accused to produce their evidence *Held* that this procedure was erroneous It is only after an order under s 112 has been made that proceedings under s 110 can take place Nor should a magistrate detain a person in custody under s 110 unless he has the information upon which he can make an order under s 112 *King Emperor* v *Parmal* Nai *10 A L J 351* followed EMPEROR v FAJBANSI **I L R 42 All 646**

——— **ss 110 112 and 117**—

See SECURITY FOR GOOD BEHAVIOUR
I L R 41 Calc 808

——— *Necessity of setting out substance of information received in order under s 112—Trial of accused on charges under cl (a) and (f) of s 110—Evidence of general repute—Inadmissibility to prove charge under cl (f)—Evidence to prove charge under cl (a)* Where an order under s 112 Criminal Procedure Code which does not clearly disclose the substance of the information received by the Magistrate the proceedings cannot be regarded as legal *Kripa sindhu Naiko* v *Emperor (1918) 47 I C 2*— followed To prove a charge under cl (a) to (e) of s 110 Criminal Procedure Code evidence of repute is admissible *Per* SESHAGIRI AYYAR J—Such evidence must relate to particular instances which have come to the knowledge of the deponent and must be specific Mere belief and opinions without reference to acts and instances which have induced the witnesses to form the opinion can hardly be regarded as evidence of repute within the meaning of s 117 cl 3 *Per* MOORE J—The evidence that is required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of the accused's reputation It must be the general opinion and not merely the repetition of what certain persons have said to the witnesses To prove a charge under cl (f) of s 110 Criminal Procedure Code evidence of repute is inadmissible The evidence must be of definite acts and instances Where a person is tried jointly under cl (f) and any of the other clauses of s 110 evidence of repute admitted with regard to the latter cannot be taken into consideration in deciding the charge under cl (f) RANGA REDDI v KING EMPEROR (1920)
I L R 43 Mad 450

——— **ss 110 (b) 117**—*Security for good behaviour—Evidence for general repute not admissible when the case for the prosecution rests on s 110 (f)* In a proceeding under s 110 of the Code of Criminal Procedure where the basis of the Court's order is cl (f) of that section the fact that the person against whom the proceeding is taken is so desperate and dangerous as to render his being at large without security hazardous to the community is not a fact which under s 47 of the Code can be proved by evidence of general repute EMPEROR v INDAR (1918) **I L R 40 All 372**

——— **ss 110 117**—*Security for good behaviour—Joint inquiry—Statements made by parties concerned amounting to confessions and implicating other parties to the inquiry—Use of such statements as against the others—Evidence Act (I of 1872) s 30* On an inquiry which was being conducted against six persons jointly under ss 110 and 117 of the Code of Criminal Procedure the case for the prosecution being that all six were habitually thieves and house breakers and also were associated together in the matter under inquiry two of such persons made statements to the magistrate amounting to confessions of the actual commission of a particular offence and containing incriminating matter as to the relations of two others out of the six persons before the Court with the other persons associated with them in the inquiry *Held* that these statements might be taken into consideration along with the other evidence in the case as against the other persons mentioned in them whose cases were being jointly inquired into if not under s 30 of the Evidence Act at any rate under s 117 (8) of the Code of Criminal Procedure EMPEROR v SARJU (1918)
I L R 41 All 231

——— **ss 110 118 367 424**—

See PRACTICE **I L R 40 Calc 376**

——— **ss 110 118 and 406**—An appeal lies to the District Magistrate against an order under s 118 made in proceedings under s 110 by an additional District Magistrate MAHENDRA BHUMIJ & ORS v KING EMPEROR
25 C W N 383

——— **ss 110 and 120**—*Person once convicted—If fit for surety* Where a Magistrate rejected a surety because he had once been convicted under 3 3 of the Penal Code *Held* that although the Magistrate had a discretion he had acted unreasonably BUDHU ARIR v KING EMPEROR
25 C W N 141

——— **ss 110 and 122**—*Security for good behaviour—Sureties to be solvent and respectable—Such surety when offered rejected on the ground that they could not exercise control and that certain of them were at large—Order rejecting surety should be judicial order* On a charge of habitually harbouring outlaws certain persons were ordered to execute a personal recognizance and to furnish

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— ss. 110 and 122—contd

two solvent and respectable sureties for good behaviour for one year. When such sureties were offered they were summarily rejected on the strength of the police report that the sureties were not strong enough to exercise control over the accused and that the outlaws were still at large. *Held* that the sureties offered having been shown to be solvent and respectable the reasons given were not sufficient to disqualify them to be sureties. — Jesa Batia (1918)
I L R 44 Bom 385

——— ss 110 123

——— ——— Security for good behaviour—Security furnished—Record not required to be sent to the Sessions Judge for orders. Under s. 123 cl (2) of the Code of Criminal Procedure it is only necessary to lay the proceedings before the Sessions Judge or the High Court when security has not been given, not when it has been given. *Ras Ben Persad v Queen Empress I L R 23 Calc 621* referred to. Emperor v Ram Kishan (1917)
I L R 40 All 39

——— ——— Security for good behaviour—Nature of imprisonment to be awarded in default of finding security. In cases under s. 110 of the Code of Criminal Procedure the imprisonment awarded in default of finding security should as a rule be simple rather than rigorous. It is in each case for the court concerned to exercise its discretion in deciding which class of imprisonment is called for. Emperor v Gandarp Singh
I L R 42 All 563

——— ss 110 and 167—*Proceedings under s 110—Power to remand under s 167.* In proceedings under s 110 of the Code of Criminal Procedure (Act V of 1898) the Magistrate has no power to remand an accused person to custody. S 167 of the Code applies to proceedings under Ch XIV and not to those under s 110. *Emperor v Ba ya u Bom L R 2*—referred to. Re Subbarayya Chetti (1915)
I L R 39 Mad 928

——— ss 110 167, 169 55—*Arrest on suspicion of complicity in a particular dacoity—Evidence insufficient—Detention in custody with a view to proceedings under s 110 illegal without re-arrest under s 55.* Certain persons who had been arrested (under s 54 of the Code of Criminal Procedure) on suspicion of having been concerned in a dacoity were committed to the local jail on a Magistrate's warrant. Before the formal conclusion of the investigation the investigating police officer reported to the Magistrate that there was no sufficient evidence upon which to charge these persons with participation in the dacoity. They were not however released but the Magistrate passed an order directing them to be detained in jail pending the result of a police inquiry with reference to their liability to be proceeded against under s 110 of the Code of Criminal Procedure. Twelve days after the passing of this order information was laid before a Magistrate having jurisdiction under s 110 and an order was duly framed under s 112 and communicated to the persons concerned. *Held* that the order for detention of such persons after the police had reported that there was no evidence against them on the specific charge of dacoity was illegal unless and until they were re-arrested by the police under s 55.

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——— ss. 110 167 169 55—contd

Emperor v Mathi I L R 41 All 483 referred to. Emperor v Lahu
I L R 43 All 185

——— s 110 (c) and 190 (c)—*Security for good behaviour—Magistrate proceeding on his own knowledge, effect of—Joint trial—station diaries of police report entries in.* Although s 110 (c) of the Code of Criminal Procedure 1898 applies only to offences the principle of that clause is also applicable to cases of miscellaneous character. Where therefore on the complaint of one J the Magistrate instituted proceedings under s 110 (c) of the Code of Criminal Procedure 1898 but in the course of his judgment observed that it was impossible to remove from his mind the impression which had been produced upon seeing large tracts of land completely devastated by the ravages of cattle and that in addition to the witnesses examined in the case a large number of persons had made complaints to him regarding the ravages of cattle, *held* that the Magistrate should not have tried the case personally. *Held* (ordering a re trial) (1) that the accused were not liable to be tried jointly in a proceeding under s 110 (c) unless there was evidence of something in the nature of conspiracy or of concert in respect of the various acts of habitual mischief deposed to by the witnesses, (2) that there must be an investigation as to whether each of the accused had taken part in the various acts or otherwise acted in concert. *Held further* that entries in station diaries or police reports cannot be used without legal evidence of the acts alleged. Godhan Ahir v King Emperor
4 Pat L J 7

——— ss 110 526—*Security for good behaviour—Transfer—Jurisdiction—Powers of District Magistrate.* When proceedings under s 110 of the Code of Criminal Procedure initiated before a Magistrate of the first class were transferred by the High Court to the District Magistrate with instructions to transfer them to some other Magistrate subordinate to him competent to try them it was held that the District Magistrate had no power to transfer such proceedings to a Magistrate of the second class. *King Emperor v Munno I L R 24 All 151* distinguished. Emperor v Govind Sahai (1914)
I L R 37 All. 20

——— s 112—

See s 110 I L R 42 All. 646

See Security for Good Behaviour
I L R 41 Calc 866

——— ss 112 118—*Order to show cause, terms of, if restricts scope of enquiry—Prejudice.* The enquiry provided by ss 117 and 118 of the *Code of Criminal Procedure is not strictly limited* by the terms of the order drawn up under s 112 calling upon the accused to show cause why he should not execute a security bond to keep the peace or for his good behaviour though if the person eventually bound down can show that he was misled or prejudiced by the terms of the order he would be entitled to relief. Deputy Legal Remembrancer v Kalir Mirza (1915)
1? C W N 331

——— ss 112 and 167—*Security—Remand—Jurisdiction of Magistrate.* Where a Magistrate in a case sent up by the police for action to be taken by the Magistrate under Chapter VIII of the Code of Criminal P[rocedure pass]ed an order remanding

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——— ss 112 and 167—*contd*

the persons concerned to police custody under s 167 it was *held* that his action was *ultra vires* Even if s 167 applied at all to proceedings under Chapter VIII of the Code no order could be passed under that section until the Magistrate had recorded an order under s 112 *Empress v Babua I L R 6 All 132 In the matter of petition of Daulat Singh I L R 14 All 45* and *King Emperor v Jamal Nai 10 All L J 351* referred to EMPEROR v RAMESHWAR (1914)
I L R 36 All 262

——— s 114—

See SECURITY FOR GOOD BEHAVIOUR.
I L R 46 Calc 215

——— s 117—

See s 107 — I L R 37 All 30; I L R 32 All 642

See s 110 — I L R 40 All 372; I L R 41 All 231

See s 526 — I L R 32 All 642

See LEGAL PRACTITIONERS ACT (XVIII OF 1879) s 36 I L R 40 All 153

——— ss 117 (4) 122 123 (3) 367 424

See SECURITY FOR GOOD BEHAVIOUR
I L R 37 Calc 91
I L R 41 Calc 806

——— ss 117 242—*Bond to keep the Peace—Enquiry sufficiency of* A Magistrate proceeding under s 117 Criminal Procedure Code (Act V of 1898) as nearly as practicable in the same way as under s 242 Criminal Procedure Code must state to the accused the particular of the matter against them and ask them if they can show cause why they should not be required to execute bonds *Held* that the question are you willing to execute the bonds required or do you wish for further inquiry answered by a statement that the accused would execute bonds is not a sufficient compliance with s 117 LALAMIAPPA ASARY v EMPEROR (1910)
I L R 34 Mad 139

——— s 118—

See s 107 — I L R 32 All 642

See s 110 — 25 C W N 383

See s 112 — 17 C W N 331

See PRACTICE — I L R 40 Calc 376

——— ss 118 and 123—*Security for good behaviour—Imprisonment in default not to include solitary confinement* The imprisonment which a person may be ordered to undergo in default of furnishing security for good behaviour cannot be made to include solitary confinement EMPEROR v KUNJAN (1914) I L R 36 All 495

——— s 119—

See s 437 — I L R 33 Mad. 85

——— ss 119 200 437—*Security for good behaviour—Discharge by Magistrate—District Magistrate ordering fresh inquiry—Accused—Discharge—Interpretation* A District Magistrate can under s 437 of the Criminal Procedure Code 1898 order fresh inquiry into the case of a person discharged by a subordinate Magistrate under s 119 of the Code The phrase any accused person as used in s 437 is not confined in its application to a person against whom a complaint has been made under s 200 of the Code It includes a person proceeded against under Chapter VIII of the Code The term discharged is not defined in the Code and there is no valid ground for departing in respect of it from the rule of construction that where in a Statute the same word is used in different sections it ought to be interpreted in the same sense throughout unless the context in any particular section plainly requires that it should be understood in a different sense *Queen Empress v Mutsaddi Lal I L R 21 All 107 King Emperor v Fyaz ud din I L R 24 All 148* and *Queen Empress v Mona Puna I L R 16 Bom 661* followed *Queen Empress v Iman Mondal I L R 27 Calc 662* and *Value Tayi Ammal v Chidambaravelu Pillai I L R 33 Mad 85* not followed *In re* BABA YESHWANT DESAI (1911)
I L R 35 Bom 401

——— ss 119 and 437—*Security for good behaviour—Release or discharge—Competence of District Magistrate to order further inquiry under s 437 against a person in whose favour an order under s 119 has been passed* *Held* that a person who has been released or discharged under s 119 of the Code of Criminal Procedure is so far in the position of an accused person who has been discharged within the meaning of s 437 of the Code that it is competent to the District Magistrate to take further action against such a person under the last named section Where however proceedings had twice been taken under s 110 without result and the District Magistrate had not given the person concerned any opportunity of showing cause against the order which might be passed the proceedings were set aside *Queen Empress v Ahmad Khan All Weekly Notes (1900) 206 Sheo Din v King Emperor 6 O C 262 Muhammad Khan v King Emperor P R Cr 302 Velu Tayi Ammal v Chidambaravelu Pillai I L R 33 Mad 85 Queen Empress v Iman Mondal I L R 27 Calc 662 Dayanath Taluqdar v Emperor I L R 33 Calc 8 Hopecroft v Emperor I L R 36 Calc 163 King Emperor v Fyaz ud din I L R 24 All 148* and *Queen Empress v Mutsaddi Lal I L R 21 All 107 Queen Empress v Ratti All Weekly Notes (1899) 203* referred to EMPEROR v KHARGA (1913)
I L R 36 All 147

——— s 120—

See s 110 — 24 C W N 141; I L R 44 Bom. 385

——— s 122—

See s 110 — I L R 44 Bom. 385

See SECURITY FOR GOOD BEHAVIOUR
I L R 37 Calc 446

See SURETY — I L R 41 Calc 764; I L R 42 Calc 706; I L R 44 Calc 737; I L R 43 Calc. 1021

——— *Sureties in bad livelihood cases refusal of—Reasons for the refusal—Testing reason* The Magistrate in rejecting sureties under s 122 Criminal Procedure Code has to record his reasons for doing so Before recording the reasons he should carefully con

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

———— s. 122—contd

ller and test them This might be done by bringing them to the notice of the person offered as sureties and allowing them an opportunity of controverting them Fida Buksh v Emperor (1910) 14 C W N 709

———— s 123—

See 109 I L R 34 Bom 326

See 110 I L R 40 All 39
I L R 42 All 562

See 118 I L R 36 All. 495

See 122 1 Pat. L. J 212
I L R 37 Bom 178

See Security for Good Behaviour
I L R 37 Calc 446

———— not applicable to proceedings under Punjab Act V of 1918—

See Restriction of Habitual Offenders (Punjab) Act 1918
I L R 1 Lah 614

———— *Order to furnish security—Reference by Magistrate to Sessions Judge—Sessions Judge to go into merits of the case* In a proceeding under ss 110 and 118 of the Criminal Procedure Code 1898 the Magistrate ordered the accused to be bound over for a period of three years and referred the case to the Sessions Judge under cl (3) of s 123 of the Code The latter confirmed the order without going into the merits of the case *Held* that the words of cl (3) of s 123 of the Criminal Procedure Code 1898 were wide enough to give discretionary power to the Sessions Judge to deal with the case on the merits and pass such orders as the circumstances of the case might require Emperor v Amir Bala (1911) I L R 35 Bom 271

———— s 125—

See s 107 23 C W N 958
I L R 40 All 143

See Magistrate Power of
I L R 37 Calc 72

———— *Security to keep the peace—Cancellation of bond—Power of Magistrate to send accused to jail* Under s 125 of the Code of Criminal Procedure a District Magistrate may cancel a bond for good behaviour but he is not competent to send the person whose bond is so cancelled to jail Emperor v Fakhr ud din Khan (1911) I L R 33 All 624

———— *Power of the District Magistrate to cancel a security bond* The District Magistrate has jurisdiction under s 125 Criminal Procedure Code to cancel a bond to keep the peace on the ground that on the fact it execution should not have been ordered *Nabi Sardar v Emperor I L R 34 Cal 1* followed Mahe Gowd Re I L R 37 Mad 125

———— *Application to cancel order for security—Appeal—Revision* An application made to the District Magistrate to cancel an order for security to keep the peace under s 125 of the Code of Criminal Procedure cannot be regarded in the same light as an appeal and the Magistrate's order thereon would not be vitiated by the fact alone that the applicant had not been heard *Semble* that on an application for revision of an order for security to keep the peace the High Court should not refuse to interfere *solely* on the ground that the applicant has not first applied to the District Magistrate under s 125 Emperor v Sita Ram (1917)
I L R 39 All 456

———— *Appeal—Jurisdiction* A District Magistrate taking action under s 125 of the Code of Criminal Procedure cannot treat an application made under that section as an appeal and reverse the order of a first class Magistrate on the fact If he considers the order to be wrong on the merits he can exercise his revisional power and submit the record to the High Court but the cancellation of bonds contemplated by s 125 can only be on the ground that the bonds are no longer necessary Banarsi Das v Partab Singh (1913) I L R 35 All 103

———— *Revision—Jurisdiction* A District Magistrate taking action on an application made ostensibly under s 125 of the Code of Criminal Procedure cannot treat such application as an appeal and reverse the order of a magistrate of the first class on the fact If he considers the order to be wrong on the merits he can in the exercise of his revisional powers submit the record to the High Court but the cancellation of bonds contemplated by s 125 can only be on the ground that the bonds are no longer necessary *Banarsi Das v Partab Singh I L R 35 All 103* followed Emperor v Shankar Lal (1919) I L R 41 All 651

———— s 133—

———— *Public nuisance—Construction of dam causing injury to village lands* A *B* and *C* being contiguous villages of which *C* lay at a lower level than *A* and *B* the surplus water falling on *A* and *B* used to run off through certain natural channels over the lands of village *C* The inhabitants of *C* erected a dam to keep the water from their lands and by so doing caused flooding of and damage to the land of *A* and *B* *Held* that the area and number of persons affected by the action of the inhabitants of *C* were sufficient to justify a magistrate in treating their action as a public nuisance and taking steps to abate it under s 133 of the Code of Criminal Procedure Emperor v Bhaposa Pathak (1912)
I L R 34 All 345

———— *Jurisdiction—Channel which may be lawfully used by the public—Field over which water from other fields at a higher level flows* *Held* that a field which is on a lower level than the adjoining fields and over which the surplus water of those adjoining fields used to flow into a tank even if it could be described as a channel was not such a channel as had been or could lawfully be used by the public and action could not be taken under s 133 of the Code of Criminal Procedure for the removal of any obstruction from it *Jhun v Singh v Mata Autar All Weekly Notes (1906) 190* and *In re Maharana Shri Jaswatsinghji Fatesinghji I L R 23 Bom 958* referred to *Emperor v Bhaposa Pathak I L R 34 All 345* and *Zaffer Nawab v Emperor I L R 3 Calc 9 0* distinguished Jagarnath Sahu v Parmeshwar Sahu (1914)
I L R 36 All 209

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 133—*contd*

——— *Claim of right Magistrate's duty to decide* bona fides *of—Magistrate bound to refer parties to Civil Court if such claim is not mere pretence—Steps which Magistrate may take if suit not instituted in Civil Court within reasonable time* Per SHARFUDDIN J (TEUNON J *dubitant*) Sub s (3) of s 133 Criminal Procedure Code provides that no order duly made by a Magistrate under the section shall be called in question in any Civil Court From this latter provision it is clear that the provision of s 133 Criminal Procedure Code should be sparingly used Any order passed under the section cannot be questioned in any Civil Court It is therefore necessary that if the party against whom the order is contemplated to be passed raises a question that the pathway is not a public property in the sense of the provision of this section the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situated on a private and or if it is for public use but he should even when the claim of the objection is not substantiated find whether the claim is bona fide or it is set up only to oust the jurisdiction of the Court If the Magistrate finds that the claim which is set up is a mere pretence he should then proceed to pass a final order and make the rule issued by him absolute If however he finds that the claim although not substantiated is not a mere pretence and is not raised to oust the jurisdiction of the Court but that it is raised bona fide he should stay his hand and refer the party to Civil Court And if the party within a reasonable time does not have recourse to Civil Court the Magistrate may then proceed to make the rule absolute MANIPUR DEY *v* BIDHU BHUSAN SARKAR (1914) **18 C W N 1086**

——— *s 133 scope of—Claim of right Magistrate bound to determine* bona fides *of before appointing jury—Case in which* bona fide *claim of right raised as also appointment of jury asked for—Duty of jury to hear parties and evidence* S 133 Criminal Procedure Code contemplates only an enquiry as to the existence or non existence of the obstruction complained of and not an enquiry into a disputed question of title and where a bona fide claim of private right is raised the Magistrate cannot make an order under the section but should leave the determination of the question to the Civil Court When once a party who raised a private right has asked for a jury and has had the case referred to the jury the jury are bound to hear the parties and such witnesses as they may desire to be heard When a second party to a proceeding under s 133 Criminal Procedure Code raises a question of private right and insists on having it decided the Magistrate should look into the bona fides of that claim before submitting the case to a jury Where however the second party raised the question of private right and also stated that if it was thought proper a jury might be appointed and a jury was appointed who on evidence held that inasmuch as a question of title was involved the proceeding could not be proceeded with and the Magistrate on perusing the material placed before the jury decided that the matter was one for the Civil Court and dropped the proceedings *Held* that the Magistrate was justified in making the order passed by him ASHRAFUDDIN *v* KARIM BUKSH (1914) **18 C W N 1148**

——— *Jury—Applicant consulted by Magistrate as to appointment of jury* In proceedings instituted under s 133 of the Code of Criminal Procedure at the instance of *H* against *F F* applied for the appointment of a jury which was granted He nominated two jurors The Magistrate called upon *H* to nominate two jurors *H* nominated two jurors and the Magistrate appointed a foreman The jury by a majority made an order again *F* *Held* that it is not illegal on the part of a Magistrate to address any inquiry to the applicant with a view to ascertaining the names of respectable and independent residents of the neighbourhood who would be willing to serve on the jury but the Magistrate should see that he does not appoint friends or partisans of the applicant The criterion in such cases is whether the person at whose instance the proceedings were instituted was allowed to exercise rights not conferred upon him by law as if he were a party to the litigation *Upendra Nath Bhuttacharjee* v *Kh tish Chandra Bhuttacharjee I L R 23 Calc 499 Kailash Chandra Sen* v *Ram Lall Mitra I L R 26 Calc 869* and *Mir Imam Abdul Ali* v *Queen Empress Punj Rec 1897 Cr J No 4* referred to FARZAND ALI *v* HAKIM ALI (1914) **I L R 37 All. 26**

——— *Reasonable opportunity to show cause—Order if can be made on result of local inspection—Vague and indefinite order* A proceeding under s 133 Cr P C is in the first instance entirely *ex parte* and the report or the other information whereon the Magistrate has taken action before making the conditional order is no evidence against the opposite party It is consequently desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by s 135 cl (*b*) and to adduce evidence as prescribed by s 137 (*1*) An order under s 133 cannot even by consent of parties be based upon information gathered at a local enquiry When in a proceeding under s 133 instituted against a number of persons it is alleged that various unlawful obstructions have been caused upon a public way it is essential that the order should state accurately with regard to each person the specific obstruction made by him which he is required to remove unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned *Kalimohan* v *Nakari Chandra 11 C L J 114* followed RAI MOHAN KARMAKAR *v* KING EMPEROR (1916) **20 C W N 1171**

——— *Public nuisance—Illegality of order proceeding on grounds different from those set out in the notice—and relating to the manner of carrying on a trade and not to the trade itself also referring to possible future results and not to existing facts* On the complaint of the Principal of the Khalsa College situate in the suburbs of Amritsar a notice under s 133 of the Code of Criminal Procedure was issued against the petitioners in the following term you have dug pits by excavating land around the Khalsa College *The water stagnates in them and causes a bad smell* This is a nuisance to the residents of the College

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———— s. 133—*concld*

In future ...... Khalsa College ...... The ...... to the effect that ...... the College ...... from the kiln ...... likely to breed mosquitoes ...... Magistrate ...... notice ...... the present petition ...... any fresh petition ...... College on the ground given by the witness for the complainant *Held* that the ...... proceeding on ground not covered by the notice issued was illegal and that moreover it was not proved on the present record that the ...... dug by the petitioners have ...... or can cause malaria or any injury to health *Held* ...... that at most the objection was ...... made in which petitioners carried on their occupation of manufacturing ...... and that this was not sufficient to bring the case within the purview of s 133 of the Code *Moti Shah v The Crown* (29 P R (Cr) 1889) *Mrs Parsons v The Empress* (17 P R (Cr) 1888) and *Sha ...... v The Empress* (17 P R (Cr) 1888) referred to *Held further* that s 133 relates to an existing state of affairs and not to the possibility of future result COMAL CHAND v THE CROWN

I L R 1 Lah 163

———— Where a Magistrate finds that a claim of right set up in answer to a conditional order under s 133 Criminal Procedure Code is based on substantial grounds the proper course for him to follow is to drop the proceedings He has no jurisdiction to direct the party setting up the claim to go to the Civil Court within a specified time PEARY LAL MULLICK v SURENDRO KRISHNA MITTER 24 C W N 247

———— Where four only of fixed jurors appointed in a proceeding under s 133 of the Criminal Procedure Code inspected the locality and made their report in the absence of the other juror and the Magistrate acted thereon *Held*—That the Magistrate should have appointed a fresh jury and allow the proceedings to go on with the fresh jury SRIMATI DASYA v NIRAPAIN CHANDRA GHOSH 24 C W N 928

———— *Criminal Procedure Code s 133—Obstruction of way used by Public—Claim of—right made in good faith in answer to conditional order does not oust Magistrate's jurisdiction—Magistrate if can allow objector time to establish claim by civil suit when such claim not well founded though made in good faith—Proceedings if can be continued when objector does not go to Civil Court within time allowed or fails there* Per CURIAM —When in proceedings under s 133 Criminal Procedure Code arising out of an alleged obstruction of a way used by the public the Defendant set up a claim of right which is found by the Magistrate to be made in good faith the Magistrate's jurisdiction is not thereby ousted *Per* GHOSE J —But if the Magistrate finds that there is a real or substantial question to be tried out between the parties he ought in the exercise of his discretion to stay his hands and not proceed any further after making the conditional order under s 133 *Per* SANDERSON C J —The Magistrate if he does not think the claim well founded though he considers it made in good faith may in his discretion allow the Defendant a reasonable time to assert the claim by a civil suit and if he does not go to the Civil Court within such time or fail there the Magistrate has jurisdiction to continue the proceedings under s 133 Criminal Procedure Code *Per* TEUON J —In the exercise of his discretion the Magistrate may take the course indicated above Sub s (2) of ...... does not however appear to favour any reference of parties to Civil Court *Per* RICHARDSON and NEWBOULT JJ —The Magistrate may if he does not think the claim well founded though he considers it made in good faith allow the Defendant a reasonable time to assert the claim by a civil suit *Per* CHOSE J —The Magistrate is entitled to continue the proceedings where the objector shows nothing more than a mere belief in the claim of right put forward RAM SAYAR MONDAL v ALEX ...... KAR 26 C W N 442

———— ss 133 135 138 and 139—*Issue of notice by Sub divisional Magistrate—Option to appear and show cause before a Second class Magistrate—Appointment of a jury—Verdict submitted to Sub divisional Magistrate—Jurisdiction in Sub-divisional Magistrate to deal with verdict and dispose of case* A Sub divisional Magistrate who issues notice under s 133 Criminal Procedure Code calling upon a person to do something within a specified time or to appear before another Magistrate to have the order set aside is not deprived of his jurisdiction but has power to deal with the matter under s 139 Criminal Procedure Code on receiving the verdict of the jury appointed by him under s 138 The word Magistrate in s 139 (1) refers to the Magistrate who issued notice ANGAPPA MUDALI v PERUMAL CHETTY (1920)

I L R 43 Mad. 316

———— ss 133 136 137—

See PUBLIC PATHWAY

I L R 44 Calc 61

———— ss 133 137—

See PUBLIC NUISANCE

I L R 42 Calc 158 702

———— *Order without any evidence—Determination of bona fides of claim absolutely necessary* Where cause is shown against a conditional order under s 133 Criminal Procedure Code an order absolute made without any evidence and without a determination of the *bona fides* of the claim set up is illegal RAM MONDAL v CHANDRA MONDAL (1916) 21 C W N 923

———— Bona fide claim of right—*Order staying proceeding with direction to establish right in Civil Court within limited time if should be made without evidence* Where a claim of right raised in answer to a conditional order under s 133 was found to be *bona fide* and it was ordered that unless the party sought to establish his right in the Civil Court within a limited time his *bona fides* ...... again to be questioned by the Criminal ...... that the Magistrate

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— ss 133 137—contd

should not have made the order without taking evidence adduced by one side or the other PEARY LAL MULLICK v SURENDRO KRISHNO MITTER (1919) 23 C W N 774

——— *Decision of case on local enquiry in the absence of parties* Where in a proceeding under s 133 Criminal Procedure Code the Magistrate after recording evidence under s 137 went to the spot and held a local inspection and decided the case on the result thereof making the conditional order absolute *Held* that the Magistrate acted illegally and the order made was liable to be set aside The Magistrate was not entitled to substitute the evidence recorded in the case by his own evidence KALI SADAY GHOSH v SIDDHESSUR BANNERJEE (1919) 23 C W N 1054

——— s 133 138 139—*Obstruction of a pathway—Magistrate s power to refer the matter to a jury*—Bona fide *claim to the pathway as private—Magistrate s duty to decide* In a proceeding under Chap X Criminal Procedure Code relating to the obstruction of a way it is the duty of the Magistrate before referring the matter to the jury to decide himself whether or not the claim of right to the land in question is made in good faith and whether the pathway is a public one or not and it is only on deciding that there is no such claim that any matter can be referred to the jury *Dulalram Deb* v *Baishnab Charan Deb 10 C W N 845* followed DHARAM MANDAL v GOSSAIN DAS MANDAL (1910) 14 C W N 544

——— In proceedings under s 133 before any reference can be made to the Jury it is incumbent on the Magistrate himself to investigate any claim for right that may be set up and not to leave that question to a Jury appointed under s 138 SHEIKH IMRAT ALI v SHEIKH AMJAD ALI 2 Pat L J 67

——— ss 133 435 438 and 439—

See PRACTICE I L R 48 Calc 534

——— ss 135 to 137—

See s 133 I L R 43 Mad 316

——— s 138—

See 133 I L R 43 Mad 316

——— s 144—

See s 107 3 Pat L J 130 243

See PENAL CODE (ACT XLV OF 1860) ss 332 324 I L R 40 All 28

See PROHIBITORY ORDER I L R 38 Calc 876

——— *Proceedings under* Advisability of taking proceedings under s 144 Criminal Procedure Code to prevent disturbance of peace considered MANIK CHANDRA CHAKRAVARTI v DREO NATH KUAR (1912) 17 C W N 205

——— *Renewed orders under—Jurisdiction of Magistrate—High Court s power of interference under Charter Act (24 & 25 Vict c 104) Art 15* Where a renewed order passed under s 144 Criminal Procedure Code did not state that there was again a temporary emergency and a continuing or existing insufficiency of the police force to protect the petitioners in their rights *Held* that the Magistrate gave himself a more extended jurisdiction than is covered by s 144 and the order was revisable by the High Court under art 15 Charter Act 24 & 25 Vict c 104 Their Lordships declined to set aside the order as the two months during which the order would remain in force was almost expiring on the date of hearing GOVINDA CHETTI v PERUMAL CHETTI (1913) I L R 38 Mad 489

——— *Scope of section—Hât order restraining the holding of—Doing of a lawful act on one s own property if can be restrained under the section* Where the only ground mentioned for the issue of an order under 144 Criminal Procedure Code restraining the holding of a rival *hat* was that the Magistrate was satisfied from the report of the police that by opening a new *hat* at only half a mile from the old and long established *hat* the petitioners were about to disturb the public tranquillity *Held* that an injunction cannot be issued not to do a lawful act upon a man s own property and the order in the form in which it was issued was without jurisdiction That the holding of a *hat* on a man s own property is not in itself a wrongful act and therefore any ulterior consequence which may arise from it cannot give rise to any proceeding against the owner of the land for committing an act likely to cause a breach of the peace unless those ulterior consequences are made the basis of the proceedings The law as regards preservation of public peace is based upon an apprehension that either certain person or persons are likely to commit breach of the peace by their own acts or that they are likely to do wrongful acts which may occasion other people to commit breach of the peace RAKHAL DAS SINHA v THE KING EMPEROR (1912) 19 C W N 248

——— *Successive orders propriety of—Revision by High Court of order under section after expiration of two months* A Magistrate should not by successive orders under s 144 Criminal Procedure Code extend the period of two months prescribed by cl (5) of the section *Satish Chandra Ray* v *Emperor 11 C W N 79* referred to Case in which the High Court set aside an order under s 144 Criminal Procedure Code after the expiration of two months from the date of the order BISHESHUR CHAKRAVARTI v EMPEROR (1916) 20 C W N 758

——— *Circumstances justifying the exercise of jurisdiction by Magistrate Criminal Procedure Code (Act V of 1898) s 144—Circumstances justifying Magistrate exercising jurisdiction—Revision by High Court after expiration of two months from date of order* Jurisdiction under s 144 Criminal Procedure Code primarily depends on the urgency of the case and the mere statement of the Magistrate that he considered the danger to be imminent is not sufficient to give him jurisdiction if the facts set out by him show that really there was no urgent necessity for action being taken In this case the High Court set aside the order although two months had expired from the date thereof CHANDRA NATH MUKHERJEE v EAST INDIAN RAILWAY (1918) 23 C W N 145

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

— s 144 — *contd*

——————— *Holding of rival hat on same day as old hat of rival party under section* A Magistrate is empowered to pass an order under s 144 Criminal Procedure Code prohibiting the holding of a rival *hat* on the same days with the old *hat* When for the disobedience of such an order the Magistrate granted sanction for prosecution for an offence under s 188 Indian Penal Code and the Sessions Judge revoked it on the ground that the order under s 144 Criminal Procedure Code was illegal *Held* that the order under 144 Criminal Procedure Code was illegal and the order of the Sessions Judge revoking the sanction should be set aside and the sanction restored NAGENDRA NATH BISWAS v LAKHAI DAS SINHA (1918)

23 C W N 141

——————— *Criminal Procedure Code (Act V of 1898)* 144 *if empowers a Magistrate to stop prayer in a mosque to avoid a breach of the peace —Magistrate s jurisdiction to interfere with a* mutwali *s administration of wakf property— Proper course for Magistrate when there is likelihood of breach of peace* A certain *mutwali* of a mosque appointed as *pesh imam* or the leader of prayers a certain person with whom the congregation got dissatisfied The people therefore refused to read their prayers with him and the matter went so far as to necessitate police interference Ultimately proceedings under s 144 Criminal Procedure Code were drawn up and the Magistrate passed orders forbidding people of either party to read prayers in the said mosque *Held* that the order was a misconceived one Unless the *mutwali* was displaced in due course of law no one had a right to interfere with the management of the trust property If the effect of the order of the Magistrate was that no Mahomedan would be allowed to say his prayer in the mosque the order was not justified under s 144 Criminal Procedure Code Such an order is not proper and justified by the law The proper course for the Magistrate is to find out which party is wrong and if he finds one party interfering unnecessarily with the exercise of the legal powers of the other party he ought to bind down that party restraining them from committing any act which may lead to a breach of the peace HAJI MD ISMAIL v MUNSHI BARKATAL

26 C W N 904

——————— *Scope of—Jurisdiction of Magistrate to prohibit holding of hat on one own land and on day other than the day on which old* hat *was held —Ex parte order propriety of passing—Speedy disposal of objection to order necessary* The petitioners started a new *hat* on their own property within a certain locality where existed an old *hat* belonging to the Opposite Party but on a day different from that on which the old *hat* was held The Magistrate acting on a police report made an order prohibiting any person from going to buy or sell in the said place The petitioners shifted their *hat* to another place and the Magistrate again made a similar order *Held* that every person is ordinarily entitled to exercise all rights of ownership on his own property and the holding of a *hat* on one s property is not in itself a wrongful act The Criminal Court assumes jurisdiction to interfere with the lawful exercise of a person s right to ownership when such exercise in its ulterior consequences and being directed primarily against the lawful exercise of another person s right of ownership is likely to cause a breach of the peace That inasmuch as the petitioners claimed exclusive possession of the land on which they wanted to hold the *hat* and intended to hold it on a day other than the day on which the *hat* of the Opposite Party as embled the Magistrate had no jurisdiction to make an order in the form in which it was made prohibiting the petitioners from holding their *hat* any day of the week and on every place within a large area BANWARI LAL RAM v PRONAB KRISHNA

26 C W N 663

——————— ss 144 and 145—*Dispute regarding possession of immovable property—extent of District Magistrate s power to interfere with order of Subordinate Magistrate* Cl (*4*) of s 144 of the Criminal Procedure Code contemplates only a change in the nature of the order made not a change in the party against whom it is made Where therefore in a proceeding under s 144 the first court made an order absolute against the second party and the District Magistrate acting under cl (*4*) of that section cancelled the first Court s order and substituted an order of his own forbidding the first party from cutting the crop in dispute *held* that the District Magistrate s order was without jurisdiction Where it is clear from a perusal of the police report that the claim of the disturber of the peace is a mere pretence a Magistrate is justified in acting under s 144 In such circumstances the party entitled to possession should not be harassed by proceedings under s 145 GANPAT SINGH v THE KING EMPEROR

3 Pat L J 28[?]

——————— s 145—

See s 107 — I L R 34 All 459; I L R 36 All 143

See s 19 — 5 Pat L J 135

See s 522 — 18 C W N 1088

See DISPUTE CONCERNING LAND
I L R 37 Calc 285
I L R 38 Calc 24 8[?]9
I L R 40 Calc 982
I L R 46 Calc 10[?]6
I L R 39 Calc 150

See GOVERNMENT OF INDIA ACT 1915 107 — 1 Pat L J 326

See HIGH COURT JURISDICTION OF
I L R 48 Calc 522

See LIMITATION ACT (IX OF 1908) s [?] ART 4 — I L R 28 Mad 492

See SECURITY FOR GOOD BEHAVIOUR

——————— Compromise of a proceeding under— *Effect of* Where in a proceeding under s 145 the parties compromised and filed a petition of compromise and the trying Magistrate made an order to the following effect The parties compromised and filed a petition of compromise According to its terms the lands will be in the possession of both sides as stated in the petition *Held* that the order did [?]erate as an order under cl (*6*) of s 145 [?] [?] cl (*5*) of s 145

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 145—*contd*

That as both parties came to Court and showed that no dispute likely to cause a breach of the peace existed inasmuch as they had compromised the Magistrate was precluded from passing an order under cl (6) That the existence of this order did not bar a subsequent proceeding under s 145 on a fresh dispute likely to cause a breach of the peace arising between the parties SADHU BISWAS *v* MAHAMAD ALI BISWAS (1910)

15 C W N 568

——— Adjournment—*Property of—Witnesses processes to enforce attendance of when may be refused* A Magistrate acting under s 145 of the Criminal Procedure Code should take all the evidence that is produced before him on the day originally fixed by him for the disposal of the proceeding and unless he considers it necessary for good reason to require further evidence should decide then and there if he can which of the parties was in actual possession Where the Magistrate on the application of one of the parties on the date originally fixed for the disposal of the proceeding under s 145 granted an adjournment and issued summons on witnesses named by the party some of whom did not appear on the adjourned date and some of those present were not examined by the party calling them and the Magistrate on the application of the party issued fresh summons and warrants for the arrest of the absent witnesses again adjourning the hearing and none of these witnesses appeared on the date so fixed and the party applied for fresh adjournment and the issue of fresh processes *Held* that having regard to the previous conduct of the party concerned and also to the circumstance that the witnesses mentioned could not be found the Magistrate acted rightly in refusing to issue fresh process *Held* further that the Magistrate should not have granted any adjournment after the date originally fixed for the disposal of the proceeding as in the present case no adequate reason appears to exist for granting such adjournment HARI PADA MANDAL *v* SANYASI CHARAN BISWAS (1912)

17 C W N 144

——— Failure to file written statements in time—*Omission to adduce evidence on date fixed—Magistrate if may pass final order without granting time* Where the parties to a proceeding under s 145 Criminal Procedure Code did not file their written statement or adduce evidence though more than two months had expired from the date the proceeding was drawn up but applied for time to file the written statements *Held* that the Magistrate did not act without jurisdiction in refusing to grant time and in attaching the disputed land under s 146 Criminal Procedure Code on the failure of the parties to adduce evidence *Sheikh Mansur Ali v Matiullah 12 C W N 516* distinguished BEJOY MADHUB CHOWDHURY *v* CHANDRA NATH CHUCKERBUTTY (1909)

14 C W N 80

——— Proceedings after final order—*Magistrate if may take proceedings by way of execution of the final orders in proceeding under—Ultra vires—Police putting party in possession—Legality* After passing final order declaring a party to a proceeding under s 145 Criminal Procedure Code to be in possession the Magistrate has no jurisdiction to take any proceedings in the nature of execution of that order Where after the Magistrate in a proceeding under s 145 Criminal Procedure Code had declared the first and third parties to be in possession of the property in dispute the police gave formal possession to those parties by planting bamboos but disputes still not ceasing the Magistrate held a local enquiry and again declared the possession of the first and third parties and a further inquiry was held to determine whether the property of which possession had been declared was identical with the subject of the proceeding under s 145 Criminal Procedure Code *Held* that all the proceedings after the final order passed by the Magistrate in the proceeding under s 145 Criminal Procedure Code were *ultra vires* There is no specific provision in the Code authorising a Magistrate to take proceedings in the nature of execution after passing orders under s 145 KUMAR JOGENDRA NARAIN ROY *v* KISHORI LAL ROY CHOWDHURY (1909)

14 C W N 78

——— Title proof of—*Evidence* Evidence of title is admissible in an inquiry under s 145 of the Code of Criminal Procedure (Act V of 1898) to enable the Court to decide the question of actual possession but proof of title is not proof of actual possession JANAGANTI PARTHASARATHY NAYANIM *v* PALLIKAPPU VENKATASAMI REDDY (1910)

I L R 34 Mad 138

——— Public claiming easement if may be party—*to a proceeding under the section—Declaring the public to be in possession effect of—Joint possession—Ousting of Jurisdiction of the Magistrate—Right of the public to be in possession for one day in the year to perform puja nature of—Easement—Constructive conditional possession—Proceeding not directed to the decision of the absolute continuing possession of either party ultra vires* If the public are declared under s 145 Criminal Procedure Code to be in possession of any piece of land then both parties to the dispute are included in that term and the possession therefore is joint possession and the jurisdiction of the Court under s 145 Criminal Procedure Code is ousted Where one of the parties to a proceeding under s 145 Criminal Procedure Code representing the public claimed only the right to worship on the disputed land on one day in the year and the right to make due and proper preparations for the holding of that worship by erecting huts for the purpose of holding puja *Held* the right of such party to be in possession for one day in the year or to take such steps as are necessary to prepare for the puja is in the nature of an easement and not in the nature of possession Proceedings under s 145 Criminal Procedure Code are entirely without jurisdiction unless they are directed to the decision of the absolute continuing possession of either party until they are ousted by the order of the Civil Court MANIK CHANDRA CHAKRAVARTI *v* PREO NATH KUAR (1912)

17 C W N 205

——— *Disputed land—Pathways thereon—Possession of disputed land found with one party—Order directing pathways to remain intact and remainder of disputed land to remain in possession of successful party—Jurisdiction to make such order* Where in a proceeding under s 145 Criminal Procedure Code the Magistrate found that the disputed land was in possession of the

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 145—*contd*

second party but directed that two pathways on the disputed land should remain intact and only the remainder of the disputed land should remain in possession of the second party *Held* that there is nothing in s. 145 Criminal Procedure Code which gives a Magistrate power to pass an order of this kind ASIT MOHAN GHOSH *v* SARAT CHANDRA GHOSH (1913) **17 C W N 793**

———————*Jurisdiction of High Court to deal in revision with orders passed under s 145—s 439 meaning of words otherwise comes to its knowledge—Ss 1 S 1 9 compared—S 145 Criminal Procedure Code—Defective preliminary order effect of* Ss. 143 144 145 and 146 Criminal Procedure Code deal with proceedings which are not criminal or punitive but prohibitive and where cause is shown the local magistrate has unfettered discretion to act under them There fore from the use of the word otherwise in s 439 a power in the Sessions Judge and the District Magistrate to interfere with such orders cannot be inferred when they are expressly forbidden by s. 435 to call for record *Sequitter* The words in s 439 the record of which has called for by itself are not limited to cases where the High Court acts *suo motu* The history of the law relating to superintendence and revision by the High Court reviewed. An omission to set forth in a preliminary order under s 145 Criminal Procedure Code the grounds of a Magistrate s opinion do not affect the jurisdiction of the Magistrate. *Khosh Mahomed Sirkar v Nazir Mahomed I L R 33 C le 35* discussed and *Subramania Ayyar v King Emperor I L R 25 Mad 61* distinguished. The essential requisite to give a Magistrate jurisdiction under s 145 Criminal Procedure Code is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof in his jurisdiction Once he is so satisfied his jurisdiction is complete and his subsequent action must be considered in relation to procedure not jurisdiction. KAMAL KUTTY *v* UDAYAVARMA RAJA VALI RAJA OF CHIRAKKAL (1913)

I L R 36 Mad 275

———————*Omission of Magistrate to give effect to presumption arising from recently published record of rights if a question of jurisdiction* The omission of the Magistrate in making an order under s. 145 Criminal Procedure Code to give effect to the presumption arising from the entries in a recently published record of rights is not a question going to the jurisdiction of the Magistrate and the High Court cannot interfere on that ground CHINTAMONI JENA *v* JAGANNATH RAMANUJA DAS (1914) **19 C W N 123**

———————*Rent collection of dispute regarding between lakhirajdar and putnidar—Decision in the absence of tenants—Produce rent applicability of section to* The disputed land in respect of which proceedings under s 145 Criminal Procedure Code were instituted consisted of several plots all held by tenants on a yearly rent of half the produce The parties to the proceedings were the *lakhirajdar* and the *putnidar* the dispute between whom was as to the right to collect rent It appeared that as regards some of the plots there was a dispute as to what tenants were in possession *Held* that as regards the plots about which there was a dispute as to the tenants in possession the Magistrate should not have made any order in the absence of tenants who might be very seriously prejudiced by an order in favour of one or other of the parties to the proceeding *Held* (as to the argument that s 145 Criminal Procedure Code could not refer to a half share of the produce) that it was true that if it was a question of dividing a hitherto undivided share the section might not apply but in the present case the section applied as it was a question of rent and it so happened that the rent was half the share of the produce but there was no question of shares as between the two parties to the proceeding HARI DAS SAMANTA *v* ABDUL MOTTEB MULLICK (1915) **19 C W N 959**

———————*Refusal of process against witness—Final order without jurisdiction* Where in a proceeding under s. 145 Criminal Procedure Code the petitioner applied for summons against a witness a Sub Inspector of Police and the Magistrate made an order that the Sub Inspector was to appear with his diarie but on the date on which the case was to be heard the witness did not appear and on the petitioner again applying for summons against him the Magistrate rejected the application remarking that the application was vexatious and ultimately passed the final order under s 145 Criminal Procedure Code *Held* that the order under s 145 Criminal Procedure Code was made without jurisdiction. CALIUDDI HOWLADAR *v* AINUDDI HOWLADAR (1917) **18 C W N 94**

———————*Non examination of witness on either side Final order on documentary evidence dating back to long time previous to date of proceeding—Magistrate s duty under cl (4)—Jurisdiction* In a proceeding under s 145 Criminal Procedure Code no witness was examined on either side but the Magistrate decided the case on the documents filed before him the latest of those documents dating back to about ten years before the date of the proceeding It appeared that one of the parties was present in Court but was not examined *Held* that the Magistrate was bound to take such further evidence as became necessary after a consideration of the documents and the final order was without jurisdiction Cl (4) of s 145 clearly provide that the Magistrate shall not exercise his jurisdiction under the section unless and until he has sufficient evidence before him JUTHAN SINGH *v* RAM NARAIN SINGH (1914) **18 C W N 700**

———————*Order under section contrary to decree of Civil Court* The petitioners, the second party to the proceeding under s. 145 Criminal Procedure Code obtained a decree against one of the first party and another person who were entitled to an undivided one fourth share in the property in dispute This share was sold in execution of the decree and purchased by the decree holders the petitioners who obtained delivery of possession through the Court. The Magistrate finding that the petitioners were never in actual possession of the property and the crop was grown by the first party made an order in favour of the latter *Held* that the order was liable to be set aside ATUL HAZRAH *v* UMA CHARAN CHONGDAR (1916) **20 C W N 798**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 145—*contd*

——— *Addition of parties —Sub s 4 (1)—Wrongful and forcible dispossession —Digging tank with sanction of Municipality— Party of must have had notice of the proceeding to be concerned in the dispute* Where in a proceeding under s 145 Criminal Procedure Code it appeared that one of the parties within two months from the commencement of the proceeding obtained sanction from the Municipality and proceeded to dig a tank on the land in dispute to the exclusion of another party who was then found to be in possession *Held* that it was forcible and wrongful dispossession within the meaning of sub s 4 cl (1) of s 145 *Held* further that under the Full Bench Ruling in *Krishna Kamini v Abdul Jubbar I L R 30 Calc 155 s c 6 C W N 737* a party may be added provided he was concerned originally in the dispute which was the foundation of the proceeding and there is no necessity for a fresh proceeding Further if a party is added before the inquiry begins there is no irregularity That whether or not there was then an apprehension of a breach of the peace is a matter eminently for the exercise of the Magistrate's discretion For a person to be concerned in a dispute relating to land it is not necessary to be actually present near the land or to have had notice of the proceeding when started MANMOTHA NATH CHATTERJEE v GANGA GIR GOSSAIN (1916) 20 C W N 978

——— *Joint title to land effect of on the applicability of the section* The mere fact that there may be a joint title to the land would not prevent the application of s 145 Criminal Procedure Code *Jagat Kumari Dassi v Mohesh Chandra Saha 17 C W N 911* followed BAIJNATH MARWARI v W S STREET (1916) 20 C W N 518

——— *Order without recording oral evidence on either side* Where a Magistrate made an order under s 145 Criminal Procedure Code without giving either party an opportunity of adducing oral evidence as to possession *Held* that the order was liable to be set aside SAKHAYUR ALI v ALHADI HAZI (1917) 21 C W N 928

——— *Proceedings if can be had after order under s 107 Criminal Procedure Code—Jurisdiction* There would be no want of jurisdiction on the part of a Magistrate to continue proceedings under s 145 Criminal Procedure Code after having made an order under s 107 Criminal Procedure Code NASIRUDDIN SARKAR v GOFURUDDIN MAHAMED (1916) 21 C W N 160

——— *Government of India Act 1915 s 107—Order under s 145 by a Magistrate duly empowered to act under Chapter XII— Revision—Jurisdiction of High Court* Where proceedings are in intention in form and in fact proceedings under Chapter XII of the Code of Criminal Procedure and are taken by a Magistrate duly empowered to act under that chapter the High Court has no power to send for the record of those proceedings either under the Code of Criminal Procedure or under the Government of India Act 1915 There is no practical difference between s 107 of the Government of India Act

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 145—*contd*

1915 and s 15 of the Charter Act *Jhinjan Singh v Piari Lal I L R 31 All 150* *Maharaj Tewari v Har Charan Lal I L R 26 All 144* *Sajid Khan v Dil Singh I L R 36 All 231* *Ballan Singh v Lalleo Singh 4 All L J 91* *Har Prasad v Jindurray All W N 1905 p 260* *Lalleo Lal h Singh v Raj Killan Singh 2 All L J* and *Muhammad Suleman Khan v Fatima I L R 9 All 104* referred to *Nathi Lal v Emperor* through *Puran Mal 15 All L J 0* and *in re Mathu Mal I L R 24 All 315* distinguished *Farmeshwar Singh v Kailaspati I Lutn L J 336* dissented from MATUK DHARI SINGH v JAISRI (1917) I L R 39 All 612

——— *Magistrate's refusal to take documentary evidence when mineral rights claimed on leases and settlement of mineral rights —Irregularity in procedure —Error of law and judgment —Interference of High Court* Where the dispute was regarding the mineral rights in a certain area between the lessees under the *patnidars* and the *darpatnidars* and the Magistrate declined to accept or consider documentary evidence on either side *Held per* CHITTY AND RICHARDSON J J (TEUNON J *contra*) that whether or not it is possible to decide the question of actual possession on the materials before him it is for the Magistrate to decide and where he was found it possible to decide that question there is no material irregularity in procedure in rejecting evidence as to title and the High Court will not interfere if the Magistrate committed an error of law or of judgment SUJAHDI MONDAL v E L CORK (1917) 22 C W N 459

——— *Supplementary order at the instance of one party without notice to the other* Proceedings under s 145 Criminal Procedure Code were drawn up in respect of certain premises consisting of a *dalan* a hotel and a privy and the Magistrate made his final order with regard to the first two Subsequently the omission in respect of the privy being brought to his notice by one of the parties the Magistrate declared that party s possession of it without any notice to the other party *Held* that the order should not have been made without hearing the other party NATABAR DUTT v BIRESWAR RAKHIT (1917) 22 C W N 552

——— *Whether applicable to a joint holding separate portion of which is held by each co owner—necessity for enquiry into possession —Revision by High Court* *Mussammat M* complainant petitioner filed an application under s 145 Criminal Procedure Code alleging that she had been in possession of her husband s land since his death and that certain reversioners of her husband s property had forcibly taken possession of it and that she feared for her life The Magistrate after a summary enquiry issued notice to the opposite party calling upon them to file their written statements with regard to the actual possession of the land In the statements filed they claimed to be entitled to the land in question alleging that *Mst M* had remarried and further alleging that the *khata* was joint *Mst M* was examined and stated that she had been in possession of the land for many years that she did not know whether there had been any partition but

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s. 145—*contd*

that the various joint owners had held separate portions of the joint holding for themselves each one being in actual possession of a definite portion The Magistrate thereon, without any further enquiry dismissed the application holding that s. 145 Criminal Procedure Code was not applicable to disputes for possession of joint land *Held* that s. 145 Criminal Procedure Code was applicable to a case where the dispute is between co sharers each claiming to be in possession of the disputed land to the exclusion of the others and that the Magistrate should have inquired and decided whether or not the applicant had been recently in actual possession *Musammat* MALAN v MAKHAN SINGH I L R 2 Lah. 372

——— *Government of India Act 1915 s 107—Order under s 145 of the Code of Criminal Procedure made by a Magistrate duly empowered to act under Chapter XII of the Code —Revision—Jurisdiction* When proceedings are in intention in form and in fact proceedings under chap XII of the Code of Criminal Procedure and are taken by a magistrate duly empowered to act under that chapter the High Court has no power to send for the record of those proceedings, either under the Code of Criminal Procedure or under the Government of India Act 1915 *Matukdhari Singh v Janki I L R 39 All 619* followed It is however open to a party in such a case to satisfy the High Court that property of which he is entitled to possession has been dealt with by an order which has no legal authority at all and he may do so by an affidavit or in any other reliable manner and thereby invoke the superintending power of the Court SUNDAR NATH v BABANA NATH (1918) I L R 40 All 364

——— *Symbolical possession value of and how far a determining factor—Magistrate s duty to decide actual possession where considerable time has elapsed since delivery of symbolical possession* The second party's case was that they purchased the disputed property at a sale in execution of a money decree against one N and his sons while the first party alleged that the property belonged to the whole body of villagers whose possession continued even after the delivery of symbolical possession which took place in June 1915 up to November 1916 when the proceedings were started. *Held* that the value of the delivery of symbolical possession was little as against parties who set up an independent title and even as against N and his descendants its value as a piece of evidence must vary inversely with the time that has elapsed since the date of the decree and the delivery of possession thereunder and it was incumbent on the Magistrate to consider the question of actual possession at the date of the proceedings on the evidence adduce on that point before he could make a final order HAZARI KHAN v NAFAR CHANDRA PAL CHAUDHURY (1917) 22 C W N 479

——— *Civil Court decree against third parties when and how far binding on the Criminal Court in deciding the question of actual possession* Where in a proceeding under s 145 Criminal Procedure Code it appeared that the first party previously brought a suit for rent against some persons not parties to the proceeding and purchased the disputed property at the sale in execution of an *ex parte* decree obtained therein and was put into possession without the knowledge of the second party and the Magistrate found that the rent suit was not a *bonâ fide* one brought by the landlord *against tenants in possession* and declared the second party to be in possession of the disputed land *Held* that in the circumstances of the case the order of the Magistrate was not erroneous and was not liable to be set aside *Per* WALMSLEY J—That a previous order of the Civil Court relating to the property in dispute may throw light upon the matter but the evidentiary value to be attached to such a piece of evidence must depend upon the particular circumstances of the individual case *Per* SHAMSUL HUDA J—That decrees of Court so far as third parties are concerned may have different values in different cases. Where for instance there has been a real contest between the parties to a suit and upon an adjudication regarding title or possession a party has been awarded a decree and has been put in possession in execution of such a decree it may not be enough for a party claiming adversely to such a decree to show that he was not a party to it Cases of money decrees followed by sale of properties would stand on a different footing In those cases the sale in execution only passes the right title and interest of the judgment debtor Consequently there is *no adjudication regarding his title to the property* except where an attachment gives rise to a claim and there is an adjudication on such claim or where the delivery of possession leads to an investigation under O XXI rr 97 to 100 Criminal Procedure Code In estimating the value of delivery of possession against third parties it is also material to see what is the true nature of the possession said to have been delivered ATUL CHANDRA MANDAL v SRINATH LAIK (1919) 23 C W N 582

——— *Order declaring one party to be in possession of property in the joint possession of both parties* Where it was found that the second party was in possession of the disputed land on behalf of the first party as also on behalf of himself both parties being members of the same family and the Magistrate declared the second party to be in possession of the disputed land *Held* that the order was without jurisdiction *Tarujan Bibi v Asamuddi Bepari 4 C W N 496* followed KINU MONDAL v HAJI BAUL MONDAL (1919) 21 C W N 1051

——— *Omission to add proper parties—Jurisdiction of High Court—Government of India Act 1915 s 107—Difference of opinion in a Divisional Bench—Opinion of Senior Judge when prevails—Letter Patent s 36—Criminal Procedure Code (Act V of 1898) ss 429 439* Where in a proceeding under s 145 Cr P C. the Petitioner applied to the Magistrate to be made a party on the ground that she was in possession of a portion of the disputed land on which her dwelling house stood and part of which she cultivated but the Magistrate rejected the application *Held per* NEWBOULD J—That the omission to join a party in a proceeding under s. 145 Cr P C. is not an error of jurisdiction and there was no irregularity in the case resulting in such prejudice as would justify the interference of the

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— s 145—contd

High Court *Per* SHAMSUL HUDA J—That there were reasonable grounds in the case for the apprehension that the action taken by the Magistrate resulted in a serious failure of justice which justified the interference of the High Court which was not confined to questions of jurisdiction alone. There being this difference the opinion of the senior Judge prevailed. MOIRAM BEWAH *v* MRI JAN SARDAR 24 C W N 97

——— *Likelihood of breach of the peace basis of jurisdiction under the section—Correct specification of subject matter of dispute in proceeding necessary* Where in his order directing the issue of a proceeding under s. 145 Cr P C., the Magistrate was of opinion that there was no likelihood of a breach of the peace but as the dispute was one relating to possession s 145 Cr P C. was applicable *Held*—That the Magistrate acted without jurisdiction inasmuch as the basis of jurisdiction in cases of this character is the likelihood of a breach of the peace Absence of a clear specification of the subject matter of dispute in the proceeding drawn up is a serious defect. SIB NARAIN MUKHERJEE *v* SATISH CHANDRA GHOSAL 24 C W N 621

——— *Ex parte order—Written return of service by the peon—Affidavit proving service if necessary—Allegation of non-service of notice of order under cl (1) of s 145—Application for rehearing refusal of by Magistrate—Magistrate's duty—High Court power of to order rehearing* Where in a proceeding under s 145 Cr P C. the first party having been absent though there was a written return of service on them by the peon the Magistrate passed an order in favour of the second party upon taking evidence of that party and subsequently on the first party having filed an application to the Magistrate for rehearing of the case on the allegation of non service of the notice of the order under cl. (1) s. 145 the Magistrate refused the said application on the ground that the case could not be revived and thereupon the first party moved the High Court *Held*—That the Magistrate should not have rejected the application for reopening of the case without satisfying himself about the truth or otherwise of the allegation of the first party as to the notice not having been served and in these circumstances the High Court directed that the matter be reheard by the Magistrate KALI CH. KAPALI *v* ABDUL LASKAR 24 C W N 902

——— *Proceeding under s 145 relating to dispute concerning lac on trees standing on the lands of a part whether without jurisdiction—Lac whether comes within definition of land under s 145* Trees may come within the definition of land in s 145 Cr P C. as being produce of land but lac which is not a part of the tree self but is a parasitic growth on the tree is not "crop or a produce of land Proceedings held under s 145 Cr P C. in respect of lac are therefore without jurisdiction The definition of land as including crops or the produce is for the purpose of s 145 only and there is no such definition in connection with s. 147 ALI MOHAMMAD MONDAL *v* FAKIRUDDI MUNSHI 24 C W N 1039

——— *Wrongful and forcible possession meaning of* Under sub s 4 of s 145 Criminal Procedure Code dispossession may be wrongful and yet not forcible A dispossession otherwise than in due course of law is wrongful. It is not necessary that actual force or violence should have been used to some person or persons before a dispossession can be said to be forcible When the dispossession is effected by a show of criminal force sufficient to intimidate those in possession and to deter them from resistance it is forcible within the meaning of the section. SITANATH SHAHA BHOUMIC *v* A HARVEY 25 C W N 601

——— *Effect of sub s (5)—Duty of party to satisfy Magistrate as to non existence of likelihood of breach of peace* The effect of sub s (5) to s 145 Criminal Procedure Code is that unless a party is in a position to show to the Magistrate that there is no likelihood of a breach of the peace the Magistrate's order under sub s (1) stands The mere absence of a finding of the Magistrate that there is likelihood of a breach of the peace where there are mere allegations by the parties to the contrary does not go to the root of the Magistrate's jurisdiction. RANADA RANJAN BHATTACHARJEE *v* BHARAT CHANDRA SHAHA 25 C W N 215

——— *Reference to arbitration—acquiescence essence in award* Where a dispute concerning the possession of land is referred to arbitration by consent of the parties and the award of the arbitrators is acquiesced in by the parties the Magistrate is entitled to proceed under cl (4) of s 145 of the Code of Criminal Procedure and he is not bound to insist upon the production of evidence HALDHAR SINGH *v* BULAKI SINGH 3 Pat L J 248

——— Where in a proceeding under s 145 the Magistrate without taking any evidence made the final order on the basis of a local enquiry of which no note or memorandum was seconded and on the basis further of a judgment in a Criminal Case under s 448 of the Penal Code between a relation and some members *Held* that the final order was based upon no evidence and must be set aside GAGAN HOWLADAR *v* KARIMUDDI CHOWKIDAR 25 C W N 1007

——— *Dispute regarding immovable property—Right to tap a tree* The right to tap a tree is a question which may be the subject of proceeding under s 145 of the Code of Criminal Procedure 1898 Where in a proceeding under s 145 the Magistrate directed the second party to leave an opening in a wall which he was building for the purpose of allowing the first party to tap a tree *Held* that the order was without jurisdiction JIB LAL MAHTO *v* THE KING EMPEROR 3 Pat. L. J 316

——— *Dispute concerning possession of mica mines—order with regard to possession of mines and of mica stored in a godown validity of—whether order separable* When the produce of land has been removed from and is wholly unconnected with and dissociated from the land in dispute a Magistrate has no jurisdiction to deal with it under s 145 (?) of the Code of Criminal Procedure 1898 In a dispute concerning the possession of a mica mine the Magistrate made an order with regard not only to the possession

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s. 145—*contd*

of the mines but also with regard to the possession of certain mica which had been taken out of the mines and stored in a godown belonging to a person unconnected with the parties and their dispute in a village other than that in which the mine in dispute was situate *Held* that the order with regard to the possession of the mica in the godown was bad and must be set aside but that the order being divisible the portion regarding possession of the mines would be maintained SUNDER LALL *v* JHARI LALL 2 Pat L J 637

——— *Delegation of duties to arbitrators by Magistrate ... duty of—jurisdiction wrongful delegation of duties* A Magistrate has no jurisdiction even with the consent of the parties to make over an enquiry under s 145 of the Code of Criminal Procedure 1898 to any other person Sub s (4) of s 145 makes it clear that the section contemplates only an enquiry by the person directed by the Act to hold it and by no one else S 145 read as a whole does not give the person charged with holding the enquiry under that section the right or power to delegate the duties which have been vested in him to any other person to hold an enquiry or to ascertain the facts which the law requires the Magistrate to do himself It is a question of jurisdiction whether a person has power to delegate his duties or not A person who has no power to delegate his duties to another acts in excess of jurisdiction by delegating his powers to another HAMIDUL HAQUE *v* JUBEISH ATAIT HUSSAIN 2 Pat L J 86

——— *Cancellation by District Magistrate of an order of his predecessor passed under sub s (1) of s 145—Whether intra vires—Revision* *Held* that a Magistrate has jurisdiction to cancel an order passed under sub s (1) of s 145 Criminal Procedure Code and to stay proceedings if he becomes satisfied whatever the source of information may be that the state of things does not exist which alone would give him jurisdiction to proceed with the enquiry The High Court cannot interfere in such cases as the Magistrate has not acted without jurisdiction *Manindra Chandra Nandi v Barada Kanta Chowdry (I L R 30 Cal 112)* followed SANTOKH SINGH *v* RAM SINGH I L R 2 Lah 364

——— The absence of a likelihood of a breach of the peace deprives a Magistrate of Jurisdiction PASICK LAL HORE *v* JAGABANDHU ROY (1920) 25 C W N 214

——— Where in a proceeding under s 145 it appeared that a proper appreciation of the oral evidence was impossible in the absence of an important document *Held* that the Magistrate was wrong to refuse to grant an adjournment for the production thereof BISWAMBHAR ROY BASHIA *v* AMINUDDIN TALUKDAR 25 C W N 602

——— Where is a case under the section the parties amicably made a reference of their dispute to 5 arbitrators and the Magistrate made his final order on an award given by 4 although both parties contested the validity *Held* that a reference is not contemplated in a proceeding under this section which directs the Magistrate himself to decide the question of actual possession though if both parties had accepted the award he could have proceeded under sub s ... JAMUNADAS KHIRIWALA *v* HANUMAN BAKSH MARWARI 25 C W N 719

——— *Heirs of judgment debtors remaining in possession notwithstanding delivery of possession to auction purchaser by Civil Court—Such possession of heirs adverse to auction purchaser and fit to be up-held under the section —Sub s 4—Dispossession of auction purchaser after delivery of actual possession by Court* In execution of a decree against the predecessor of the first party possession was given to the auction purchaser the second party of a tank on the 17th November 1918 during the lifetime of the judgment debtor and of a residential house on the 16th May 1920 after his death On the 22nd January 1921 proceedings under s 145 were taken in respect of the tank and the house It was found that notwithstanding the delivery of possession by the Court the first party who were the heirs and representatives of the original judgment debtor continued all along to be in possession up to the date of the proceedings *Held* that the possession of the first party from the date of the death of the judgment debtor to the date of the proceeding was adverse to the second party and in that view the order in favour of the second party in respect of the tank should be set aside That having regard to the fact that the case of the second party was that actual possession was given to them of the house on the 16th May 1920 and having regard to the finding that the first party was in possession up to the date of the proceeding it was clear that between the delivery of possession and the institution of the proceedings there was dispossession of the second party and the order in their favour in respect of the house was also liable to be set aside SHAHABAJ MANDAL *v* BHAJOHARI NATH 25 C W N 743

——— *Collection of offerings at a Karbala whether proceedings with regard to are incompetent—Counsel right of to be heard* A dispute with respect to the collection of offerings at a *Karbala* cannot be the subject matter of a proceedings under s 145 of the Code of Criminal Procedure 1898 The words hear the parties in s 145 (4) mean hear the evidence of the parties and arguments of Counsel or Pleaders appearing on their behalf or arguments addressed by themselves and if the Magistrate refuses to hear arguments he is not complying with the provisions of the law which are imperative GHULAM SIBTAIN *v* MUSSAMMAT KANIZ KHATTON 5 Pat. L J 246

——— *Possession given under decree of Civil Court whether bars proceedings—Code of Civil Procedure (Act V of 1908) O XXI rr 35 and 36* Where possession of immovable property has been delivered to an auction purchaser under O XXI r 35 of the Code of Civil Procedure 1908 a Magistrate acts without jurisdiction in proceeding under s 145 of the Code of Criminal Procedure 1898 and in making an order against the auction purchaser under that section The possession which is delivered to an auction purchaser under O XXI r 35 is actual possession and not symbolical formal possession as under r 36 of that BEHARI GIR *v* RANI BHUBANESWARI 5 Pat. L. J 104

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 146—*contd*

by a Criminal Court under s 146 Criminal Procedure Code the plaintiff was found to have held exclusive and undisturbed possession of the *jallar* for eleven years prior to attachment *Held* that in the circumstances of the case such possession was evidence of a right to possess and unless a better title or antecedent possession was proved by the defendants the plaintiff would be entitled to be maintained in possession against all but the true owner *Nisa Chand Gaita* v *Kanchiram* *I L R 26 Calc 579 s c 3 C W N 668* doubted and distinguished *Wise* v *Amirunissa Khatun* *L R 7 I A 73* and *Sundar* v *Parbati L R 16 I A 186* referred to The rule laid down in the former case presupposes facts to which the provisions of s 9 Specific Relief Act apply SHYAMA CHARAN RAY *v* SURYA KANTA ACHARYA (1910)
15 C W N 163

——— *Order under effect on possession—Suit by one party against the other for declaration of ties—Specific Relief Act (I of 1877) s 42* Where in a proceeding under s 145 Criminal Procedure Code between the plaintiff and the defendants the Magistrate being unable to decide which party was in possession passed an order under s 146 of the Code and appointed the Collector as Receiver to take possession of the land — *Held* that the plaintiff was justified in instituting a suit for declaration of title against the defendants and was not bound to ask for recovery of possession of the land The suit was therefore not bad under s 42 of the Specific Relief Act ADMINISTRATOR GENERAL OF BENGAL *v* BHAGWAN CHANDRA RAY CHAUDRY (1911)
15 C W N 758

——— *Attachment order under s 146 without jurisdiction—Evidence omission to take when amounts to want of jurisdiction—Jurisdiction* Where in a proceeding under s 145 Criminal Procedure Code the Magistrate without taking any evidence or making any local enquiry made an order attaching the land in dispute under s 146 Criminal Procedure Code *Held* that the order of the Magistrate was incompetent and without jurisdiction as the Magistrate did not make the slightest effort to satisfy himself as to the *factum* of possession *Sheikh Mansur Ali* v *Matiullah 12 C W N 896* relied upon *Bejoy Madhab Chaudhury* v *Chandra Nath Chuckerbutty 14 C W N 80* referred to SHEO BALAK RAI *v* BHAGWAT PANDAY (1912) 16 C W N 1052

——— *Limitation—Attachment under s 146 of the Criminal Procedure (Act V of 1898)—Limitation Act (XV of 1877) Sch II Art 142 or 144—Arts 47 and 120 applicability of* Where a property was attached under s 146 of the Criminal Procedure Code on the 7th March 1899 and it remained under attachment till the 26th February 1903 when on the application of the purchaser of the holding of the opponent of the plaintiff in the proceedings under s 145 who had been put in symbolical possession by the Civil Court the Magistrate put him in possession of the same and the plaintiff on the 28th February 1906 instituted a suit to recover possession *Held* that the limitation applicable would be that provided by Art 142 or Art 144 of Sch II of the Limitation Act and the suit was not time barred *Goswami Ranchor* v *Sri Girdharyi I L R 20 All 120* followed *Rajah of Venkatagiri* v *Isakapalli Subbiah I L R 26 Mad 410* dissented from NISARALLI SHEIKH *v* ADEBUDDI SHANA (1912) 16 C W N 1073

——— Suit to determine rights of parties to order under period of limitation for —Suit if lies against Magistrate BROJENDRA KISHORE ROY CHOWDHRY *v* SAROJINI RAY (1915) 20 C W N 481

——— *Section when to be applied—Order made in disregard of decision under s 41 of Survey Act (V of 1875) B S and entry in record of rights—Rejection of material evidence on erroneous grounds—Order made without jurisdiction or after gross and material irregularities prejudicing party* Where in a proceeding under s 145 Criminal Procedure Code the trying Magistrate without giving effect to an order made under s 41 of the Survey Act and the entry in the record of rights in accordance with the order regarding the disputed land which remained fallow up to the time when the present dispute arose attached it under s 146 Criminal Procedure Code *Held* that an order under s 146 Criminal Procedure Code can be made only when the Magistrate is unable to satisfy himself as to which of the contending parties is in possession and the trying Magistrate when he proceeded to determine the question of possession which arose between the parties should in the first instance have presumed that the possession of this fallow land was with the owners who had title as determined by the decision under s 41 of the Survey Act which had the force of an order of the Civil Court and which title was further to be presumed from the entry in the record of rights That the Magistrate not having done that and discarded and rejected on erroneous grounds practically every piece of evidence that might have led him to a correct conclusion made his final order either without jurisdiction or after such gross and material irregularities as seriously to prejudice the second party PRAFULLA NATH TAGORE *v* J HUDDING (1917) 21 C W N 1059

——— *Attachment when to be made—Imperative duty of Magistrate to consider evidence on record* Under s 146 Criminal Procedure Code a Magistrate is entitled to make an order of attachment only when he is unable to satisfy himself as to which of the parties was in possession at the date of the proceeding The section contemplates that the Magistrate should consider the evidence fairly and judicially for the purpose of arriving at a decision The High Court set aside the order under s 146 Criminal Procedure Code on the ground that the Magistrate did not give to the case that judicial consideration which the law requires AMBIKA NATH ROY *v* MOULVI WAZIDALI KHAN (1919)
23 C W N 910

——— ss 146 148—

See ATTACHMENT I L R 40 Calc 105

——— ss 146 196 235 239 342 364, 447 454 532—

See JURY RIGHT OF TRIAL BY
I L R 37 Calc 467

CRIMINAL PROCEDURE CODE (ACT V OF 1898)— *contd*

——— ss 146 439—*Defect in form of initial order—Jurisdiction—Revision* Where in proceedings under Chapter XII of the Code of Criminal Procedure the initial order was defective in that it did not set forth the grounds for the Magistrate being satisfied of the existence of a dispute likely to cause a breach of the peace but on the other hand both parties were fully cognizant of the matter in dispute and there was in fact danger of a breach of the peace the High Court declined in revision to interfere with the Magistrate s order GANGA SARAN SINGH v BHAGWAT PRASAD (1909) I L R 32 All 132

——— s 147—

See DISPUTE CONCERNING EASEMENT I L R 39 Calc 560

——— *Order of Police to remove a bundh thrown across a pyre—Conflict between orders of Civil and Criminal Courts* A Magistrate is not authorised to carry out an order under s 147 Criminal Procedure Code *e g* an order directing the removal of a *bundh*—through the agency of the police *Pasupati Nath Bose v Nando Lal Bose* 5 C W N 67 *Lalit Chandra Neogi v Tarini Persad Gupta* 5 C W N 335 distinguished MOHUNT DALMIR PURI v KHODADAD KHAN (1909) I L R 36 Calc 923 14 C W N 179

——— *Dispute concerning the right to act as pujari and not the right of use of land—Easements* S 147 of the Criminal Procedure Code is not limited in its terms to easements but relates to any dispute concerning the right of use of land or water A dispute concerning merely the right to act as *pujari* in a temple and not the right of use of the land on which it stands is not within the scope of s 147 of the Code *Kader Batcha v Kader Batcha Rowthan I L R 29 Mad 237* not followed. GUIRAM GHOSAL v LAL BEHARI DAS (1910) I L R 37 Calc. 578

——— Jurisdiction—*Jurisdiction to pass order under s 147 on a proceeding under s 133* No order can be passed under s 147 Criminal Procedure Code on a proceeding taken under s 133 ABDUL RAHMAN MIA v SAFAR ALI (1910) 15 C W N 667

——— *Ferry dispute as to possession of—Dispute referred to arbitration pending proceedings—Proceeding stayed—Failure of arbitration—Revival of proceeding without fresh proceeding—Jurisdiction* Where proceedings which were started in respect of a disputed ferry in September 1908 were stayed owing to the dispute having been referred to the Commissioner of the Division for arbitration but the arbitration having failed the Magistrate on 24th May 1910 purported to revive the proceedings and called upon the parties to appear with evidence on 19th June 1910 —*Held* that the Magistrate acted without jurisdiction in reviving the proceeding merely because the arbitration proved ineffectual without being satisfied that there were at the time sufficient grounds or proceeding under the section and without drawing up fresh proceedings for that purpose Fresh proceedings should if necessary be drawn up on the basis of present circumstances and not on what existed in 1908 and it should not be assumed that the causes which existed in 1908 or 1909 still continue to exist When the dispute was referred to arbitration the trying Magistrate recorded an order further proceedings are unnecessary and they are therefore stayed *Held* that the order was in terms one under s 145 (5) Criminal Procedure Code and directly it was passed the Magistrate ceased to have jurisdiction notwithstanding that by mistake he omitted to withdraw an order of attachment previously passed by him KALANANDA SINGH v PARMESHWAR SINGH (1910) 15 C W N 271

——— *Dispute about right to collect tolas from hât if comes within the section* A dispute relating to a right to collect *tolas* from a *hât* is a dispute concerning the right of use of land within the meaning of s 147 Criminal Procedure Code The words concerning the right of use of any land or water in s 147 Criminal Procedure Code which have been substituted in the present Code in place of the words the right to do anything in or upon tangible immovable property in the corresponding section of the Code of 1882 are of wider and more general application than the words concerning land or water in s 145 Criminal Procedure Code SARAT CHANDRA MADAK v MABARAK MULLICK (1916) 21 C W N 439

——— *Right of use of any land or water—Some positive right claimed by each party and denied by the other—Magistrate s duty—Intention of the Legislature* S 147 of the Code of Criminal Proceedure is not well or artistically drafted When a dispute exists concerning the right of use of any land or water each side claims some positive right the existence of which the other side denies and the positive right claimed on either side involves the negative right of preventing the other party from exercising the right which he claims The Magistrate has to deal with the opposing rights which cannot both exist at the same time But the Legislature cannot have intended that the section should be one sided in its operation or that the party which comes on the record as the first party should have any advantage over the second party The Magistrate must have power to make an order whichever party establishes its right In the clause if it appears to him that such right exists the words such right must be understood as meaning such right as is claimed by either party When the Magistrate had found that one of the parties has the right which he claims the enabling clause which follows may make an order permitting such thing to be done or directing that such thing should not be done as the case may be is clearly intended to give him the power to protect the right so found to exist The relative words such thing have no true antecedent but the sense is not difficult The protection is to be afforded by some appropriate order of permission or prohibition PYARI MOHAN SHAHA v HARISH CHANDRA SHAHA (1918) 23 C W N 856

——— s 148—

See s 146 I L R 40 Calc 105

——— Costs under if may be assessed after order—*High Court s power of revision as to the amount of costs awarded* An order for assessment of c under s 148 Criminal Pro

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 148—*concld*

cedure Code does not become illegal simply because it was not made at the time of pronouncing judgment in the proceeding under ss 145, 146 or 147 Criminal Procedure Code The order will be good if it is made within a reasonable time while the same Magistrate who decided the proceeding is sitting and the parties are able to appear before him *Benoda Sundari Choudhurani* v *Kali Kristo Paul Chowdhury I L R 22 Calc 387 Queen Empress* v *Tomijuddi I L R 24 Calc 707* referred to and explained When costs allowed by the Magistrate fall within the scope of s 148 the High Court will not interfere on the ground that they are either excessive or deficient BAKSI SINGH v SAYAD MOHAMED AKBAR ALI KHAN (1911)
15 C W N 811

——— In a case under s 145 an order for costs may be made subsequent to the passing of the judgment All that the law requires is that the order should be made by the same Magistrate An application for costs if not made at the time the judgment is delivered should be filed within a reasonable time NAFAR CHANDRA PAL CHOUDHURY v SIDHARTHA KRISHNA MAZUMDAR
24 C W N 672

——— ss 148 202 293 294 556 Expln —

See LOCAL INSPECTION
I L R 37 Calc 340

——— s 154—

See s 14 **3 Pat L J 291**

——— *First information if evidence* First information is not evidence in the case It is tendered by the Crown for such use as the defence may be able to make of it and to test the consistency of the prosecution evidence ASFAR SHEIKH v THE KING EMPEROR (1910)
15 C W N 198

——— *First information proper recording of by Police* A careful and accurate record of the first information has always been considered as a matter of the highest importance by the Courts in India the object of the first information being to show what was the manner in which the occurrence was related when the case was first started *Emperor* v *Kampu Kuki 11 C W N 554* referred to As the first informaton can be used in evidence under ss 157 and 158 of the Evidence Act to corroborate or impeach the testimony of the person lodging the first information such a document becomes value less if drawn up by some person other than the proper informant *As the first information in this* case which related to a charge of criminal conspiracy at Midnapore was drawn up by a police officer employed in the Criminal Investigation *Department in Calcutta and settled by an attorney Held* that it was of no value PEARY MOHAN DAS v D WESTON (1911) **I L R 40 Calc 898**
16 C W N 145

——— *First information if substantive evidence* Six persons were convicted of murder and sentenced to death The Sessions Judge treated the first information in the case as a piece of *substantive evidence* The *accused* appealed to the High Court There was a difference of opinion between the Judges who first heard the appeal necessitating a reference to a third Judge

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 154—*concld*

and *nearly six months elapsed before the appeal* was finally disposed of *Held per* STEPHEN AND CARNDUFF JJ —The first information although a document of great importance which is in practice always and very rightly produced and proved in criminal trials is not a piece of substantive evidence and it can be used only as a previous statement admissible to corroborate or contradict the author of it AUTOR SINGH v EMPEROR (1913) **17 C W N 1213**

——— ss 154 and 155—

See PENAL CODE (ACT XLV OF 1860) s 409 **I L R 41 All 311**

——— ss 154 155 157 162 and 551—

See EVIDENCE ACT (I OF 1872) ss 25 AND 114 **I L R 35 Mad 247**

——— ss *154 173 190 (1) (b)*—

See CRIMINAL PROCEEDINGS INSTITUTION OF **I L R 37 Calc 49**

——— ss 157 159 476—*Police report by Sub inspector—Further investigation by Superintendent—Subsequent inquiry by Magistrate —Order for prosecution of witnesses examined in the Magistrate s inquiry—Penal Code (Act XLV of 1860) s 193* On the strength of a police report the District Magistrate ordered the Superintendent of Police to investigate a certain case The Superintendent made an investigation and came to the conclusion that the case was not a true one but at the same time suggested that a *Magistrate might* be sent to inquire into it The District Magistrate accordingly deputed a Magistrate of the first class to inquire He made an inquiry which resulted in an order for the prosecution of *certain witnesses* who had given evidence before him *Held* that there was no legal authority for the inquiry held by the Magistrate and his order for the prosecution of the witnesses was therefore invalid *In the matter of the petition of Kandhaiya Lal All Weekly Notes (1899) 87* and *Mouli Dar* v *Nauranji Lal 4 C W N 751* referred to EMPEROR v ABDUL RAHMAN (1909)
I L R 32 All 30

——— s 161—

See s 14 **3 Pat L J 291**

——— *Statement recorded by the police consideration of by Court—Criminal trial —Duty of Judge to record independent finding as to truth or otherwise of evidence* Where the Sessions Judge in his judgment gave no finding as to the truth or falsity of each witness s statement but relied entirely on the difference in what they said in Court and what they said or were alleged not to have said before the *police* *Held* that it is exceedingly dangerous to appeal from evidence judicially recorded under the sanction of cross examination to alleged statements made to the police which *are not judicially* recorded It is the Judge s duty to make up his mind while the witness is before him whether he is a witness of truth or falsehood and it is only when the Judge *sees any* reason to distrust his evidence that omission in a police record can become of any importance JUNG PAI v THE KING EMPEROR (1912) **19 C W N 217**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 162—

See s 154 I L. R 35 Mad. 247
See POLICE DIARIES

3 Pat. L J 568

——— *Statements made to police during investigation—Proof of the statement by oral deposition of the police officer to whom it is made—Indian Evidence Act (I of 1872) s 157* During an investigation a witness stated to the police that she had seen a boy at the scene of murder soon after the offence was committed When examined before the committing Magistrate she denied the presence of the boy at the scene of the offence At the trial before the Court of Sessions she admitted the presence of the boy The statement that the witness had made in the investigation was sought to be proved at the trial by the oral deposition of the police officer to whom it was made The defence objected to this deposition on the ground that it offended against the provisions of s 162 of the Criminal Procedure Code The Sessions Judge overruled the objection and let in the evidence The accused having appealed *Held* that the police officer could be allowed to depose to what the witness had stated to him in the investigation for the purpose of corroborating what she had said at the trial EMPEROR v. HANMARADDI (1914) I L. R 39 Bom 58

——— ss 162, 154, 155 157 and 551—

See EVIDENCE ACT ss 25 114 133 157
I L. R 35 Mad 397

——— ss 162 288—*Indian Evidence Act (I of 1872) ss 21 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of as to statements made by witnesses to him —Examination in chief—Practice and procedure.* During the trial of an accused person the Sessions Judge admitted into evidence and used against the accused the following statements (1) statements made by a witness to the Police implicating the accused (2) the same witness statement to the Panch (3) and his statement as an accused person made before a Magistrate and (4) statements made by the co accused to the Police The witness when he was examined before the Committing Magistrate gave a consistent story but he deposed to quite a different version when he was examined in the Sessions Court The learned Judge disbelieved the changed story and he used the witness statements to the Police and his statements as an accused person and his statements to the Panch by way of corroboration of what the witness had stated to the Committing Magistrate The accused was convicted and sentenced On appeal —*Held* (i) that it was an error to admit statements Nos 1 and 2 for the purpose of corroborating statement No 3 for only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by s 157 of the Indian Evidence Act 1872 Previous statements might be used to corroborate or contradict statements made at the trial not to corrobarate statements made prior to the trial

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 162 288—*contd*

(ii) That statements No 2 were altogether inadmissible as evidence of the accused s guilt or they could at most be regarded as admissons by the co accused which could possibly be used against himself but could not be proved and used against the accused The Investigating Police Officer ought not to be allowed to depose in examination in chief to what the witnesses stated to him It opens up an undesirably wide field for cross examination and leads to the attention of the Court being diverted and distracted from the true issue Moreover it is contrary to the plain intention of s 162 of the Code of Criminal Procedure which is that such statement should be used if at all on behalf of and not against the person under trial EMPEROR v AKBAR BADOO (1910)
I L R 34 Bom 599

——— s 164—

See s 14 3 Pat L J 291
See CONFESSION I L R 40 Calc 873
2 Pat L J 89

——— *Difference between statement and confession—Statement taken on affirmation under s 164 from a complainant not a confession—Admissibility in evidence of statement to prove perjury* A complainant s sworn statement charging another with an offence was recorded by a Magistrate as a statement under s 164 of the Criminal Procedure Code *Held* the fact that the statement happened also to amount indirectly to a confession of the complainant s own guilt of some other offence but not recorded as such by the Magistrate in accordance with the provisions of s 364 of the Code is no bar to its admissibility in evidence against the complainant on a charge of perjury *Semble* Whether a statement is to be regarded as a *confession* or not depend on the connection in which and the prupose for which it was made A statement recorded as such cannot be used as a confession nor a confession as a statement *Re* PAMANUJAMMA (1916) I L I 39 Mad. 977

——— *Warrant for search of house—Resistance to police—Legality of warrant* In the course of an investigation into a dacoity which had occurred in the Agra district a circle inspector of the Mainpuri district sent a sub inspector to the circle inspector concerned with a suggestion that the house in which one Nihal Singh lived in the Mainpuri district might be searched The Agra circle inspector thereupon gave as he said written instructions to the sub inspector who had been sent to him from Mainpuri to the effect that the house of Nihal Singh be searched it connection with the dacoity at Nagla Murli that he might be arrested for the sake of identification and that the houses of those persons should also be searched who were suspected by the sub inspector of receiving stolen property Nihal Singh was not directly implicated by any one in the dacoity under investigation. When the police in pursuance of this order attempted to search the house where Nihal Singh was living which belonged to Brikhbhan Singh his father in law they were assaulted by Brikhbhan Singh and his relations and friends and prevented from conducting the search or arresting Nihal Singh. *Held* that the authority under which the police had attempted to make the search was invalid and the persons

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 164—*concld*

resisting them could not be convicted under s 332 of the Indian Penal Code Whether or not these persons might have been found guilty under other sections of the Indian Penal Code as *e g* ss 107 395 or 142 was discussed as a matter arising on the evidence in the case EMPEROR v BRIKHBHAN SINGH (1915) I L R 38 All 14

——— Portion of a statement admitted— When the first information was given by the accused himself in which he admitted committing the offence but when he made a statement subsequently before the Deputy Commissioner he did not make a confession and this statement was not recorded *Held* that the first information was only admissible as far as it gave a narrative of events before the occurrence but accused could demand that it be considered in its entirety SUPERINTENDENT AND LEGAL REMEMBRANCER BENGAL v LALIT MOHAN SINGHA ROY 25 C W N 788

——— ss 164 298—

See MISDIRECTION I L R 45 Calc 557

——— ss 164 (3) and 342—*Confessions recorded by Magistrate—Without making a memorandum of the enquiry made to satisfy himself that the confession is made voluntarily—Examination of accused by the Court—improper questions* *Held* that although it is most advisable that a Magistrate recording a confession under s 164 of the Code of Criminal Procedure should make a memorandum of enquiry showing what steps he has taken to fully satisfy himself that the accused person is confessing voluntarily a confession otherwise duly recorded is not inadmissible in evidence merely because no such memorandum has been made *Nga Shwe Sin* v *Emperor (4 Cr L J 385)* and *Queen Empress* v *Narayan (I L R 25 Bom. 543)* distinguished *Held also* that although a Court may under section 342 of the Code at any stage of any enquiry or trial put such questions to the accused as the Court considers necessary it is not competent to the Court to cross examine the accused or to ask him question with the object of trapping him into some sort of admission UMAR DIN v CROWN I L R 2 Lah 129

——— ss 164 (1) and 533—*Held* that it is imperative for the Magistrate before recording a confession made to him in the course of a police investigation to question the person making it as to whether it was made voluntarily and that the defect being one of substance was not cured by s 533 and the confession was not admissible in evidence FARID v THE CROWN I L R 2 Lah 325

——— s 165—

See s 4 (*p*) I L R 42 Mad 446

See s 94 17 C W N 1209

See SEARCH BY POLICE OFFICER I L R 41 Calc 261

——— General search without warrant— *Private defence right of against police search* S 165 Criminal Procedure Code does not authorise a general search by the police for stolen property in the house of an absconding offender It speaks of a specific document or thing which may be the subject of summons or order under s 94 *Ishuar Chandra Ghosal* v *The Emperor 12 C W N 1016*, referred to Where the police without a search warrant under s 98 Criminal Procedure Code entered the house of the accused and searched for stolen articles —*Held* that the search was illegal and the occupiers of the house who were also part owners had the right of private defence against the searching officers. BAJRANGI GOPE v EMPEROR (1910) I L R 38 Calc 304 15 C W N 343

——— A search made by a Sub Inspector of Police under following directions From a circle inspector House of Nihal Singh be searched in connection with the dacoity at Nagla Muli and that he might be assisted for sake of identification and that houses of those persons should be searched who were suspected by Sub inspector of receiving stolen property held invalid. EMPEROR v BRIKHBHAN SINGH I L R 38 All 14

——— s 167—

See s 110 I L R 39 Mad. 928

See s 112 I L R 36 All. 262

——— s 167 169—

See s 110 I L R 39 Mad. 928

I L R 43 All 186

——— s 170—Whether the discretion vested in the investigating police officer by s 170 can be controlled by the Superintendent of Police UMESH CHANDRA ROY v SATISH CHANDRA ROY (1917) 22 C W N 69

——— s 172—

See PRIVY COUNCIL PRACTICE OF I L R 44 Calc 876

——— *Case Diaries proper recording of by investigating officer* The object of recording case diaries under s 172 Criminal Procedure Code is to enable Courts to check the method of investigation by the Police and this object was defeated in this case as the provisions of the law for recording case diaries from day to day had been deliberately disobeyed by the Police during the most important period of the investigation *Queen Empress* v *Mannu* referred to PEARY MOHAN DASS v D WESTON (1911) 16 C W N 145

——— ss 173 190 (1) (b)—

See s 4 25 C W N 357

See COGNIZANCE OF OFFENCE I L R 40 Calc 854

See CRIMINAL PROCEEDINGS I L R 37 Calc. 49

——— s 177—

See s 4"6 4 Pat L J 298

See EMIGRATION I L R 37 Calc 27

——— *Jurisdiction—Effect of place where offence was committed ceasing to be British territory* An offence was committed in March 1910 at a place which was then part of the Mirzapur District Subsequently one of the persons alleged to have taken part in the commission of such offence was arrested in Bengal and sent to Mirzapur when he was committed by the Joint Magistrate to take his trial before the Court

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 177—*concld*

of Session. In the meanwhile the place where the offence was committed had ceased to be British territory *Held* that this fact did not oust the jurisdiction of either the Magistrate or the District Judge of Mirzapur LATEEFOR *v* GANGA (1912)
I L R 34 All 451

——— ss 177 to 187 526 531—*Murder committed outside Madras—Inquiry by Chief Presidency Magistrate and commitment to High Court Sessions—Jurisdiction of Magistrate Original Criminal Jurisdiction of High Court—Letters Patent cl 24—Jurisdiction whether conferrable under s 526 Criminal Procedure Code* The petitioners were charged before the Chief Presidency Magistrate of Madras with having kidnapped a child from his guardian in Madras with having stolen his jewels from him in Madras and with having taken him out of the city to a place within the jurisdiction of the Sessions Judge of Chingleput and there murdered him The Chief Presidency Magistrate after inquiry committed the petitioners to the High Court Sessions on the aforesaid charges. On an application to the High Court on its appellate side to set aside the commitment so far as the charge of murder was concerned on the grounds that (*a*) the Magistrate had no local jurisdiction to inquire into the case and (*b*) the High Court had no local jurisdiction to try the charge of murder *Held* (i) that the irregularity or illegality if any in the Magistrate s proceedings was cured by s 531 Criminal Procedure Code (ii) that even if the High Court had no jurisdiction on its Original Side to try the case an order could be made under s 526 Criminal Procedure Code directing the trial at the High Court Sessions Ordered accordingly *Semble* The High Court has power under cl. 24 of the Letters Patent in the exercise of its original criminal jurisdiction to try persons for offences committed outside the City of Madras *Queen Empress* v *James Ingle I L R 16 Bom 200* and *Queen Empress* v *Ram Dei I L R 18 All 58* referred to *Assistant Sessions Judge of North Arcot* v *Ramammal I L R 36 Mad 387* distinguished. GANAPATHY CHETTY *v* REX (1919)
I L R 42 Mad 791

——— ss 177 531—

See PENAL CODE ss 403 471
I L R 36 Mad 387

——— 179—*Criminal misappropriation—Jurisdiction— Place where consequences of act ensued* The word consequence in s 179 of the Criminal Procedure Code means a consequence which forms a part and parcel of the offence It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence Hence where an agent in charge of a branch shop in Sultanpur misappropriated money belonging to his principal, which should have been sent to the head office at Cawnpore it was *held* that the Courts at Cawnpore had no jurisdiction to try the agent for criminal misappropriation *Queen Empress* v *O Brien I L R 19 All 111* and *Colville* v *Kristo Kishore Bose I L R 26 Calc 746* distinguished *Babu Lal* v *Ghansham Das All L J 333* referred to GANESHI LAL *v* NAND KISHORE (1912)
I L R 34 All 487

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 179—*concld*

——— *Jurisdiction—Place where consequence of act ensued—Act No XLV of 1860 (Indian Penal Code) s 406—Criminal breach of trust* *Held* that the loss caused to the person beneficially entitled to property through a criminal breach of trust is a consequence which completes the offence and a prosecution will therefore lie at the place where such loss occurred. *Queen Empress* v *O Brien I L R 19 All 111* *Emperor* v *Mahadeo I L R 32 All 377* followed *Babu Lal* v *Ghansham Das All W N (1908) 115* *Ganeshi Lal* v *Nand Kishore I L R 34 All 487* and *Sirdar Meru* v *Jethabhai Amirbhai 8 Bom L R 513* distinguished *Kirbhe Ram* v *Kallu Ram 4 O C 376* dissented from LANGRIDGE *v* ATKINS (1912) I L R 35 All 29

——— ss 179 181 (2)—

See JURISDICTION I L R 44 Calc 912

——— *Complainant in Madras town doing business in mofassil by agent—Agent s duty to remit principal s money to Madras—Misappropriation by agent in mofassil—Jurisdiction to try offences under Indian Penal Code (Act XLV of 1860) s 406 or 409* A firm in the town of Madras dealing in kerosine oil authorized an agent in a mofassil station to sell their oil and remit to them at Madras the sale proceeds less his commission The agent sold the oil in the mofassil and without sending the proceeds misappropriated the same *Held* (*a*) that the proceeds were the property of the Madras firm (*b*) that the case was governed by s 181 and not s 179 of the Criminal Procedure Code and (*c*) that as the misappropriation and consequent loss occurred to the Madras firm primarily only in the mofassil station the Magistrate at that station and not the one in Madras had jurisdiction to try the offences under s 406 or 409 Indian Penal Code Cases on the subject reviewed. KRISHNAMACHIRI *v* SHAW WALLACE & Co (1915) I L R 39 Mad 576

——— ss 179 and 182—

See PENAL CODE (ACT XLV OF 1860) s 405 I L R 38 Mad 639

——— ss 179 to 188—*Entrustment to native Indian subject in India—Conversion outside British India—Loss in India—Jurisdiction of Indian Courts to charge and try without certificate under s 188* A entrusted some jewels at Vellore to the accused a native Indian subject for sale The accused pledged them in Bangalore and misappropriated the proceeds at Madras *Held* that the British Court at Vellore had jurisdiction to try the accused for breach of trust or dishonest misappropriation without a certificate under s 188 Criminal Procedure Code *Sessions Judge Tanjore* v *Sundara Singh (1910) Mad W N 143* *Imperator* v *Tribhun 13 Cr L J 530* dissented from ASSISTANT SESSIONS JUDGE NORTH ARCOT *v* RAMASWAMI ASARI (1914)
I L R 38 Mad 779

——— s 180—*Indian Penal Code (Act XLV of 1860) s 411—Theft within British territory—Retention of stolen articles out de British territory—British Court of have jurisdiction to try accused for such retention of stolen articles* The accused was found in possession of stolen articles at a place outside British territory The theft

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 164—*concld*

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——— *Portion of a statement admitted*—When the first information was given by the accused himself in which he admitted committing the offence but when he made a statement subsequently before the Deputy Commissioner he did not make a confession and this statement was not recorded *Held* that the first information was only admissible as far as it gave a narrative of events before the occurrence but accused could demand that it be considered in its entirety SUPERINTENDENT AND LEGAL REMEMBRANCER BENGAL v LALIT MOHAN SINGHA ROY 25 C W N 788

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——— s 177—

See s 476 4 Pat L J 293

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CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s. 177—*concl*

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——— ss 177 to 187 526 531—*Murder committed outside Madras—Inquiry by Chief Presidency Magistrate and commitment to High Court Sessions—Jurisdiction of Magistrate Original Criminal Jurisdiction of High Court—Letters Patent cl 24—Jurisdiction whether conferrable under s 526 Criminal Procedure Code* The petitioners were charged before the Chief Presidency Magistrate of Madras with having kidnapped a child from his guardian in Madras with having stolen his jewels from him in Madras and with having taken him out of the city to a place within the jurisdiction of the Sessions Judge of Chingleput and there murdered him. The Chief Presidency Magistrate after inquiry committed the petitioners to the High Court Sessions on the abovesaid charges. On an application to the High Court on its appellate side to set aside the commitment so far as the charge of murder was concerned on the grounds that (a) the Magistrate had no local jurisdiction to inquire into the case and (b) the High Court had no local jurisdiction to try the charge of murder *Held* (i) that the irregularity or illegality if any in the Magistrate s proceedings was cured by s 531 Criminal Procedure Code (ii) that even if the High Court had no jurisdiction on its Original Side to try the case an order could be made under s 526 Criminal Procedure Code directing the trial at the High Court Sessions. Ordered accordingly *Semble* The High Court has power under cl. 24 of the Letters Patent in the exercise of its original criminal jurisdiction to try persons for offences committed outside the City of Madras *Queen Empress* v *James Ingle I L R 16 Bom 200* and *Queen Empress* v *Ram Dei I L R 18 All 387* referred to *Assistant Sessions Judge of North Arcot* v *Ramammal I L R 36 Mad 387* distinguished. GANAPATHY CHETTY v REX (1919) I L R 42 Mad 791

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CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 179—*concl*

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See JURISDICTION I L R 44 Calc 912

——— *Complainant in Madras town doing business in mofassil by agent—Agent s duty to remit principal s money to Madras—Misappropriation by agent in mofassil—Jurisdiction to try offences under Indian Penal Code (Act XLV of 1860) s 406 or 409* A firm in the town of Madras dealing in kerosine oil authorized an agent in a mofassil station to sell their oil and remit to them at Madras the sale proceeds less his commission The agent sold the oil in the mofassil and without sending the proceeds misappropriated the same *Held* (a) that the proceeds were the property of the Madras firm (b) that the case was governed by s 181 and not s 179 of the Criminal Procedure Code and (c) that as the misappropriation and consequent loss occurred to the Madras firm primarily only in the mofassil station the Magistrate at that station and not the one in Madras had jurisdiction to try the offences under s 406 or 409 Indian Penal Code Cases on the subject reviewed. KRISHNAMACHIRI v SHAW WALLACE & Co (1915) I L R 39 Mad 576

——— ss 179 and 182—

See PENAL CODE (ACT XLV OF 1860) s 405 I L R 38 Mad 639

——— ss 179 to 188—*Entrustment to native Indian subject in India—Conversion outside British India—Loss in India—Jurisdiction of Indian Courts to charge and try without certificate under s 188* A entrusted some jewels at Vellore to the accused a native Indian subject for sale The accused pledged them in Bangalore and misappropriated the proceeds at Madras *Held* that the British Court at Vellore had jurisdiction to try the accused for breach of trust or dishonest misappropriation without a certificate under s 188 Criminal Procedure Code *Sessions Judge Tanjore* v *Sundara Singh (1910) Mad W N 143* *Emperor* v *Tribhun 13 Cr L J 530* dissented from. ASSISTANT SESSIONS JUDGE NORTH ARCOT v RAMASWAMI ASARI (1914) I L R 38 Mad 779

——— s 180—*Indian Penal Code (Act XLV of 1860) s 411—Theft within British territory—Retention of stolen articles outside British territory—British Courts if have jurisdiction to try accused for such retention of stolen articles* The accused was found in possession of stolen articles at a place outside British territory The theft

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

———— s 180—contd

of the articles took place within British territory The accused was placed on his trial before the Court in British territory having jurisdiction over the place where the theft took place *Held* that the British Courts had no jurisdiction to try the accused for an offence under s. 411 Indian Penal Code committed at a place beyond British territory with regard to the stolen properties MOHESHWARI PROSAD SINGH v THE KING EMPEROR (1914) 18 C W N 1178

———— s 181—

See JURISDICTION I L R 41 Calc 912

———— *Kidnapping committed outside British India—Jurisdiction of British Courts when person kidnapped detained within British India—Moyurbhunj not in British India* A person charged with having committed the offence of kidnapping in Moyurbhunj which is outside British India cannot be tried by a Court in British India within the local limits of which the person kidnapped may be conveyed or concealed or detained BHUTA SANTAL v DAMA SANTAL (1915) 20 C W N 62

———— *Penal Code (Act XLV of 1860) s 406—Criminal breach of trust in respect of monies received at Singapore for which the accused was liable to account in Calcutta—Court in Calcutta if has jurisdiction to take cognisance of the complaint —Jurisdiction* Where a firm carrying on business in Calcutta employed A as agent at Singapore and prosecuted him in Calcutta for criminal breach of trust in respect of monies received at Singapore for which he was to render accounts in Calcutta *Held*—That the Court in Calcutta had jurisdiction to take cognisance of the complaint ABDUL LATIFF YUSUFF v ABU MUHAMED KASSIM 26 C W N 175

———— s 182—

See PENAL CODE s 405 I L R 38 Mad 639

———— ss 182 531—

See COMPANY I L R 45 Calc 490

———— *Jurisdiction—Place at which consequence of act ensued—Criminal breach of trust—Penal Code (Act XLV of 1860) s 408* One M was employed as an agent by a firm in Mirzapur Goods were entrusted to him for sale in various districts in Lower Bengal and from time to time as he sold goods he remitted money to his employers at Mirzapur When called upon to furnish accounts he offered to furnish Rs 500 as a deposit but did not submit any account *Held* that the Courts of Mirzapur had jurisdiction to try M for whatever offence he had committed arising out of the above transactions *Queen Empress v O Brien I L R 19 All 411* followed EMPEROR v MAHADEO (1910) I L R 32 All 397

———— s 185—

See JURISDICTION I L R 41 Calc 305

See JURISDICTION OF HIGH COURT I L R 44 Calc 595

———— *Power of the High Court under the section to transfer case pending in Court not subject to its jurisdiction—Stay of further proceeding to enable accused to bring Civil action—Proceeding which discloses no offence if to be quashed* Where the nominee of a policy holder claiming payment in respect of a life policy effected at Chittagong and resident within the District of Chittagong brought a charge of cheating in the Court of the District Magistrate of Chittagong against the Secretary and other officers of an Insurance Company having its head office at Gujranwalla in the Punjab and a branch office at Chittagong and the Insurance Company brought a charge of cheating against the nominee and others in the Court of the District Magistrate of Gujranwalla both charges relating to the payment of the amount secured on the policy *Held* (on an application by the nominee under s 185 Cr P C) that the High Court could properly make an order under s 185 Cr P C to the effect that the offence should be enquired into and tried at Chittagong and transfer the case from the Court of the District Magistrate of Gujranwalla to that of the District Magistrate of Chittagong Proceedings in the case were however stayed for two months to enable the accused to institute a Civil suit *Held* (on the application of the officers of the Insurance Company) that as on the face of the record no offence had been disclosed against them the proceeding against them should be quashed. HIRAN KUMAR CHOWDHURY v MANGAL SEN (1912) 17 C W N 761

———— *High Court if can interfere merely on the ground of convenience* Where the petitioners were prosecuted in the Court of the Additional District Magistrate of Lahore under ss 409 420 467 447 Penal Code and on the allegations of the prosecution the Courts at Chittagong and Lahore were equally competent to exercise jurisdiction in the case *Held* that s 185 Cr P C does not warrant interference by the High Court merely upon the ground of convenience The decision of the High Court within the local limits of whose appellate jurisdiction the offender actually is can only be sought where a doubt arises as to the Court by which an offence should be enquired into or tried. RAJANI BINODE CHAKERBURTTY v THE ALL INDIA BANKING AND INSURANCE CO LD LAHORE (1913) 17 C W N 1297 I L R 41 Cal 305

———— *Doubt as to Court having jurisdiction to try a case decision of High Court in case of* In a case under s. 408 Indian Penal Code instituted in the Court of one of the Presidency Magistrates of Calcutta it being doubtful whether the Courts in Calcutta or in the District of 24 Parganas had jurisdiction the High Court in exercise of its jurisdiction under s 185 of the Code of Criminal Procedure decided that the case should be inquired into and tried by the Court within the District of 24 Parganas BENODE PEHARY MAL v GANESH CHANDRA MISTRI (1916) 21 C W N 434

———— *Transfer of case—Case pending in a Court outside the jurisdiction of High Court—Power of High Court to transfer to a Court within its jurisdiction or to decide by which Court such case shall be tried* S 185 of the Criminal Procedure Code (Act V of 1898) does not empower a High Court to transfer to a Court subordinate to its own jurisdiction a case pending in a Court subordinate to the jurisdiction of another High

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

—— s 185—*concld*

Court nor does it empower a High Court to decide by which Court such a case shall be tried RAHMAN SAHIB v VELLAPPI (1916) I L R 40 Mad 835

—— ss 188 192—

See SURETY I L R 42 Calc 706

—— *Effect of illegal arrest on trial of accused—Extradition* Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code it will not avail him to say that he was brought there illegally from a foreign country The principle upon which English cases to this effect are based underlies also s 188 of the Criminal Procedure Code (Act V of 1898) EMPEROR v VINAYAK DAMODAR SAVARKAR (1910) I L R 35 Bom 225

—— *Offence committed on high seas—Native Indian subject of His Majesty—Jurisdiction of British Magistrate to try accused without sanction of Government* The accused pulled up certain fishing stakes which the complainant had planted in the sea at a distance of five or six miles beyond the low water mark. They were convicted by a Magistrate for offences punishable under ss 426 143 of the Indian Penal Code (Act XLV of 1860) On appeal, it was contended that the Magistrate had no jurisdiction to try the case without the sanction of the Local Government under s 188 of the Criminal Procedure Code (Act V of 1898) for the offences if any were committed on the high seas. *Held* overruling the contention that the Magistrate had jurisdiction to try the case inasmuch as the first proviso to s 188 of the Criminal Procedure Code 1898 was limited to territorial jurisdiction and had no bearing upon the question of jurisdiction to try an offence committed on the high seas EMPEROR v MANUEL PHILIP (1917) I L R 41 Bom 667

—— *Penal Code s 363—Kidnapping from lawful guardianship—Offence committed outside British territory—Jurisdiction—Certificate of Political Agent* The absence of the certificate of the Political Agent required by s 188 of the Code of Criminal Procedure is an absolute bar to the trial of a case to which the provisions of that section apply *Queen Empress v Ram Sundar I L R 19 All 109* followed EMPEROR v NARAIN (1919) I L R 41 All 452

—— *Certificate of Political Agent not obtained—Agreement between Darbar of Native State and the neighbourhood authorities in British India not a substitute therefor* The existence of an agreement between the Darbar of a Native State and the authorities of the neighbouring portion of British India to render mutual assistance in the arrest of persons found gambling in either territory will not do away with the necessity of obtaining the certificate of the Political Agent or the Local Government where such certificate is required by section 188 of the Code of Criminal Procedure EMPEROR v NANDU I L R 42 All 89

—— ss 188 227—*Offence committed in Nepal territory—Certificate granted by Political Officer specifying a particular section of the Indian Penal Code—Trying Magistrate not debarred from convicting under another section if within the facts stated* A certificate granted by a Political Officer under s 188 of the Code of Criminal Procedure in respect of a certain set of facts will cover every charge which the facts disclosed in the proceedings will suffice to sustain The certificate is granted on the allegation of certain facts which constitute the charge against the accused and the trying Magistrate is not restricted to the section which is mentioned in the certificate but at the utmost to the facts EMPEROR v KRISHNA NATH TIWARI (1911) I L R 33 All 514

—— s 190—

See s 4 I Pat L J 592

See s 54 I L R 44 Calc 76

See s 110 4 Pat L J 7

See s 154 I L R 37 Calc 49

See COGNIZANCE I L R 40 Calc 854

See COMPLAINT I L R 41 Calc 1013

See FALSE INFORMATION I L R 46 Calc 807

See JURISDICTION OF CRIMINAL COURT I L R 40 Calc 71

See JURISDICITON OF MAGISTRATE I L R 37 Calc 221

—— *Complaint not disclosing facts—Validity when may be questioned* The complaint in this case did not set out the facts which constituted the alleged offence but stated that the persons named had committed offences punishable under certain sections of the Penal Code *Held (per* MOOKERJEE *J)* That a complaint of this description constituted a merely colourable compliance with the provisions of s 190 Criminal Procedure Code *Per* HARINGTON *J*—There was a complaint which the Magistrate had jurisdiction to entertain Where a trial has been concluded the proceedings cannot be attacked on the ground that the materials the Magistrate had before him at the time he issued process were meagre or even insufficient if the Magistrate had jurisdiction to issue process To make the whole proceeding void it is necessary to show that there was no complaint before the Magistrate and the Magistrate had no other course but to refuse to issue process on the ground that he had no jurisdiction under the law to issue process When the accused took no steps at the initial stage to set aside the Magistrate's order issuing process on the ground that on the face of it the materials on which it was made were insufficient and proceeded to trial *Held (per* HARINGTON *J)* that no objection could be allowed to be taken to the issue of the process upon an appeal from the conviction had at the trial the point not being one affecting the fairness of the trial in any way *Per* MOOKERJEE *J* The case was covered by cl (a) of s 537 of the Criminal Procedure Code PULIN BEHARI DAS v KING EMPEROR (1911) 16 C W N 1105

—— *Information before police reported to be false—Judicial enquiry ordered by Deputy Magistrate disposing of police report—Case made over to another Magistrate—Issue of process by latter after enquiry—Competency of such Magistrate to try* Where the police reported an ... lodged against the peti

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 190—*contd*

tioners by one S to be false and recommended the prosecution of S and the Deputy Magistrate in charge on receipt of the police report ordered a judicial enquiry although there was no complaint by S and subsequently recalled that order and made over the case for disposal to another Deputy Magistrate who after taking evidence issued summons against the petitioners *Held* that the Deputy Magistrate who issued process against the petitioners did not act either upon a police report or upon a complaint and although s 190 cl (c) may not strictly apply the petitioners ought to be allowed to have the case tried by another Magistrate ANANTA RAM TEWARY *v* SHEIKH ALTAB SARKAR (1913) **17 C W N 795**

——— *Trial by second class Magistrate as case under s 408 Indian Penal Code of complaint disclosing offences under s 409 477A Indian Penal Code and acquittal by him—District Magistrate s jurisdiction to take cognizance of further complaint* A complaint was filed against the petitioner disclosing offences under ss 409 and 477A Indian Penal Code The case was by mistake made over to and tried by a Magistrate exercising second class powers and not invested with the power of making commitment to the Court of Sessions who treated the case as one under s 408 Indian Penal Code and acquitted the accused The complainant subsequently presented a further complaint under ss 409 and 477A Indian Penal Code to the District Magistrate who took cognizance of the same *Held* that the District Magistrate was competent to take cognizance of the second complaint KRISHNA DHON GHOSH *v* MOHENDRA NATH DUTT (1918) **23 C W N 518**

——— *Omission of one Magistrate to take cognizance on suspicion effect of on subsequent proceedings* WOODROFFE J (BEACHCROFT J concurring) Where the Police searched a hut on suspicion and incriminating evidence was found and after the search was over the Additional District Magistrate came to the spot and saw what had been found and a search list was prepared which the Additional District Magistrate signed and the accused were subsequently placed before another Magistrate who held an enquiry and committed the accused to the Court of Sessions for trial *Held* that the fact that the Additional District Magistrate did not take cognizance of the case at once did not render the subsequent proceedings before another Magistrate bad nor could such subsequent proceedings be held to be prejudicial to the accused That it was not the duty of the Additional District Magistrate to take cognizance of the case on the basis of what he found at the spot RAMESH CHANDRA BANERJEE *v* EMPEROR (1913) **18 C W N 498**
I L R 41 Calc 350

——— *District Magistrate receiving information of offence as President of District Board—Right to take cognizance under s 190 (c)* The fact that a District Magistrate who happens to be also the President of a District Board receives in the latter capacity information as to the commission of an offence by a servant of the Board does not debar him from taking cognizance of the offence under s 190 (c) of the Criminal Procedure Code *Thakur Pershad Singh v The Emperor (1906) 10 C W N 770*, dissented from SUNDARASAN *v* KING EMPEROR (1920) **I L R 43 Mad 709**

——— *Cattle Trespass Act (I of 1871) s 20—Magistrate—Cognizance of offences—Special authority to try cases under the Cattle Trespass Act* A Magistrate who is authorized under s 190 of the Code of Criminal Procedure 1898 to take cognizance of offences upon receiving complaints can take cognizance of complaints under s 20 of the Cattle Trespass Act 1871 although he is not specially authorised in that behalf EMPEROR *v* VISHVANATH VISHNU (1919) **I L R 44 Bom 42**

——— ss 190 and 200—*Complaint failure to examine complainant* M the defendant in a civil suit filed a petition before the District Magistrate stating that he had no certain knowledge of the fact but he had heard that the plaintiff had taken steps to abstract from another court where a number of papers had been filed in a previous suit papers in connection with the present suit and had employed K J and B to introduce by forgeries entries therein which would support the plaintiff's case He did not ask the Magistrate to issue summonses or warrants against the accused but desired that a confidential enquiry should be made by the Criminal Investigation Department The Magistrate ordered the inquiry to be made and on receipt of the report of the inquiry issued warrants against the three accused The High Court stayed further proceedings pending the disposal of the civil suit When that suit had been decided the Magistrate without making any further enquiry ordered the proceedings against K to be continued *Held* that the petition filed by M was a complaint within the meaning of s 190 (1) (a) of the Code of Criminal Procedure 1898 and that the Magistrate should have examined M on oath under s 200 *Held further* that on receipt of the report of the enquiry by the Criminal Investigation Department the Magistrate should either have called upon M to lodge a further complaint and examined him on oath or should have directed the officer of the Criminal Investigation Department to file a complaint The power of a Magistrate to proceed upon information is intended to be used in cases in which the Magistrate has good reason to believe that there has been a serious infringement of the law but is unable to take action in the ordinary way for the reason that the party aggrieved is unwilling or unable to prosecute It is not open to a Magistrate under s 190 (1) (c) to take cognizance upon complaint without examining the complainant or upon the report of a police officer JHUNA LAL SAHU *v* THE KING EMPEROR **2 Pat L J 657**

——— ss 190 200 and 403—There is nothing in the code to prevent a Magistrate from entertaining a second complaint after an order of discharge by another Magistrate BIJOO SINGH *v* KING EMPEROR **2 Pat L J 34**

——— ss 190 295 (e) 309 530 (k) 531—
See MAGISTRATE **I L R 39 Calc 119**

——— ss 190 497 498—
See BAIL **I L R 37 Calc 412**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 190 (1) 202 203—

See COMPLAINT I L R 41 Calc 1013

——— s 191—

See DEFENCE OF INDIA ACT (IV OF 1915) s 2 I L R 41 All 164

——— s 192—

See s. 107 I L R 41 Mad. 246

See MAGISTRATE POWER OF I L R 38 Calc 68

——— *Transfer—Case transferred by District Magistrate to the Court of a Sub divisional Magistrate—Further transfer by Sub divisional Magistrate* ultra vires *Held* that when a District Magistrate has referred a case for trial to a Sub divisional Magistrate the latter has no power to transfer it to any other Magistrate subordinate to him. BASHIR HUSAIN *v* ALI HUSAIN (1913) I L R 33 All 166

——— ss 192 200 to 203 476 537—

See FALSE INFORMATION I L R 43 Calc 173

——— s 193—*Transfer—Appeal— Case — Powers of Sessions Judge Held* that the word cases as used in s 193 (2) of the Code of Criminal Procedure does not include appeals In re *the petition of Mansa Asmal I L R 9 Bom 165* and *Chatter Pal Singh v Raja Ram I L R 7 All 621* followed. *Allah Dei Begam v Kesri Mall I L R 28 All 93* referred to EMPEROR *v* ABDUR RAZZAK (1915) I L R 37 All 286

——— s 195—

See s 4 I L R 35 All 8
I L R 43 Calc 1152

See s 197 I L R 2 Lah 305

See s 230 I L R 45 Bom 834

See APPEAL TO PRIVY COUNCIL I L R 41 Calc 734

See APPEAL RIGHT OF I L R 44 Calc 804

See APPRAISEMENT I L R 48 Calc 1086

See CALCUTTA RENT ACT 1920 s 24 25 C W N 661

See CIVIL PROCEDURE CODE 1908 s 115 I L R 33 All 512

See CRIMINAL JURISDICTION I L R 37 Calc 714
14 C W N 896

See CRIMINAL PROCEDURE CODE
s 476
1 Pat L J 233 533 and 637

See PENAL CODE (ACT XLV OF 1860)
ss 182 211 I L R 34 All 522
ss 19 AND 193
I L R 45 Bom 663

See PERJURY I L R 33 Mad 471

See SANCTION FOR PROSECUTION

See USING A FORGED DOCUMENT I L R 39 Calc 463

——— Further evidence—*Superior Court has no jurisdiction to order further inquiry by Subordinate Court* A superior Criminal Court

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 195—*contd*

to which an appeal has been preferred under s 195 of the Criminal Procedure Code against an order of an inferior Criminal Court granting sanction has no power to take or call for further evidence The power to do so given by s 428 is limited to appeals under that chapter KRISHNA REDDY *v* EMPEROR (1909) I L R 33 Mad 90

——— Sanction by Presidency Small Cause Court—*Order granted by single Judge—Powers of Full Court to revoke the sanction—Full Court not an Appellate Court—Presidency Small Cause Courts Act (XV of 1882) ss 37 38* Where a sanction to prosecute has been granted by a Judge of the Presidency Small Causes Court at Bombay the Full Court of that Court has no power to revoke the sanction *Per* CHANDAVARKAR *J* The language used in ss 37 and 38 of the Presidency Court of Small Causes Act (XV of 1882) does not appear to be appropriate for the purpose of conferring appellate jurisdiction upon the Full Court *Per* BATCHELOR *J* The jurisdiction conferred by s 38 of the Act is not appellate but revisional only SHIVLAL PADMA *In re* (1909) I L R 34 Bom 316

——— False information to police prosecution for—*Sanction to prosecute—Cognizance of offence without the complaint of the public servant with whom false information lodged* Where on the Police reporting an information to be false the Inspector of Police purporting to act under s 195 Criminal Procedure Code granted sanction for the prosecution of the informant under s 182 Indian Penal Code and the Magistrate took cognizance of the offence *Semble* That without the complaint of the public servant to whom the alleged false information was given the Magistrate was not right in taking cognizance of the offence ISSER *v* KING EMPEROR (1910) 14 C W N 765

——— Appeal—*Held* that when sanction to prosecute has been granted or refused by a Court under the provisions of s 195 of the Code of Criminal Procedure only one appeal from such order will lie under that section *Kanhai Lal v Chhadammi Lal I L R 31 All 48* followed *Muthusuami Mudali v Veeni Chetti I L R 30 Mad 38* referred to MATA PRASAD *v* BARAN BARHAI (1914) I L R 36 All 469

——— Perjury—*No desirable in public interest* In granting sanction to prosecute for perjury Courts should not merely see whether there is a good prospect of conviction but should also consider whether the circumstances are such as to render prosecution desirable in the public interests Where the petitioner a girl of fifteen in a statement before a Magistrate under s. 164 Criminal Procedure Code said that her mother and one Bushayya used to talk and fight with each other and as a witness before another Magistrate stated that they never quarrelled with each other *Held* that a prosecution for perjury was not desirable NATTAVA PARANKUSAM *Pe* (1914) I L R 37 Mad 564

——— Omission to record deposition as on solemn oath—*Or affirmation—Presidency Court of Small Causes enquiry by Registrar as to proper service of summons of judicial proceedings—Sanction to prosecute* personation in service

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s 195—*contd*

of summons Before the Pegistrar of the Presidency Court of Small Causes at Calcutta whose duty it is to enquire into the proper service of summons and to take evidence in this behalf it transpired that the petitioner in this case by false representation had returned the summons as properly served and the Public Prosecutor at the instance of the Chief Judge made an application for sanction to prosecute the petitioner under s 205 of the Indian Penal Code which was granted by the said Registrar under s 195 of the Criminal Procedure Code and upon a rule being obtained to question the propriety of the sanction *Held* that the proceedings before the Registrar were judicial proceedings and he was a judicial officer that the sanction given by him to prosecute was properly given and the fact that it was not stated in the depositions recorded by the Registrar that they were taken on solemn oath or affirmation was a matter covered by s 13 of the Oaths Act *Queen* v *Seua Bhogta 14 B L R 294* and *Queen Empress* v *Shava I L R 16 Bom 359* referred to BALCHAND v TARAK NATH SADHU (1914) **18 C W N 1323**

—**cl 1 (b)—False endorsement on a promissory note**—*Indian Penal Code (Act XLV 1860) s 193 complaint under—Sanction—Necessity* Where a complaint of false endorsement on a promissory note to prove a payment of Rs 1 500 was preferred to a Second Class Magistrate but was transferred to a First Class Magistrate and where between the date of filing of the complaint and its transfer a civil suit on the promissory note was filed *Held* that the sanction of the Civil Court under s 195 (*1*) (*b*) was necessary before the Court could take action on the complaint *Held* also that the date of the presentation of the complaint before a Magistrate having no jurisdiction to entertain it was not the date of the institution of the Criminal Proceedings *Re* PARAMESWARAN NAMBUDRI (1915) **I L R 39 Mad. 677**

———— **Sanction to be granted on legal evidence**—*S 195 (b) High Court hearing an appeal under—Judges divided equally in opinion—Whether an appeal lies under cl 15 of the Letters Patent* A Magistrate received a complaint of criminal breach of trust examined the complainant on oath under s 200 Criminal Procedure Code but suspecting the complaint to be false referred it under s 202 Criminal Procedure Code to a Police Inspector for investigation and on receiving the report of the Inspector to the effect that the case was entirely false dismissed the complaint under s 203 Criminal Procedure Code On an application being made for sanction to prosecute the complainant for preferring a false complaint the Magistrate asked the complainant to show cause why sanction should not be given but as no witnesses were examined by him to show the truth of his complaint the Magistrate granted sanction *Held* affirming the decision of SUNDARA AYYAR J that the above materials did not constitute legal evidence for the Magistrate to grant the sanction and that hence the sanction given should be set aside *Quære* Whether an appeal under c 15 of the Letters Patent lies against an order of a Division Bench of the High Court when one of the Judges differs from his colleague on hearing an application under s 195 (*b*) Criminal Procedure Code to revoke a sanction granted by a lower Court BAPU v BAPU (1913) **I L R 39 Mad. 768**

———— **Scope of section**—*Proceedings in relation to which sanction of Court necessary—Information to police followed by complaint in Court* Where the information to the Police was followed by a complaint to the Court based on the same allegations and on the same charge as that contained in the information to the police and the complaint was investigated by the Court sanction or a complaint of the Court itself under s 195 (*b*), Criminal Procedure Code would be necessary before the Court could take cognizance of an offence punishable under s 211 Indian Penal Code alleged to have been committed by making a false charge to the police on the ground that it was an offence committed in relation to a proceeding in Court BROWN v ANANDA LAL MULLICK (1916) **20 C W N 1347**

———— **Sanction against witness for forgery if must be taken**—No sanction is necessary for the prosecution of any person who is not a party to the suit or proceeding for offences under s 467 or abetment thereof *Girdhari Marwari* v *Emperor 12 C W N 892* distinguished DEBI LAL v DHAJADHARI GASHAI (1911) **15 C W N 565**

cl. 1 (b & c)—Jurisdiction—*Sanction to prosecute Subordination of Courts—Transfer of case out of local jurisdiction power to* A petition asking for sanction to prosecute for certain offences under s 195 (*b*) and (*c*) Criminal Procedure Code Act V of 1898 should not be transferred to a Court to which the Court before which the petition for sanction was pending is not subordinate as the sanction of such a Court would be ineffective The High Court cannot transfer a case under s 110, Criminal Procedure Code to any Magistrate other than one within whose local jurisdiction the person is found against whom proceedings are instituted In the matter of the petition of *Amar Singh I L R 16 All 9* *Held* that the same principle applies to s 195 Criminal Procedure Code EKAMBARASWARA IYER v VEERAVADRA THEVAN (1910) **I L R 34 Mad 186**

—— **cl 6— False evidence**—*Prosecution stayed at the instance of the party to be proceeded against pending the disposal of the appeal by the Appellate Court—Expiry of six months time—Power of the High Court to extend time nunc protunc* Under s 195 cl (*6*) of the Criminal Procedure Code of 1898 the High Court has the power to extend the time of a sanction to prosecute even after the expiry of the original period of six months from its date *Karuppana Servagaram* v *Sinna Gounden I L R 26 Mad 480* followed *Kali Kinkar Sett* v *Dinobandhu Nandy I L R 33 Calc 679* dissented from KRISHNA KEERING & Co v MILLER (1916) **I L R 41 Bom 631**

———— **Appeal**—*Letters Patent s 10* *Held* that an order made by a single Judge of the High Court granting sanction for a prosecution under s 195 of the Code of Criminal Procedure is not a judgment within the purview of s 10 of the Letters Patent and is not appealable under that section Neither can such an order be called in question under sub s (*6*) of s 195 of the Code of

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s 195—*contd*

Criminal Procedure inasmuch as a Judge of the High Court sitting alone is not subordinate to a Division Bench of the Court *Hurrish Chunder Chowdhury v Kalisunderi Debi I L R 9 Calc 482* referred to RAMJAS v MAHADEO PRASAD (1916) I L R 39 All 147

———— Sanction granted by a Court of Small Causes—*Application to revoke sanction Jurisdiction—District Judge* When an order granting or refusing sanction to prosecute is made by a Court of Small Causes under s 195 of the Code of Criminal Procedure the Court to which an application for the reversal of such order lies is the Court of the District Judge *Sundar Lal v King Emperor 6 All L J 96 Wazir Muhammad v Hub Lal I L R 31 All 313 In re Ram Prasad Malla I L R 37 Calc. 13* and *Budhu Lal v Chhatu Gope I L R 43 Calc 597* referred to *Ajudhia Prasad v Ram Lal I L R 31 All 197* distinguished *Ambika Tewari v King Emperor 1 Patna L J 206* and *Sukhdeo Singh v The District Magistrate of Muzaffarpur 2 Patna L J 1* dissented from CHIDDA LAL v BHAJAN LAL (191) I L R 39 All. 647

———— On the hearing an application to the High Court against the order of the Presidency Small Cause Court refusing sanction to prosecute a Vakil has right of audience before Bench appointed by the Chief Justice to dispose of it BUDHU LAL v CHATTU GOPE (1917) 21 C W N 654

————cl. 7— Prosecution of witness pending disposal of suit in which he deposed—*Propriety of sanctioning—Cl (7)—Revocation of sanction granted by Subordinate Judge if to be applied for before District Judge or High Court* In a suit brought by a lady relating to a certain business which she claimed as the exclusive property of her husband the petitioner who was her brother and Ammukhtear entrusted with the conduct of the suit filed an affidavit about entries in the books of the business showing the defendant s status therein While the suit was still pending on the application of the defendant the Subordinate Judge granted sanction for the prosecution of the petitioner in respect of the statement in the affidavit The petitioner moved the High Court *Held* that generally speaking it is not desirable that witnesses should be prosecuted while the case in which they have deposed or are about to depose is still pending and in the circumstances of the present case (the plaintiff being dependent on the petitioner for the prosecution of her case) the order made was all the more improper Without deciding whether an application for revocation of sanction granted by a Subordinate Judge should be made to the District Judge as being the Court to which appeals ordinarily lie from the former Court the High Court set aside the order in the present case RAJ KUMAR DEOTT v SATISH CHANDRA GHOSH (1917) 21 C W N 753

———— Abetment of perjury——*Before a Committing Magistrate—Application for sanction made to the Committing Magistrate—Transfer of the Magistrate pending inquiry—The Magistrate succeeded by another Magistrate who had no power to commit—Sanction proceedings sent to District Magistrate—Grant of sanction by District Magistrate* It was alleged that the applicant who was a pleader had during the course of an inquiry before a Committing Magistrate abetted perjury An application for sanction to prosecute the applicant was therefore made to the Magistrate While the proceedings for sanction were pending before him the Magistrate was transferred and was succeeded by another Magistrate who had only second class powers and had no power to commit The outgoing Magistrate accordingly submitted the sanction proceedings to the District Magistrate who conducted the inquiry and granted the sanction The applicant applied to the High Court contending that the District Magistrate had no jurisdiction to grant the sanction *Held* that the District Magistrate had jurisdiction to grant the sanction inasmuch as he was clearly one of the officers on whom devolved the disposal of committal of cases *In re* RAMRAO N BELLARY (1917) I L R 42 Bom 190

———— Appeal—*Against order refusing sanction—Munsif of Jaunpur—Additional Sessions and Subordinate Judge of Jaunpur—Bengal Agra and Assam Civil Courts Act (XII of 1877) s 21(4)* *Held* that an application to revoke or grant a sanction for a prosecution granted or refused by the Munsif of Jaunpur would lie to the Additional Sessions and Subordinate Judge, Jaunpur *Held* also that a Court to which such an application is made is competent to take additional evidence for the purpose of satisfying itself whether sanction ought or ought not to be granted *Rahmat ullah v The Emperor 32 Indian Cases 157* followed EMPEROR v JAGRUP SHUKUL (1917) I L R 40 All 21

——cl. 6— Period for which sanction remains in force—*Terminus a quo* Under cl (6) of s 195 of the Code of Criminal Procedure the date on which sanction is given is the date of the order of the Court which originally granted sanction and not the date of any subsequent order refusing to set it aside *In re Muthukudam Pillai I L R 6 Mad 190* followed TILAK RAM v DALIP SINGH (1918) I L R 40 All 338

— cl 6 — Confirmation OF SANCTION BY APPELLATE COURT—*Revision application against grant of sanction rejected summarily by High Court—Time cannot run from the date of summary rejection* On the 24th July 1916 a sanction to prosecute was given by the first Court it was confirmed on appeal by the District Court on the 23rd October 1916 An application to the High Court under its revisional jurisdiction against the grant of sanction was summarily rejected on the 1st February 1917 A complaint under the sanction was filed on the 10th July 1917 Upon an objection being raised that the complaint was time barred under s 195 cl (6) of the Criminal Procedure Code 1898 as more than six months had elapsed since the grant of sanction *Held* upholding the objection that the complaint was time barred for the summary rejection of the application by the High Court did not constitute a date from which the period of six months began to run PARVATRAO MHASKOJIRAO *In re* (1917) I. L R. 42 Bom. 281

———— Of Receiver appointed by Court—*Without sanction—Agent of firm appointed Receiver* —

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 195—*contd*

of summons Before the Registrar of the Presidency Court of Small Causes at Calcutta whose duty it is to enquire into the proper service of summons and to take evidence in this behalf it transpired that the petitioner in this case by false representation had returned the summons as properly served and the Public Prosecutor at the instance of the Chief Judge made an application for sanction to prosecute the petitioner under s 0o of the Indian Penal Code which was granted by the said Registrar under s 195 of the Criminal Procedure Code and upon a rule being obtained to question the propriety of the sanction *Held* that the proceedings before the Registrar were judicial proceedings and he was a judicial officer that the sanction given by him to prosecute was properly given and the fact that it was not stated in the depositions recorded by the Registrar that they were taken on solemn oath or affirmation was a matter covered by s 13 of the Oaths Act *Queen v Sewa Bhogta 14 B L R 294* and *Queen Empress v Shava I L R 16 Bom 359* referred to BALCHAND v TARAK NATH SADHU (1914) **18 C W N 1323**

—**cl 1 (b)—False endorsement on a promissory note**—*Indian Penal Code (Act XLV 1860) s 193 complaint under—Sanction—Necessity* Where a complaint of false endorsement on a promissory note to prove a payment of Rs 1 500 was preferred to a Second Class Magistrate but was transferred to a First Class Magistrate and where between the date of filing of the complaint and its transfer a civil suit on the promissory note was filed *Held* that the sanction of the Civil Court under s 195 (*1*) (*b*) was necessary before the Court could take action on the complaint *Held* also that the date of the presentation of the complaint before a Magistrate having no jurisdiction to entertain it was not the date of the institution of the Criminal Proceedings *Re* PARAMESWARAN NAMBUDRI (1915) **I L R 39 Mad. 677**

——— **Sanction to be granted on legal evidence**—*S 195 (b) High Court hearing an appeal under—Judges divided equally in opinion—Whether an appeal lies under cl 15 of the Letters Patent* A Magistrate received a complaint of criminal breach of trust examined the complainant on oath under s 200 Criminal Procedure Code but suspecting the complaint to be false referred it under s 202 Criminal Procedure Code to a Police Inspector for investigation and on receiving the report of the Inspector to the effect that the case was entirely false dismissed the complaint under s 203 Criminal Procedure Code On an application being made for sanction to prosecute the complainant for preferring a false complaint the Magistrate asked the complainant to show cause why sanction should not be given but as no witnesses were examined by him to show the truth of his complaint the Magistrate granted sanction *Held* affirming the decision of SUNDARA AYYAR J that the above materials did not constitute legal evidence for the Magistrate to grant the sanction and that hence the sanction given should be set aside *Quære* Whether an appeal under c 15 of the Letters Patent lies against an order of a Division Bench of the High Court when one of the Judges differs from his colleague on hearing an application under s 195 (*b*) Criminal Procedure Code to revoke a sanction granted by a lower Court BAPU v BAPU (1913) **I L R 39 Mad. 768**

——— **Scope of section**—*Proceedings in relation to which sanction of Court necessary—Information to police followed by complaint in Court* Where the information to the Police was followed by a complaint to the Court based on the same allegations and on the same charge as that contained in the information to the police and the complaint was investigated by the Court sanction or a complaint of the Court itself under s 195 (*b*) Criminal Procedure Code would be necessary before the Court could take cognizance of an offence punishable under s 211 Indian Penal Code alleged to have been committed by making a false charge to the police on the ground that it was an offence committed in relation to a proceeding in Court BROWN v ANANDA LAL MULLICK (1916) **20 C W N 1347**

——— **Sanction against witness for forgery if must be taken**—No sanction is necessary for the prosecution of any person who is not a party to the suit or proceeding for offences under s 467 or abetment thereof *Girdhari Marwari v Emperor 12 C W N 82*. distinguished DEBI LAL v DHAJADHARI GASHAI (1911) **15 C W N 565**

cl. 1 (b & c)—Jurisdiction—*Sanction to prosecute Subordination of Courts—Transfer of case out of local jurisdiction power to* A petition asking for sanction to prosecute for certain offences under s 195 (*b*) and (*c*) Criminal Procedure Code Act V of 1898 should not be transferred to a Court to which the Court before which the petition for sanction was pending is not subordinate as the sanction of such a Court would be ineffective The High Court cannot transfer a case under s 110, Criminal Procedure Code to any Magistrate other than one within whose local jurisdiction the person is found against whom proceedings are instituted In the matter of the petition of *Amar Singh I L R 16 All 9* *Held* that the same principle applies to s 195 Criminal Procedure Code EKAMBARASWARA IYER v VEERAVADRA THEVAN (1910) **I L R 34 Mad. 186**

—— **cl. 6— False evidence**—*Prosecution stayed at the instance of the party to be proceeded against pending the disposal of the appeal by the Appellate Court—Expiry of six months time—Power of the High Court to extend time nunc protunc* Under s 195 cl (*6*) of the Criminal Procedure Code of 1898 the High Court has the power to extend the time of a sanction to prosecute even after the expiry of the original period of six months from its date *Karuppana Servagaram v Sinna Gounden I L R 26 Mad 480* followed *Kali Kinkar Sett v Dinobandhu Nandy I L R 32 Calc 379* dissented from KRISHNA KERRING & Co v MILLER (1916) **I L R 41 Bom 631**

——— **Appeal**—*Letters Patent s 10* *Held* that an order made by a single Judge of the High Court granting sanction for a prosecution under s 195 of the Code of Criminal Procedure is not a judgment within the purview of s 10 of the Letters Patent and is not appealable under that section Neither can such an order be called in question under sub-s (*6*) of s 195 of the Code of

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— s. 195—contd

Criminal Procedure inasmuch as a Judge of the High Court sitting singly is not subordinate to a Division Bench of the Court *Hurrish Chunder Chowdhury v Kali Sunderi Debi I L R 9 Calc 4* referred to RAMJAS v MAHADEO PRASAD (1916) I. L. R 39 All 147

——— Sanction granted by a Court of Small Causes—*Application to revoke sanction Jurisdiction—District Judge* When an order granting or refusing sanction to prosecute is made by a Court of Small Causes under s 195 of the Code of Criminal Procedure the Court to which an application for the reversal of such order lies is the Court of the District Judge *Sundar Lal v King Emperor 6 All L J 796 Wazir Muhammad v Habib Lal I L R 31 All 313 In re Ram Prasad Malla I L R 3 Calc 13* and *Ladhu Lal v Chhatu Gope I L R 43 Calc 597* referred to *Ajudhia Prasad v Ram Lal I L R 34 All 197* distinguished *Ambika Tewari v King Emperor 1 Patna L J 206* and *Sukhdeo Singh v The District Magistrate of Muzaffarpur 2 Patna L J 1* dissented from CHIDDA LAL v BHAJAN LAL (1917) I. L. R 39 All. 697

——— On the hearing an application to the High Court against the order of the Presidency Small Cause Court refusing sanction to prosecute a vakil has right of audience before Bench appointed by the Chief Justice to dispose of it BUDHU LAL v CHATTU GOPE (1917) 21 C W N 654

——— cl. 7— Prosecution of witness pending disposal of suit in which he deposed—*Propriety of sanctioning—Cl (7)—Revocation of sanction granted by Subordinate Judge if to be applied for before District Judge or High Court* In a suit brought by a lady relating to a certain business which she claimed as the exclusive property of her husband the petitioner who was her brother and Ammukhtear entrusted with the conduct of the suit filed an affidavit about entries in the books of the business showing the defendant s status therein While the suit was still pending on the application of the defendant the Subordinate Judge granted sanction for the prosecution of the petitioner in respect of the statement in the affidavit The petitioner moved the High Court *Held* that generally speaking it is not desirable that witnesses should be prosecuted while the case in which they have deposed or are about to depose is still pending and in the circumstances of the present case (the plaintiff being dependent on the petitioner for the prosecution of her case) the order made was all the more improper Without deciding whether an application for revocation of sanction granted by a Subordinate Judge should be made to the District Judge as being the Court to which appeals ordinarily lie from the former Court the High Court set aside the order in the present case RAJ KUMAR DEOTY v SATISH CHANDRA GHOSH (1917) 21 C W N 753

——— Abetment of perjury——*Before a Committing Magistrate—Application for sanction made to the Committing Magistrate—Transfer of the Magistrate pending inquiry—The Magistrate succeeded by another Magistrate who had no power to commit—Sanction proceedings sent to District Magistrate—Grant of sanction by District Magistrate* It was alleged that the applicant who was a pleader had during the course of an inquiry before a Committing Magistrate abetted perjury An application for sanction to prosecute the applicant was therefore made to the Magistrate While the proceedings for sanction were pending before him the Magistrate was transferred and was succeeded by another Magistrate who had only second class powers and had no power to commit The outgoing Magistrate accordingly submitted the sanction proceedings to the District Magistrate who conducted the inquiry and granted the sanction The applicant applied to the High Court contending that the District Magistrate had no jurisdiction to grant the sanction *Held* that the District Magistrate had jurisdiction to grant the sanction inasmuch as he was clearly one of the officers on whom devolved the disposal of committal of cases *In re* RAMRAO N BELLARY (1917) I L R 42 Bom 190

——— Appeal—*Against order refusing sanction—Munsif of Jaunpur—Additional Sessions and Subordinate Judge of Jaunpur—Bengal Agra and Assam Civil Courts Act (XII of 1877) s 21(4)* *Held* that an application to revoke or grant a sanction for a prosecution granted or refused by the Munsif of Jaunpur would lie to the Additional Sessions and Subordinate Judge, Jaunpur *Held also* that a Court to which such an application is made is competent to take additional evidence for the purpose of satisfying itself whether sanction ought or ought not to be granted *Rahmat ullah v The Emperor 32 Indian Cases 157* followed EMPEROR v JAGRUP SHUKUL (1917) I L R 40 All 21

——cl. 6— Period for which sanction remains in force—*Terminus a quo* Under cl (6) of s 195 of the Code of Criminal Procedure the date on which sanction is given is the date of the order of the Court which originally granted sanction and not the date of any subsequent order refusing to set it aside *In re Muthukudam Pillai I L R 6 Mad 190* followed TILAK RAM v DALIP SINGH (1918) I L R 40 All. 338

— cl. 6 — Confirmation OF SANCTION BY APPELLATE COURT—*Revision application against grant of sanction rejected summarily by High Court—Time cannot run from the date of summary rejection* On the 24th July 1916 a sanction to prosecute was given by the first Court it was confirmed on appeal by the District Court on the 23rd October 1916 An application to the High Court under its revisional jurisdiction against the grant of sanction was summarily rejected on the 1st February 1917 A complaint under the sanction was filed on the 10th July 1917 Upon an objection being raised that the complaint was time barred under s 195 cl (6) of the Criminal Procedure Code 1898 as more than six months had elapsed since the grant of sanction *Held* upholding the objection that the complaint was time barred for the summary rejection of the application by the High Court did not constitute a date from which the period of six months began to run PARVATRAO MHASKOJIRAO *In re* (1917) I. L R 42 Bom 281

——— Of Receiver appointed by Court—*Without sanction—Agent of firm appointed Receiver*—

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——— s 195—*contd*

and acting for it position of The accused was a partner and sole representative in Calcutta of a firm to which some moneys were due from a firm of which the complainant was a partner The firm of the accused brought a suit in the High Court and by virtue of an order for attachment before judgment took delivery of some bales of jute belonging to the firm of the complainant in respect of which the firm of the accused was appointed Receiver Subsequently an order was made by the High Court with the consent of the parties that on the complainant s firm furnishing security the firm of the accused would give delivery of the jute to the complainant s firm which however on taking delivery of some bales alleged that the jute had been tampered with A charge was then laid under s 406 Indian Penal Code against the accused *Held* that although strictly speaking the firm of the accused was appointed Receiver the accused as representing the firm must be deemed to be the Receiver appointed by the High Court and the prosecution did not lie without the sanction of the Court SANTOKE CHAND v SUGAN CHAND MUNAWAT (1918) **22 C W N 910**

——— **Appellate Court to which appeals do not ordinarily lie hearing appeal by transfer**—*Jurisdiction of to grant sanction for perjury whether as original or as Appellate Court* The offence of perjury is complete when the false statement is made in the Court of first instance and it is not re committed in the Appellate Court by the production of the record or otherwise in appeal so as to entitle the Appellate Court to grant sanction as an Original Court And a Joint Magistrate to whose Court appeals from convictions by a Third class Magistrate do not ordinarily lie but who hears an appeal from such Court by transfer from the District Magistrate cannot grant sanction for perjury committed before the Third class Magistrate either as a Court of first instance or as an Appellate Court *Eroma Varrar* v *Emperor I L R 26 Mad 656* referred to *Bhadesar Tiwari* v *Kamta Prasad I L R 35 All 90* not followed ANANTHARAMAYA v TUKKADU (1918) **I L R 41 Mad 787**

——— **Disobedience to an order of a public servant**—*Under s 144 Criminal Procedure Code—Public servant whether a Court—Sanction for disobedience whether a judicial or administrative order—Appeal* An order under s 144 of the Criminal Procedure Code is a judicial and not an administrative order and an order of a Sub Magistrate refusing to sanction the prosecution of a person for an offence under s 188 of the Indian Penal Code in respect of an order made by him under s 144 of the Criminal Procedure Code is the order of a Court to which the appeal provisions in s 195 (7) of the Criminal Procedure Code are applicable *Sankaram Aiyar* v *Sakkarappa Mudaliar 2 Weir 155* considered ARUNACHALM PILLAI v PONNUSAMI PILLAI (1918) **I L R 42 Mad 64**

— **cl 6 — Arms Act**—(*XI of 1878*) *ss 25 and 23—False information to District Magistrate—Sanction by District Magistrate—Application to Sessions Court to revoke sanction whether competent—District Magistrate granting sanction whether a Court* Where a District Magistrate receives information of illicit possession of arms and issues a search warrant in consequence of the information he acts as a Court though the information may have been given under s 23 and the search warrant issued under s 25 of the Indian Arms Act and an application lies to the Sessions Court under s 195 (6) of the Criminal Procedure Code to revoke a sanction given by him for the prosecution of the informant for an offence under s 182 of the Indian Penal Code *Sankaran Aiyar* v *Sakkarappa Mudaliar 2 Weir 155* dissented from *Clarke* v *Brajendra Kishore Choudhury I L R 39 Calc 953* referred to PANCHALU REDDI v CHINNA VENKATA REDDI (1918) **I L R 42 Mad 96**

——— **Probability of proceedings being abortive**—*abortive* Where it appeared to the High Court that in the peculiar circumstances of the case if proceedings for the prosecution of the Petitioners were taken there was a strong probability of their being abortive *Held*—That the sanction granted by the lower Court should be revoked Observations of Jenkins C J *In re Attorney I L R 41 Calc 446 s c 19 C W N 593* approved of CHAUDHURI MIA v ABDUL RAHAMAN **24 C W N 102**

——— **Appellate Court**—An application under s 195 cl (6) of the Code of Criminal Procedure stands on a different footing from an application in revision and is analogous to an appeal The intention of the Legislature is that a Court of superior jurisdiction whose jurisdiction is invoked under the above section should consider the entire matter on the merits upon a complete review of all the facts RAM RAJA DAT v SHEO DAYAL (1915) **I L R 37 All 439**

—**cl 1 (b & c)— Income-Tax Collector**—*Revenue Court—Sanction to prosecute—Indian Penal Code (Act XLV of 1860) ss 193 196 199 471—Offences committed before the Income Tax Collector* An Income Tax Collector is a Revenue Court within the meaning of that term as used in clauses (b) and (c) of s 195 of the Criminal Procedure Code 1898 PUNAMCHAND MANEKLAL *In re* (1914) **I L R 38 Bom 642**

——— **Insolvency Proceedings**—Where alleged forged documents were filed in the Insolvency Court *Held* that the sanction of the Insolvency Court to prosecute for offences relating to the making and using of the said documents is necessary although the offence of forgery was complete before the commencement of the Insolvency Proceedings Where the documents were produced before the Official Assignee *Held* that the sanction of the Court and not of the Official Assignee was necessary The Official Assignee does not become a civil Court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent or because persons aggrieved by decisions of his can appeal to the Court from those decisions BEARDSELL AND CO v ABDUL CUNNI SAHIB (1914) **I L R 37 Mad 107**

—**cl 1 (c)— In respect of a document produced in a Civil Court**—*By a party but before the person had become a party to any suit* The words used in s 195 (1) (c) when such offence has been committed by a party to any proceeding in any Court refer not to the date of the commission of the alleged offence, but to the date on

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———— s 195—*contd*

which the cognizance of the Criminal Court is invited Hence when once a document has been produced or given in evidence before a Court the sanction of that Court or of some other Court to which that Court is subordinate is necessary before a party to the proceedings in which the document was produced or given in evidence can be prosecuted notwithstanding that the offence alleged was committed before the document came into Court at a time when the person complained against was not a party to any proceedings in Court *Girdhar Merwari v King Emperor I C W N 8? King Emperor v Raja Mustafa Ali Khan 8 Oudh Cases 313* and *Emperor v Lalta Prasad I L R 34 All 654* referred to *Noor Mahommad Cassum v Kaikhorru Maneckjee 4 Bom L R 268* not followed EMPEROR v BHAWANI DASS (1915) I. L. R 38 All. 169

—cl. 1 (c)— Mamlatdar's Court—*Enquiry into Record-of Rights—Mamlatdar's Court is Revenue Court—Land Revenue Code (Bombay Act V of 1879) Chapter XII* A Mamlatdar holding an enquiry relating to Record of Rights under Chapter XII of the Land Revenue Code (Bombay Act V of 1879) is a Revenue Court within the meaning of s 195 (1) (c) of the Criminal Procedure Code (Act V of 1898) EMPEROR v NARAYAN GANPAYA (1914) I L R 39 Bom 310

—cl. 1 (b)—Election petition—*Penal Code (Act) XLV of 1860) ss 193 511—Court—District Judge hearing election petition under s 22 of the Bombay District Municipalities Act (Bom Act III of 1901) is a Court—False evidence before the District Judge—Sanction for prosecution* A District Judge hearing an election petition under the provisions of s. 22 of the Bombay District Municipalities Act (Bombay Act III of 1901) is a Court within the meaning of s 195 clause (b) of the Criminal Procedure Code 1898 No prosecution for attempting to fabricate false evidence (ss 193 and 511 of the Indian Penal Code) before the District Judge can be instituted without having obtained sanction as required by s 195 of the Criminal Procedure Code 1898 *Raghoobuns Sahoy v Kokil Singh I L R 17 Calc 872* followed *In re* NANCHAND SHIVCHAND (1912) I L R 37 Bom 365

—cl 1 (a)— Disobedience of the order of a public servant—*Application for sanction if necessary—Police report* Where sanction for a prosecution under s 188 Penal Code for disobedience of an order under s 144 Cr P C was granted by the Magistrate on a police report setting forth the facts of the disobedience of the order and also containing a request that the petitioner should be prosecuted under s 188 Penal Code *Held* that the order was clearly made under s 195 *(1) (a)* Cr P C *Per* CHAPMAN J So far as the provisions of s 195 *(1) (a)* are concerned there is no necessity of any application for sanction PANCHU MONDAL v THE KING EMPEROR (1913) 17 C W N 976

—cl. 1 (b)— Falsicating False evidence—*Penal Code (Act XLV of 1860) s 193—Fabricated document—Certified copy filed with plaints as proof—Charge of fabricating false evidence sanction if necessary* The petitioner was said to have fabricated a *kabinnama* which was registered and he subsequently brought a suit in the Munsif's Court for restitution of conjugal rights and filed a certified copy of the *kabinnama* along with the plaint as proof of marriage and asked the Court to cause the original to be produced *Held* under s 195 cl *(b)* Cr P C no Court could take cognizance of an offence under s 193 Penal Code imputed to the petitioner except with the previous sanction or on a complaint of the Munsif's Court or of some other Court to which the Munsif's Court was subordinate such offence being committed in relation to a judicial proceeding in the Munsif's Court ABDUL MAJID KHAN v MUNSHI NABUL HUQ (1913) 17 C W N 937

——cl 6— Appeal—*Revision Held* that the Appellate Court equally with the Court of first instance has power to grant sanction for a prosecution in respect of a document filed or evidence recorded in the suit *Held* also that a petition under s *195 (6) of the Code of Criminal Procedure seeking* the cancelment of an order under s 195 *(1)* should be classed as a criminal appeal BHADESWAR TIWARI v KAMTA PRASAD (1912) I L R 35 All 90

—cl 1 (c)— Forgery—*Offence alleged not in connection with any proceeding before any Court—Sanction unnecessary* By s 195 cl (c) of the Code of Criminal Procedure Courts are prohibited from taking cognizance of an offence described in s 463 of the Indian Penal Code when such offence has been committed by a party to any proceeding in any Court in respect to a document produced or given in evidence in any such proceeding The section does not remove from the cognizance of Criminal Courts an offence described in s 463 when such an offence has been committed by an ordinary individual So long as the prosecution is confined to offences connected with a document committed prior to its production in Court such prosecution is within the law and requires no sanction EMPEROR v LALTA PRASAD (1912) I L R 34 All 654

—cl 6— Application to District Judge to revoke sanction—*To prosecute granted by Munsif —Transfer to Subordinate Judge if valid —Civil Courts Act (XII of 1887) s 22 cls (1) and (4)* An application under sub s 6 of s 195 Criminal Procedure Code is not an appeal within the meaning of sub s *(2)* of s 22 of the Bengal Civil Courts Act An application made to a District Judge for the revocation of a sanction to prosecute granted by a Munsif cannot therefore be transferred by him for disposal to a Subordinate Judge HARI MANDAL v KESHAB CHANDRA MANNA (191_) 16 C W N 903

—cl 7 — Sanction refused—Further application— *Case — Principal Court of original jurisdiction* In a suit for arrears of rent exceeding Rs 100 a decree was passed in favour of the appellant In course of execution proceedings the respondents made certain statement which according to the appellant were false The appellant applied for sanction to prosecute them under s 195 cl (7) of the Code of Criminal Procedure The sanction was refused by the Assistant Collector *Held* on application made to the District Judge to grant sanction, that no such application lay The case in connection with which an offence was alleged to have been committed was [illegible] dings in execution from

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 195—*contd*

which no appeal lay and the District Judge was not in relation to such proceedings the principal Court of original jurisdiction AJUDHIA PRASAD v RAM LAL (1911) I L R 34 All 197

——— **Appeal**—*Order granting sanction by Presidency Small Cause Court—Appeal to High Court—Jurisdiction to Appellate and not Original Side— Principal Court of Original Jurisdiction meaning of* From an order of the Presidency Small Causes Court giving or refusing sanction an appeal lies to the High Court generally and not to any particular branch of it But the jurisdiction it exercises being Appellate and not Original it is the Appellate Side alone that can dispose of such matters The effect of clause (7) (c) of s 195 Criminal Procedure Code is merely to designate the Court to which an appeal lies under that clause and not to describe the nature of the jurisdiction which it exercises in dealing with orders of the Small Cause Court Its effect is only to make the High Court the appellate tribunal *Sew Bolloch Singh* v *Ramdhan Bania 14 C W N 896* followed *Per* CURIAM When one Court deals with a judgment of another Court having power to confirm or to set it aside the jurisdiction it exercises is appellate jurisdiction Original jurisdiction is the jurisdiction in original proceedings instituted in the Court whether suits petitions or other proceedings The Original Side of the High Court is not a different *Court* from the Appellate Side the Court is one but it exercises both original and appellate jurisdiction JAMNA DOSS v SABAPATHY CHETTY (1913) I L R 36 Mad 138

——— *Provincial Small Cause Court sanction to prosecute granted by—appeal to District Judge of lies* A Provincial Small Cause Court is under sub-cl (c) of cl (7) of s 195 Criminal Procedure Code to be deemed to be subordinate for the purposes of that section to the Court of the District Judge NIBARAN CHANDRA CHAKRAVARTI v AKSHOY KUMAR BANERJI (1917) 21 C W N 948

——— **Police report based on a judgment of Court**—*Sufficient legal basis for grant of sanction* Though a Court should not accord a sanction to prosecute under s 195 Criminal Procedure Code (Act V of 1898) for bringing a false complaint merely on the strength of a police report yet if the report is based upon a judgment of the Court in a counter-case brought against the complainant in connection with the same matter wherein his defence which was exactly the same as his complaint was found to be false such report is sufficient legal material for the Court to accord its sanction for false complaint *Queen Empress* v *Sheikh Beari I L R 10 Mad 232* referred to S 195 Criminal Procedure Code does not prescribe any rule as to upon what materials a Court should accord its sanction nor does it say that a fresh or preliminary enquiry should be held before granting sanction *Per* SADASIVA AIYAR J The complainant s sworn statement which was disbelieved by the Magistrate was another legal material to form the basis for the grant of sanction against him A sanction given by the lower Court ought not to be lightly revoked by a Court of Appeal A third appeal to the High Court to revoke a sanction though legally made in the form of a petition under s 195 Criminal Procedure Code ought not to be encouraged in practice *Re* NARAYANA NADAN (1914) I L R 38 Mad. 1044

——— **Undue delay in passing order thereon**—Upon an application by the decree holder for sanction to prosecute the judgment debtors and certain other persons for wrongful resistance to execution the trying Court after adjourning the case from time to time for the examination of witnesses ultimately disposed of the matter after examining the peon only Sanction to prosecute was given but nearly six months from the date of the application In the circumstances of the case the High Court strongly condemned the delay which had taken place in disposing of the application MAKHAN LAL SAHA v SAROJENDRO NATH SAHA CHOWDHURI 24 C W N 743

——— **Court hearing an appeal application for sanction to taking additional evidence**—An appellate Court hearing an application to revoke or grant a sanction granted or refused by a Lower Court under s 195 Criminal Procedure Code has power itself to take additional evidence before disposing of the application *Rama Aiyar* v *Venkatachella Padayachi (1907) I L R 30 Mad 311* and *Krishna Reddy* v *Emperor (1910) I L R 33 Mad 90* distinguished SUBBASARI v EMPEROR (1921) I L R 44 Mad 47

——cls 1 & 13—**Abetment of offences of forgery and personation**—*Committed not in the course of judicial proceedings* The offence or offences in which s 195 cl. (1) sub cl. (c) read with cl (3) of the Code of Criminal Procedure requires that sanction should be given by a court with respect of documents produced in Court must be offences committed by parties to the proceeding whether the offence be one of the substantive offences described in s. 463 or punishable under ss. 471 475 or 476 of the Indian Penal Code or only amounts to abetment of any such offences EMPEROR v GHANSHAM SINGH (1909) I L R 32 All 74

——cl 6— **Refusal of sanction by First Class Magistrate**—*Additional Sessions Judge can grant it on appeal—Jurisdiction* Under s 195 cl 6 of the Criminal Procedure Code 1898 an Additional Sessions Judge has jurisdiction to hear an application or an appeal from an order passed by a First Class Magistrate refusing or granting sanction *In re* SIKANDARKHAN (1920) I L R 44 Bom 877

——cl 7— **Appellate Court**—*What is—Sanction to prosecute made to District Court after refusal in Small Cause Court* A District Judge has no power to sanction a prosecution under s. 209 of the Indian Penal Code in respect of a case instituted in Small Cause Court and with regard to which sanction has already been refused by the Small Cause Court Judge The words that is to say in cl (7) of s 195 of the Code of Criminal Procedure do not indicate that a supplementary provision is to be found in cl. (c) but they are merely an explanation of the word to which appeals ordinarily lie The words original jurisdiction in sub-cl (c) of cl. (7) of s 195 mean original jurisdiction over the class to which the case in question belongs. A Small Cause Court is itself

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— s 195—contd

a principal court of original jurisdiction with regard to suits cognizable only by a Small Cause Court. SUKHDEO SINGH v THE DISTRICT MAGISTRATE OF MUZAFFARPUR 2 Pat. L J 1

——— Duty of Court granting—*Claim before Official Assignee whether a proceeding in Court and claimant whether a party —Insolvency Court sanction by for offences under ss 193 and 465 Indian Penal Code committed before Official Assignee.* A Court granting sanction under s 195 Criminal Procedure Code ought to abstain from analysing the evidence or expressing any opinion as to the probability or otherwise of a conviction All that the Court should feel is that the matter is one which on the face of it require investigation by a Magistrate The granting of sanction is in no way tantamount to an intimation that a *prima facie* case has been made out If a claimant files a false affidavit and a forged document in support of a claim before the Official Assignee and thereby commits offences under ss 193 and 465 *Indian Penal Code Held* that the offences are committed in a proceeding in Court and the claimant is a party within the meaning of s 195 Criminal Procedure Code and that the Insolvency Court can grant sanction. *Kristnamma v Chilluri Chinna Perraju (1915) 17 M L T 15* followed dictum of SESHAGIRI AYYAR J in *Palanippa Chettiar* v *Ramaswami Chettiar (1917) 32 M L J 41* dissented from HAJEE MAHOMED HALIBULLA BADSHA SAHIB *In re* (1920) I L R 43 Mad 1

——— Assignment of the decree—*Assignee can prosecute under the sanction* A decree holder having obtained a sanction to prosecute a witness of the judgment debtor for perjury assigned the decree The assignee of the decree then launched prosecution against the witness under the sanction The witness objected that as the sanction was granted to the original decree holder and not to the assignee the prosecution should not go on —*Held* overruling the objection that the assignee was entitled to go on with the prosecution inasmuch as there was no provision that the prosecution should be specified in s 195 of the Criminal Procedure Code *In re* WITHAL BHIMROA (1918) I L R 43 Bom 538

——— Alteration in a document filed before an Assistant Collector—*In his administrative capacity—Certificate of age produced by candidate for post of patwari* Applicant who was a candidate for the post of patwari produced before an Assistant Collector a certificate of the upper primary class dated the 16th May 1917 with the apparent object of showing (though it did not do so) that at the date of his application he was of full age One of the zamindars filed a complaint with regard to the certificate in question alleging it to be a forgery and the applicant was committed to the Court of Session *Held* that the order of committal was not bad for want of the sanction required by s 195 of the Code of Criminal Procedure The document upon which the charge was based was not produced before the Assistant Collector in a judicial capacity but in his administrative capacity under Chapter III of the Land Revenue Act EMPEROR v SANTI LAL I L R 42 All 130

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— s 195—contd

—cl 6 & 7— Small Cause Court Judge appeal from order of—*Provincial Small Cause Courts Act (IX of 1887) ss 4 24 27 and 33—Code of Civil Procedure (Act V of 1908) s 115—Government of India Act 1915 s 107 Held* by the *Full Bench* (Jwala Prasad J *dissentiente*) that an application for revocation or grant of a sanction given or refused by a Small Cause Court of by a Munsif or Subordinate Judge exercising the powers of a Small Cause Court under s 195 of the Code of Criminal Procedure 1898 lies only to the District Court and not to the High Court Per *Atkinson J*—Sanction granted or refused by a Small Cause Court may come before the High Court in its revisional jurisdiction under s 115 of Code of Civil Procedure 1908 or possibly under s 107 of the Government of India Act, 1915 but not under the provisions of s 195 of the Code of Criminal Procedure 1898 S 195 is self contained and provides its own procedure Sub s (6) does not give an unqualified right of appeal to the person against whom an application for sanction has been decided It is an enabling clause authorising a superior authority to review an order of a subordinate authority granting or refusing sanction The word authority in sub s (6) applies both to public servants in sub 1 (a) and to Court in sub s 1 (b) and (c) When the authority granting or refusing sanction is a Court then the provisions of sub s (7) indicate the authority which is empowered to revise the order Except cl (c) which applies only to Courts from which no appeal lies whether the Court be a Civil Criminal or Revenue Court sub s (7) refers to cases in which an unqualified and absolute right of appeal is given from the decision of one Court to another at the instance of a party to the litigation before it S 25 of the Provincial Small Cause Courts Act 1887 does not confer an absolute and unqualified right of appeal and although it enables the High Court in the exercise of its discretion and power of superintendence to review the proceedings of a Small Cause Court with a view to seeing that justice is done and that the law is properly applied and administered it does not constitute the High Court a Court to which appeals from Small Cause Courts ordinarily lie in the sense contemplated by s 195 ( ) of the Code of Criminal Procedure There is no Court to which an appeal ordinarily lies from a Small Cause Court and therefore an appeal against an order of a Small Cause Court granting or refusing sanction is governed by cl (c) of sub s ( ) and not by cl. (a) or (b) *Obiter dictum* —The District Magistrate is the principal Court of original jurisdiction in Criminal cases and the Collector is the principal Court of original jurisdiction in Revenue cases A Small Cause Court is a Court of civil jurisdiction. Per *Jwala Prasad J* An application against an order passed by a Small Cause Court Judge granting or refusing sanction may be made either to the District Court or to the High Court but as a matter of procedure an application should first be made to the District Court Neither sub s. ( ) nor any of its sub-clauses applies to Courts of Small Causes. The High Court at Patna has no ordinary original civil jurisdiction. LALJI TEWARI v THE KING EMPEROR 4 Pat. L J 609

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 195—*contd*

——— After a considerable lapse of time—Points for consideration (*e g*) subsequent conduct as regards granting sanction for prosecution discussed In the circumstances of this case it was held that after so long a lapse of time since the offence alleged the ends of Justice did not require that there should be a prosecution TRAILOKYA NATH BANERJEE *v* RADHARANJAN ALIAS BONOMALI BHATTACHARJI 25 C W N 886

——cl 6— Sanction given or refused —*Order by Munsif refusing sanction to prosecute—Order affirmed by District Judge—whether High Court has power to grant the sanction—Perjury when sanction to prosecute for should be given—Penal Code (Act XLV of 1860) s 193* It is only when a sanction to prosecute given by the first court is revoked by the appellate authority referred to in cl. (6) of s 195 of the Code of Criminal Procedure 1898 or when a sanction refused by the first court is granted by such appellate authority that the order of the appellate authority can be said to be an order refusing or giving sanction as the case may be And therefore it is only when the appellate authority gives or refuses a sanction which has been refused or given by the first court that the appellate order is appealable under cl. (6) But the Patna High Court following the practice in the Calcutta High Court will interfere in proper cases with an order of a District Judge confirming a sanction to prosecute granted by a Munsif No person should be convicted under s 193 of the Penal Code unless it be proved that it is impossible that the statements of the party accused, made on oath can be true Sanction to prosecute for perjury should not be lightly given in cases where the court would have to determine the question by merely weighing the evidence on both sides PADARATH SINGH *v* RATAN SINGH 5 Pat L J 23

——cl 7(*a*)— Munsif Court to what subordinate — An application was made for sanction to prosecute a witness for a false statement alleged to have been made by him in a civil suit before a Munsif The Munsif had been transferred from the district and sanction could therefore be given only by the Court to which the Court of the Munsif was subordinate and the question was referred to the High Court whether the application was cognizable by the Subordinate Judge or the District Judge *Held* that having regard to cl. (*a*) of sub s (7) of s 195 of the Code of Criminal Procedure 1898 the Munsif must for the purposes of the section be deemed to be subordinate only to the Court of the Subordinate Judge of the 1st class *Bure Khan* v *Queen Empress (16 P R (Cr) 1898) Labhu Ram* v *Aand Ram (29 P R (Cr) 1918)* and *Boddu Ramayya* v *Chitturi Surayya (29 Indian Cases 71)* followed *Sunder Singh* v *Phuman Singh (50 Indian Cases 591)* disapproved. DINA NATH *v* MUHAMMAD ABDULLA I L R 2 Lah 57

——— *Sanction to prosecute—Jurisdiction of Additional District Judge to revoke Sanction granted by Munsif— Sanction where an appeal in the suit has been assigned to him by the District Judge.* An Additional District Judge having all the powers of the District Judge in respect of cases assigned to him by the District Judge is competent to revoke a sanction to prosecute granted by a Munsif in a case which is before him in appeal. *Mutsaddi Lal* v *Mulu Mal 9 A L J 95* referred to RAM CHARAN *v* MEWA RAM I L R 43 All 409

——— cl 6— Application under not An appeal—*No revision intended after order passed under s 195 (6)—Jurisdiction to grant sanction not ousted by transfer of magistrate from one sub-division to another in the same district* *Held* that an application under 195 cl. (*6*) of the Code of Criminal Procedure to revoke or grant a sanction given or refused by a Subordinate authority is not an appeal. *Bhadesar Tiwari* v *Kamta Prasad I L R 35 All 90* not followed. *Held* also that it was not the intention of the Legislature that when a question of granting or refusing sanction to prosecute has already been before two courts it should be brought by way of revision before a third. *Mata Prasad* v *Baran Barkat I L R 36 All 469* followed. *Held* further that where an application for sanction is properly before a Magistrate of the first class in charge of sub division of a district his jurisdiction to pass orders on such application is not taken away by the fact of his being transferred to another sub division of the same district *Mithani* v *King Emperor 9 A L J 448* referred to It is objectionable for a court dealing with a sanction case under s 195 cl (*6*) of the Code of Criminal Procedure to confine itself to merely writing the word Rejected on the application without giving any reasons for the rejection thereof CHHOTE *v* KHACHERU I L R 42 All 64

——— Appeal what is—*Application to higher Court for grant of sanction to prosecute refused by Lower Court—whether an appeal for purposes of limitation* The petitioner applied under s. 195 of the Code of Criminal Procedure for sanction to prosecute The first Court refused to grant sanction An application was made to the Lower Appellate Court under sub s (*6*) of the same section The application being put in on the 2nd day was dismissed as time barred under art 154 of the Limitation Act Against this decision the petitioner preferred the present application for revision to the High Court *Held* that although applications under s 195 (*6*) Criminal Procedure Code are akin to appeals and may be treated as appeals yet they are not appeals for the purposes of the Limitation Act and the application to the Lower Appellate Court was therefore not time barred. *Hardeo Singh* v *Hanuman Dat (I L R 26 All 214 F B)* and *Bapu* v *Bapu (I L R 39 Mad 750 F B)* followed PUNNA LAL *v* JAMITA MAL I L R 1 Lah 602

——— *Appeal from an order of a Judge of the late Chief Court granting sanction for the prosecution of the appellant in respect of allegations made by him in an affidavit presented to that Judge* *Held* that no appeal is competent from an order of a Judge of the late Chief Court of the Punjab under s 195 of the Code of Criminal Procedure granting sanction for the prosecution of the appellant in respect of allegations made by him in an affidavit presented to that Judge RAMJI DAS *v* THE CROWN I L R 1 Lah 659

——— *Sanction to prosecute—Costs if may be ordered by civil Court in proceedings*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— s 195—contd

under the section Proceedings for sanction under s 195 Criminal Procedure Code though taken in a civil Court relate to a criminal matter and the Court has no power to direct payment of costs in such cases BHOLANATH KHANNA v PURNA CHANDRA BANERJEE 25 C W N 661

———cl 1 c)——— In a dispute as to the possession of immovable properties between an auction purchaser and another claimant to the land the latter produced a certain document before the police officer who was inquiring into the dispute The officer filed it with his report and subsequently referred to it in his deposition. The party who had produced the document withdrew from the proceedings and the Magistrate without referring to the document recorded a finding that possession was with the auction purchaser The latter moved the Magistrate to impound the document and to sanction the prosecution of his opponent The latter resisted the application on the ground that sanction was not necessary The auction purchaser thereupon filed a complaint against him under ss 463 471 and 476 of the Penal Code The accused pleaded that sanction was necessary but process was issued. The accused moved the High Court without having moved the Sessions Court *Held* (1) that although the conduct of the accused was open to criticism the High Court was bound to decide whether the prosecution was such as the law admitted (2) that it would be a strain of ordinary language to say that the document which came into court merely because it was attached to the Police Report prior to the proceedings was produced in the proceeding (3) assuming however that it was produced the prosecution of the accused who had no hand in its production was not barred by reason of the absence of sanction (4) that the accused had not in any way abused the authority of the court and therefore the sanction of the court was not necessary The words has been committed by a party in s 195 (1) (c) can only mean is alleged to have been committed by a party JANARDHAN THAKUR v BALDEO PRASAD SINGH 5 Pat L J 135

——— ss 195 (6) and 439—*Sanction to prosecute—Petition—Powers of High Court* S 195 of the Code of Criminal Procedure does not enable the High Court to reconsider an order of a Sessions Judge refusing under cl (6) to grant a sanction to prosecute which was refused by the Magistrate and although the revisional jurisdiction of the High Court under s 437 of the Code of Criminal Procedure can always be exercised in order to prevent a gross and palpable failure of justice it should not be exercised in such a way as to practically give a right of appeal in cases where such right is definitely excluded by the Code AHSAN ULLAH KHAN v MANSUKH RAM (1914) I L R 36 All 403

——— *Civil Procedure Code (Act V of 1908) s 115—24 & 25 Vict c 104 s 15—Order by Civil Court refusing sanction—Jurisdiction of High Court to revise such order—Delay in applying for sanction* The opposite party brought a suit for the recovery of money in the Court of the Munsif which was dismissed the claim being found to be false and malicious An application for sanction to prosecute the opposite party was however rejected by the Munsif as also by the District Judge in appeal on the ground of delay in making the application. *Held* (on an application by the Local Government against the order refusing sanction) that it was clear from the decision of the Full Bench in *Emperor v Har Prasad I L R 40 Calc 477 s c 17 C W N 647* that the orders of the Munsif and the Judge are not orders of a Criminal Court and cannot therefore be revised under s 439 Criminal Procedure Code. The High Court however in the exercise of its powers under s 115 Criminal Procedure Code and s 15 of the Charter Act granted sanction for the prosecution of the opposite party holding that the case being in substance a prosecution undertaken by Government mere delay could not be taken as suggesting *mala fides* DEPUTY LEGAL REMEMBRANCER v RAM UDAR SINGH (1914) 19 C W N 447

——— ss 195 (6) and 476—*Sanction to prosecute—Lapse of sanction—substitution of proceedings under s 476 legality of* The period of six months provided by s 195 (6) of the Code of Criminal Procedure 1898 can only be extended by the High Court and it is not competent to any other court when that period has expired without any action having been taken to draw up proceedings under s 476 LALJI TEWARI v KING EMPEROR 5 Pat L J 58

——— *Indian Penal Code ss 471 474—Using as genuine a forged document—Filing a forged document as coming from the custody of the person by whom it purported to be held if constitutes user —Offence committed by such act sanction if necessary for prosecution for—Possession of forged document knowing it to be forged and intending to use it as genuine prosecution for if lies without sanction—Stay of criminal proceedings pending determination of civil suit* Where in a case under s 474 Indian Penal Code the prosecution story was that the accused who was the *plaintiff in a rent suit himself filed a kobuliyat and* an *amalnama* which were forged and which purported to be filed by the complainant the defendant in the rent suit *Held* that the act constituted user within the meaning of s 471 Indian Penal Code and the offence committed was one under that section and in respect of that offence sanction under s 195 or an order under s 476 Criminal Procedure Code was necessary That no sanction is necessary for a prosecution under s 474 Indian Penal Code That the decision of the issues in the rent suit being largely dependent on the question whether the documents in question were or were not genuine it was expendient that the criminal proceedings should be deferred pending the final disposal of the rent suit ASRABUDDIN SARKAR v KALIDAYAL MULLIK (1914) 19 C W N 125

——— ss 195 (6) and 509—
See SANCTION TO PROSECUTE 4 Pat L J 374

——— ss 195 (6) (7) (c) 435 439—
See SANCTION FOR PROSECUTION I L R 44 Calc 816

——— ss 195 476—
See JURISDICTION OF CRIMINAL COURT I L R 37 Calc 250

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— ss 195 476—*contd*

———— *Sanction to prosecute—Sanction set aside by superior Court and order for prosecution under s 476 substituted—Jurisdiction* *Held* that a Court hearing an application under s 195 of the Code of Criminal Procedure to revoke sanction for a prosecution granted by a subordinate Court has jurisdiction to set aside the order of the subordinate Court and direct a prosecution under s 476 of the Code *In the matter of the petition of Mathura Das I L R 26 All 80* overruled. CHADAMMI *v* LALTA PRASAD (1912)

I L R 34 All 602

———— ss 195 476 532 537—

See JURISDICTION OF CRIMINAL COURT

I L R 40 Calc 360

———— ss 195 (1) 478—*Sanction to prosecute—Subsequent order to prosecute passed under s 478* The grant of a sanction to prosecute to a private individual under s. 195 of the Criminal Procedure Code 1898 is no bar to the subsequent institution of proceedings by the Civil Court itself under s 478 of the Code *Queen Empress v Shankar I L R 13 Bom 384* followed. EMPEROR *v* NAGJI GHELABHAI (1909)

I L R 34 Bom 88

———— ss 195 (6) 537—*Sanction to prosecute—Irregularity of illegality—Complaint filed after expiry of the time allowed by s 195 (6)* *Held* that the taking cognizance of a complaint in respect of which sanction had been obtained under s 195 of the Code of Criminal Procedure after the expiry of the six months period allowed by clause (6) of the section and when objection was taken at the earliest opportunity by the accused was more than an irregularity and was not covered by the provisions of s 537 of the Code EMPEROR *v* ZAHIR SINGH (1915) I L R 37 All 283

———— s 196—

See CONTEMPT OF COURT

I L R 41 Calc 173

See JURY RIGHT OF TRIAL BY

I L R 37 Calc 467

See SANCTION FOR PROSECUTION

———— Sanction vagueness—*Objection that Local Government illegally constituted if may be taken* Where a conviction under s 121A of the Penal Code at a trial which was sanctioned under s. 196 Criminal Procedure Code by the Local Government was challenged on appeal to the High Court on the ground that the Local Government was not legally constituted and had no authority to sanction the prosecution *Held* (*per* HARRINGTON *J*) That it was not open to persons who had been convicted to question the right of the *de facto* Government of the Province to exercise any of those powers which a Government may lawfully exercise no such point having been taken as an early stage of the trial by motion to the High Court and the fairness of the trial and the merits of the case being in no way affected *Per* MOOKERJEE *J*—The acts of one who although not the *de jure* holder of a legal office was actually in possession of it under some colour of title or under such conditions as indicated the acquiescence of the public in his actions cannot be collaterally impeached in any proceeding in which such person is not a party *Parker v Kett I Lord Raymond 658 12 Mad 467 R v Bedford Level Corporation 6 East 659* followed. When the persons sought to be prosecuted were all named in the sanction and the sections of the Code under which they were alleged to have committed offences as also the period of their activity were specified the mere fact that those persons were not described as members of a revolutionary society (the existence of which was sought to be established at the trial) did not affect the validity of the sanction. The sanction was neither vague nor did it amount to a delegation of authority vested in the Local Government *Barindra Kumar Ghose v Emperor 14 C W N 1114 I L R 37 Calc 467* distinguished. PULIN BEHARI DAS *v* KING EMPEROR (1911)

16 C W N 1105

———— *Authority by Government for filing complaint—Telegram by Government to District Magistrate—Authority to Public Prosecutor—Discretion given to District Magistrate as to filing complaint immediately—Complaint to be submitted to Government for supplemental sanction—Authority whether valid* Where the Government sent a telegram to a District Magistrate expressly authorizing the Public Prosecutor to file a complaint against a person for an offence under s. 124 A Indian Penal Code but the telegram added that the Public Prosecutor might act on this authority immediately if the District Magistrate on consultation should think it desirable and that the complaint prepared should be submitted at once to the Government for issue of supplemental sanction *Held* that the authority given by the Government was valid under s 196 of the Criminal Procedure Code. *Per* NAPIER J—S 196 Criminal Procedure Code is a disenabling section and should not therefore be construed with the strictness applicable to an enabling section *Chidambaram Pillai v Emperor I L R 32 Mad 3* followed *Queen Empress v Samavier I L R 16 Mad 468* distinguished. *Barindra Kumar Ghose v Emperor I L R 37 Calc 467* dissented from VARADARAJULU NAIDU *v* PUBLIC PROSECUTOR MADURA (1918)

I L R 42 Mad 180

———— *Held* that the sanction of the Local Government required by s 196 must be conveyed by the Chief Secretary Any order signed by a Deputy Secretary is not in proper form MD OZULLAH *v* BENI MADHAB CHOWDHERY

26 C W N 878

———— *Held* that although the allegation of the prosecution supports a case of conspiracy to forge documents for which sanction to prosecute is required under s 196 there is no reason why the accused should not be tried for offences in respect of which no sanction is required (*e g*) conspiracy to cheat and cause delivery of property ABDUL SALEM *v* KING EMPEROR 26 C W N 660

———— ss 196 235 342 360 (1) 417—

See CHARGE I L R 42 Calc 957

———— ss 196 428—*Prosecution for offence under s 124 A Indian Penal Code—Sanction by whom to be given—Local Government—Sanction by one Member of Government alone whether sufficient*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss. 196 428— *contd*

—*Sanction after complaint whether valid—Sanction by telegram—Proof of sanction—Telegram purporting to be sent by Government—Presumption as to sender—Evidence Act s 88—Objection overruled by Magistrate—Conviction—Appeal—Additional evidence on appeal as to proof of sanction if can be permitted—Policy in granting sanction under s 196 Criminal Procedure Code.* Sanction given *after the filing* of the complaint does not fulfil the requirements of s. 196 Criminal Procedure Code *Barindra Kumar Ghose v King Emperor I L R 37 Calc 467* followed. Sanction granted under s 196 of the Code must in order to satisfy the section, have been the act of the Local Government and not of a single member of such Government. S 88 of the Evidence Act forbids the raising of any presumption as to the person by whom a telegram is sent and the Act does not contain any special provision as to telegrams purporting to emanate from Government. Where therefore a telegram containing a sanction to prosecute a person under s. 124 A Indian Penal Code purported to be despatched from Ootacamund and to be signed Madras which is the telegraphic name of the Chief Secretary to the Government of Madras there was no presumption as to the person by whom it was sent and in the absence of proof it could not be held that the telegram was sent by the authority of the Madras Government The powers given by s 428 Criminal Procedure Code to an appellate Court to take additional evidence are perfectly general and are subject only to the condition that the Court should record its reasons Where a conviction on a serious charge such as sedition if otherwise sustainable would have to be upset for want of formal proof of sanction owing to a misconception as to the proper mode of proving it on the part of the prosecution a misconception which was shared by the trial magistrate *Held* (by WALLIS C J and AYLING J SADASIVA AYYAR J dissenting) that it was a fit case for the appellate Court to admit additional evidence to supply the defect in formal proof of the sanction but on its being elicited in Court that the sanction sought to be proved was not the act of all the members of the Local Government the Court declined to order fresh evidence to be taken and set aside the conviction and sentence *Per* SADASIVA AYYAR J —Under s 428 Criminal Procedure Code an Appellate Court should permit additional evidence to be taken only where it feels a reasonable doubt whether on the evidence as it stands the conviction is justified and not where being convinced that the prosecution fails on the evidence on record it considers that the negligence of the prosecutor might be excused the discretion to be exercised under the section is not an arbitrary one and should not be exercised especially against the accused in a criminal case if the prosecution had ample opportunity to adduce all its evidence and is similar to the power exercised by an Appellate Court in a civil appeal under O XLI r 27 Civil Procedure Code Considerations of public policy involved in granting sanction under s 196 Criminal Procedure Code in the first instance or after failure of a prosecution on technical grounds pointed out by SADASIVA AYYAR J VARADARAJULU NAIDU v KING EMPEROR (1919) I L R 42 Mad 885

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 196 532—*Penal Code ss 121 124—Order of Government authorising complaint of certain offences—Delegation of power* Where an order under s 196 of the Criminal Procedure Code authorized a particular police officer to prefer a complaint of offences under ss 121A 122 123 and 124 of the Penal Code *or under any other section of the said Code which may be found applicable to the case* and the examination of the complainant also referred to the same sections —*Held* that no complaint under s 1[illegible] of the Penal Code was thereby authorized by the Local Government or in fact preferred that the Magistrate had no power to commit thereunder and that the defect was not cured by a subsequent order obtained while the case was before the Sessions Court authorizing a complaint under the section which was not in fact made thereafter nor did s 532 of the Criminal Procedure Code apply in such a case *Sham Khan s case (1890) Punj R Cr J No 16* approved of *Queen Empress v Morton I L R 9 Bom. 288* distinguished and *Queen Empress v Bal Gangadhar Tilak I L R 22 Bom 112* dissented from The Local Government cannot delegate to any other body or person the controlling power and discretion of determining whether cognizance shall be taken by the Court of an offence mentioned in s 196 of the Criminal Procedure Code and its judgment must be specifically directed to the particular section and no other under which the prosecution is to be carried on and the order or authority should be proceeded by a deliberate determination in this respect An order authorizing a complaint under certain specified sections *or under any other sections found applicable* if it means found by any one other than Government involves a delegation which cannot be sustained BARINDRA KUMAR GHOSE v EMPEROR (1909) I L R 37 Calc 467

——— s 196A—

See PENAL CODE (ACT XLV OF 1860) s 120B I L R 40 All 41

——— s 197—

See SANCTION FOR PROSECUTION

———A Magistrate or Judicial officer who is holding a trial cannot be said to be acting in a judicial capacity if he abuses or defames a witness or legal practitioner before him but if in order to examine a witness he detains him until the time of his re examination he acts judicially and if in doing such an act he commits any offence sanction under this section is necessary before a complaint can be lodged against him RAISNAB CHARAN PARAN v SUKHOMOY CHOWDHURY 25 C W N 956

——— *Order passed by a District Judge under s 197—whether open to revision by the High Court* The respondent a practising Vakil applied to the District Judge at H[illegible]ar for sanction under s 197 Criminal Procedure Code to prosecute the petitioner a Subordinate Judge for offences under ss 500 504 and 506 Indian Penal Code in connection with an incident which occurred while the petitioner was hearing a case in his Court The District Judge ordered a notice to issue to the petitioner to show cause why sanction should not be granted and petitioner then filed an application [illegible] High Court for the revision of that [illegible] that the application

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s 197—*contd*

for revision was not maintainable as the order complained of was an executive and not a judicial order The distinction between the provisions of s 197 and those of s 195 of the Code explained *Nando Lal Basak* v *Mitter* (*I L R 26 Calc 852*) followed *Grey* v *North Western Railway Administration* (*13 P P (Cr) 1891*) referred to ALI HUSSAIN KHAN v HARCHARAN DASS

I L R 2 Lah 305

———— ss 197 210 215—*Committal proceeding—Evidence taken in absence of sanction to prosecute—Sanction produced before Magistrate on the day he passed an order committing the case—Committal order passed in view of the wishes of the parties and a Government Resolution—Order of committal not valid* The accused a Vatandar Patil was charged with the offences of harbouring an offender and taking a bribe from him. Enquiry into the case was instituted and the whole of the evidence was taken in absence of a sanction to prosecute The Magistrate committed the case to the Court of Session relying on a Government Resolution and yielding to the wishes of the parties The sanction was produced before the Magistrate on the day he committed the case The Sessions Judge referred the case to the High Court as he was of opinion that the commitment was illegal. *Held* quashing the order of commitment that owing to the absence of sanction the whole of the proceedings before the Magistrate were without jurisdiction and totally invalid. *Held* further that the Magistrate was not competent to commit the case to the Court of Session solely by the wish of the parties and the terms of a Government Resolution. EMPEROR v BHIMAJI ENKAJI (1917) I L R 42 Bom 172

———— ss 197 239 and 532—*Sanction to prosecute public servants—Form of sanction—Public servants conspiring to cheat three persons—Joint trial—Commitment quashing of after the trial has once commenced—Practice and procedure* The two accused the Kulkarni and the Patil of a village conspired to cheat certain ryots of their money Sanction to prosecute them was given by the Collector for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from ryots They were tried at one trial by the Additional Sessions Judge who heard the whole case and recorded the opinions of the assessors The case then stood over for judgment But the learned Judge being of opinion that the sanction was invalid and that the joint trial of the two persons for distinct offences of the same kind was not permissible quashed the commitment and directed a fresh inquiry under s 532 of the Criminal Procedure Code On review *Held* that the sanction was not invalid inasmuch as the sanctioning authority had applied its mind to the facts of the case and sanctioned the prosecution of the accused and had also sufficiently designated the offence or offences which might be established in connection with obtaining money from ryots *Held* also that the joint trial of the accused was regular because the offences charged against them were committed in the same transaction within the meaning of s 239 of the Criminal Procedure Code there having been clear proximity of time and space clear continuity of action and sufficiently specific community of purpose *Held* further that under the circumstances the lower Court had no power to quash the commitment and direct a fresh inquiry under s 532 the proper procedure being to move the High Court for a quashing of the commitment under s 215 of the Criminal Procedure Code 1898 EMPEROR v MADHAV LAXMAN (1918) I L R 43 Bom 147

———— s 198—

See PENAL CODE (ACT XLV OF 1860) s 494 I L R 32 All 78

———— ss 198 200 503—

See COMPLAINT I L R 42 Calc 19

———— s 199—

See PENAL CODE s 493 I L R 38 All 276

———— s 200—

See s 4 1 Pat L J 592

25 C W N 357

See s 119 I L R 35 Bom 401

See s 190 2 Pat L J 34 657

See s 439 I L R 33 Mad 48

See COMPLAINT I L R 42 Calc 19

See FALSE INFORMATION I L R 43 Calc 173

I L R 46 Calc 807

————*Complaint by a purdanashin lady signed and presented by agent holding general power to present complaints—Absence of special power—Duty of Magistrate to satisfy himself if complaint really by person by whom it purports to be—Magistrate bound to examine complainant before issuing process—Complaint not presented in person proper course for Magistrate on receipt of—Words at once effect of in s 200—S 198 of—Words at once effect of in s 200—S 198 compliance with the requirements of—S 503 scope of—Examination of complainant on commission—Indian Penal Code (Act XLV of 1860) s 500—Defamation* A complaint was filed before the Chief Presidency Magistrate under s 500 the Indian Penal Code purporting to be made by a purdanashin lady and signed by a person in whose favour there was a general power of attorney authorising the presentation of criminal complaints but no power of attorney authorising the presentation of the specific complaint The Chief Presidency Magistrate issued process against the accused and transferred the case to another Magistrate *Held* (on a reference under s 432 Criminal Procedure Code) that the Chief Presidency Magistrate was wrong in issuing process against the accused. It is perfectly well settled that a process cannot be issued against an accused person either by the Magistrate first taking cognizance of an offence or by the Magistrate to whom the case is transferred under the proviso to s 200 Criminal Procedure Code unless and until the Magistrate issuing process has first examined the complainant And this is more necessary in the case of a purdanashin lady than in other cases to enable the Magistrate to satisfy himself that the complaint is really her own action That the Magistrate should be very loth to take cognizance of any complaint which is not presented in person The words at once in s 200 of the Code clearly

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

———— s. 200—contd

his case that ordinarily a complaint must be presented in person and a complaint should not be accepted which is not signed by the complainant and is not preferred by a person duly authorised to prefer that specific complaint That whether the requirements of s. 198 Criminal Procedure Code were satisfied in the present case depended upon whether or not the complaint was the complaint of the lady [The High Court quashed the proceedings giving liberty to the lady to file a fresh complaint and directed her examination if fresh complaint was made by a commission issued to a Magistrate.] *Held* that the terms of s 503 Criminal Procedure Code are very wide They refer not only to an enquiry and a trial but to any other proceedings The section authorises the examination of any witness and the complainant is a witness. ABHOYESWARI DEVI v KISHORI MOHAN BANERJEE (1914)
I L R 42 Calc 19
18 C W N 1020

———— ss 200 203 435 437 and 528—*Complaint petition of objection to dismissal of counter case whether amounts to—Dismissal of counter case without examining complainant whether the District Magistrate has power to revise order of—Penal Code (Act XLV of 1860) ss 3 9 and 45*
A instituted a criminal case against *B* under s 457 of the Penal Code and *B* lodged an information against *A* alleging that he had committed an offence under s 3 9 *B* was acquitted of the charge under s 457 and in the counter case the Magistrate recorded the order Enter false under s 3 9 Indian Penal Code *B* thereupon filed a petition of objection before the Sub Divisional Officer asking that an investigation might be made and *A* summoned He also moved the District Magistrate who set aside the order dismissing the counter case and sent the case to the Sub Divisional Magistrate for orders *A* applied in revision to the High Court to set aside the District Magistrate s order *Held*—(1) that the petition of objection was a complaint within the meaning of the Code of Criminal Procedure 1898 (2) that the Magistrate s order directing the case under s 3 9 to be entered as false was in substance an order of dismissal under s 203 (3) that where the final order is in fact an order of dismissal under s. 203 then the revisional jurisdiction of the District Magistrate can be exercised even though the complainant has not been examined on oath (4) that s 437 contemplates that where a complaint has been dismissed under s 203 the revisional jurisdiction of the District Magistrate can be invoked irrespective of the consideration whether the dismissal is legal or illegal SADHU CHARAN PAL v BALTI SWAIN 3 Pat L J 346

———— ss 200 254— *Procedure—Accused summoned without the complainant being examined—Irregularity—Proceedings not vitiated—Hurt both simple and grievous—Cumulative sentences legality of* The complainants made a complaint to the police to the effect that the accused beat them causing grievous hurt The police did not send up the case and the complainants applied to the Magistrate who sent for the police papers and summoned the accused without examining the complainants On the date fixed the complainants were absent and the accused were discharged.

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

———— ss 200 254—contd

Later in the day the complainants appeared and explained their delay and the Magistrate again gave them time to produce evidence He summoned the accused found them guilty and sentenced them to imprisonment *Held* that the course the Magistrate adopted was irregular but did not vitiate the entire proceedings *Held* further that where different persons are injured grievous hurt being caused in one case and simple hurt in others it is competent to the Court to impose separate and accumulated sentences EMPEROR v BATESHAR (1915) I L R 37 All 628

———— s 201—

See FALSE INFORMATION
I L R 43 Calc 173

———— s 202—

See s 437 4 Pat L J 456

See COMPLAINT I L R 46 Calc 854

See FALSE INFORMATION TO POLICE
I L R 46 Calc 807

See LOCAL INSPECTION
I L R 37 Calc 340

See MAGISTRATE POWER OF
I L R 38 Calc 68

See MALICIOUS PROSECUTION
I L R 37 Mad 181

———— *Local enquiry by pleader—Consideration of new ground at hearing of rule* A Magistrate has no jurisdiction to order a local enquiry by a pleader in the nature of a commission in a civil case Case in which the High Court considered a ground other than those on which the rule was issued MOHAR KHAN v GAYZUDDIN SHEIKH (1913) 18 C W N 399

———— *Magistrate s duty to record reasons before directing local investigation—Accused if should be allowed to be represented when Magistrate considers the report of the local investigation* It is most desirable that Magistrates should follow the procedure which is quite clearly laid down in Chap XVI dealing with complaints to Magistrates Under s 202 if the Magistrate on examining the complainant distrusts the statement of the complainant he must record his reasons before directing a local investigation It is irregular and quite inconsistent with the scheme of the Code of Criminal Procedure to allow the accused to be represented by a lawyer to argue the case for the defence when the Magistrate is considering under s 202 Criminal Procedure Code the report of the local investigation ordered by him BALAI LAL MUKERJI v PASUPATI CHATTERJI (1916)
21 C W N 127

———— ss 202 203—

See COMPLAINT I L R 41 Calc 1013
I L R 46 Calc. 854

See FALSE INFORMATION
I L R 43 Calc 173

See MAGISTRATE JURISDICTION OF
I L R 39 Calc 1041

See MALICIOUS PROSECUTION
I L R 38 Calc. 880

———— *complaint dismissed without giving ... the complainant*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 215 and 478—*Letters Patent cl (15)—Order of commitment by a Judge of the High Court on the Original Side—Appeal on questions of fact only whether permissible.* A witness in a Civil suit before the High Court was committed to the High Court Sessions for trial on charges of perjury On appeal against the order of commitment *held* that assuming such an appeal could be preferred under the general words of cl (15) of the Letters Patent s 215 Criminal Procedure Code which enacts that an order of commitment made by any Civil Court can be quashed only on a point of law modifies to that extent the general provisions of cl (15) of the Letters Patent and that as no point of law is involved in the appeal the order of commitment cannot be quashed *Quære* whether an appeal lies under cl (*15*) of the Letters Patent from an order of commitment by a High Court Judge trying a Civil suit VENKATAGIRI AYYAR *v* N M FIRM (1920) I L R 43 Mad 361

——— ss 221 223 350—

See RIOTING I L R 39 Calc 781

——— ss 221 222 223—*Forgery charge of —Omission to set out intention* Where the charge under s 467 Penal Code did not set out the intention of the accused *Held* that this vitiated the charge HAIDAR ALI PRADHANIA *v* EMPEROR (1912) 17 C W N 354

——— s 222 (2)—

See PENAL CODE s 409

I L R 33 All 36

———*Indian Penal Code* (*Act XLV of 1860*) *s 406—Criminal breach of trust —Gross sum specified in charge—Particulars as to time—Defect in charge amounting to illegality—Applicability of s 537 Cr P C to cure such defect—Retrial if may be ordered where charge fails for want of evidence* Where the appellant who was an executor to the estate of one D M R under his will and who was finally called upon on the 16th August 1910 to deliver over to the complainant all money valuables and papers belonging to the testator s estate was placed on his trial on two charges under s 406 Penal Code and was charged in the first charge with having committed criminal breach of trust in respect of or having dishonestly misappropriated the gross amount specified in the charge between 17th August 1909 and 15th August 1910 and in the second charge with having committed the same offence in respect of the account books of the estate between 11th July 1910 and 15th August 1910 and it appeared that most of the sums making up the gross amount charged were received before the period specified in the charge and the evidence did not disclose any completed ac of breach of trust between the dates mentioned in the charge and there was no evidence of any dishonest dealing with the account books before the 15th August 1910 *Held* as to the first charge that the error in the charge and the discrepancy between the dates specified therein and the actual dates on which the offence appeared to have been committed were not a mere irregularity which might be cured by the provisions of s 537 Cr P C It vitiated the whole trial and the appellant was entitled to an acquittal *Subramanya Ayyar v King Emperor 5 C W N 866 I L R 25 Mad 61* followed It was not enough to know that there was embezzlement at some time before during or after the period charged, because the charge was framed under the special provisions contained in cl (2) of s 222 Cr P C and the provision thereto and it was at any rate necessary to show an act or acts of embezzlement in respect of the gross sum named in the charge or some part of it committed within the space of one year *Held* as to the second charge that the same objection applied to the second charge which however was not bad on the ground that there was a separate offence as regards each account book and the appellant could not be tried for more than three of such offences the books forming one set of account books of the estate and having been found together in two locked boxes the keys of which were with the accused No retrial was ordered in this case as the charges failed not because they were not deficient in point of form but because they were not supported by the evidence adduced PROMOTHA NATH RAY *v* KING EMPEROR (1912) 17 C W N 479

——— *Act No XLV of 1860 (Indian Penal Code) s 408—Criminal breach of trust—Charge of general deficit in accounts where agent had not only to receive but also to expend moneys of his principal* S 222 sub s (2) of the Code of Criminal Procedure was meant to provide for the case of an agent or subordinate whose duty it might be merely to receive sums of money from time to time and to account for them It is not suitable to the case of an agent whose employment involves the expenditure of money belonging to the principal as well as its receipt *Emperor v Ibrahim Khan I L R 33 All 36* referred to Although transactions which involve civil liabilities may amount to criminal offences and often do so that the dividing line between the two in a discussion of the case is almost indistinguishable the use of the criminal law not for the purpose of punishing an offender or in the public interest but as a means of exerting pressure to extract money from an agent is to be discouraged EMPEROR *v* MOHAN SINGH I L R 42 All 522

——— ss 222 (2) and 233—*Penal Code ss 409 and 477A—Misjoinder of charges—Criminal breach of trust and falsification of accounts—Illegality* An accused person was charged with and tried at the same trial for offences under s 409 and s 477A of the Indian Penal Code In respect of the former offence he was charged with criminal breach of trust respecting a lump sum of money composed of numerous items In respect of the latter offence he was charged with suppressing a large number of documents showing the tender to him of sums of money by the persons liable to pay the same and with putting false numbers on three of such documents These documents (called *arzirsals*) related as well to other sums of money as to the sums which the accused was alleged to have embezzled *Held* that the principle of s 222 (2) of the Code of Criminal Procedure could not apply to s 477A of the Indian Penal Code and that the framing of the charges against the accused in the manner described was an illegality which vitiated the trial EMPEROR *v* KALKA PRASAD (1915)

I L R 38 All 42

——— ss 222 (2) 233 234—

See CHARGE I L R 41 Calc 722

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 222, 234 239—*Charges misjoinder of—Criminal misappropriation or breach of trust—Charge how to be framed where several persons are implicated—Joint charge illegality of* Where in a case more than one person were jointly charged with the offence of criminal breach of trust under s 408 Indian Penal Code with respect to a sum of money *Held* that there was a misjoinder of charges in the case The wording of s 2-2 Criminal Procedure Code refers to a single accused and it must be so because it is impossible to hold that two persons can be guilty of misappropriation of the same parcel of money S 239 therefore has no application to such a case When two persons are implicated in a case of criminal misappropriation or breach of trust with respect to a certain sum of money the charges against them must be of misappropriation in one case and of abetment in the other It is also open to the Court to frame the charges against each of them in the alternative i e of misappropriation or abetment GIRWAR NARAIN v THE KING EMPEROR (1912) 16 C W N 600

——— s 227—

See s 188 I L R 33 All 514

See s 237 26 C W N 344

——— s 233—

See s 4?1 I L R 39 Mad 527

See CHARGE I L R 40 Calc 846

See EXCISE I L R 41 Calc 694

——— *Omission to frame two separate charges for two offences if vitiates trial—Distinct offence meaning of—S 537 irregularity cured by—Scope of section* The petitioner was charged with and convicted of having caused hurt to two persons and thereby having committed an offence under s 323 Indian Penal Code Only one charge was framed against the petitioner in respect of the hurt caused to two persons *Held per* Sharfuddin, and Beachcroft JJ That the omission to frame two separate charges was an irregularity cured by s 537 Criminal Procedure Code The effect of the words subject to the provisions herein before contained in s 537 Criminal Procedure Code cannot be that the section is to have no application if there has been any departure from any of the previous sections of the Code Those words must be read as having reference only to ss 529 to 536 and do not refer to the entire Code that precedes that section That the case of *Subramania Iyer* v *The King Emperor I L R 25 Mad 61 s c 5 C W N 866* is not an authority for the proposition that failure to observe the first part of s 233 is fatal to the trial Beachcroft J—The observation of the Judicial Committee that their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity is limited in its application to the case where charges are tried to gether which the law expressly says shall not be tried together in the same trial The words mode of trial in that sentence cannot have reference to the formal defect of drawing up one charge instead of two The drawing up of the charge is part of the trial but the words mode of trial have reference to the constitution of the trial and when their Lordships speak of disobedience to an express provision as to a mode of trial they do not refer to a formal defect in the proceedings in a trial which is properly constituted Sharfuddin J—In *Subramania Iyer* v *The King Emperor I L R 25 Mad 61 s c 5 C W N 866* the case before the Privy Council was not that any provision of s 233 was contravened The only question before their Lorships was whether the mode of trial in which one indictment contained 41 acts spread over a period longer than 12 months was or was not illegal by reason of the provisions of s 34 of the Code What their Lordships of the Privy Council have prohibited is that if the law expressly provides a particular mode of trial a disobedience of that vitiaties the whole of the trial It is doubtful if the framing of charges is a mode of trial but joint trial of charges as to distinct offences would be a mode of trial and if an accused is tried jointly on several charges not coming under ss 234 235 236 and 239 that trial would be null and void When two offences have been committed and they have no connection with each other they are distinct offences within the meaning of s 233 Criminal Procedure Code Fletcher J S 233 Criminal Procedure Code provides that for every distinct offence of which any person is accused there shall be a separate charge The causing of hurt to two different persons is obviously two distinct offences and there ought to have been two separate charges framed against the petitioner of the offences charged under s 323 Indian Penal Code and the failure to do so rendered the trial illegal The whole of s 537 is governed by the words subject to the provisions hereinbefore contained. This includes amongst other provisions the provisions contained in s 233 and a neglect of the provisions contained in that section is not cured by s 537 RAM SUBHEG SINGH v THE KING EMPEROR (1915) 19 C W N 972

——— ss 233 235—

See s 222 I L R 38 All 42
I L R 41 Calc 722

See s 239 5 Pat L J 11

See CHARGE I L R 40 Calc 318

——— ss 233 236 239—*Misjoinder of charges—Illegality—Penal Code (Act XLV of 1860) ss 408 and 467* The accused was charged and tried at one and the same trial for three offences under s. 408 of the Indian Penal Code committed within a period of one year and three offences of forgery under s 467 of the Code and was convicted and sentenced in respect of all the six offences *Held* that this was an illegality not covered by s 537 of the Code of Criminal Procedure *Subrahmania Ayyar* v *King Emperor I L R 25 Mad 61* followed. *In re Bal Gangadhar Tilak I L R 33 Bom 221* referred to and discussed. EMPEROR v SHEO SARAN LAL (1910) I L R 32 All 219

——— ss 233 235 239—

See CHARGES I L R 46 Calc 712

——— *Irregularity in charge—Misjoinder of offences and parties—Charge framed confusing—Prejudice—Re-trial by a new Magistrate* Where the two petitioners were charged under s. 3-4 Penal C[illegible] causing hurt to three persons and only [illegible] was framed

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

———— ss 233 235 239—contd

against them which was in the following terms—That you on or about the 1st day of February 1906 at M voluntarily caused hurt to B S and L by a *dao* a cutting instrument and thereby committed an offence punishable under s 324 I P C and one of the petitioners was convicted under s 324 Penal Code and the other petitioner was convicted by the lower Appellate Court under s 352 Penal Code for using a *lathi* against two of the persons named in the charge *Held* that the irregularity in the charge might have prejudiced the accused in their trial and the conviction should be set aside and the accused should be retried on charges properly framed. Re trial by a new Magistrate ordered. SITAL CHANDRA MOITRA v THE EMPEROR (1906) 17 C W N 419

———— ss 233 535—*Charges misjoinder of* The four petitioners were convicted under s 193 Indian Penal Code for fabricating two *kabuliyats* executed on the same day one by two of them and the other by the two others the two sets of executants not having any community of interest *Held* that there was a misjoinder of charges SOFIUDDIN KAJI v FAJEL SHAIK (1917) 21 C W N 756

———— ss 233 to 239— *Person —Joint trial —Indian Penal Code (Act XLV of 1860) s 409* The word person in s 234 of the Code of Criminal Procedure 1898 is not confined to the singular number It is for the trial Court in the exercise of its discretion to determine whether the trial of more than one accused should be joint or not If a joint trial would prejudice the accused the trial should be separate KAILASH PRASAD VARMA v KING EMPEROR 3 Pat L J 124

———— ss 233 234 537—

See CHARGE I L R 41 Calc 66

———— s 234—

See s 222 16 C W N 600

See s 233 3 Pat L J 124

See JOINDER OF CHARGES
I L R 38 All 457
I L R 43 Calc 13

———— *Section if applies to offences against different persons* S 234 Criminal Procedure Code is not limited to cases where the offences have been committed against the same person. It applies where the complainants are different persons *Per* Fletcher J The power given by s 234 is however one that requires to be used with great care and caution when there are different complainants. CHATTRADHARI MIAN v THE KING EMPEROR (1915) 19 C W N 557

———— *Misjoinder of charges* Two accused persons were tried together on two charges, namely theft in a building (s 380 Indian Penal Code) and theft of paddy in a field (s 379 Indian Penal Code) committed on two different dates the property in the building and the paddy belonging to one and the same complainant *Held* that there was a misjoinder of charges under s 234 Criminal Procedure Code RAHIMAN BIBI v MABARAK MANDAL (1916) 20 C W N 672

———— *Joint trial—Same transaction* The petitioner was jointly tried and convicted under s 411 Indian Penal Code along with another person who was either the thief or who as first receiver having obtained a certain amount of the booty subsequently handed over a portion of it to the petitioner *Held* that the first receipt or retention by the co accused and the act by which he handed over a portion of the stolen property to the petitioner did not form part of the same transaction The High Court set aside the conviction and directed a retrial by a Magistrate other than the trying Magistrate RAMRATAN SUKUL v EMPEROR (1917) 21 C W N 1111

———— *Misjoinder of charges* The accused was tried on three charges of criminal misappropriation (s 409 Indian Penal Code) as also a charge under s. 210 Indian Penal Code The offence under s 210 had relation to one of the charges of criminal misappropriation but not to the other two and it partly referred to matter unconnected with any of the said charges and the date of this offence was not within the year within which the offences of criminal misappropriation were alleged to have been committed. *Held* that there was a misjoinder of charges KING EMPEROR v RAJENDRO ROY (1918) 22 C W N 596

———— *Person charged with more than one offence—Whether separate charges must be against same person* S 234 of the Code of Criminal Procedure 1898 is not limited to offences committed against the same person BABU LALL v KING EMPEROR 2 Pat L J 209

———— ss 234, 537—*Penal Code s 477A —Charge—Misjoinder of charges—Illegality* Where a person who was sent up for trial under s. 477A of the Indian Penal Code was charged with having wilfully altered and mutilated certain accounts between the years 1907 and 1909 and the evidence showed that the subject matter of the charge was practically five series of entries in certain sets of books *Held* that the charge so framed was bad, and the defect could not be remedied by s 537 of the Code of Criminal Procedure *Subrahmania Ayyar* v *King Emperor I L R 25 Mad 61* and *Queen Empress* v *Moti Lal Lahiri I L R 26 Calc 560* referred to EMPEROR v SALIM ULLAH KHAN (1909) I L R 32 All. 57

———— s 235—

See s 233 I L R 46 Calc 712

See CHARGE I L R 42 Calc 957

See JURY RIGHT OF TRIAL BY
I L R 37 Calc 467

See PENAL CODE, ss. 71 147
I L R 39 All 623

———— *Same transaction what is—Community of purpose or design and continuity of action necessary* In order that a number of acts may be so connected together as to form part of the same transaction within the meaning of s 235 Criminal Procedure Code community of purpose or design and continuity of action are essential elements To constitute community of purpose the mere existence of some general purpose or design will not be sufficient. The purpose in view must be something particular and definite There is no continuity of action where each act is a completed act in itself and the

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

———— s 235—contd

original design accomplished so far as that act is concerned. Where a company is formed with the object of defrauding the public, it cannot be said that distinct acts of embezzlement committed in the course of several years form part of the same transaction by reason of such general object. CHOPAGUDI VENKATADRI v EMPEROR (1910)
I L R 33 Mad 502

———— *Charges—Misjoinder—Same transaction.* The accused by means of personating a Police Officer obtained from *A* several sums of money on different occasions and on one occasion attempted to obtain another sum. *Held* that the trial of the accused on a charge under s 170 Indian Penal Code and on three charges of extortion in respect of three sums and in the alternative on three charges of cheating in respect of those three sums and on a charge of an attempt at extortion in respect of another sum was not illegal by reason of misjoinder of charges as the offences charged were committed in the same transaction. *Queen Empress v Wazir Jan I L R 10 All 58* referred to and followed. JAGDISH KUMAR SINHA v ATMA RAM (1911)
15 C W N 732

———— *Whether charges under Bihar and Orissa Excise Act 1915 (B and O Act II of 1915) s 47 (a) and the Opium Act (I of 1878) s 9 (c) can be tried together—Separate sentence's legality of—General Clauses Act (X of 1897) s 26.* Where the accused was charged and convicted of having sold opium to a certain person on two occasions and of being in possession of opium and was separately sentenced for each conviction *held* that neither the joint trial for the two offences nor the separate sentences imposed was illegal. BALI SAHU v KING EMPEROR
13 Pat L J 433

———— ss 235 (1) and 537—*Misjoinder of charges at one trial—vitiates whole trial and is not a mere irregularity—meaning of "same transaction" explained.* A accused (appellant) was anxious to marry the daughter of one Jagan Nath but her father objected and arranged to marry her to another man in February 1920 and on 31st January the ceremony of *lagan* which precedes the actual marriage by a few days was celebrated. On 2nd February between noon and 1 30 P M accused gave some sweetmeat poisoned with arsenic to Amir Singh, aged 9 years and on the same day about 5 P M he gave a similar sweetmeat to Dalip Singh, aged 12 years both being sons of Jagan Nath. After eating the sweetmeats the 2 boys were taken ill. Dalip Singh recovered but Amir Singh died the next day. The Sessions Judge tried the accused at one trial for both offences namely the murder of Amir Singh and the attempt to murder Dalip Singh, and convicted him of both offences. On appeal to the High Court it was contended that the joint trial was contrary to law and therefore altogether illegal. *Held* that if the joint trial of two offences is contrary to the express provisions of the law their joinder vitiates the whole trial and the mere fact that the accused has not been prejudiced by the procedure is not a valid ground for condoning the defect. *Subramania Ayyar v King Emperor (I L R 25 Mad 611 P C)* followed. *Held further* that no hard and fast rule can be laid down for determining the question whether the charges in a particular case constitute one transaction. The answer to the question depends, to a large extent upon the peculiar circumstances of each case. The word "transaction" in s 235 (1) of the Code of Criminal Procedure suggests not necessarily proximity in time so much as continuity of action and purpose. It is not necessary that the acts constituting the crimes should have been committed on the same occasion but it is sufficient that though separated by a distinct interval of time they are closely connected by continuity of purpose and progressive action towards a single object. *Emperor v Sherufalli Allibhoy (I L R 27 Bom 135)* and *Emperor v Datto Hanmant (I L R 30 Bom 49)* referred to. *Held also* that upon the facts of the present case the trial did not transgress the rules as to the joinder of charges because the charges in this particular case did constitute one transaction. PAHLAD v THE CROWN
I L R 1 Lah 562

———— ss 236 195 537 (b)—*Indian Penal Code (Act XLV of 1860) s 193—Perjury arising from contradictory statements—Alternative charge—Series of acts consisting of contradictory statements—Judicial proceeding—Statement taken under s 164—Contradictory statements made before different Courts—Sanction of each Court essential—No interference in revision unless want of sanction occasions failure of justice.* A statement recorded by a Magistrate in the course of a police investigation under s 164 of the Criminal Procedure Code is not evidence in a stage of a judicial proceeding within the meaning of Explanation 2 to s 193 of the Indian Penal Code 1860. *Held* by MACLEOD C J and PRATT FAWCETT and SETALWAD JJ (SHAH J dissenting) —Although a statement recorded under s 164 of the Criminal Procedure Code 1898 is not evidence in a stage of a judicial proceedings but comes within the meaning of the words "evidence in any other case" used in s 193 of the Indian Penal Code it can be linked with a statement which is evidence in a stage of the judicial proceeding following on the investigation so that the two can be said to be a series of acts on which an alternative charge can be framed under s 236 of the Criminal Procedure Code of intentionally giving false evidence under s 193 of the Indian Penal Code 1860. *Queen Empress v Mugappa bin Ningapa (1893) 18 Bom 37* overruled. *Queen Empress v Ismail valad Fataru (1886) 11 Bom 659* and *Queen Empress v Khem (1899) 22 All 115* approved. *Held* by MACLEOD C J and SHAH J —Where an alternative charge of giving false evidence is based on contradictory statements made before different Courts it is necessary that sanction of each of these Courts must be obtained under s 195 of the Criminal Procedure Code 1898 before the Court can take cognizance of the charge. If however want of sanction has not occasioned a failure of justice it cannot be made the basis of interference in revision. *Sunder Dasaell v Sital Mahto (1900) 28 Cal 217* referred to. EMPEROR v PURSHOTTAM ISHWAR (1920)
I L R 45 Bom 834

———— ss 236 237—

See AUTREFOIS ... 45 Calc 727

See COCAINE ... 11 Calc 537

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 236 237—*contd*

——— *Indian Penal Code (Act XLV of 1860) ss 147 323—s 237 Criminal Procedure Code when applies—Conviction of rioting without any charge under s 323 Indian Penal Code—Conviction under s 323 Indian Penal Code by Appellate Court after setting aside conviction of rioting legality of* The petitioners were convicted by the Magistrate under s 147 Indian Penal Code On appeal the Sessions Judge set aside the conviction and sentence under s 147 Indian Penal Code and convicted the petitioners under s 323 Indian Penal Code No charge had been framed against the petitioners under s 323 Indian Penal Code *Held* that 237 has to be read with s 236 If the facts of the case do not fall under s 236 s 237 has got no application There was no charge framed against the petitioners for an offence of causing hurt and they had therefore no opportunity to defend themselves on this charge and the conviction and sentence must be set aside GENU MANJHI v THE KING EMPEROR (1914)

18 C W N 1276

——— s 237—

See PENAL CODE ss 417 420 AND 511

1 Pat L J 391

——— *Conviction of rioting with common object of assault—Acquittal by Appellate Court on charge of rioting and conviction of assault if proper—Necessity of finding against individual accused on charge of assault* The petitioners were charged under s 147 Indian Penal Code the common object of the alleged unlawful assembly as stated in the charge being to assault the police No charge under s 353 or s 323 was framed The Magistrate convicted the petitioners under s 147 Indian Penal Code The Sessions Judge in appeal acquitted the petitioners of the offence of rioting and convicted them under s 353 Indian Penal Code in respect of the assault committed upon the several police officers The Sessions Judge did not find which police officer was assaulted by which petitioner *Held* that the Sessions Judge was wrong in convicting the petitioners of an offence under s 353 Indian Penal Code the petitioners not having been called upon to answer any such charge That in the view taken by the Sessions Judge of the case a finding as to which police officer was assaulted by which petitioner was essential HAR NARAN SARDAR v THE EMPEROR (1914)

18 C W N 1274

——— *Charge under s 457 Indian Penal Code of house breaking by night with the object of committing theft conviction under s 456 for house breaking by night with the object of carrying on intrigue with the complainant s wife —Propriety of conviction without amendment of charge—Indian Penal Code (Act XLV of 1860) ss 456 457* The accused was tried on a charge under s 457 of the Penal Code of breaking open at night the door of the complainant s house with the object of committing theft and was convicted under s 456 for having committed the offence of house breaking by night with the object of carrying on an intrigue with the complainant s wife *Held* that though it cannot be laid down as a general rule that in all cases a prosecution for house trespass with the alleged object of theft must fail if that object is not proved, when a charge has been definitely framed in which theft is alleged as the object the accused cannot be convicted of house trespass with some other object without an amendment of the original charge unless the Court is satisfied that he has not been in any way prejudiced HAJARI SONAR v KING EMPEROR

26 C W N 344

——— ss 237 238 423—*Person convicted of an offence cannot on appeal be convicted of abetment of such offence* The power of an Appellate Court under s 423 of the Code of Criminal Procedure to alter a finding must be used in accordance with the provisions of ss 237 and 238 of the Code Where a person who has been convicted of an offence has appealed the Appellate Court cannot after acquitting him of such offence convict him of the abetment of such offence PADMANABHA PANJIKANNAYA v EMPEROR (1909)

I L R 33 Mad 264

——— s 238—

See LURKING HOUSE TRESPASS

I L R 44 Calc 358

See PENAL CODE s 498

I L R 38 All 276

——— *Trial with the aid of assessors—Conviction of the accused for a minor offence which is triable only by a jury—Trial regular —Practice and procedure* The accused was tried for an offence punishable under s 302 of the Indian Penal Code by the Sessions Judge of Belgaum with the aid of assessors At the close of the trial and after the opinions of the assessors were recorded the learned Judge was of opinion that though the accused was not guilty of the offence charged he was still guilty of the minor offence punishable under s 326 of the Code Accordingly in the same trial he convicted the accused of the minor offence though it was triable, in that District only by a jury On appeal — *Held* that the Sessions Judge was competent to convict the accused of an offence punishable under s 326 of the Indian Penal Code even though it was triable by a jury PER CRUMP J —S 238 of the Criminal Procedure Code 1898 invests the Court trying the offence (however constituted) with authority to find as an incident to such trial that certain facts only are proved in the trial which facts constitute a minor offence though such minor offence is not triable by the Court as constituted PER SHAH J —The necessary implication of s 238 appears to be that there need be no separate trial with reference to the minor offence According to the section even the charge is not required to be made *Pattaladan Ummaru* v *Emperor (1902) 26 Mad 243* referred to EMPEROR v CHANGOUDA (1920)

I L R 45 Bom 819

——— s 239—

See s 197, I L R 43 Bom 147

See s 222 16 C W N 660

See JOINT TRIAL 1 Pat L J 65

See JURY I L R 37 Calc 467

See MISJOINDER I L R 38 Calc 453

I L R 42 Calc 760 1153

I L R 46 Calc 741

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 239—*contd*

——— *Joint trial of principal and abettor—Prejudice—Re trial by another Judg* Where there were three charges under ss. 408 and 408—109 Indian Penal Code against two accused persons in respect of three sums said to have been defalcated on three different dates and the Sessions Judge tried the two accused jointly in spite of objection taken by them *Held* that under s 239 Criminal Procedure Code judicial discretion was given to the Court to try the principal offender and the abettor either jointly or separately and the manner in which this discretion should be exercised must depend on the facts of each case The High Court on a consideration of the circumstances of the case held that the accused should not have been tried on the charges jointly and set aside the convictions and sentences and directed that the re trial if any should take place before another Sessions Judge DWARKA SING v KING EMPEROR (1913) 19 C W N 121

——— *Same transaction determining factor as to* In deciding whether offences are so connected as to form one and the same transaction the determining factor is not so much proximity in time as continuity and community of purpose and object S 239 Criminal Procedure Code is only an enabling section and does not in any way trammel the discretion of the Court LEGAL REMEMBRANCER BENGAL v MON MOHAN ROY (1914) 19 C W N 672

——— *Procedure—Joint trial—Thief and receiver triable together* *Held* that in the absence of evidence clearly disassociating the act of receiving the stolen property from the theft thereof the theft and the receipt of the stolen property may be considered as parts of the same transaction It would not therefore be illegal to try thief and the receiver jointly *Emperor v Balabhai Hargovind 6 Bom L R 517* followed EMPEROR v BHIMA (1916) I L R 38 All 311

——— ss 239 233 and 235— *In the same transaction —joint trial* Where the first accused seized a woman with the intention of forcibly having sexual intercourse with her and was attacked by her husband and the second and third accused thereupon appeared and assaulted the husband *held* that in the absence of proof that the three accused were acting for a common purpose in execution of a common design a joint trial in which the first accused was charged under s 354 of the Penal Code and the second and third accused under s 323 was illegal TEPANIDHI GOBINDRA CHANDRA BHARATI v THE KING EMPEROR 5 Pat L J 11

——— ss 239 435 436 439—*Evidence Act (I of 1872) s 91—Civil Procedure Code (Act V of 1908) O XVIII rr 5 and 6—Prosecution for perjury—Deposition of a witness not read over and interpreted to him before his signing it—Record whether admissible in proof—Irregularity or illegality—Public policy—Joinder of persons in preliminary inquiry whether prohibited—Discharge of accused by Sub Magistrate—Power of Sessions Judge to direct committal for offences under ss 471 and 193 Indian Penal Code* Where a deposition of a witness is not read over and interpreted to him before it is signed by him he cannot be prosecuted for perjury on such deposition under s 193 of the Indian Penal Code Omission to interpret and read over the deposition to the witness is not a mere irregularity but renders the record inadmissible in proof of the deposition under s 91 of the Evidence Act as the guarantee provided by the law for its accuracy has been substantially ignored and it is dangerous and against public policy to make a witness liable on such a wholly unsafe record *Bogra v Emperor I L R 34 Mad 141* distinguished *Meango v Baviah 45 I C 507* dissented from A Sessions Judge acting under ss 435 and 436 of the Criminal Procedure Code cannot direct committal to the Sessions Court of an accused who has been discharged by a Sub Magistrate in a preliminary enquiry into offences under ss 193 and 471 of the Indian Penal Code for forgery of a promissory note not being a Government of India Promissory note as such offences are not exclusively triable by a Court of Sessions S 239 of the Criminal Procedure Code prohibits only a joint trial and not a joint preliminary inquiry into a case against several persons for the purpose of committal to the sessions CHENCHIAH v KING EMPEROR (1919) I L R 42 Mad 561

——— s 241—

See s 14 3 Pat L J 291

——— s 242—

See s 117 I L R 34 Mad 139

See CHARGE I L R 42 Calc 957

——— ss 246 247—*Examination of complainant if absolutely necessary—Examination of witnesses on date of hearing in the absence of complainant if vitiates trial* S 244 of the Code of Criminal Procedure does not make the examination of the complainant himself in a summons case absolutely necessary S 247 Cr P C gives the Magistrate a discretion to adjourn the hearing on any day when the complainant is absent and the examination of witnesses on any such day in the absence of anything to show that the accused was in any way prejudiced does not vitiate the trial SARAFDI HAZI v KING EMPEROR 24 C W N 199

——— ss 244 and 540—*Right of accused to summon witnesses—Second application by accused to Magistrate not seised of the case—Procedure—Affidavit* When an accused person has been called upon to make his defence and has applied for and obtained the summoning of witnesses on his behalf his only means of procuring the summoning of further witnesses is to ask the Court to take action under s 540 of the Code of Criminal Procedure The accused has no right to put in a second application *simpliciter* for the summoning of more witnesses nor has the Court any power to grant such an application more particularly when such Court is a Magistrate not seised of the case to whom the application is made in the absence of the trying Magistrate Observations on the content drafting and attestation of affidavits EMPEROR v MANGAL (1913) I L R 36 All 13

——— s 247—

See s 244 24 C W N 199

See ACQUITTAL I L R 46 Calc 867

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s 247—*contd*

See COMPLAINT

I L R 42 Calc 385

1 ———— *Death of Complainant effect of in a summons case—Substitution of relative of complainant* In a case under s 352, Indian Penal Code after the death of the complainant his nephew applied for substitution of his name in place of the deceased The Magistrate directed the case to be proceeded with the ground assigned being that the accused had been guilty of the contempt of the process of the Court *Held*, that it was not a sufficient ground and the Magistrate should have recorded an order of acquittal under s. 247 Criminal Procedure Code PURNA CHANDRA MOULIK *v* DENGAR CHANDRA PAL (1913) 19 C W N 334

2 ———— *Death of complainant—Application by the son of complainant to proceed with the case—Acquittal under s 247 Criminal Procedure Code—Reference under s 438 Criminal Procedure Code—Interference by High Court—Practice in case of acquittals* On the application of the complainant in a case of rioting which ended in a conviction proceedings under ss 154, 155 Indian Penal Code were instituted against the person in whose interest the riot had been committed On the date fixed for hearing the complainant s son appeared in Court his father having died in the meantime, and asked to be allowed to go on with the case but the trying Magistrate acquitted the accused under s 247 Criminal Procedure Code being of opinion that he had no option in the matter *Held* that it is open to doubt whether s 247 Criminal Procedure Code was intended to apply to a case like the present The section seems to apply to the case of a complainant who is alive but does not appear That in any view the trying Magistrate should have proceeded with the case That the practice of the High Courts has always been to refuse to interfere in revision with acquittals except for special reasons but in the present case which was one of considerable importance involving the peace of the district and in which the Magistrate had not exercised his discretion and given reasons for refusing to go on with the case the order of acquittal should be set aside DAMOO SAHU *v* JITAN DUSADH (1916) 20 C W N 862

3 ———— *Summons case, hearing of when concludes—Non appearance of complainant on date fixed for argument and consequent acquittal of accused if proper* Where in a summons case after the examination of the witnesses for the prosecution and the defence the Magistrate adjourned the case for argument for the purpose of the documentary and oral evidence being explained to him and on that adjourned date the complainant did not appear and the accused was acquitted under s 247 Criminal Procedure Code *Held* that although the Code of Criminal Procedure makes no provision for argument in a case governed by Chap XX of the Code the hearing of the case did not end with the examination of the witnesses for the parties and s 247 had application to the circumstances of the case RAM JIWAN RAI *v* ABILAKH BARAI (1913) 18 C W N 584

4 ———— *Order of acquittal on account of complainant's absence passed on a date not fixed for hearing of case effect of* A case was called on by mistake on a date not fixed for hearing and the Magistrate recorded an order of acquittal under s 247 Criminal Procedure Code on account of the absence of the complainant On the date fixed for hearing the mistake was discovered and the Magistrate ignored the order previously passed by him under s 247, Criminal Procedure Code and went on with the case which ended in a conviction *Held* that an order passed on a date which was not fixed for the hearing of the case and on which date the complainant was necessarily absent is no order at all and the trying Magistrate had jurisdiction to ignore it and go on with the case and come to the finding which he did *High Court Proceedings No 1793 2 Weir 307* followed *Suresh Chandra v Banku, 2 C L J 622* distinguished ACHAMBIT MONDAL *v* MOHATAB SINGH (1914) 18 C W N 1180

5 ———— *Complaint by servant on behalf of master—Acquittal under s 247 on death of such complainant—Complaint of same offence by another servant—Previous acquittal if bar to Magistrate s taking cognizance of second complaint—Penal Code (Act XLV of 1860) s 426—Maiming an animal* A servant on behalf of his master filed a complaint that an elephant belonging to his master had been maimed by the accused The Magistrate receiving the complaint issued process under s 426 of the Penal Code On the date fixed for the disposal of the case finding that the complainant was dead the Magistrate acquitted the accused under s 247 Criminal Procedure Code Thereupon another servant (the petitioner) complained to the Sub divisional Magistrate of the same offence of maiming his master's elephant but the Sub divisional Magistrate dismissed the complaint under section 203 Criminal Procedure Code on the ground that the previous acquittal was a bar to his taking cognizance of it *Held* that the previous acquittal was wholly without jurisdiction and was no bar to the Magistrate s taking cognizance of the second complaint MADHO CHOWDHURY *v* TURAB MIAN (1914) 18 C W N 1211

———— ss 247 and 403—*Autrefois Acquit—Acquittal under s 243 bars further proceedings* Where a case was disposed of under s 247 Criminal Procedure Code the complainant and accused both being absent the order under s 247 operates as a bar to further proceedings The provision in s 403 Criminal Procedure Code that a fresh trial will not be barred unless the accused has in the first case been tried does not limit the effect of an order of acquittal under s 247 Criminal Procedure Code *In the matter of* GUGGILAPU PADDAYA OF PALAKOT (1910) I. L. R 34 Mad 253

———— ss 247 403 and 494—*Order of acquittal under s 494 whether final bar to further proceedings—Autrefois acquit* In a summons case the Public Prosecutor withdrew from the prosecution before the accused had been served and the accused was acquitted under s 494 Criminal Procedure Code On a difference of opinion between ABDUR RAHIM and NAPIER JJ as to whether the accused could be said to have been tried as well as acquitted within the meaning of s 403 so as to bar further proceedings *Held* by Sir JOHN WALLIS C J under s 429 that the rule of English

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 247 403 and 494—*contd*

law requiring the accused to have been tried as well as acquitted in order to bar further proceedings which is embodied in s 494 of he present Code (s 61 of the Code of 1872) is inapplicable to the statutory acquittals subsequently introduced into the Code i e the sections now numbered 494 247 and 345 which are intended to bar further proceedings whether the accused can be said to have been tried or not Cases governed by s. 429 Criminal Procedure Code cannot be referred to a Full Bench *Re Kotayya I L R 40 Mad 97* (foot note) dissented from *In re* DUDEKULA LAL SAHIB (191) I L R 40 Mad 976

——— ss 247 259—*Penal Code (Act XLV of 1860) ss 352 and 504—Summons case—Warrant case—Trial of both offences in one trial—Procedure to be followed—Absence of complainant at the hearing—Discharge of accused effect of—Subsequent trial for the same offences whether barred* Where a complaint was preferred against a person for offences under ss 352 and 504 of the Indian Penal Code committed in the cause of the same transaction the former offence being triable as in summons-case and the latter as a warrant case and the Magistrate discharged the accused owing to the absence of the complainant on the day of hearing and a fresh complaint was preferred in respect of the same offences *Held* that the procedure to be followed in such a trial is the one provided for the trial of a warrant case and that the discharge of the accused did not amount to an acquittal of the offence under s 352 of the Indian Penal Code and was not a bar to the subsequent trial for the same offence *Rajnarain Kcorwar v Lala Tamoli Raut I L R 11 Calc 91 Re Subbarudu I L R 9 Mad 503 Hossein Sardar v Kalu Sardar I L R 29 Calc 481* and *In re Samu udin I L R 22 Bom 711* followed RAGHAVALU NAICKER v SINGARAM (1918)

I L R 41 Mad 727

——— ss 247 438—It is open to doubt whether s 247 was intended to apply at all to a case where the complainant has died DOMOO SAHU v JITAN DUSADH 1 Pat L J 264

——— ss 248 258 345—*Warrant case—Non compoundable offence—Complainant withdrawing from prosecution—Order of acquittal—Practice and procedure* In a warrant case in respect of a non compoundable offence it is not competent to the Magistrate on a private complainant s offering to withdraw from the prosecution to enter an order of acquittal EMPEROR v RANCHHOD BAWLA (1919) I L R 37 Bom 269

——— s 248 345—*Wrongful confinement case—Petition filed by the complainant praying that the case may be struck off without hearing—Such petition whether compromise or withdrawal—Procedure in warrant cases for withdrawal—Meaning of compromise and withdrawal* Compromise is a word which in itself contemplates an arrangement to which there are two parties Withdrawal has no such meaning A case is compromised if with the consent of the accused it is withdrawn A case is withdrawn under s 248 Criminal Procedure Code without the consent of the accused When a petition is filed by the complainant praying for striking off the case it is clearly open to the Magistrate to satisfy himself under what section the petition is before him Where the answers of the complainant clearly indicate that the case had not been compromised but was being withdrawn without the consent of the accused and the subsequent action of the accused shows that he had never consented to the compromise of the case *Held* that the petition was not a petition made under s 345 Criminal Procedure Code and that the subsequent proceedings resulting in the trial and conviction of the accused were in order *Murray v Queen Empress I L R 21 Calc 103 Abdool Biswas v Khater Mondal 3 C W N 339* and *In re Ganesh Narayan Sathe I L R 13 Bom 600* referred to BAYAN ALI v KING EMPEROR (1916)

20 C W N 1209

——— s 250—

See s 107 I L R 36 All 382

See COMPENSATION

I L R 39 Calc 157

See COMPENSATION TO ACCUSED

I L R 38 Calc 302

See INFORMATION 14 C W N 926

See PENAL CODE s 494

I L R 40 All 615

See WORKMEN S BREACH OF CONTRACT ACT (XIII OF 1859) ss 1 2

I L R 41 All 92

——— *False charge—Vexatious charge—Compensation awarded to accused from complainant—Order sanctioning prosecution of complainant for false charge under s 211 of the Indian Penal Code (Act XLV of 1860)* S 250 of the Criminal Procedure Code (Act V of 1898) applies to a charge which is false and also to a charge which is frivolous or vexatious *Emperor v Lax Asha 5 Bom L R 128* and *Beni Madhub Kurmi v Kumud Kumar Biswa I L R 30 Calc 193* followed It is competent to a Magistrate passing an order of compensation under s 250 of the Criminal Procedure Code to also recommend issue of sanction to prosecute the complainant under s 211 of the Indian Penal Code 1860 *Adillan v Alagan I L R 21 Mad 237* followed *Bachu Lal v Jagdam Sahai I L R 26 Calc 181* not followed *In re* GOPALA BAHAU (1912)

I L R 37 Bom 356

——— *In appeals under s 250 notice to accused not imperative* In appeals under s 250 of the Criminal Procedure Code it is not imperative that notice should be given to the accused] AMBAKKAGARI NAGI REDDI v BASAPPA OF MEDIMAKULAPALLI (1909)

I L R 33 Mad. 89

——— *Frivolous or vexatious complaint—Award of compensation to accused—Award to be made by order of discharge or acquittal and not by separate order* *Held* that s 250 of the Code of Criminal Procedure was not intended to meet the case of false accusation but of frivolous and vexatious accusations *Held also* that the direction to pay compensation in a case found to be frivolous or vexatious cannot be made in a subsequent proceeding but must form part of the order of discharge or acquittal RAM SINGH v MATHURA (191) I L R 24 All 4

——— *Compensation to accused—Final order of should be contained in order*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

———— s 250— contd

of discharge or acquittal—Proviso meaning of—Imprisonment in default of payment of fine when to be ordered Where in discharging the accused under s 253 Criminal Procedure Code the Magistrate in his order of discharge declared the case to be vexatious and directed the complainant under s 250 Criminal Procedure Code to pay compensation to the accused subject to any cause being shown by him and no cause being shown by the complainant the Magistrate the day after made his previous order absolute and further directed the complainant to suffer simple imprisonment for 30 days in default of payment of the compensation *Held* that the Magistrate s order directing the payment of compensation was in strict compliance with s 250 Criminal Procedure Code It is sufficient that the Magistrate fixed the compensation in his order of discharge The proviso to s 250 clearly contemplates that the direction in the first paragraph of the section shall be considered as in the nature of a rule and that that rule shall not be made absolute until the complainant has shown cause *Haru Tanti* v *Satish Roy I L R 38 Calc 392* distinguished So far as the sentence of imprisonment in default of payment was concerned the High Court held *that there was an obvious error* and ordered it to be amended in terms that the compensation shall be recovered as if it were a fine and in the event of its not being so recovered there shall be simple imprisonment LALIT MOHAN SINGHA *v* KUNJA LEHARY GHOSH (1913) **18 C W N 702**

———— *Compensation order for payment of by complainant—Opportunity to show cause* The Magistrate after acquitting the accused made the following order — Accused acquitted complainant to pay compensation to each of the accused *under s 250 Criminal Procedure* Code and show cause why he should not pay Complainant is absent His brother verbally shows cause which is insufficient order made absolute *Held* that the complainant was in fact given no opportunity of showing cause and the order should be set aside SUBANS SINGH *v* MOHABIR PROSAD SINGH (1914)

18 C W N 1277

———— *Compensation—Accused tried on two charges and acquitted on one but convicted on the other* S 250 of the Code of Criminal Procedure is only applicable where the trying court discharges or acquits the accused altogether It cannot be made use of where the accused being tried on two charges is acquitted on one but convicted on the other *Mukti Bewa* v *Jhotu Santra I L R 21 Calc 53* followed MUHAMMAD ALI KHAN *v* RAJA RAM SINGH (1918)

I L R 40 All 610

———— *Frivolous or vexatious accusation—Compensation—Against whom order for compensation can be made* It is not necessary that the person against whom an order for compensation under s 250 of the Code of Criminal Procedure is made should be the person who himself gives information to a Magistrate in consequence of which another is accused of an offence provided that he is the person upon whose information an accusation is made EMPEROR *v* BAHAWAL SINGH (1917) **I L R 40 All 79**

———— *Complaint or information given to police officer* Where a criminal proceeding was started not upon the petitioner s complaint or upon information given by him to a police officer or to a Magistrate as required by the Criminal Procedure Code 1898 s 250 but upon evidence obtained by the police upon enquiry instituted by them *Held* the petitioner could not be said to have instituted the proceedings even though his statement was taken with that of others during the enquiry by the police SARJU PRASAD SINGH *v* THE KING EMPEROR

1 Pat L J 106

———— *Compensation for frivolous or vexatious complaint—Bombay Public Conveyances Act (Bom Act VI of 1863) s 28—Proceeding to recover legal fare not complaint for an offence* A proceeding to recover legal fare under s 28 of the Bombay Public Conveyances Act 1863 is not a complaint for an offence and even if frivolous or vexatious no order for compensation can be passed under s 250 of the Criminal Procedure Code 1898 *In re* VALLI MITHA (1919)

I L R 44 Bom 463

———— *Order for compensation without examining all the witnesses of complainant legality of* In a case of rioting and intimidation the Magistrate after examining only some of the witnesses of the complainant discharged the accused and after asking the complainant to show cause why he should not be ordered to pay compensation to the accused passed an order for compensation without examining the remaining witnesses in spite of his request to do so *Held* that the order was not illegal but one that should only be made in very exceptional circumstances APPALANARASAYYA BHUKTA *v* EMPEROR

I L R 44 Mad 51

———— ss 250 423—*Compensation order for—Appeal—Notice to the accused order without improper but not illegal—Complaint false as well as frivolous or vexatious* In appeals under 250 of the Code of Criminal Procedure notice should ordinarily be given to the accused even though failure to give notice may not render the proceedings of the Court illegal *Emperor* v *Palaniappavelan I L R 29 Mad 187* approved *Ambakkagari Nagi Reddy* v *Basappa of Medimakulapalli I L R 33 Mad 89* followed *Guruswami Naicken* v *Tirumurthi Chetty 27 Mad L J 629* explained *Alagirisami Naidu* v *Balakrishnasami Mudaliar I L R 26 Mad 41* *Imperatrix* v *Sadashiv I L R 22 Bom 519* *In the matter of the petition of Umrao Singh* v *Fakir Chand I L R 5 All 719* and *In the matter of Teacotta Sheldar I L R 8 Cal 393* referred to S 250 not only refers to false complaints but to frivolous and vexatious complaints as well *Emperor* v *Bindeshri Prasad I L R 26 All 512* and *Bani Madhab Karim* v *Kumud Kumar Biswas I L R 30 Calc 123* referred to *Ram Singh* v *Mathura I L R 31 All 341* doubted *Per* SPENCER J S 250 does not declare what the powers of an Appellate Court are in disposing of appeals under clause (3) of the section It is therefore unnecessary to invoke the aid of s 423 for the purpose *Per* SESHAGIRI AYYAR J The powers of the Appellate Court to grant redress have to be gathered from s 423 S 250 is not self contained as are sections relating to grant of sanction and to convictions for contempt (ss 195 and 480)

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

—————— ss 250 423—contd

Chapter XXXI of the Criminal Procedure Code applies to appeals against orders under s 250 of the Code VENKATARAMA v KRISHNA (1916)
I L R 38 Mad 1091

—————— ss 250 537—*Frivolous or vexatious complaint—Compensation—Procedure—Irregularity* A Magistrate after recording the evidence for the prosecution and the statement of the accused came to the conclusion that the complaint was unfounded and discharged the accused and in the same order called upon the complainant to show cause under s 250 of the Code of Criminal Procedure why he should not pay compensation to the accused. Four days later after hearing the complainant the Magistrate passed an order directing him to pay compensation *Held* that the proceedings though not strictly in accordance with s. 250 of the Code were not so far at variance with its provisions as to fall outside the purview of section 537 *Jugal Kishore v Abdul Karim All Weekly Notes (1905) 214* and *Emperor v Punamchand Hirachand 8 Bom L R 47* followed *In re Safdar Husain I L R 25 All 315* not followed GHURBIN KOERI v KHALIL KHAN (1914)
I L R 36 All 132

—————— ss 253 359—
See REVIEW
I L R 38 Calc 828

—————— ss 253 (2) 350 and 437—
See AUTREFOIS ACQUIT
I L R 38 Mad. 585

—————— ss 253 259—*Warrant case—Discharge of accused for absence of complainant* In a warrant case an order discharging an accused person on account of the absence of the complainant cannot be made under s 253 Criminal Procedure Code Such an order can only be made under s 259 and in a case where the offence may be lawfully compounded ALEXANDER v CONNORS (1916)
20 C W N 698

—————— s 254—
See s 200 I L R 37 All 628

—————— *Commitment of case which Magistrate was competent to try—Commitment quashed—Indian Penal Code s 2??* It is not competent to a Magistrate to commit a case which it is within his jurisdiction to try unless he is of opinion that the accused if guilty cannot be adequately punished by him EMPEROR v BINDESHRI GOSHAIN (1919)
I L R 41 All 454

—————— ss 254 347—*Commitment to Sessions by Magistrate competent to try and adequately punish legality of* The terms of s 347 of the Criminal Procedure Code are general and give a Magistrate who is empowered to commit a discretion in committing cases for trial which is not limited by s 254 so as to make it obligatory on him to try every case which he can adequately punish *Queen Empress v Kazemullah Mandal I L R 24 Calc 429 King Emperor v Dharam Singh 1 M L T 61* and *Emperor v Jagmohan 11 Cri L J 51* not followed *In the matter of Chinnammiagaru I L R 1 Mad 289* applied CROWN PROSECUTOR THE v BHAGAVATHI (1918)
I L R 42 Mad 83

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

—————— s 255 256 271 272 and 428—
See EVIDENCE ACT (I OF 1872) s 21
I L R 36 Mad 457

—————— ss 255 342—*Evidence Act (I of 1872) s 30—Confession of co accused admissible under—Separate trials not necessary where confession made during trial* When before a Magistrate in a statement under s 347 Criminal Procedure Code certain accused confessed the crime and implicated their co accused and further under s 255 (1) pleaded guilty to the charges *Held* that it was not necessary to try the co accused separately to enable the confessions to be used against them under s 30 Indian Evidence Act *Queen Empress v Lakshmayya Pandaram I L R 22 Mad 491* dissented from *Queen Empress v Pirbu I L R 17 All 524* and *Queen Empress v Pahuji I L R 19 Bom 195* distinguished *Re* BATI REDDI (1913) I L R 38 Mad 302

See CROSS EXAMINATION
I L R 37 Calc 236

—————— *Compensation for making a frivolous or vexatious complaint—Consequential order—S 423 sub s 1 cl (d)—Power of Appellate Court under* An Appellate Court can pass an order against the complainant awarding compensation to the accused under s 250 Criminal Procedure Code Such an order may very reasonably be regarded as a consequential order within the meaning of s 423 sub s 1 cl (d) *Balli Pandey v Chittan I L R 28 All 675* dissented from KAPI SINGH v TUFANI DHANUK (1909)
14 C W N 212

—————— s 256—

—————— *Summons case and Warrant case trial of—Procedure that of Warrant case—Warrant case withdrawn—Charge framed in summons case—Right of accused to recall and cross examine prosecution witnesses—Magistrate refusal of illegal—Prejudice—Onus on prosecution* When a summons case and warrant case are tried together the procedure to be followed is that prescribed for the warrant case *Pajnarayan Koonwar v Lala Tamoli Raut I L R 11 Calc 91* followed. If the complaint in respect of the offence triable as a warrant case is not proceeded with but a charge be framed only in respect of the offence triable as a summons case the accused is entitled to recall and cross examine the prosecution witnesses under s 256 of the Code of Criminal Procedure as he could not have anticipated the withdrawal of the former charge and could not be said to have been in default A refusal of the Magistrate to allow the accused to recall and cross examine the prosecution witnesses is illegal and it is for the prosecution to show that the accused are not prejudiced thereby *P* SOBHANADRI (1915)
I L R 39 Mad 503

—————— ss 256 and 257—

—————— *Right of accused after charge to recall prosecution witness for further cross examination—Absolute or qualified right—Applicability of s 256 to witness not present before Court—Waiver by counsel whether binding on accused—Entering upon defence meaning of—Evidence Act (I of 1872) sec. 33—Deposition of prosecution witness cross examined before charge—No opportunity for further cross-examination after charge*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 256 and 257—*contd*

—*Deposition when then admissible at the trial* S 256 Criminal Procedure Code confers an absolute and unqualified right on the accused to recall for further cross examination only such of the witnesses as are still before the Court and have not been discharged from further attendance After the charge had been framed the accused pleaded not guilty and mentioned to the Court that he had witnesses to examine *Held* that he had entered upon his defence and an application for further cross examination of a witness discharged from attendance must be deemed to have been made under s. 257 Waiver by counsel of further cross-examination in case a charge is framed cannot prejudice the right of the accused under ss 256 and 257 Criminal Procedure Code A deposition of a prosecution witness is admissible in evidence if the accused had an opportunity of cross examining him before the charge and there was no opportunity for further cross examination after charge LOCKLEY *v* KING EMPEROR (1920)
I L R 43 Mad 411

——— *witness right of accused to cross examine—duty of court to secure attendance* After a charge had been framed against the accused he applied for four of the prosecution witnesses to be re-summoned for cross-examination The Magistrate ordered him to pay Rs 20 as process fees to secure the attendance of the four witnesses and this was done One of them did not obey the summons and the accused applied to the court to re-summon him The Magistrate ordered this to be done on condition that a further sum of Rs 20 was deposited The accused did not comply with this condition and the witness was not re-summoned *Held* that in the absence of a recorded finding that the application to re-summon the witness was frivolous and vexatious and would defeat the ends of justice the Magistrate was bound to secure the attendance of the witness RAMYAD SINGH *v* THE KING EMPEROR
5 Pat L J 94

——— s 256 258 417—*Penal Code (Act XLV of 1860) s 406—Appeal by Local Government against acquittal—Powers and duties of the High Court—Order of acquittal passed after cross examination of prosecution witnesses subsequent to framing of charge* The accused was placed on his trial for having committed criminal breach of trust in respect of some bales of jute The accused admitted his liability The trying Magistrate framed a charge under s 406 Indian Penal Code and after cross examination of the witnesses for the prosecution acquitted the accused under s 258 Criminal Procedure Code holding that the case was one of civil dispute *Held* (on an appeal by the Local Government under s 417 Criminal Procedure Code) that in an appeal from an acquittal the High Court could not interfere unless the judgment of the Court below was wrong and perverse or without jurisdiction and based upon obvious errors in procedure and there being nothing of the kind in the case the High Court should uphold the decision of the Magistrate even though wrong because it would be based at the most on a doubtful weighing of facts and not on any irregularity or negligence or other matter owing to the jurisdiction or the regularity

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 256 258 417—*contd*

of the trial That the order of acquittal having been passed subsequent to the framing of the charge and after the cross-examination of the witnesses for the prosecution was not irregular or without jurisdiction DEPUTY LEGAL REMEMBRANCER OF BENGAL *v* AMULYA DHAN (1913)
18 C W N 666

——— s 258—

See s 248 I L R 37 Bom 769

See s 439 18 C W N 1244

——— s 259—

See s 247 I L R 41 Mad 727

See s 203 20 C W N 668

——— s 260—

See COMPANIES ACT (VI OF 1882) s 74
I L R 35 All 13

See WORKMAN'S BREACH OF CONTRACT ACT 1859 I L R 43 All 281

——— cl (1)—*Bengal Tenancy Act (VIII of 1885) s 71—Paddy cut and carried away by landlord from tenant's land value of for summary trial for theft* Since a tenant is entitled to the exclusive possession of the whole produce until it is divided under s 71 of the Bengal Tenancy Act his complaint against landlord for theft for having cut and carried away paddy worth Rs 88 of which the latter was only entitled to one half cannot be summarily tried by a Magistrate as the value of the property in this case must be regarded as Rs 88 and not Rs 44 only HAROO *v* SHEIKH KARIMAN (1916)
20 C W N 1212

——— *Summary procedure adopted in the middle of a trial if legal—Such change of procedure causing prejudice to accused—Illegality of conviction—Trial before 1st Magistrate* The petitioners were summoned under ss 166 and 206 Indian Penal Code After the examination in chief of the witnesses for the prosecution in the regular manner the Magistrate being of opinion that no offence under s 206 was made out charged the procedure to that applicable to summary trials and ultimately convicted the petitioners under s 166 Indian Penal Code *Held* that the procedure adopted by the Magistrate was not authorised by law and caused prejudice to the accused and the conviction was therefore liable to be set aside GOPAL DEBATY DAS *v* BAISTUM DAS DEUPA
26 C W N 831

——— s 263—*Hearing and recording of evidence—Complainant and his witnesses examination of—Procedure—Practice* S 263 of the Criminal Procedure Code does not excuse the Magistrate from hearing the evidence of all witnesses In all criminal cases the complainant and such witnesses as he may produce must be examined whether their evidence is required to be recorded or not and the case must be decided upon the effect of their evidence JABBAR SHAIK *v* TAMIZ SHAIK (1912) I L R 39 Calc 931

——— s 263 342—

See SUMMARY TRIAL
I L R 41 Calc. 743

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— ss 263 and 355—

See SUMMARY TRIAL.

I L R 48 Calc 280

———— ss 268 and 537—*Trial by Sessions Judge with the aid of assessors—Evidence recorded by the Judge alone after the assessors had been discharged—Illegality* Where a Sessions Judge is trying a case with the aid of assessors it is the Judge plus the assessors who constitute the Court not the Judge alone Where therefore a Sessions Judge recorded evidence after the assessors had been discharged it was held that this was a material irregularity which vitiated the trial *Queen Empress v Pars Lal I L R 15 All 136* followed EMPEROR v JAI SUKH

I L R 43 All 125

———— ss 271 272—

See EVIDENCE ACT 21

I L R 36 Mad 457

———— ss 271 272 308 403—

See AUTREFOIS ACQUIT

I L R 41 Calc 1072

———— s 282—*Jury—Juror discharged during trial and fresh juror substituted—Trial not recommenced—Invalidity of proceedings* On trial by a jury after two witnesses had been examined one of the jurors was discovered to be deaf and was discharged and another juror sworn in his place The trial however was not commenced afresh, but the evidence given by the two witnesses was read over to and admitted by them *Held* that this procedure was inadmissible and the trial so held invalid EMPEROR v NARAIN (1914)

I L R 36 All 481

———— s 284—*Assessors—Trial with only one duly appointed assessor—Trial illegal* Of two assessors assisting the Sessions Judge in the trial of a sessions case one only had been duly summoned to act as an assessor in that case The other was a gentleman of some position who had formerly been on the list of assessors but had been exempted on the recommendation of the District Magistrate *Held* that in these circumstances there was no lawful trial before a lawfully constituted tribunal and that a new trial must be ordered *Queen Empress v Padri All W N (1894) 201* followed EMPEROR v MAN SINGH (1913)

I L R 35 All 570

———— ss 284 and 285—*Trial with assessors—one assessor absent—person not on official list of assessors acting as assessor—validity of trial* Where one of two assessors who had been summoned to assist the Sessions Judge in a trial for forgery was absent on the day when the trial opened, and the Judge ordered another person who was not on the official list of assessors to act as assessor *Held* that the trial was illegal BALAK SINGH v THE KING EMPEROR

3 Pat L J 141

———— s 285—

See s 14 3 Pat L J 291

———— s 287—

See PRACTICE I L R 40 Bom 220

———— ss 287 and 310—*previous conviction when evidence of may be tendered—Evidence Act (I of 1872) ss 14 and 54* S 287 of the Code of Criminal Procedure 1898 permits a previous statement of the accused to be read as a part of the case for the prosecution only so far as such statement refers to the offence for which the accused is being tried and not so far as it relates to a previous conviction The latter portion cannot be read out to the jury or assessors under s 310 until they have given their verdict Evidence of the previous conviction of an accused person amounts to evidence of bad character and is not admissible under s 54 of the Evidence Act 1872 unless and until the accused produces evidence of good character TEKA AHIR v THE KING EMPEROR

5 Pat L J 706

———— ss 289 292—

See RIGHT OF REPLY

I L R 43 Calc 426

———— s 291—

See WITNESS I L R 47 Calc 758

———— ss 293 294—

See LOCAL INSPECTION

I L R 37 All 340

———— s 295—

See s 14 3 Pat L J 291

See MAGISTRATE I L R 39 Calc 119

———— s 297—*Charge to jury—Misdirection—Omission to tell the jury that they could draw inference against the prosecution when material witnesses were not called—Evidence Act (I of 1872) s 114 III (g)—Summing up of the evidence—Omission to draw attention of the jury to discrepancies in the prosecution evidence—Retrial—Indian Penal Code (Act XLV of 1860) s 304* Where certain material witnesses named in the first information and also in the evidence who were available were not examined at the trial and the Judge did not tell the jury that they could draw an inference unfavourable to the prosecution and in summing up the evidence the Judge omitted to draw the attention of the jury to discrepancies in the evidence of the principal witnesses for the prosecution between the statements made in their examination-in-chief and those in cross examination *Held* that the omission to place before the jury the matters stated above constituted material misdirection to the jury The conviction and sentence passed on the accused were set aside and a retrial ordered *Fanindra Nath Banerjee v Emperor I L R 36 Calc 281 s c 13 C W N 197 (1908)* referred to TENARAM MONDAL v THE KING EMPEROR

25 C W N 142

———— ss 297 298—*Duty of Judge in charging jury—Judge in charging jury if bound to explain law on exceptions reducing murder to culpable homicide when no exception pleaded and when there is no evidence of that—Withdrawal of case under s 304 Indian Penal Code if necessarily follows from direction that exceptions in s 300 do not apply—Court if should considered case not made by counsel defending accused— Lay down the law in s 297 meaning of—Non-direction if always misdirection—Evidence Act (I of 1872) s 105—Letters Patent 1865 s 26—Review of Criminal case decided by High Court in Original Criminal Jurisdiction on certificate of Advocate General—Statement by presiding Judge as to what took place a*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— ss 297, 298—*contd*

trial—Jurisdiction of High Court to consider case when errors alleged in certificate not established The accused was tried and convicted in the Criminal Sessions of the High Court He was placed on his trial on charges under ss 302 304 and 326 Indian Penal Code to which he pleaded not guilty He was defended by counsel who argued that the case against the accused was one of murder or nothing and the jury could not convict him of murder on the meagre and unsatisfactory testimony before the Court Grave and sudden provocation was no part of the defence case The Judge in charging the jury laid down the law under s 302 Indian Penal Code but not that under s 304 or the exception contained in s 300 He observed that he did not see that there was any evidence of any of the exceptions provided for in s 300 He did not explain to the jury the application of the exception of provocation to the facts of the case The jury found the accused guilty under s 302 by a majority of 8 to 1 and the Judge agreeing with the verdict gave judgment in accordance therewith No verdict was taken on the charges under s 304 and 326 Indian Penal Code The case came up before a Full Bench on a certificate granted by the Advocate General under s 26 of the Letters Patent *Held* that a statement by the Trial Judge as to what took place at the trial is conclusive That there was no illegality in not taking the verdict of the jury on the charge under s 304 Indian Penal Code That where there is no misdirection or other error as certified by the Advocate General under s 26 of the Letters Patent his certificate is misconceived and the High Court has no power to interfere It is not within its power to reopen the case and express any opinion on the merits That in the present case in the absence of any direct evidence of grave and sudden provocation or of facts from which this exception could be legitimately inferred the Judge was correct in excluding enquiry into the exception. That under s 105 of the Evidence Act the Court has to regard the absence of grave and sudden provocation as proved until the contrary is proved by the accused on whom the onus lies *Per* JENKINS C J That it is not impossible under the law to leave the case to the jury under s 304 Indian Penal Code after holding that the exceptions enumerated in s 300 do not apply to the circumstances of the case That under ss 297 and 298 Criminal Procedure Code it comes within the duty of the Judge to determine whether any evidence has been given on which the jury can properly find the question for the party on whom the onus of proof lies It is not enough to say that there was some evidence There must be evidence on which the jury might reasonably and properly conclude the fact to be established That the duty of the Judge in charging the jury is to lay down the law in reference to the case presented to the Court and the facts of the case and not to perplex the minds of the jury with considerations that are outside the legitimate scope of the enquiry That the conduct of a case by counsel is not a negligible factor even in a criminal suit though it may not conclude the accused and in approaching the question whether the Judge rightly decided as a matter of law that there was no evidence of any of the exceptions it is relevant to consider how the accused's case was placed before the Court *Per* STEPHEN J That the propriety and not the possibility of an inference is the test by which a Judge should decide whether or not he should suggest a case for the consideration of the jury on his own initiative It is the duty of a Judge to make a case for the accused on which he thinks that a verdict of not guilty may be properly returned though the case has not been suggested by or on behalf of the accused. It is the duty of defending counsel to make the Judge aware of any case that he considers may be made on behalf of the accused though he has not made it himself *Per* WOODROFFE J It cannot be laid down as a general proposition of universal applicability that a Court cannot and should not consider a case in favour of the accused which he has not raised If such a case arises on the prosecution evidence it should be put to the jury for their consideration whatever line might have been taken by the accused or his counsel. But on the question whether an inference does arise in favour of the accused the fact that a particular defence has or has not been taken may affect the significance of the evidence given *Per* MOOKERJEE J The expression lay down the law in s 297 Criminal Procedure Code does not signify lay down the whole law on the subject irrespective of the facts of the particular case before the Court The reasonable construction of s 297 Criminal Procedure Code is that the Judge should lay down the law only in so far as it bears upon the evidence adduced in the particular case The mere fact that counsel for the accused has failed to present to the Court a particular aspect of the case cannot justify an omission on the part of the Judge to draw the attention of the jury to what appears to be a possible answer to the charge against the accused even on the prosecution evidence Mere non direction is not necessarily misdirection those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively *Per* HOLMWOOD J No error of law is committed by a Judge who refrains from directing the jury as to exceptions which have neither been raised nor relied upon by the accused and have no basis in evidence on the record Where there is no evidence bringing the case directly within any such exception it would be misdirection to ask the jury to come to a finding of fact on a hypothetical state of circumstances which do not bring the case within the exception as a matter of fact KING EMPEROR *v* UPENDRA NATH DAS (1914) 19 C W N 653

———— ss 297 303—

See JURY TRIAL BY
I L R 40 Calc 367

———— ss 297 303 304—*Trial by Court of Sessions—Verdict how to be taken where many accused and both jury and assessors charged* S 297 Criminal Procedure Code (Act XIV of 1898) specifically enacts that the Judge shall only charge

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— ss 297 301 303 — contd

th jury w... the case for the defence and the p... ation rep... are ... Where th re... lo... ta... Jud... ... as re... de... ... on to hear a... ... Held that th... procedure adopted ... might be ... ... T... ... of a jury ... be ... take ... upon ... triable by jury even wh... th jury may b... ... as assessors ... triable by assessors A jury ... having ... ... may no... be ... asked to consider th... verdict It may only be questioned to ... out what ... in fact th... verdict is ... ss 303 and 304 ... Criminal Procedure Code ... discussed and explained PUBLIC PROSECUTOR v ABDUL HAMEED (1913) I L R 36 Mad 585

——— s 298—

See 297　　19 C W N 653

See MISDIRECTION　　I L R 45 Calc 557

——— ss 298 (1) (c) 337—

See PARDON　　I L P 47 Calc 883

——— s 303—

See VERDICT　　I L R 43 Calc 207

——— *Person other than a juror holding communication with a juror after charge without Court's leave* Where it was proved that after the charge had been delivered a person other than a juror spoke to or held communication with a member of the jury without the leave of the Court *Held* that that was sufficient to upset the verdict and it was not relevant to consider whether the irregularity had in fact prejudiced the accused It is a matter of great importance that s 309 of the Criminal Procedure Code which is explicit in its terms should be observed *R v Ketteridge (1915) 1 K B 467* referred to BENI MADHAB KUNDU v KING EMPEROR (1918)　　22 C W N 740

——— s 301—*Trial by jury—Verdict settled by casting lots—Enquiry thereabout—Evidence of individual jurors if admissible* Where it was alleged that the verdict of the jury was arrived at by casting lots and the Sessions Judge held an enquiry into the matter in the course of which he examined besides other persons all the jurors *Held* that the statement of a juror as to what happened in the jury room is inadmissible KING EMPEROR v HARKUMAR BURMAN ROY (1913)　　17 C W N 787

——— ss 303 304—

See s 297　　I L R 33 Mad 585

——— ss 303 and 307—*Verdict of jury—Reasons for their verdict—Power of Sessions Judge to question jury as to their reasons for their verdict—Question if permissible for determining whether reference to High Court necessary* A Sessions Judge is not entitled under s 303 of the Criminal Procedure Code to question the jury as to the reasons for their verdict even if he intended to make a reference to the High Court under s 307 of the Code Reference No 30 of 1919 dissented from *Emperor v Sirunadi (1907) I L P 30 Mad 469* and *Public Prosecutor v Abdul Hameed (1913) I L P 36 Mad 589* followed Though a Sessions Judge is neither bound nor entitled to put such questions to the jury still his having done so for the purpose of determining whether he should make a reference is not improper or a sufficient ground for not accepting the reference SUBBIAH THEVAN v THE ASSISTANT SESSIONS JUDGE OF TINNEVELLY (1920)　　I L R 43 Mad 744

——— s 307—

See CRIMINAL TRESPASS　　I L P 41 Calc 662

See REFERENCE　　I L R 42 Calc 783

1 ——— *Disagreement between Judge and jury—Reference to High Court—Words "Opinion of the jury" if equivalent to Sub s (3)—Opinion of the jury if equivalent to verdict—Verdict grounds of when desirable to ascertain* The expression opinion of the Sessions Judge and the jury in sub s (3) of s 307 of the Criminal Procedure Code is equivalent to opinion of the Sessions Judge and verdict of the jury ... it is not necessary for a Sessions Judge before making a reference to the High Court to ascertain ... the opinion of the jurors apart from their verdict *Emperor v Chellan I L R 29 Mad 91* not followed After the jury have returned their verdict and after the Judge has stated that he will not accept the verdict it may be desirable to ascertain the grounds of their verdict but there is no express provision in the Code for ascertaining the opinion of the jury EMPEROR v TARAPADA NASKAR (1913)　　18 C W N 615

2 ——— *Jurisdiction of High Court to convict of offence under s 326 Penal Code (Act XLV of 1860)* The High Court is empowered on a reference under s 307 Criminal Procedure Code to convict the accused of an offence under s 326 of the Penal Code *Sir V Bhashyam Ayyangar J* in *Pattikadan Ummaru v Emperor I L R 26 Mad 243* followed *Benson J* in *Pattikadan Ummaru v Emperor I L R 26 Mad 243* dissented from MUTHAKU Re (1914)　　I L R 37 Mad 235

3 ——— *Reference to High Court on disagreement between Judge and Jury—Acceptance by Judge of verdict on some charges reference to High Court on others—High Court on reference on charges in relation to if can consider evidence on charges in relation to which verdict accepted by trial Judge—Course to be followed by High Court on such reference not being verdict referred* Where the accused was tried on several charges and the Sessions Judge accepted the verdict of the jury as to some and disagreed ... and referred the verdict to the High Court as to others and referred the verdict to the High Court as to the latter *Held* that by this limited form of reference the High Court was precluded from considering the entire evidence on the record and on such reference all that the High Court had to decide was whether the verdict of the jury on the charges as to which there was disagreement between the Judge and the jury was a reasonable verdict which a body of reasonable men could arrive at having regard to the evidence bearing on these charges That the Sessions Judge if he considered that the interests of justice required a reference to the High Court should have referred the whole case leaving it to the High Court to consider the whole of the evidence that was placed before the jury KING EMPEROR v ANNADA CHARAN ROY (1916)　　21 C W N 435

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— s 307—contd

4 ——— *Jury verdict of—Interference of High Court on reference when verdict not perverse* Where the accused were tried on several charges and the jury unanimously found them not guilty on all the charges but the Sessions Judge not accepting the verdict as to some of the charges referred the case to the High Court *Held* that in the circumstances of the case the verdict could not be said to be perverse or erroneous and the accused should be acquitted A DAR MONDAL v KING EMPEROR (1918)
22 C W N 811

5 ——— *Reference to High Court by Sessions Judge on disagreement with jury—Scope of High Court's interference* The accused was tried on charges under ss 395 411 412 Indian Penal Code and found not guilty by a majority of the jury The Sessions Judge disagreeing with the jury referred the case to the High Court under s 307 Criminal Procedure Code The High Court on a consideration of the evidence held that the guilt of the accused was not proved beyond reasonable doubt and acquitted the accused EMPEROR v CHANDO LAL BANIA (1918) 22 C W N 1028

6 ——— *Reference to High Court when can be made* The accused were found guilty under s 304 and s 304 Indian Penal Code by the verdict of a majority of the jury The Sessions Judge though not agreeing with it accepted it on the ground that he could not call it perverse *Held* that it is no longer the law that before making a reference the Judge must be satisfied that the verdict is perverse It is sufficient that he should be clearly of opinion that it is necessary for the ends of justice The High Court set aside the verdict on the ground of misdirection and acquitted the accused IMAM SARKAR v KING EMPEROR (1918)] 23 C W N 74

7 ——— *Judge and jury disagreement between—Duty of High Court on reference* In the case of a reference to the High Court on a disagreement between the Sessions Judge and the jury under s 307 cl (3) Cr P C the High Court is to give due weight not to the opinion of the jury alone but to that of the Sessions Judge as well EMPEROR v SHEIKH NAMATULLA (1913) 17 C W N 1077

8 ——— *Reference to High Court on disagreement with jury—Matters which must be stated by Sessions Judge in making reference—Incompetent reference effect of—Misdirection to jury—Duty of Sessions Judge to present case to jury dispassionately and impartially—Statement in charge to jury not borne out by record* The accused were placed on their trial all on charges under ss 302 147 and 302/149 Indian Penal Code and one of them under s 148 Indian Penal Code in addition thereto The jury returned a verdict of guilty under ss 147 and 326/149 Indian Penal Code against some and found the others not guilty on all the charges The Sessions Judge disagreeing with the verdict of the jury made a reference to the High Court under s 307 Criminal Procedure Code stating that the verdict was erroneous and inconsistent and could not be accepted that a murder had been committed and if the evidence was believed all the accused should have been found guilty under s 302 *Held*—That the reference was not a proper reference as there was not a sufficient compliance with the provisions of s 307 Criminal Procedure Code It is only if the Judge has made a proper reference that the High Court can deal with the matter In dealing with the matter the High Court has to give due weight to the opinions of the Sessions Judge and the Jury and in making a reference the Judge is bound to state the grounds of his opinion and in the case of an acquittal the offences which he considers to have been committed The record was sent back to the Sessions Judge for a proper reference which having been made the case was heard The Sessions Judge in charging the Jury said that those of the accused who pleaded *alibi* were bound to prove the plea and if the Jury were of opinion that they had failed to establish the plea there would arise a presumption against them as to their complicity in the crime *Held*—That the Judge was clearly wrong and there was no authority for the statement that such a presumption would arise Matters which must be stated by a Sessions Judge in making a reference and a Judge in his summing up under this section discussed KING EMPEROR v TAFIBULLAH SHEIKH
25 C W N 682

——— s 308—

See AUTREFOIS ACQUIT
I L R 41 Calc 1072

——— s 309—

See DACOITY I L R 41 Calc 350

See MAGISTRATE I L R 39 Calc 119

——— ss 309 403 423 439—

See ASSESSORS I L R 40 Calc 163

——— s 310—

See s 537 5 Pat L J 706

——— s 337—

See PARDON
I L R 42 Calc 756 856

——— *Tender of pardon—Approver—Breach of the conditions of pardon—Discharge of accused—Forfeiture of pardon—Trial of approver—Approver committed to Sessions Court—Re trial of the discharged accused—Accused to be committed if prima facie case made out to Sessions Court for joint trial with the approver—Joint trial—Practice and procedure* In an inquiry into a charge of dacoity against five accused persons the Magistrate granted a conditional pardon to one of them The approver was examined as a witness in the inquiry against the four remaining accused persons but he denied all knowledge of the alleged dacoity and the accused persons were discharged by the Magistrate under s 209 of the Criminal Procedure Code (Act V of 1898) The pardon granted to the approver was next withdrawn and the case as against him with regard to dacoity was proceeded with under s 339 of the Criminal Procedure Code It ended in his being committed for trial to the Court of Sessions The material piece of evidence to be adduced against the approver was his confessional statement which implicated both himself and the four accused persons The Sessions Judge referred the case to the High Court for an order quashing the commitment and directing the

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s 337—*contd*

re-trial of the approver along with the discharged accused person *Held* that the High Court had the power to direct that the accused person who had been discharged should be subjected to a re-trial jointly with the approver for under s 439 of the Criminal Procedure Code the High Court had the power in the case of those accused persons to direct that there should be a fresh inquiry and if that inquiry ended in the framing of a charge that they should be committed to a particular Court of Session *Held* further that inasmuch as the provision of sub s (3) of s 337 of the Criminal Procedure Code were fully carried out at the time when they were applicable namely during the pendency of the Magisterial proceedings they would not constitute any bar against the High Court's ordering that if the inquiry against the discharged persons ended in a commitment they should be committed to trial jointly with the approver *Per* CURIAM Sub s 3 of s 337 of the Criminal Procedure Code contemplates only a case where there has been a commitment made by the Magistrate to the Court of Session or the High Court It omits to consider the case where the Magistrate himself on his own responsibility discharges the accused person The meaning of the sub section is that the approver shall not be set at large until the judicial proceedings pending against the accused are finished For the purposes of the section it is immaterial whether the proceedings are finished by a Magisterial order of discharge before trial or by a Judge's order of acquittal after trial In the case of the Magisterial discharge the sub section would be satisfied if the approver were detained in custody or on bail until the order of discharge was made EMPEROR *v* INAYA SALABAT KHAN (1912)

I L R 37 Bom 146

———— *Accomplice—statement on oath by an accused person who has accepted a pardon but has not been discharged—whether evidence against the other accused—case not exclusively triable by Sessions Court* M one of the accused persons was offered a pardon on 6th June 1918 On the 11th June the case was *challaned* by the Police and *M* was entered as one of the accused persons in the *chalan* as well as in the opening sheet of the Magistrate's proceedings *M's* evidence was recorded by the Magistrate on the 4th July The case was not one exclusively triable by the Court of Session or High Court *Held* that as the case was one not exclusively triable by a Court of Session s 337 of the Code was inapplicable *Held also* that as there had been no verbal or written order of discharge by the Magistrate *M* was still an accused person on the 4th July when he was examined and his evidence was consequently not admissible against the other accused *Bannu Singh* v *Emperor* (*I L R 33 Calc 1353*) referred to *Sardar Khan* v *Emperor* (*21 P R (Cr) 1904*) distinguished MAHANDU *v* THE CROWN

I L R 1 Lah 102

———— Under the present Code of Criminal Procedure no formal withdrawal of a pardon and no formal declaration that a pardon has been forfeited are required before proceeding against a person who accepted a conditional pardon but violated the condition thereof THE EMPEROR *v* SABER AHQUJI

19 C W N 179

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s 337—*contd*

———— *No true and full disclosure where witness subsequently recants his previous statement—On trial after withdrawal of pardon if pardon pleaded in bar jury to determine whether pardon forfeited* A person who has accepted a tender of pardon under s 337 of the Criminal Procedure Code and made a true and full disclosure before the inquiring Magistrate may be recalled and examined by such Magistrate and his pardon will be forfeited if he resiles from such former statement It is not necessary in order to forfeit the pardon that he should be examined as a witness in the Court of Sessions He is examined in the case when he is examined by the Magistrate and the prosecution is not bound to examine before the sessions an untrustworthy witness When such person is tried after withdrawal of pardon for the original offence and pleads the pardon as a bar the jury must determine whether the pardon was forfeited or not In default of such determination a conviction will be bad *Kullan* v *Emperor I L R 32 Mad 173* referred to *Emperor* v *Kothea I L R 30 Bom 611* referred to ALAGIRISAMI NAICKEN *v* EMPEROR (1910) I L R 33 Mad 514

———— ss 337 339—

See PARDON* I L R 37 Calc 845
I L R 42 Calc 756

———— s 339—

———— *Pardon—Forfeiture of pardon—Procedure—Witness giving evidence at a sessions trial on a conditional pardon disbelieved by Judge* A conditional pardon was given to *G* and he was tendered as a witness in a Sessions trial The Judge before whom he was examined was of opinion that *G* had not spoken the truth and acquitting the accused directed the prosecution of *G* *G* did not plead his pardon before the committing Magistrate but did plead it before the Sessions Judge who set aside the commitment and discharged the accused *Held* that *G* was entitled to raise the plea before the Sessions Judge though he had not raised it before the committing Magistrate *Held* also that the Sessions Judge in the former trial had no authority to direct the prosecution of *G* on any specific charge but if he thought that *G* had wilfully concealed anything essential or given evidence on any point which was positively false he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion or possibly to suggest the propriety of *G's* prosecution *Emperor* v *Kothia I L R 30 Bom 611* *Kullan* v *Emperor I L R 32 Mad 173* *Alagirisami* v *Emperor I L R 33 Mad 514* *Emperor* v *Abani Bhusan I L R 37 Calc 845* referred to EMPEROR *v* GANGUA (1915)

I L R 37 All 331

———— *Withdrawal of pardon—Procedure* Where an accomplice who has accepted a tender of pardon made under s 337 of the Code of Criminal Procedure fails to make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence under inquiry there is no necessity to record any formal [illegible] withdrawing the pardon If the accomplice [illegible] his pardon and is put on his trial f[illegible] respe[illegible] of which

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— s 339—contd

the pardon was tendered it is open to him to plead his pardon in bar of trial and it will then be for the prosecution to show in what manner the pardon has been forfeited *Kallan v Emperor I L R 32 Mad 173* followed EMPEROR v KHIALI (1916) I L R 39 All 205

——— *Pardon tendered by District Magistrate—Sessions Judge ordering commitment of approver—Legality of commitment—Jurisdiction* The case in connection with which the pardons were tendered by the District Magistrate was heard by the Sessions Judge who at the conclusion of the trial directed the commitment of both the approvers to the Sessions for trial on the original charge *Held* following *Crown v Kadu (1906 P L R 190a)* that the Sessions Judge had jurisdiction to pass the order and at their trial the petitioners could plead their pardon and it would be for the trial Court to decide whether or not the pardon had been forfeited CHANAN SINGH v THE CROWN I L R 1 Lah 218

——— s 340—

See MUKHTEAR I L R 48 Calc 488

——— s 341—

——— *Deaf and dumb accused—Procedure and practice* Though great caution and diligence are necessary in the trial of a deaf and dumb person yet if it be shown that such person had sufficient intelligence to understand the character of his criminal act he is liable to punishment EMPEROR v A DEAF AND DUMB ACCUSED (1916) I L R 40 Bom 118

——— *Accused who does not understand proceedings—case reported to High Court—proper action* *Held* that the usual practice in cases reported to the High Court under s 341 of the Code of Criminal Procedure is to refer the matter to the Local Government but where the offence is a minor one the Court may sentence the accused to a term of imprisonment or discharge him *Empress v Gohra (37 P R (Cr) 1889) Crown v Lost Muhammad (13 P R (Cr) 1911) Queen v Lowka Bors (22 W R 35 (Cr)) Atu Ram v Empress (34 P R (Cr) 1880)* and Criminal Revision No 1 01 of 1915 (unpublished) referred to CROWN v RAHMAN I L R 1 Lah 260

——— s 342—

See s 146	I L R 37 Calc 467
See s 255	I L R 38 Mad 302
See s 263	I L R 41 Calc 742
See s 164]	I L R 2 Lah 129
See s 435	25 C W N 609
See CHARGE	I L R 42 Calc 957
See WITNESS	I L R 45 Calc 720

1 ——— *Cross examination of accused propriety of* Cross examination of the accused by putting questions with a view to induce him to incriminate himself condemned HAIDAR ALI PRADHANIA v EMPEROR (1912) 17 C W N 354

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— s 342—contd

2 ——— *Necessity for examination by the Court in certain cases discussed* CANGADHAR GOALIA v I EGINAL WILLIS LEOLON I ED 25 C W N 609

3 ——— *Criminal Law Amendment Act (XIV of 1908) case under Court if may examine accused in* It is within the competence of the Court in a case under Act XIV of 1908 to examine the accused in order to give him an opportunity of explaining the circumstances appearing on the evidence against him EMPEROR OF INDIA v NAGENDRA NATH GUPTA (1915) 19 C W N 893

4 ——— *Right of the Magistrate or Sessions Judge to put questions or take statements from accused when no evidence given by prosecution to implicate them—Answers taken from accused in contravention of s 342 not admissible in evidence* If in a criminal case the prosecution had not let in any evidence implicating the accused or some of the accused in the crime charged the Magistrate is not entitled under s 342 of Criminal Procedure Code to put questions to such accused or to invite them to make a statement and this rule equally applies to trials before the Sessions Court Answers to questions received by the committing Magistrate in contravention of s 342 of the Criminal Procedure Code are not admissible in evidence against the accused in the subsequent trial before the Sessions Court *Mohideen Abdul Kader v Emperor I L R 27 Mad 238* and *Reg v Berri mar 6 Cox Cr C 388* followed IN RE ABILLILA MAR RAVUTHAN (1915) I L R 9 Mad 770

5 ——— *Power to examine accused—Summons case—Practice and procedure* Under s 242 of the Criminal Procedure Code 1898 a Magistrate is bound in a summons case to examine the accused before convicting him EMPEROR v FERNANDEZ (1920) I L R 45 Bom 672

6 ——— Under s 342 the Court must examine the accused after the witnesses for the prosecution have been examined. Therefore an examination of the accused after the prosecution witnesses have been examined in chief but before they have been cross examined is not in compliance with the section MITARJIT SINGH v THE KING EMPEROR 6 Pat L J 645

——— ss 342 244 245 253 and 283—s 342 of the Code applies to summons warrant and sessions trials and an omission to examine accused in accordance with it vitiates such a trial A prosecution under s 218 of the Bengal Municipal Act 1884 of s 202 and 203 is within time if instituted within 6 months from the expiry of the time allowed for compliance with the order under the latter section GULAM RASUL v THE KING EMPEROR 6 Pat L J 175

——— ss 342 289 364 and 533—*Sessions trial—omission to examine accused effect of—Statement by accused person effect of omission to record—Confession effect of retracted Per* (MULLICK JWALA PRASAD AND SULTAN AHMAD JJ (MULLICK J dissenting) The provisions of s 342 of the Code of Criminal Procedure 1898 are mandatory and the omission to examine the accused after the witnesses for the prosecution have been exa

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— ss 342, 289 364 and 533—*contd*

mined and before the accused is called on for his defence vitiates the trial *Per* JWALA PRASAD J —The filing of a written statement by the accused does not take the place of an examination under s 342 It is doubtful whether the omission to prepare a record of the examination of an accused person under s 364 can be cured by s 533 A confession which is not supported by the evidence of witnesses must be examined very carefully to see whether it gives those details which indicate that it is a natural narrative of what took place in the presence of the man making it and is not at variance with any evidence in the case which is believed and is not merely a parrot like repetition of a story put into a man s mouth Even a retracted confession may be acted upon so far as the confessing accused is concerned if after applying the proper tests the Judge is convicted of its truth While the High Court is dealing with the case of an accused person who has appealed it is competent to consider the case of a co accused who has not appealed and to set aside the conviction *Per* SULTAN AHMED J —It is unsafe to convict an accused person on a retracted conviction alone RAGHU BHUMJI *v* THE KING EMPEROR 5 Pat L J 430

———— ss 342, 362—

See EXCISE OFFICERS
I L R 46 Calc 411

———— s 344—

———— *Case taken upon police charge-sheet—Informant represented by vakil—Absence of vakil—Application by informant for adjournment—Adjournment conditional on payment of costs by informant—Validity of order* Where a case was taken up by a Magistrate on a police charge sheet filed on information furnished by a person who retained a vakil to represent him at the trial and joined in an application for adjournment made by the police officer on the ground of the vakil s absence *Held* that it was competent to the Magistrate under s 344 of the Code of Criminal Procedure to grant an adjournment conditional on the payments of costs by such person although he was not a complainant under s 200 of the Code *Mathura Prasad* v *Basant Lal I L R 28 All 207 Sew Prasad Poddar* v *The Corporation of Calcutta 9 C W N 18* and *Muthusami Iyer* v *Ramanathan Chettiar* Criminal Revision Cases Nos 485 and 486 of 1916 followed SUNNASI KUDUMBAN *v* SIVASUBRAMANIA KONE (1917) I L R 40 Mad 1130

———— *Order of adjournment at the instance of a party—Liability to pay costs of the day* In granting an adjournment at the instance of a party the Magistrate can order him to pay the costs of the day to the opposite side under s 344 of the Criminal Procedure Code 1898 only where the circumstances are exceptional and where for some reason or another the ordinary method of conducting criminal cases must be departed from *In re* ABDUL RAHIMAN (1917)
I L R 42 Bom 254

———— *s 345—*

See s 248 I L R 37 Bom 369
20 C W N 1209

See COMPROMISE I L R 45 Calc 816

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s 345—*contd*

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 439
I L R 39 Mad 604

———— *Compromise effected out of Court by parties pending hearing of rule issued by High Court if can be given effect to under s 345 Criminal Procedure Code* The petitioner was the complainant in a case and the accused in the counter case The petitioner s complaint was dismissed by the Magistrate and in the other case he was convicted under s 352 of the Penal Code He moved the High Court and obtained a Rule in each case in one for a further enquiry into his complaint and in the other for a reduction of the sentence passed on him Pending the hearing of the Rules both cases were compromised by the parties out of Court *Held* that at the hearing of the Rules the parties had no *locus standi* to ask the Court to treat the compromise as one coming under s 345 Criminal Procedure Code ADHAR CHANDRA DEY *v* SUBODH CHANDRA GHOSH (1914) 18 C W N 1212

———— *Compounding offences—Revision—Powers of High Court—Court not competent to allow composition in revision Held*, that the High Court has no power to allow a case to be compounded which is before it in the exercise of its revisional jurisdiction EMPEROR *v* RAM CHANDRA (1914) I L R 37 All 127

———— *Compounding an offence—Complainant resiling before hearing effect of Per* ABDUR RAHIM J (AYLING J *dubitante*)—A composition arrived at between the parties of a compoundable offence is complete as soon as it is made and it has the effect of an acquittal of the accused under s 345 Criminal Procedure Code in respect of that offence though one of the parties later on resiles from the compromise and no statement or petition recording the compromise is filed in Court by the parties *Murray* v *Queen Empress I L R 21 Calc. 103* referred to. KANNI ROWTHER *v* INAYATHALLA SAHIB (1915)
I L R 39 Mad 916

———— *Compounding of an offence before filing complaint whether lawful* The compounding of offences mentioned in the first paragraph of s 345 Criminal Procedure Code is lawful even if it takes place before any complaint is filed in respect thereof in a Court and once a composition has been arrived at it has the effect of an acquittal under the section so as to bar the trial of the offence KUMARASAWMI CHETTI *v* KUPPUSWAMI CHETTY (1918)
I L R 41 Mad. 685

———— *Composition of an offence with one of several accused persons effect of* The composition of an offence under s 345 of the Criminal Procedure Code with one of several accused persons does not effect an acquittal of the others *Chandra Kumar Das* v *The Emperor 7 C W N 176* dissented from MUTHIA NAICK *v* THE KING EMPEROR (1917)
I L R 41 Mad 323

———— *Compounding of offences—Composition with one accused does not mean acquittal* The compounding of an offence with many accused has not

CRIMINAL PROCEDURE CODE (ACT V OF 1898)

——— s 345—contd

the effect [illegible] I L R 45 Bom 348

——— [illegible] of several [illegible]—whether case can proceed against the other accused. The complainant in a hurt case compounded the offence with two of the accused before the Court who were therefore acquitted while the other accused was convicted and sentenced Held that the compounding of the offence against two of the accused did not in law have the effect of an acquittal of the remaining accused and that the conviction was not therefore illegal *Muthia Naick v King Emperor (I L R 41 Mad 3 3)* followed *Chandra Kumar Das v Emperor (7 Calc W N 176)* discussed and *Emperor v Mulo (14 Cr L J ..)* distinguished RAM KISHEN v THE CROWN I L R 1 Lah 169

——— *Compounding with one of several accused—Effect as regards the others* The complainant charged four persons with having combined in committing the offence of grievous hurt against him Subsequently on its appearing that the offence was not grievous but simple hurt he compounded the case as regards one of the four accused *Held* that this did not necessitate the case being compounded as regards the other three *Muthia Naick v The King Emperor I L R 41 Mad 3 3* followed. EMPEROR v CHANDAN I L R 43 All 483

——— ss 345 403 (2)—*Several offences alleged in complaint—Accused summoned for one of such offences—Compromise of such offence with leave of Court—Further prosecution for the other offences of less—Case if revivable on the ground of non payment of compensation for compromise* The petitioner was accused of committing house trespass causing grevious hurt and being member of an unlawful assembly but was summoned only under s 3.. Penal Code and the offence under that section was compromised with the leave of the Court The complainant subsequently filed another complaint and sought to revive the case alleging that the terms of the compromise had not been carried out *Held* that the petitioner could not be again prosecuted either for grievous hurt or house trespass or for being member of an unlawful assembly the common object being to commit offences which had been compromised BASIRUDDI v KHAIRAT ALI (1913) 17 C W N 948

——— ss 345 (5) 423 (1) (d) 439—

See CRIMINAL TRESPASS I L R 43 Calc 1143

——— ss 345 438 and 439—*Compounding of offences—Revision—Court exercising revisional jurisdiction not empowered to allow an offence to be compounded* It is not competent to a court exercising revisional jurisdiction to allow an offence to be compounded. *Emperor v Ram Piari* I L R 32 All 153 not followed. *Emperor v Ram Chandra* I L R [illegible] referred to. EMPEROR v RAM BARAN SINGH. I L R 42 All 4[illegible]

——— ss 345 (2) 439—*Revision—Power of High Court in revision to give leave to compound.* Held that the High Court can in the exercise of its powers of revision under s 439 of the Code of Criminal Procedure give leave for the composition of an offence under s 3.3 of the Indian Penal Code EMPEROR v RAM PIARI (1909) I L R 32 All. 153

——— ss 345 439—*Compo[illegible]—Assault in the course of which the person ass[illegible] received fatal injury—High Court's revisional jurisdiction* Four persons assaulted one P with the result that P died Held that it was not competent to the widow of P to compound the case with the assailants in respect of the injuries caused [illegible] Held further that when several persons were acquitted by the Sessions Judge and on being moved by the Government the High Court issued warrants for their arrest only one was arrested but the others were absconding the High Court in the exercise of its revisional jurisdiction [illegible] competent to set aside the order of their acq[illegible] EMPEROR v RAHMAT (1915) I L R 37 A[illegible]

——— s 347—

See s 251 I L R 42 M[illegible]

——— s 348—*Indian Penal Code (Act [illegible] of 1860) Chaps XII and XVII—Procedure—Magistrate who cannot adequately punish* [illegible] case the accused who had been previously convicted of an offence under s 394 Indian [illegible] Code was charged before the Sub Magistrate [illegible] Salem with an offence under s 411 Indian [illegible] Code The Sub Magistrate tried and [illegible] him of the offence and ordered his commitment to the Court of Sessions for the purpose of [illegible] him enhanced punishment Held that [illegible] viction and commitment were illegal [illegible] procedure to be followed in such a case [illegible] Magistrate either as a preliminary [illegible] before framing a charge to determine [illegible] he has power to pass a sufficient sentence [illegible] thinks he has not such power he should [illegible] a charge and commit the accused *Re* S[illegible] (1913) I L R 38 M[illegible]

——— s 349—

——— *Shall pass such [illegible] as he thinks fit meaning of* The words [illegible] order as he thinks fit in s 349 Criminal [illegible] cedure Code do not empower the Superior [illegible] trate to send the case back to the Sub Ma[illegible] for disposal but only empower him to pass [illegible] final order disposing of the case as he may [illegible] fit *Re* PONNUSAMY NADAN (1913) I L R 36 M[illegible]

——— *Trying Magistr[illegible]ing up a case to the Sub divisional Magistrate [illegible] ground that he cannot pass adequate sentence [illegible] Sub divisional Magistrate sending up the case [illegible] another Magistrate—Committal of the case by [illegible] Magistrate to Court of Session—Commitment [illegible] valid—Practice and Procedure* A Magistrate [illegible] the Second Class trying a case sent up the case [illegible] the Sub divisional Magistrate on the ground [illegible]

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CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 349—*contd*

he could not pa s an adequate sentence The latter tran ferred the ca e to a Magistrate of the First Cla s who committed it to the Court of Se icn A que tion having arisen if the commitment was legal *Held* quashing the commitment that under s 349 of the Criminal Procedure Code (Act V of 1898) it was the Sub divi ional Ma istrate alone who was competent to deal with the case EMPEROR v VINAYAK NARAYAN (1914) I L R 38 Bom 719

——— s 350

See s 15 I L R 41 All 116

See s 107 I L R 43 Mad 511

See s 145 I L R 37 Calc 812

See s 2›3 I L R 38 Mad. 585

See s 30ˉ I L R 40 Mad. 108

See MAGISTRATE TRANSFER OF I L R 37 Calc 812

See RIOTING I L R 39 Calc 781

——— *Procedure—Jurisdic* the *—Magistrate ceasing to have jurisdiction by* un t n *of the transfer of a case pending before him* convic *ther Court—Evidence not necessarily to be* EMPER S 350 of the Criminal Procedure Code as much to cases in which a Magistrate o exercise jurisdiction so far as the parti se in question is concerned by reason of sfer to another Court as to cases in which gistrate ceases to exercise jurisdiction by of his own death or transfer to another *Mohesh Chandra Saha* v *Emperor I L P* charge s *457 Kudrutulla* v *Emperor I L R* —4bs n *781* and *Palaniandy Goundan* v *Emperor* adjourn *32 Mad 218* followed EMPEROR v of coste s (1918) I L P 40 All 307

a case charge sh ——— *Transfer—Jurisdic* person wh *of Court to which a case is transferred* the trial an *lence taken by the Court from which it* ment mad 50 of the Code of Criminal Procedure of the v ed to cases in which Magistrates succeed petent to in offices but applies also to all cases of Crim d from the file of one Magi trate to that conditi er under s 5 8 of the Code An order of person sent to the Court of Se sion passed by a s 200 te on evidence recorded by a bench of Lal I ates from whose Court it was transferred, v The n illegal order *Queen Empress* v *Bashir* Muthu *I L R 14 All 316* distinguished *Em* Revisic *Angnu All Weekly Notes (1889) 136* not SUMMAR *Mohesh Chandra Saha* v *Emperor* (1917) *35 Calc 457* and *Palaniandy Coundan* *ueror I L R 32 Mad 218* followed ——— n v NANHUA (1914) I L R 36 All 315

at the of the ——— *Trial by Bench of* instanc *y Magistrates who have not heard the whole* to pay *dence whether legal* The petitioner was under s convicted for an offence und r s 3 3 1898 on de by a Bench of Honorary Magistrates and wh of whom had heard the entire evid nce meth that all criminal cases should be decid d by depa rates who have heard the whole of the n and that s 350 of the Code of Criminal re does not apply to cases tried by Benches istrates consequently the conviction of tioner must be set aside *Sufferuddin* v

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 350—*contd*

Ibrahim (I L R 3 Calc 754) Ram Sunder De v *Lajab Ali (I L R 1 Calc 558) Shumbu Nath* v *Ram Kamal (13 Calc L R 21?) Harduar Singh* v *Alega Ojha (I L R ?0 Calc 870) Damri Thakar* v *Bhowani Sahoo (I L R 23 Calc 194) Queen Empress* v *Basiappa (I L R 18 Mad 394)* Re *Subramania Ayyer (I L P 31 Mad 304) Nga Paik* v *Nga Sau (50 Indian Cases 6?) Emperor* v *Mathura (I L P 41 All 116) Abdul Azi* v *Emperor (15 All L J ?37)* followed GIRDHARI v THE CROWN I L R 2 Lah 237

——— s 355—

See SUMMARY TRIAL I L R 48 Calc 280

——— s 356—

See DISPUTE CONCERNING LAND I L R 42 Calc 381

——— s 360—

See CHARGE I L R 42 Calc 957

See DEPOSITION 14 C W N 83

——— ss 360 (1) 476—

——— *Handing over record of deposition to witness for being read by him if sufficient compliance with law —Such deposition if admissible and assignment of perjury if can be made thereon—Examination of witnesses in enquiry under s 476 Criminal Procedure Code—Duty of Magistrate to make a record of statements* An order under s 476 Criminal Procedure Code was made against the petitioner directing his prosecution under s 193 of the Penal Code with reference to a deposition given by him as a witness at a criminal trial It appeared that after the deposition had been recorded the record was handed over to the petitioner who proceeded to read it over himself The Magistrate held a preliminary enquiry under s 476 Criminal Procedure Code before making the order for prosecution, and examined witnesses in the course of that enquiry but made no record of their statements *Held* that the provisions of s 360 sub s *(1)* Criminal Procedure Code were not sufficiently complied with inasmuch as that sub section requires that the evidence should be read over in the presence that is in the hearing of the accused in order that the accused should have an opportunity of correcting any mistake in it That the deposition was inadmissible and the order for prosecution must be set aside That the Code of Criminal Procedure does not contain any provision with regard to the manner in which the evidence in an enquiry under s 476 Criminal Procedure Code should be recorded but for future reference the Magistrate should have made a summary of the statements of the witnesses examined KING EMPEROR v JOGENDRO NATH GHOSH (1914) I L R 42 Calc 240
18 C W N 1242

——— s 362—

See s 342 5 Pat L J 430

See EXCISE OFFICER I L R 46 Calc. 411

——— *Record of evidence recorded by Presidency Magistrate.* It is the duty of the Magistrate in a ca e which comes within

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

——— s 362—contd

s 362 Criminal Procedure Code to take a note of all the material facts whether they appear in the course of the examination in chief or in the cour e of cross examination AH FOONG CHINA MAN v KING EMPEROR (1918) 22 C W N 834

——— s 364—

See s 14 3 Pat L J 291

See s 140 I L R 37 Calc 467

See s 342 5 Pat L J 430

——— *Statement mad by a c 1 p rson—Refusal of accused to sign record—Indian Penal Code s 180* When the statement of an accused p rson has been recorded un ler the provisions of s 364 of the Code of Criminal Procedure and admitted by the accused to be correct the a cuse l is bound to sign the record of such statement, an l his refusal to si n it amounts to an offence within the meaning of s 180 of the In lian Penal Code *Imperatrix v Sursapa I L R 4 Bom 15* distinguish d EMPEROR v UMAR KHAN (1917) I L R 39 All 393

——— ss 364 533—

See EVIDENCE ACT (I OF 1872) s 91 I L R 35 All 230

——— ss 366 and 367—

See s 105 25 C W N 887

——— s 367—

See CHARGE TO JURY 1 Pat L J 317

See PRACTICE I L R 40 Calc 376

——— *Transfer of a Magis trat who has written but not delivered judgm nt—D mand for a n w trial b fore successor under s 350 of Criminal Procedure Code—Legality of order granting new trial—Successor not bound to pro nounce his predecessor s judgm nt* A Magistrate who had tried a case wrote a judgment dated and signed it on the day fixed for judgment Owing to the absence of one of the accused he did not pronounce it on that day but adjourned the case to a later date In the meanwhile the Magis trate was transferred to another station and succeeded by another Magistrate before whom all the accused demanded on the adjourned date a *de novo* trial On a reference under s 438 Criminal Procedure Code *Held* that the action of the new Magistrate in according a *de novo* trial under s 350 Criminal Procedure Code was not illegal and that he was not bound to deliver his predecessor s written judgment *Obiter* In the absence of a demand for a new rial it would be in the discretion of the successor to date sign and pronounce his predecessor s judgment *Quære* Whether it is legal for him to pronounce his predecessor s judgment in the face of a demand for a new trial *In re Sankara Pillai 18 Mad L J 197* considered PE SAVARIMUTHU PILLAI (1918) I L R 40 Mad 108

——— ss 367 and 421—*Appeal—Appeal summarily dismissed—How far Court bound to record reasons for dismissal* A Court of criminal appeal is not bound when dismissing an appeal summarily under s 421 of the Code of Criminal Procedure to write a judgment as defined in s 367 of the Code It is however advisable that it should give reasons for rejecting the appeal in view of the possibility of its order being challenged by an application for revision *Queen Empress v Warubai I L R 20 Bom 540* followed *Rash B hari Das v Balgopal Singh I L R 21 Calc 92 Queen Empress v Namin I L P 8 All 514 Qu en Empress Nannhi I L P 17 All 241* and *Qu en Empress v Pandeh Bhat I L P 19 All 506* referred to EMPEROR v KUNDAN (1914) I L R 36 All 496

——— ss 367 418 423—*Trial by Jury—Charge to Jury—Record of heads of charge—Mis dir ction—App al—Powers of App llate Court* Nine persons were tried by a jury on a charge of dacoity the case for the prosecution being that the dacoity charged was committed by these nine persons together with the approver The jury however found a verdict of not guilty in favour of seven out of the nine accused *Held* that no conviction for dacoity which implies the participation of five or more persons could be had against the remaining accuse l *The King v Plumm r (1902) 2 K B 339* referred to In a trial by jury before a Session Court the record of the Judge s charge to the jury ought to show in what manner the law applicable to the case has been explained to the jury the mere statement that the law was explained is not sufficient It ought also to show that the evidence relied upon by the defence was properly put before the jury *Emperor v Baij Nath All W N 1903 p 232 followed* In appeal from the verdict of a jury it is not open to the Appellate Court to substitute its own finding for that of the jury and to convict the accused of the offence of which the jury have acquitted them or of some cognate offence substantiated by the evidence which was before the jury and in this respect an appeal under s 418 of the Code of Criminal Procedure must be distinguished from a reference under s 307 *Wafadar Khan v Queen Empress I L R 21 Calc 955 referred to* EMPEROR v IKRAM UD DIN (1917) I L R 39 All 248

——— ss 367 424—

See JUDGMENT I L R 37 Calc 194

——— ss 367 424—*Judgment in appeal* Where the reason for upholding a conviction in a judgment in appeal was that the evidence for the prosecution was slightly stronger and the story as regards probability was far more likely *Held* that this was not sufficient for a conviction in a criminal case KASBAT ALI v KING EMPEROR (1916) 21 C W N 550

——— s 368 and 369—

See REVIEW (CRIMINAL) I L R 48 Calc 60
I L R 38 Calc 828

——— *Review of judgment—Power of High Court to review its own order on the criminal side—Rules of Court Ch VII r 8—Finality of order* *Held* that the High Court has no power to review an order dismissing an applica tion for revision made by an accused person *In the matter of the petition of F W G bbons I L P 14 Calc 42* and *Queen Empress v Durga Charan I L R 7 All 672* followed But so long as an order is not sealed as required by the Ch VII

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— ss 368 and 369—*contd*

r 8 of the Rules of Court it is not final and it is open to the Judge who passed it to alter it *Queen Empress* v *Lalit Tiwari* I L R 21 All 1" and *Emperor* v *Kallu* I L R 27 All 92 followed EMPEROR v GOBIND SAHAI (1915)
I L R 38 All 134

———— s 369—

See REVIEW IN CRIMINAL CASES
I L R 38 Calc 828

———— ss 369 488—*Final order in proceedings for maintenance of wife or child if can be reviewed by Magistrate* Proceedings under s 488 Criminal Procedure Code are judicial proceedings and the final order or the reasons given for the final order in any such proceeding is in effect a judgment and the principle enunciated in s 369 Criminal Procedure Code applies to judgments passed in proceedings under s 488 Criminal Procedure Code and a Magistrate has no power to review a final order passed in such a proceeding NANDA NARAIN NEWAR v MANMAYA KAMINI (1916)
21 C W N 344

———— *Trial completed and sentence passed for offence under s 379 of the Indian Penal Code—Trial continued on another charge under ss 75 and 379 of the Indian Penal Code in the same case—Further trial is bad* The accused was committed to a Court of Session on two charges one under s 379 and another under ss 75 and 379 of the Indian Penal Code The trial went on the first charge and ended in conviction and sentence The second charge was next taken up in the same trial and a sentence was passed on the accused again The accused having appealed *Held* that the subsequent proceedings on the second charge were not valid and should be set aside for when the judgment including the sentence was pronounced in the trial on the first charge there was no power under s 369 of the Criminal Procedure Code to alter or review the same EMPEROR v MARI PARSU (1917)
I L R 42 Bom 202

———— s 374—

See PRIVY COUNCIL PRACTICE OF
I L R 44 Calc 876

———— *Capital sentence—Circumstances to be considered by the High Court in confirming sentence of death—Delay between passing of sentence in the Sessions Court and final orders in the High Court if sufficient ground for not confirming sentence of death* Per CARNDUFF J—As the law stands in India where the alternative sentences of death and transportation are prescribed for murder the fact that the accused had the capital sentences suspended over their heads for nearly six months is a matter for the consideration of the Judge of the High Court who finally disposes of the appeal and he ought not to confirm the sentence of death which might have been rightly passed by the Sessions Judge in the first instance unless he personally thinks that such sentence should be carried out at the time final orders are passed by him and delay such as in the present case is a sufficient reason for refraining from imposing the extreme penalty AUTOR SINGH v EMPEROR (1913)
17 C W N 1213

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s 386—

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 69 I L R 40 Mad 767

———— s 397—

See s 109 I L R 34 Bom 326

———— *Sentence of imprisonment whether imprisonment for failure to give security is—Sentence of imprisonment on person already in prison legality of* Imprisonment under s 123 of the Criminal Procedure Code 1898 on account of failure to furnish security for good behaviour is not a sentence of imprisonment within the meaning of s 397 of the Code When a person is convicted of an offence and sentenced to a term of imprisonment such term cannot under s 397 be made to commence on the expiry of the period for which he has been committed to prison under s 123 MARKANDAR GENDA v THE KING EMPEROR 1 Pat L J 212

———— ss 397 123—*Sentence—Postponement of sentence—Person undergoing imprisonment for failing to give security—Penal Code (Act XLV of 1860) s 379—Theft—Practice and procedure* The accused was convicted of an offence of theft and sentenced to suffer rigorous imprisonment for six months At that date he was undergoing imprisonment for failing to give security for good behaviour The Magistrate directed that the sentence passed in the theft case should take effect after the expiry of imprisonment inflicted in the security proceedings *Held* that the sentence passed in the theft case could not be postponed to the expiry of imprisonment in the security proceedings inasmuch as the latter was not a sentence of imprisonment as used in s 397 of the Criminal Procedure Code 1898 *Emperor* v *Kanji* 5 *Bom L R* 26 *Emperor* v *Durga* 6 *Bom L R* 1098 and *Emperor* v *Arjun* I L R 34 *Bom* 596 followed EMPEROR v VISHNU BALKRISHNA (1917)
I L R 37 Bom 178

———— s 403—

See s 190	2 Pat L J 34
See s 247	I L R 34 Mad. 253 I L R 40 Mad. 976
See s 271	I L R 41 Calc 1072
See s 345	17 C W N 948
See s 413	I L R 39 All 293
See ACQUITTAL	I L R 37 Calc. 604
See ASSESSOR EXAMINATION OF	I L R 40 Calc 163
See AUTREFOIS ACQUIT	
See DEFAMATION	I L R 48 Calc 383
See RIOTING	I L R 48 Calc 78

———— *Previous acquittal plea of—Acquittal of some accused charged with rioting grievous hurt and murder—Liability of others to be tried for the same offences—Prosecution story found to be false as to the grievous hurt and murder* An acquittal of some of the accused on charges of rioting armed with deadly weapons grievous hurt and murder is no bar under s 403 of the Criminal Procedure Code to the trial of others concerned in the same es Where the Sessions Judge was of op e original

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s 403—*contd*

trial that the prosecution story as to the manner in which the deceased met his death did not represent the truth and acquitted the accused though he did not disbelieve the fact of a rioting having occurred while one of the Assessors believed the whole story *Held* that the High Court would not interfere with a pending prosecution against others for the same offences *Kishun Das Ghose v King Emperor* ~ (W N 433 distinguished KOKAI SARDAR v MEHER KHAN (1910) I L R 37 Calc 659

———— (1) *Autrefois acquit—403 (1) scope of—Sanction to prosecute s 195—Indian Penal Code (Act XLV of 1860) s 18 and 211* Sanction was obtained by the complainant to prosecute the accused for an offence under s 211 Indian Penal Code Accused was tried and convicted but the conviction was quashed by the High Court in revision on the ground that the accused had not committed an offence under that section but under s 182 Indian Penal Code for which no sanction had been granted Complainant thereupon obtained sanction to prosecute the accused under s 182 Indian Penal Code On accused pleading in bar of prosecution s 403 (1) Criminal Procedure Code the Magistrate overruled the objection and his order was confirmed by the Court of Session Accused petitioned the High Court *Held* that the prosecution was barred by s 403 (1) Criminal Procedure Code *Held* further that s 403 (4) refers to the character and status of the tribunal when it refers to competency to try an offence and that a sanction under s. 195 Criminal Procedure Code is not a condition of the competency of the tribunal but only a condition precedent for the institution of proceeding *In re* GANAPATHI BHATTA (1913) I L R 36 Mad 308

———— *Previous acquittal—Court of competent jurisdiction —Sanction* Where the law requires a previous sanction to be given before a charge can be entertained by a Court that Court is not a Court of competent jurisdiction until the sanction has been obtained *In re Samsudin I L R* ~ *Bom* ~11 followed The fact therefore that a person has been tried for and acquitted of offences under the Indian Penal Code in respect of certain transactions in connection with the registration of a document is no bar to his trial for an offence under s 82 of the Registration Act arising out of the same transactions EMPEROR *v* JIWAN (1914) I L R 37 All. 107

———— *Previous acquittal—Subsequent trial how far barred—Penal Code (Act XLV of 1860) ss 46 109 471* The accused was tried before a Court of Session for abetment of forgery in relation to a document under ss 467 and 109 of the Indian Penal Code and was acquitted. He was again tried before the Court of Session for using as genuine the same forged document under s 471 of the Indian Penal Code It was objected that the previous acquittal was a bar to the second trial under s 403 of the Criminal Procedure Code *Held* overruling the contention that sub 1 of s 403 of the Criminal Procedure Code did not apply to the case inasmuch as the case was not one contemplated by s 236 that is to say a case where upon the facts proved it was doubtful what should be the true view of the offence constituted *Held* further that the case fell under sub cl (2) of s 403 for the series of acts beginning with the forgery and ending with the user of the forged document in the Civil Court to support the civil claim must be regarded as so connected together as to form the same transaction or carrying through of a single predetermined plan so that under s 235 (1) it would have been competent to try the accused for both offences at the same trial *Held* also that the case fell under sub s 4 of s 403 because the Court which acquitted the prisoner on the charge of abetment of forgery was not competent to try the offence under s 471 of the Indian Penal Code inasmuch as at the time of the earlier trial no sanction for the prosecution under s 471 had been given under s 195 of the Criminal Procedure Code EMPEROR *v* JIVRAM DANKARJI (1915) I L R 40 Bom 97

———— *Autrefois acquit—Duty of Court before which plea in bar is taken to decide on evidence* The petitioner charged the opposite party before the Presidency Magistrate of Calcutta with cheating and criminal breach of trust The preliminary objection was taken that the accused had been tried on the same facts in the Court at Burdwan and acquitted The Magistrate on hearing both parties and looking into the papers of the previous trial discharged the accused holding that no further trial could go on *Held* that whether the facts in the present case were the same as those in the previous case has to be determined after hearing the evidence and ascertaining what the facts are in this case and what were the facts found in the previous case The case was sent back to the Magistrate for due enquiry M N MUKHERJI *v* MATANGI CHARAN LALIT (1918) 23 C W N 599

———— *Autrefois acquit—as to bar must be based on investigation of facts* A Court ought not to decide that a charge pending trial before him is barred under s 403 of the Criminal Procedure Code without an investigation of the facts put forward on behalf of the complainant RADHA KISHEN COENKA *v* FATEH CHAND BORAH (1918) 23 C W N 543

———— *Discharge of complaint by one Magistrate whether fresh complaint can be entertained by another Magistrate* There is nothing in the Code of Criminal Procedure 1898 to prevent a Magistrate from entertaining a second complaint after an order of discharge by another Magistrate BIJOO KING *v* KING EMPEROR 2 Pat L J 34

———— *Autrefois acquit—Legality of trial person previously acquitted for offence for which a separate charge might have been framed at the former trial—Indian Penal Code (Act XLV of 1860) ss 5? ~9 and 147* The petitioners who were police constables were convicted of rioting in the course of which they took several persons in custody Two of the petitioners were previously tried on a charge under s 342 I P C in respect of the arrests made by them and were acquitted *Held* that the present trial of these two petitioners for rioting was not vitiated by contravention of the rule embodied in section ? sub s (1) Cr P C. The case was covered by sub s (2) which provide that a person ac

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 403—*contd*

quitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under s 235 (1) Cr P C *Held* on a consideration of the circumstances of the case that the petitioners were not entitled to the benefit of s 79 I P C RAM SAHAY RAM v KING EMPEROR 24 C W N 763

——— *Autrefois acquit* The petitioner were tried on charges of kidnapping a minor girl and rioting with the common object of kidnapping the girl The trying Magistrate acquitted them of the said charges but convicted them of being members of an unlawful assembly with the common object of causing assault and wrongful restraint In appeal the Sessions Judge set aside the conviction and ordered a retrial on charges of abducting the girl in order to confine her secretly and of rioting with that common object *Held* that retrial on the charges mentioned was barred by s 403 Cr P C KALANATH BARMAN v KING EMPEROR 24 C W N 856

——— ss 403 423 439—*Previous acquittal on a charge of causing simple hurt—Subsequent death of person injured—Commitment of the persons acquitted of the minor offence under s 304 of the Penal Code—Revision* S and R were charged with causing simple hurt to K The case was compounded and both the accused were acquitted K later on died of the injury caused by S and R The Magistrate thereupon sent up P for trial before the Sessions under s 304 and discharged S as he found that the injury caused by him did not in any way contribute to K's death The Sessions Judge directed the Magistrate to commit S also and he was committed accordingly *Held* that there was no legal bar to the trial of S under s 304 of the Indian Penal and to his conviction under that section if the evidence enabled the Court to apply either s 34 or 114 of the Penal Code to the case A commitment can only be set aside on a point of law and as no such point arose in this case High Court did not interfere EMPEROR v SAILANI (1913) I L R 36 All 4

——— s 406—

See s 110 25 C W N 383

See APPEAL I L R 48 Calc 874

——— s 407—*Sanction to prosecute—Application to Magistrate of the first class—Appeal to District Magistrate—Transfer—Jurisdiction* S 407 of the Criminal Procedure Code does not entitle a District Magistrate to send appeals under s 195 of that Code to a Magistrate of the first class subordinate to him That section deals with appeals from convictions *Sadhu Lal* v *Ram Churn Pasi I L R 30 Calc 394* followed EMPEROR v LAL SINGH (1911) I L R 34 All 244

——— s 408—

See s 35 3 Pat L J 138

See s 413 I L R 40 Mad 591

See SEDITION I L R 38 Calc 214

——— *Assistant Sessions Judge—One accused sentenced to imprisonment for more than four years—Others to a lesser period—Appeal* When an Assistant Sessions Judge sentences one of several accused to more than four years rigorous imprisonment and others to lesser terms the appeals of all lie to the High Court even though the accused who is sentenced to more than four years does not appeal EMPEROR v HAR DAYAL (1915) I L R 37 All 471

——— ss 408 413—*One of several co accused in the same trial sentenced to one month s imprisonment others to a longer period—Appeal* *Held* that the right of appeal exercisable by a person who has received an appealable sentence carries with it a right of appeal also by any other person convicted at the same trial even though that particular person may have received a sentence which if it stood alone would not have been appealable EMPEROR v LAL SINGH (1916) I L R 38 All 395

——— ss 408 413 and 439—*Joint trial of several accused—one only awarded appealable sentence—whether Appellate Court may deal with case of all accused—Revision power of High Court—Construction of Statutes* K and 14 others were jointly tried for theft and were all convicted K was awarded an appealable sentence and the other 14 were awarded non appealable sentence K appealed to the Sessions Judge who disbelieved the story of the theft and acquitted all the accused In revision the High Court went into the merits of the case of all the accused and affirmed the finding of the Sessions Judge *Per* ATKINSON J (JWALA PRASAD J dissentiente) —If two or more persons are tried jointly and some are convicted and awarded non appealable sentences and others are convicted and awarded appealable sentences and the latter alone appeal the Appellate Court is not entitled in that appeal to deal with the cases of those who have been awarded a non appealable sentence ATKINSON J —S 408 of the Code of Criminal Procedure 1898 must be read and construed subject to the limitations and qualifications expressed in s 413 *Per* JWALA PRASAD J —S 413 controls s 408 only in cases in which there is no sentence upon any convicted person above the limit prescribed by s 413 so that if any of the persons convicted in the same case has received a punishment above that limit the right of appeal given in s 408 enables a person to appeal whose sentence is otherwise unappealable *Per* ATKINSON J —The word cases in s 413 applies to all cases whether they be summons cases warrant cases or trial cases The word is used in its widest and most extensive sense to cover the trial of all cases in respect of which an accused person may be convicted *Per* JWALA PRASAD J —The High Court has power in a proper case to set aside the conviction and sentence passed on an accused person who has not appealed while considering the case of the co accused who did appeal and the High Court has a similar power in considering an appeal by the complainant *Per* JWALA PRASAD J —The Court has no power in interpreting a section to add words to the section which the Legislature has omitted especially when the addition of the words would curtail an undoubted and substantial right given by the statute in clear and unambiguous terms such as the right of appeal given by s 408 of the Code It is consonant with the rules of construction of a statute that the inter

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 408 413 and 439—*contd*

pretation favourable to the right expressly conferred upon a subject should be accepted and acted upon as being the true intention and meaning of the Legislature INDRU JHA v THE KING EMPEROR 4 Pat L J 435

——— ss 408 415—*Appeal—Sentence* Where certain persons were tried by a Magistrate of the first class convicted of an offence under s 323 Indian Penal Code and sentenced to a day's imprisonment and a fine of fifty rupees *Held* that the circumstances that the accused were in fact neither sent to jail nor actually imprisoned would not prevent their being entitled to appeal to the Sessions Judge EMPEROR v ALAM (1911) I L R 33 All 510

——— s 409—

See SANCTION TO PROSECUTE. 4 Pat L J 374

——— s 410—

See EXCISE I L R 41 Calc 694

——— s 413 -

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——— Concurrent sentences—*Two sentences of one month running concurrently—Appeal* Where the accused were convicted on two separate charges and sentenced to one month's rigorous imprisonment on each of the charges by a first class Magistrate the sentences to run concurrently *Held* that an appeal lay to the Sessions Court BIPIN BEHARY DEY v THE EMPEROR (1911) 15 C W N 734

——— Practice—Sentence—*Magistrate passing non appealable sentence—Adding to sentence to make it appealable—Appeal to Sessions Judge—The Sessions Judge to entertain the appeal and to decide it on merits* The Magistrate trying a case passed at first a non appealable sentence on the accused but at the request of the accused made an addition to the sentence passed so as to make it appealable When the accused appealed to the Sessions Judge his appeal was dismissed on the ground that no appeal lay inasmuch as the sentence first passed by the Magistrate was not appealable and the addition to the sentence could not be made legally In revision *Held* that the Sessions Judge had committed an error in holding that he had no jurisdiction to hear the appeal for though the Magistrate had no jurisdiction to alter the sentence once passed by him yet for the purposes of the Sessions Judge's jurisdiction so far as the appeal was concerned that was the very mistake which he was called upon to correct by way of appeal When the appeal was heard again by the Sessions Judge he struck out the addition made by the Magistrate in the sentence and having done that dismissed the appeal on the ground that the sentence appealed from was not appealable In revision *Held* that when the Magistrate had passed a sentence beyond one month an appeal lay to the Sessions Judge under s 413 of the Criminal Procedure Code whether that sentence was passed legally or illegally *Held* also that the Sessions Judge being once seized of the appeal the whole appeal became open to his Court even

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 413—*contd*

on merits EMPEROR v KESHAVLAL VIRCHAND (1911) I L R 35 Bom 418

——— *Appeal—Concurrent sentences aggregating to more than one month by a Magistrate of the first class—Whether appeal lies* For the purpose of appeal concurrent sentences passed by the trying Magistrate on an accused must be taken in the aggregate The petitioner and others were found guilty by a Magistrate of the first class under ss 143 and 365 read with s 114 Penal Code and each of them was sentenced to one month's rigorous imprisonment under each of the sections the sentences to run concurrently *Held* that an appeal lay to the Court of Sessions ABDUL KHALEK v THE KING EMPEROR (1912) 17 C W N 72

——— *Appeal—One of two co-accused given a non appealable the other an appealable sentence—Indian Registration Act (XVI of 1908) s 83— Permission —Criminal Procedure Code s 403—Previous convictions* *Held* that a person who has received a non appealable sentence does not derive any right of appeal from the fact that a co accused tried jointly with him has received a sentence which is appealable *Emperor* v *Lal Singh I L R 38 All 395* and *Sheopal* v *King Emperor 15 Oudh Cases 356* dissented from *Reg* v *Kalubhai Meghabhai 7 Bom H C Rep (Crown Cases) 35* and *Aiyar* v *Venkatakrishnayya 31 Mad L J 837* followed *Held* also that according to s 83 of the Indian Registration Act 1908 all that is required for the initiation of a prosecution under the Act is the permission of the Registration officer This is not the same as a sanction which word has received a technical meaning owing to its use in Chap XV of the Code of Criminal Procedure *Held* further that where a conviction and sentence are set aside merely for want of jurisdiction this does not bar a fresh trial on the same facts EMPEROR v HUSAIN KHAN (1916) I L R 39 All 293

——— ss 413 408—*Joint trial of several accused—Appealable sentence on some and non-appealable sentence on others—No right of appeal for the latter—S 408 of Criminal Procedure Code no guide to the interpretation of s 413 of Criminal Procedure Code* S 413 of Criminal Procedure Code prohibit an appeal by a person against whom a non appealable sentence has been passed even though appealable sentences have been passed against others jointly tried with him Though for convenience a joint trial of several accused persons under certain circumstances is allowed on conviction each accused must be deemed to have been convicted in a separate case of his own for the purposes of s 413 of Criminal Procedure Code The analogy of s 408 Criminal Procedure Code cannot be extended to s 413 of Criminal Procedure Code PIGGOT J's view in *Emperor* v *Lal Singh I L R 38 All 395* not followed *Palani Koravan* v *Emperor 17 Mad L J 243* distinguished *Reg* v *Muliya Nana 5 Bom H C R 24 (Cr C)* and *Reg* v *Kalubhai Meghabhai 7 Bom H C R 35 (Cr C)* referred to It does not follow as a matter of course that because some of the accused tried along with others are acquitted on the merits on appeal by them others should necessarily

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——— s 417—

See CHARGE I L R 42 Calc 957

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I L R 46 Calc 544

See STATUTE 24 & 25 VICT C 104 ss 1 AND 2 I L R 36 All 168

——— *Appeal from an acquittal—Distinction if any between such appeal and appeal from conviction with regard to consideration of evidence—General rule applicable to criminal cases—Appellate Court s duty to give due weight to decision of lower Court* An appeal from an acquittal does not stand on a different footing with regard to the consideration of evidence to an appeal from a conviction No distinction is drawn in the Code of Criminal Procedure between an appeal from an acquittal and an appeal from a conviction There are no special rules for dealing with the evidence in an appeal from an acquittal which it is expressly provided in the Code may lie on a question of fact Due weight must of course be given to the decision of the Court below and the reasons advanced for that decision Only one broad rule can be laid down with regard to the consideration of evidence in all criminal cases and that is that the innocence of the accused person must be presumed and the burden lies upon the prosecution of completely rebutting that presumption If after the consideration of the whole evidence any doubt is felt by the Court as to the guilt of any accused person he is entitled to the benefit of that doubt and the verdict must be in his favour DEPUTY LEGAL REMEMBRANCER BIHAR AND ORISSA *v* MATUK DHARI SINGH (1916) 20 C W N 128

——— ss 417 435 438—

See ACQUITTAL I L R 44 Calc 703

——— ss 418 to 423—

See s 367 I L R 39 All 348

——— s 421—

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——— *Appeal—summary dismissal* In dealing with an appeal under s 421 of the Code of Criminal Procedure 1898 the Appellate Court should give some reason for dismissing the appeal summarily although not required by law to write a judgment GURUBHAI BEHARA *v* THE KING EMPEROR 2 Pat L J 695

——— ss 421 423—

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CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 421 233 537—*contd*

ss 13 and 14—Joint trial of two separate calendar cases—Offences distinct—Illegality not cured by s 537 Criminal Procedure Code—Retrial of acquittal wrong When a case of acquittal taken up by the High Court in the exercise of its powers of revision was under the consideration of a Bench notice was issued to the Public Prosecutor to appear at the further hearing of the revision and also to inform the Court whether Government intended to appeal against the acquittal He appeared and handed in the appeals by the Government to the learned Judges who perused them and ordered notice forthwith On that date an Admission Court constituted by a single Judge was sitting *Held* that there was a valid presentation of the appeals The fact that a single Judge sitting in the Admission Court is entrusted with the duty of admitting criminal appeals does not deprive the Divisional Court constituted for the disposal of criminal business of the right to exercise its power of admitting criminal appeals It is by reference to the rules made by the High Court that the respective powers of Judges sitting alone and of Divisional Courts must be ascertained and not by reference to the notes to the Sittings List which are merely instructions for the guidance of practitioners Under s 13 of the Charter Act rules for the exercise of the High Court s appellate jurisdiction by one or more Judges or by Divisional Courts can be made only by such High Court the powers of the Chief Justice being only those conferred by s 14 to determine which Judge shall sit alone and which in Divisional Courts *Per* OLDFIELD J —As regards presentation no special method is enjoined in the Code of Criminal Procedure and therefore the question is one of administrative convenience alone So long as there is an actual presentation to an officer of the Court such as a Bench Clerk or to one of the Judges its members the presentation is not invalid Where on the presentation of a single complaint against the accused containing all the allegations necessary for the establishment of two cases those allegations being shortly that accused had cheated the Bank of Madras in connection with certain bills of exchange and also by a false representation contained in a document as to the amount of his assets the Magistrate after recording the prosecution evidence continuously without discriminating between that which was relevant on each of these two charges framed separate charges and also numbered them as different calendar cases but when the witnesses came to be cross examined he lost sight of the necessity for keeping the two trials separate and allowed the witnesses to be cross examined promiscuously in respect of both the charges *Held* that the joint trial of the two cases was illegal inasmuch as it contravened the provisions of s 233 Criminal Procedure Code and that the legality could not be cured by s 537 Criminal Procedure Code *Subramania Ayyar* v *King Emperor I L R 25 Mad 61* followed Where in an appeal preferred by the High Court against the acquittal of an accused after an illegal trial the Court is of opinion that the acquittal is wrong on the merits the accused cannot be convicted and sentenced by the High Court the only course open is to order that the accused be tried a second time *Per* NAPIER J —The decision of the Privy

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———— ss 417 435 438—

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CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— ss 421, 233 537—*contd*

ss 13 and 14—Joint trial of two separate calendar cases—Offences distinct—Illegality not cured by s 537 Criminal Procedure Code—Retrial if acquittal wrong When a case of acquittal taken up by the High Court in the exercise of its powers of revision was under the consideration of a Bench notice was is ued to the Public Prosecutor to appear at the further hearing of the revision and al o to inform the Court whether Government intended to appeal against the acquittal He appeared and handed in the appeals by the Government to the learned Judges who perused them and ordered notice forthwith On that date an Admission Court constituted by a single Judge was sitting *Held* that there was a valid presentation of the appeals. The fact that a single Judge sitting in the Admis sion Court is entrusted with the duty of admit ting criminal appeals does not deprive the Divi sional Court constituted for the disposal of crimi nal business of the right to exercise its power of admitting criminal appeals It is by reference to the rules made by the High Court that the respective powers of Judges sitting alone and of Divisional Courts must be ascertained and not by reference to the notes to the Sittings List which are merely instructions for the guidance of practitioners Under s 13 of the Charter Act rules for the exerci e of the High Court s appellate jurisdiction by one or more Judges or by Divisional Courts can be made only by such High Court the powers of the Chief Justice being only tho e conferred by s 14 to determine which Judge shall sit alone and which in Divisional Courts. *Per* OLDFIELD J —As regards presentation no special method is enjoined in the Code of Criminal Pro cedure and therefore the question is one of administrative convenience alone So long at there is an actual pre entation to an officer of the Court such as a Bench Clerk or to one of the Judges its members the presentation is not invalid Where on the presentation of a single complaint against the accused containing all the allegations necessary for the establishment of two cases those allegations being shortly that accused had cheated the Bank of Madras in connection with certain bills of exchange and also by a false re presentation contained in a document as to the amount of his assets the Magistrate after re cording the prosecution evidence continuously without discriminating between that which was relevant on each of these two charges framed separate charges and also numbered them as different calendar cases but when the witnesses came to be cross examined he lost sight of the necessity for keeping the two trials separate and allowed the witnesses to be cross examined promiscuously in respect of both the charges *Held* that the joint trial of the two cases was illegal inasmuch as it contravened the provisions of s 233 Criminal Procedure Code and that the legality could not be cured by s 537 Criminal Procedure Code *Subramania Ayyar v King Emperor I L R 25 Mad 61* followed Where in an appeal preferred by the High Court against the acquittal of an accused after an illegal trial the Court is of opinion that the acquittal is wrong on the merits the accused cannot be convicted and sentenced by the High Court the only course open is to order that the accused be tried a second time *Per* NAPIER J —The decision of the Privy

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— ss 421, 233 537—*contd*

Council in *Subramania Iyyar* v *King Emperor I L R 25 Mad 61* does not compel the Court to hold that in no case can a misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of s 537 Criminal Procedure Code THE PUBLIC PROSECUTOR v KADIRI KOYA (1916) I L R 39 Mad 527

———— s 422—

See APPEAL I L R 41 Calc 408

———— ss 422 423—

See s 439 I L R 39 Mad 505

———— s 423—

See s 237 I L R 33 Mad 231

See s 250 I L R 38 Mad 1011

See s 403 I L R 36 All 4

See s 421 I L R 39 Mad 527

See APPEAL I L R 32 Calc 774
I L R 4 Calc 476

See APPELLATE COURT I L R 38 Calc 293

See ASSESSORS I L R 40 Calc 163

See CRIMINAL TRESPASS I L R 43 Calc 1143

See DACOITY I L R 41 Calc 350

See DEPOSITION I L R 46 Calc 895

See EVIDENCE ACT s 167 14 C W N 493

See JURY, TRIAL BY I L R 46 Calc 635

See RIOTING I L R 39 Calc 898

See TRADING WITH THE ENEMY I L R 42 Calc 1094

———— *Appeal—Power of Appellate Court to alter finding of acquittal into one of conviction* An Appellate Court can under s 423 of the Criminal Procedure Code in an appeal from a conviction alter the finding of the lower Court and find the appellant guilty of an offence of which the lower Court has declined to convict him *Queen Empress* v *Jabanulla I L R 23 Calc 975* followed EMPEROR v SARDAR (1911) I L R 34 All 115

———— *Sentence—Alteration of sentence whether amounting to an enhancement or not* A Magistrate on a conviction under s 379 of the Indian Penal Code sentenced the accused to one month s rigorous imprisonment and a fine of Rs 5 each and in case of a default in payment of the fine to one week s further imprisonment The District Magistrate on appeal by the accused altered the sentence to one of three days imprisonment and a fine of Rs 100 and in default of payment of fine to a further imprisonment of one month *Held* that in the absence of any evidence that the accused were unable to pay the fine or regarded the sentence passed on appeal as more severe than the original sentence it could not be said that the sentence had been enhanced *Queen Empress* v *Chagan Jagannath I L R 23 Bom 439* and *Balthavatsalu Naidu* v *Emperor I L R 30 Mad 103* doubted *Fakhal Raja* v *Khirode Pershad Dutt I L R 27 Calc 175* approved EMPEROR v MEHAR CHAND (1914) I L R 36 All 485

———— *Honorary Magistrates—Judgment of Bench signed by one member only—Appeal—Order returning judgment to be signed by the other member of the Bench which had heard the case* A District Magistrate on an appeal from the decision of a Bench of Honorary Magistrates found that although the case had apparently been heard by a Bench of two Magistrates the judgment was signed by only one member of the Bench and accordingly returned the judgment to be signed by the other Magistrate who had heard the case *Held* that this procedure was in no way opposed to s 423 of the Code of Criminal Procedure EMPEROR v GOPAL DAS (1918) I L R 41 All 217

———— *Alteration of finding under—Penal Code (Act XLV of 1860) s 325—Conviction under may be altered to conviction under s 147—Appellate Court power of* Under s 423 (b) (2) Criminal Procedure Code the Appellate Court may alter the finding maintaining the sentence and there is nothing to restrict the finding which may be altered to a finding of conviction A conviction under s 325 Indian Penal Code may be altered by the Appellate Court into a conviction under s 147 Indian Penal Code the sentence under s 325 being maintained *Abhimanyu* v *Lakhmi Narain I L R 2 Calc 566* distinguished APPANNA v PITHANI MAHALAKSHMI (1910) I L R 34 Mad 545

———— *Power of Appellate Court to alter finding of acquittal to a finding of conviction—Penal Code (Act XLV of 1860) ss 147, 353 and 358* Under s 423 of the Code of Criminal Procedure 1898 an Appellate Court has power to alter a finding of acquittal to a conviction either on a point of law or on a point of fact Where the accused were charged with the offence of being members of an unlawful assembly with the common object of resisting arrest and the trial Court acquitted them on this charge and convicted them under s 323 of the Penal Code *Held* that the Appellate Court having found that one of the common objects of the assembly was to resist arrest was entitled to alter the conviction to one of rioting with the said common object MAHANGU SINGH v KING EMPEROR 3 Pat L J 565

———— ss 423 and 428—*Order setting aside conviction and ordering trying Magistrate to retry the case take additional evidence and decide the case on both original and additional evidence legality of* Sub Divisional Magistrate convicted the petitioners of offences under the Indian Penal Code ss 147 and 148 The Sessions Judge on appeal sent the case back for further evidence to be recorded with a direction to the Magistrate to record a fresh decision on the evidence already recorded and on the additional evidence By his order the Sessions Judge set aside the conviction and sentence and ordered a retrial from the point at which the additional evidence should have been taken After taking the additional evidence the Magistrate again convicted the petitioners who again appealed By this time the Sessions Judge who heard the first appeal had been

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 423 and 428—*contd*

su ceeded by another At the request of both parties the Appellate Court disregarded the additional evidence and decided the case on the original evidence He upheld the convictions *Held per* CHAMIER C J that even if the first Sessions Judge s order was not merely irregular but illegal it was not necessary for the High Court to order a new trial by the Magistrate Ordinarily the proper course would have been to set aside all the proceedings subsequent to the alleged illegal order and to require the Sessions Judge to record a fresh judgment on the evidence originally recorded or send the case to another Ses ions Judge for that purpose But as both sides had asked the Sessions Judge to disregard the additional evidence and as the Sessions Judge had already recorded his finding on the original evidence it was unnecessary to return the case to him in order that he might record a fresh judgment *Held per* JWALA PRASAD J that the Sessions Judge s order setting aside the convictions and sentences ordering a retrial of the accused and directing the Magistrate to take additional evidence was wholly illegal *Held* further however that under the circumstances of the case the accused had not been prejudiced GAJANAND THAKUR v KING EMPEROR 1 Pat L J 99

——— ss 423 439—

See s 403 I L R 36 All 4

See JURISDICTION OF HIGH COURT I L R 38 Calc 786

——— *High Court power of to alter finding of acquittal into conviction and enhance s ntences in Revision—Penal Code (Act XLV of 1860) s 300 explained* S 423 cl (*b*) Criminal Procedure Code 1898 gives power to the High Court when hearing an appeal against a conviction to alter the finding and s 439 gives power to enhance the sentence so as to make it appropriate to the altered finding S 439 sub s (*4*) which enacts that nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction mu t be construed as referring to cases where the trial has ended in a complete acquittal any other construction would be inconsistent with the power to alter the finding given to the Court as a Court of Revision by virtue of its power to exercise the power conferred on a Court of Appeal by s 423 cl (*b*) In this view the High Court having in revision altered a finding of rioting into one of murder enhanced the sentences from five years rigorous imprisonment to transportation for life In the course of a riot the accused attacked and killed a man with dangerous weapons *Held* that the acts of the accused having caused the death of the man and there being nothing to suggest that they were not sufficient to cause death as their ordinary and natural result in the absence of proof of circumstances sufficient to give the accused the benefit of any of the exceptions to s 300 of the Penal Code they must be taken to have intended to kill the man and are guilty of murder BALI PEDDI *Re* I L R 37 Mad. 119

——— ss 424—

See s 367 21 C W N 550

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 424—*contd*

See JUDGMENT OF APPELLATE COURT I L R 37 Calc 194

See PRACTICE I L R 40 Calc 376

——— ss 424 367—*Appellate judgment what should be* The petitioners were convicted all under ss 147 and 342 Indian Penal Code and some also under s 354 and some under s 458 Indian Penal Code the convictions were affirmed in appeal by the Se sions Judge *Held* that there ought to be sufficient materials in the appellate judgment itself to enable the High Court to form a conclusion as to the propriety of the conviction of each of the accused having regard to the various offences with which he was charged and to enable it to come to a conclusion as to the correctness of the sentence which has been passed upon each of the accused having regard to the nature of the offence with which each of the accused was charged The High Court directed a re hearing of the appeal by the same Sessions Judge ARINDRA RAJBUNSHI v KING EMPEROR (1916) 20 C W N 1296

——— s 428—

See s 196 I L R 42 Mad 885

See s 423 1 Pat L J 99

See EVIDENCE ACT s 21 I L R 36 Mad 457

——— *Re trial power of High Court to order after obtaining additional evidence—Government of India Act (5 and 6 Geo V c 61) s 107—Witnesses duty of Court to secure attendance of—Petitions filed by parties duty of Court to pass order on* The High Court has power to direct the Sessions Judge to re hear an appeal after obtaining additional evidence It is the duty of the Court when processes have once been issued for the attendance of witnesses to exhaust all the powers allowed by law to enforce their attendance unless the party citing such witnesses can be shown to have been guilty of wilful ob truction and delay Where the accused repeatedly requested that certain persons should be summoned as witnesses and the Court twice i sued process without securing their attendance *Held* that the fact that the accused had failed to deposit the travelling and diet expenses of the witnesses did not excuse the Court from its duty to secure their attendance as the accused had never been requested to deposit the sum nece sary for the expenses MAHOMED ZAMIRUDDIN v KING EMPEROR 3 Pat L J 632

——— s 429—

See PRINTING PRESS I L R 38 Calc 202

——— ss 429 439—

See SANCTION FOR PROSECUTION (18) I L R 39 Mad 750

——— s 432—*Reference under—Indian Electricity Act (IX of 1910) s 33 scope of— Every person meaning of* The words every person in s 33 of the Indian Electricity Act is not confined to persons licensed under Parts II and III of the Act S 33 of the Act is not confined to ca es in which the accident actually results in personal injury but also extends to cases

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— ss 439 258—*Order of acquittal set aside by High Court in revision on merits on the application of the complainant* Where the trying Magistrate in his judgment by which he acquitted the accused while laying great stress on all considerations that might affect the credibility of the witnesses for the prosecution omitted to consider what might be advanced in their favour and also failed to appreciate the corroborative value of an important witness for the prosecution the High Court on the application of the complainant set aside the order of acquittal on the merits and directed a re trial by a new Magistrate SHAIKH BAGU *v* RAIKA SINGH (1914)

18 C W N 1244

——— ss 439 422 423—*Order of acquittal Revision petition to the High Court by private parties—Power of High Court to interfere—Interference in what cases—Service of notice of appeal on District Magistrate—Omission of service effect of—Irregularity* The High Court has power to interfere in revision against an order of acquittal on the application of private parties but will do so only when it considers that interference is urgently demanded in the interest of public justice The High Court will not interfere with an order of acquittal where the question is one as to the appreciation of evidence or where there is no patent error or defect in the order which has resulted in grave injustice Mere omission to serve notice of appeal on the District Magistrate under ss 422 and 423 of the Code of Criminal Procedure is only an irregularity and will not render the proceedings *ab initio* void VELLANANAMBALAM *v* SOLAI SERVAI (1915)

I L R 39 Mad 505

——— ss 439 476—*Revision—Jurisdiction of High Court—Order for prosecution passed by a District Magistrate instead by a Collector acting as a Court of Revenue* The Collector of a district in deciding a Revenue appeal came to the conclusion that a receipt filed in the case was not genuine He took no action at the time as a Court of Revenue but subsequently acting as District Magistrate he held an inquiry into the matter of the receipt and sent the person whom he thought to be concerned with the making of the receipt to a subordinate Magistrate for trial *Held* that the High Court had jurisdiction to interfere in revision and that the order passed by District Magistrate was *ultra vires* EMPEROR *v* RAM SARAI (1917) I L R 40 All 144

——— ss 439 517 520—*Restoration of movable property—Charge of theft—Malkhana register order passed in making over property to complainant—Acquittal by High Court—Subsequent order of Magistrate refusing to revise order in Malkhana register—Revision by High Court* Certain properties alleged to be stolen properties were found in the house of the petitioner who was tried and convicted of theft These properties were in the custody of the Court and after the judgment of the Sessions Judge affirming the conviction of the petitioner the trying Magistrate passed an order in the Malkhana register to the effect that the properties should be made over to the complainant No order was passed on the record of the case The petitioner moved the High Court against the conviction and sentence and was acquitted After his acquittal by the High Court the petitioner applied to the trying Magistrate for the restoration of the properties to him but the Magistrate held that he could not revise his previous order in the Malkhana register The petitioner then moved the High Court and obtained a Rule *Held* that the Malkhana register forms no part of any criminal case unless it is brought on the record in a legal way and the *order in complainant's* favour recorded in it was not one under s 517 Criminal Procedure Code but the order refusing to revise that order was an order under s 517 Criminal Procedure Code and the High Court had jurisdiction to revise it under s 520 as also under s 439 Criminal Procedure Code The intention of the Legislature in cl (3) of s 517 is that an order under s 517 should not be carried into effect until it really becomes final either by there being no appeal within the prescribed period or by any final order by a Court of final jurisdiction That after the accused is acquitted of theft or burglary the proper order to make is to direct that the property found in the possession of the accused should be restored to him The complainant in that case could go to the Civil Court file a suit and secure an injunction That in the circumstances of the case the absence of a prayer by the petitioner as to the restoration of the properties in his previous application to the High Court was no bar to his getting relief in this Rule KEDAR BISWAS *v* MATHURA NATH MITRA (1913) 18 C W N 959

——— ss 439 562—*Revision—Powers of High Court* Inasmuch as action taken under s 562 of the Code of Criminal Procedure takes the place of a sentence on an accused person the High Court cannot in revision substitute for an order under that section a definite sentence of whipping or imprisonment EMPEROR *v* GHASITE (1914) I L R 37 All 31

——— ss 447 454 532—

See JURY TRIAL BY

I L R 37 Calc 467

——— s 451—

See s 435 25 C W N 609

——— ss 462 (3) 537—*European British subject—Jury—Jury not chosen by lot—Illegality* *Held* that the provisions of s 462 (3) of the Code of Criminal Procedure are imperative and if there is no choosing of the jury by lot as provided for by the section the result is that the whole trial is vitiated *Brojendro Lal v King Emperor 7 C W N 188* referred to EMPEROR *v* BRADSHAW (1911) I L R 33 All 385

——— ss 464 465—*Insanity—Inquiry into present unsoundness of mind of accused person to precede his trial on the substantive charge* Where there is any reason for supposing that an accused person may be of unsound mind and consequently incapable of making his defence it is imperatively necessary that this question should be *inquired into or tried under* the provisions of s 464 or s 465 of the Code of Criminal Procedure *before* the Court proceeds to inquire *into or try the* substantive charge against the accused *Muhammad Husain v King Emperor 15 Oudh Cases 321* referred to EMPEROR *v* JHABBU

I L R 42 All 137

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

———— s 465—

See s 14 **3 Pat L J 291**

———— s 471— *Acquittal of criminal lunatic—Court can order his detention in jail—Further orders to be passed by Government* When a criminal lunatic is acquitted under the provisions of s 470 of the Criminal Procedure Code the Court can order under s 471 of the Code that the accused be detained in custody in the jail where he then is until the further orders of Government and that the case be reported to Government for further orders EMPEROR v SOMYA HIRYA (1918) **I L R 43 Bom 134**

———— s 476—

See s 4 **I L R 38 All 32**

See s 12 **I L R 39 Calc 1041**

See s 107 **I L R 32 All 30**

See s 195 **I L R 40 Calc 360**

See s 202 **18 C W N 95**

See s 439 **I L R 40 All 144**

See APPRAISEMENTS **I L R 48 Calc 1086**

See CERTIORARI **I L R 36 Mad 72**

See COLLECTOR **I L R 40 Calc 465**

See COMPLAINT **I L R 40 Calc 444**

See COURT **I L R 37 Calc 642**

See CRIMINAL PROCEDURE CODE 195 **5 Pat L J 58**

See FALSE INFORMATION **I L R 43 Calc 173**

See JUDICIAL PROCEEDING **14 C W N 799**

See LEGAL PRACTITIONERS ACT s 14 **15 C W N 269**

See MADRAS ESTATES LAND ACT I OF *1908) ss 164—167*

See PERJURY **I L R 43 Calc 542**
I L R 42 Calc 240
I L R 39 Mad 414

See MAGISTRATE POWER OF **I L R 37 Calc 72**

See MAGISTRATE JURISDICTION OF **I L R 39 Calc 1041**

See SANCTION FOR PROSECUTION **I L R 41 Calc 446**
I L R 43 Calc 1152

———— **Court meaning of**—*Offence brought under the notice of the Court in the course of a judicial proceeding—Proceeding instituted by one Munsif for resistance to attachment of moveables in execution—Preliminary inquiry and final order by successor—Legality of order— Judicial proceeding —Execution proceedings* The word Court in s 476 of the Criminal Procedure Code includes the successor of the Judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of a judicial proceeding Where therefore the judgment creditor brought to the notice of the Munsif on the 23rd December 1908 the fact of resistance to the attachment of moveables in execution of his decree and the Munsif called upon the opposite party to show cause but his successor after holding a preliminary inquiry under s 476 of the Code ordered their prosecution on 6th October 1909 for offences under ss 183 186 and 353 of the Penal Code *Held* that the order was not without jurisdiction Action under s 476 should as far as possible be prompt and expeditious and not unduly protracted The definition of a judicial proceeding in s 4 (m) of the Criminal Procedure *Code is not exhaustive It includes an execution proceeding* and the resistance to the attachment of movables is when reported or complained of to the Court an offence brought under its notice in the course of a judicial proceeding within the meaning of s 476 of the Code BAHADUR v ERADATULLAH MALLIK (1910) **I L R 37 Calc 642**
14 C W N 799

———— **Court** —*Civil Procedure Code 1908 s 335—Revision—Inexpediency of order no ground for revision on the civil side* The word Court in s 476 of the Code of Criminal Procedure includes the successor of the Judge before whom the alleged offence was committed *Bahadur* v *Eradatullah Mallick I L R 37 Cal 642* followed Whether a particular order is expedient or not is not a ground on which the High Court can interfere in revision under s 115 of the Civil Procedure Code *In the matter of the petition of* NAWAL SINGH (1912) **I L R 34 All 293**

———— **Judicial proceeding** — *Brought under the notice of the Court —Decree on an award —Jurisdiction Held* that the words brought under its notice in s 476 of the Criminal Procedure Code are wide enough to cover an offence which may have been committed in another *forum* and on some previous occasion *Held* also that a proceeding in which a Court is asked to pass a decree in accordance with an award made with reference to a pending suit cannot be said to be other than a judicial proceeding within the meaning of the same section *Girwar Prasad* v *King Emperor 6 A L J 395 Umrao Singh* v *Hardeo I L R 29 All 418* and *Panke Bihari Lal* v *Pokhe Ram I L R 23 All 48* referred to EMPEROR v KAMTA PRASAD (1911) **I L R 33 All 396**

———— **Witness producing forged receipt**—*Prosecution ordered by successor of trying Judge without preliminary enquiry—Legality* The power to direct prosecution under s 476 Criminal Procedure Code is conferred on the Court and not on the individual judicial officer who fills the judicial office at the time of the original trial A successor of the officer before whom the original trial took place is not bound to hold an independent investigation before making an order under s 476 Criminal Procedure Code The holding of a preliminary inquiry in a proceeding under s 476 Criminal Procedure Code is discretionary and a person against whom an order for prosecution has been passed without such an enquiry cannot complain unless he has been prejudiced by the omission *Shaikh Bahadur* v *Eradatulla 14 C W N 799* explained and followed DEEPA NARAYAN BERA v BEPIN BEHARY MITTER (1911) **15 C W N 691**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s 476—*contd*

———— Preliminary inquiry—*Revision* When a Magistrate takes action under s 476 of the Code of Criminal Procedure it is not necessary to the validity of his order that he should hold a preliminary inquiry nor if he does hold preliminary inquiry is it necessary that he should give the person against whom such inquiry is being held an opportunity of cross examining the witnesses *Queen Empress* v *Matabadal I L R 15 All 392* followed ABDUL GHAFUR v RAZA HUSAIN (1912) I L R 34 All 267

———— Order under by Civil or Revenue Court if may be revised by High Court under s 439—*Civil Procedure Code (Act V of 1908) s 115—High Courts Act 24 & 25 Vict C 104 s 14* In the case of an order passed under s 476 Cr P C by a Civil or a Revenue Court s 439 Cr P C has no application but such an order can be revised by the High Court under s 115 of the Civil Procedure Code or under s 15 of the High Courts Act 24 & 25 Vict C 104 An order made by a Criminal Court under s 476 Cr P C is liable to revision by the High Court under s 439 Cr P C S 439 Cr P C is to be read along with and subject to the provision of s 435 Cr P C Where an order under s 476 made by a Civil or a Revenue Court is sought to be revised by the High Court the Bench exercising Criminal Jurisdiction cannot as such deal with the matter but the Judges composing that Bench may do so if authorised by the Chief Justice under s 14 of the High Court Act HAR PRASAD DAS v THE EMPEROR (1913) 17 C W N 647

———— Belated order—*Acquittal of the accused by one Magistrate order for prosecution of the complainant by another without jurisdiction* Where the persons complained against by the petitioner were tried and acquitted by a Deputy Magistrate on the 1st August and a week later another Deputy Magistrate called on the petitioner to show cause why he should not be prosecuted under s 211 Penal Code and finally on the 23rd August directed his prosecution under s 476 Cr P C but subsequently on the District Magistrate observing that the order for prosecution ought to be made by the Magistrate who tried the accused persons the trying Magistrate on the 16th September passed the following order — Petition purporting to show cause against prosecution under s 211 filed The cause shown is not good draw up proceedings under s 211 I P C —This order purporting to be made under s 476 Cr P C although the accused persons had applied for the prosecution of the petitioner *Held* that there was no judicial proceeding of any sort or kind before the Magistrate who made the order of the 23rd August and his order for the prosecution of the petitioner was altogether beyond his jurisdiction That the belated order of the 16th September did not represent the independent judicial opinion of the Magistrate who made it If he had thought that action ought to be taken under s. 476 Cr P C he ought to have passed the order one and a half months before and the fact that he did not do so indicated very clearly that he did not at the time think it necessary There may be cases in which a Court may not think it necessary in the public interest to take action under s 476 Cr P C but may be willing to allow the person injured to seek redress In such a case it is not necessary that the order should be passed at or near the time of the disposal of the original case *Held* however in the present case that even treating the order of the 16th September as one made under s 195 Cr P C the further prosecution of the petitioner should not be sanctioned considering how illegally and unnecessarily he has been harassed in these proceedings BHIM LAL SHAH v EMPEROR (1912) 17 C W N 290

———— Information before Police reported false—*Informant called upon by Magistrate to prove his case—Order for prosecution under s 211, Penal Code—Jurisdiction to make such order* The petitioner lodged an information with the Police who reported it to be false The petitioner made no complaint in Court but the Sub Divisional Magistrate on receipt of the police report passed the order "complainant to prove his case" and made over the case for disposal to another Magistrate who ultimately made an order under s 476 Cr P C against the petitioner *Held* that the order of the Sub Divisional Magistrate and the proceedings held thereunder do not come within any of the provisions of the Code of Criminal Procedure and the order for prosecution was without jurisdiction SARBA MAHTON v THE EMPEROR (1913) 17 C W N 824

———— Sanction for Prosecution but no order sending to Magistrate —*S 537 (b)—Illegality or Irregularity* Where a sanction to prosecute given under s 476 Criminal Procedure Code (Act V of 1898) did not order the accused to be sent before the nearest First Class Magistrate but merely ordered his prosecution *Held* that though the sanction was irregular it was not illegal and that the irregularity was cured by s 537 (b) Criminal Procedure Code *In re Bhup Kunwar I L R 26 All 249 255* dissented from *Re* SUPPAYYA THARAGAN (1914) I L R 37 Mad. 317

———— Limitation—There is nothing in s 476 of the Code of Criminal Procedure which requires a Court to take action if at all immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter *In the matter of the petition of Naval Singh I L R 34 All 93 Girwar Prasad* v *King Emperor 6 All L J 392* followed *Aiya Kannu* v *Emperor I L R 32 Mad 49 Ramadulla* v *Emperor I L R 31 Mad 140* not followed *In re Lakshmi Das I L R 32 Bom 184 Emperor* v *Rustamji Hurmusji Tarwala 4 Bom L R 778* referred to EMPEROR v TILAK PANDAY (1915) I L R 37 All 344

———— Insufficient inquiry—*Penal Code (Act XLV of 1860) s 182—Calling for a report from interested party as to truth of complaint propriety of—Order for prosecution without sufficient enquiry into truth of complaint* The petitioners filed an application before the Sub Divisional Magistrate praying for proceedings under ss 144 and 107 Criminal Procedure Code against several servants of a certain factory whereupon the Magistrate called for a report from the Manager of the factory and on receipt thereof required

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 476—*contd*

the petitioners to show cause against prosecution under s 18? Indian Penal Code and then after examining some witness on each side but without examining the petitioners themselves made an order under s 476 Criminal Procedure Code directing their prosecution for an offence under s 182 Indian Penal Code *Held* that the order of the Magistrate in calling for a report from the Manager of the factory was open to great objection That the accused being the servants of the factory the Manager was an interested party and he ought not to have been asked to make a report in these judicial proceedings *Held* (in setting aside the order for prosecution) that further enquiry should be made into the truth of the petitioners complaint and they themselves should be examined if they chose to give evidence EMPEROR v RAFFI RAUT (1914) 19 C W N 127

——— *Held* that a gazetted subordinate to whom the Collector had delegated his powers and who had before him proceedings for sale of immovable property (ancestral) was a Revenue Court acting in pursuance of s 70 of the Civil Procedure Code and that the High Court had no jurisdiction to revise an order passed by such officer under s 476 of the Criminal Procedure Code EMPEROR v A HARFI LAL I L R 39 All 91

——— Perjury—*Court bound to set out assignments of perjury alleged—Civil Procedure Code 1908 s 115—Revision—Material irregularity* *Held* that when a Civil Court makes an order under s 476 directing that a person should be prosecuted for perjury such Court is bound to set forth in its order the specific assignments of perjury alleged against the accused Failure to do so is a material irregularity within the meaning of s 115 of the Code of Civil Procedure EMPEROR v KASHI SUKUL (1916) I L R 38 All 695

——— Stay of previous proceeding pending appeal in matter out of which they arise DEBI MAHTO v KING EMPEROR (1916) 20 C W N 1116

——— Brought under the notice of the Court in the course of a judicial proceeding—*Circumstance fulfilling this requirement of the section* In a case under s 147 Indian Penal Code a certain document was exhibited and used in evidence on behalf of the petitioner who was the accused The trying Magistrate after having heard the evidence proceeded on leave and while on leave wrote a judgment which he forwarded to the District Magistrate who treated it as nullity and transferred the case to his own file under s 350 Criminal Procedure Code Before him the Public Prosecutor applied under s 494 Criminal Procedure Code to withdraw from the prosecution After examining the evidence the District Magistrate allowed this application Subsequently after making a preliminary enquiry he made an order directing the prosecution of the petitioner under ss 467 471 474 Indian Penal Code in respect of the aforesaid document *Held* that the offences as to which the prosecution of the petitioner was directed were brought to the notice of the District Magistrate in the course of a judicial proceeding within the meaning of s 476 Criminal Procedure Code and the order made was not without jurisdiction CHANDRA KISHORE ROY v KING EMPEROR (1916) 21 C W N 755

——— Person not named in order—*Magistrate taking cognizance of case on order under section if can proceed against persons not named in the order* The District Judge made an order under s 476 against one *R* who had applied before him for the probate of a will which in his opinion was *primâ facie* a forgery and in respect of which *R* was guilty of forgery or using or attempting to use a document knowing it to be forged Before the Magistrate on the application of the public prosecutor the petitioner who was not a party to the probate proceedings before the District Judge was also summoned under ss 120B and 467 Indian Penal Code in the same proceeding which was pending against *R* *Held* that the petitioner was not a party to the proceedings in the Civil Court and as the offence which appeared to have been committed was one of those described in cl (*1*) (*c*) of s 195 Criminal Procedure Code neither sanction under that section nor a complaint of the Court under s 476 was a necessary precedent to proceedings against him. That the Criminal Procedure Code provides for the taking cognizance of offences and not of offenders and a Magistrate who has legally taken cognizance of an offence on an order under s 476 has jurisdiction to proceed against any one who may be proved by the evidence to be concerned in that offence whether he was mentioned in the order under s 476 or not GIRIDHARI LAL SEROWGEE v KING EMPEROR (1916) 21 C W N 950

——— Offence not mentioned in 195—*Preliminary enquiry necessity of—Indian Penal Code (Act XLV of 1860) s 225B* Where it was reported to a Munsi that the accused persons had endeavoured to rescue the judgment debtor in a certain case tried by the Munsi from the custody of the executing peon and the Munsi *purporting to act under s 476 Criminal Procedure Code* made an order sending up the accused to the Magistrate for trial under s 225B Indian Penal Code *Held* that the order made was bad for two reasons *viz* that the offence under s 225B is not one of the offences mentioned in s 195 Criminal Procedure Code and that the order was made without making any preliminary enquiry That there may be cases where no preliminary enquiry is necessary for example in a case where the Judge is trying the case and all the facts which are material to the charge have been brought to the notice of the Judge or have come out during the course of the hearing of the case and the Judge is already in possession of all the material facts on which it is necessary for him to form the judgment But in a case like the present when the incident took place outside the Court and as to which the Judge himself could have no knowledge and as to which evidence must be called for unless the Court holds such a preliminary enquiry as may be necessary to enable him to determine whether or not there is any case fit to be sent to the Magistrate it has no jurisdiction to send the accused under s 476 Crimina

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 476—*contd*

Procedure Code TARAK DAS MOITRA v KING EMPEROR (1916) 21 C W N 125

——— **Perjury**—*Court not bound to set out assignments of perjury alleged—Civil Procedure Code 1908 s 115—Revision—Material irregularity* In every case whether under s 195 or s 476 of the Code of Criminal Procedure the particular statement when the offence refers to a statement should be set out so that the accused person should not be taken by surprise but should clearly know what is the statement which he is required to meet It does not however follow that non specification of the statement is a material irregularity justifying interference in revision by the High Court EMPEROR v CHHOTEY LAL (1917)

I L R 39 All 367

———**Offence not committed by a party to the proceeding** S 476 of the Code of Criminal Procedure (Act V of 1898) does not apply to cases where the offence was not committed by a party to a proceeding in respect of a document produced or given in evidence in such proceeding *Abdul Khadar* v *Meera Saheb I L R 15 Mad 224* followed RAMALINGAM *Re*

I L R 40 Mad 100

——— **Jurisdiction**—*Order for prosecution of persons not parties to a proceeding before the Court* A Court in taking action under s 476 of the Code of Criminal Procedure is not restricted as regards the person against whom an order may be made to the parties to a proceeding pending before it *Jadunandan Singh* v *Emperor I L R 37 Calc 250* dissented from EMPEROR v GANGA RAM (1917) I L R 40 All 24

——— **Knowledge of commission of offence after close of proceedings**—*Order under s 476 of Criminal Procedure Code validity of Held* by the FULL BENCH—Even where the facts of judicial proceeding are fresh in the mind of a Judge he cannot take action under s 476 of Criminal Procedure Code if the commission of an offence during the course of that proceeding is discovered by him only after the close of the proceeding *Per* KUMARASWAMI SASTRI J—In such cases it is open to the Court to act under s 195 Criminal Procedure Code and direct an officer to file a complaint *Ayakannu Pillai* v *Emperor I L R 32 Mad 49* applied *In re* PADMANABHA HEBBARA (1918)

I L R 42 Mad 422

——— **Revenue appeal**—*heard by Assistant Collector—Direction to prosecute a party to the appeal as well as a third person implicated in the offence though not a party to the appeal—Preliminary inquiry conducted in part by the Assistant Collector and completed by the Criminal Investigation Department—Direction to prosecute need not be a part of the revenue appeal or its continuation* Accused No 1 a Mamlatdar having decided a revenue case brought by accused No 2 an Inamdar against his tenants to recover rents appeals were preferred from the decision to the Assistant Collector The appeals were decided on the 18th July 1916 by the Assistant Collector who having suspected the genuineness of a Kabulayat produced in the case proceeded on the 28th July 1916 to call for an explanation of the Inamdar and on the 10th October 1916 obtained a report from the Mamlatdar The Assistant Collector perused the explanation and the report but as he considered the matter serious and demanding further inquiry he applied on the 7th March 1917 for assistance of the Criminal Investigation Department from the District Magistrate The assistance was given and inquiry made by the Police On receipt of the report from the Police the Assistant Collector passed on the 2nd July 1917 an order referring the matter for inquiry to the nearest First Class Magistrate under s 476 of the Criminal Procedure Code The Magistrate committed the accused to the Sessions Court where on trial held they were convicted and sentenced On appeal to the High Court it was contended (i) that even if the offence was brought under the notice in the judicial proceedings of the Assistant Collector as regards the Inamdar it was not brought to his notice as regards the Mamlatdar (ii) that the whole of the preliminary inquiry ought to have been made by the Assistant Collector and that he was *functus officio* as soon as he made his reference to the District Magistrate and (iii) that the delay in proceeding under s 476 of the Criminal Procedure Code was fatal to the jurisdiction of the Assistant Collector to act under the section *Held (i) that what was provided for in s 476 of* the Criminal Procedure Code was that after making preliminary inquiry into any offence brought to notice the case might be sent for inquiry *to the nearest* Magistrate of the First Class that is to say it was the case which was to be sent and not necessarily all the offenders who might be concerned in the commission of the offence (ii) *that some inquiry at least* having been made by the Assistant Collector he was not deprived of jurisdiction to act under the section by the mere fact that he took the precaution of making *a more careful* and deliberate inquiry with the assistance of the Criminal Investigation Department or by the fact that he applied to the District Magistrate for assistance (iii) that there was nothing in the wording of the section to require that officers acting under it were bound to make their inquiry either in the actual course of the judicial proceedings or so shortly there after as to make it really a continuation of those proceedings *In re Lakshmidas Lalji I L R 32 Bom 184* followed *Pahmadulla Sahib* v *Emperor I L R 31 Mad 140 Ayakannu Pillai* v *Emperor I L R 32 Mad 49 Begu Singh* v *Emperor I L R 34 Calc 551* and *Bahadur* v *Eradatullah Mallick I L R 37 Calc 642 649* dissented from EMPEROR v WAMAN DINKAR (1918) I L R 43 Bom 300

——— **Offence referred to in s 195"** *meaning of—Jurisdiction of Court to take action under s 476 whether restricted to limitations imposed by s 195 Criminal Procedure Code Held* by the FULL BENCH—The words in s 476 Criminal Procedure Code any offence referred to in s 195 incorporate the conditions laid down by s 195 and a Court can take action under s 476 only under such conditions Hence proceedings under s 476 of the Criminal Procedure Code cannot be taken against a person who is neither a party to nor a witness in a suit in respect of

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 476—*contd*

abetment of forgery of a document exhibited in the suit COVINDA IYER v REX (1919)
I L R 42 Mad. 540

——— **Bengal Tenancy Act** —It is competent for a Collector in cases of disobedience to orders under ss 69 and 70 of Bengal Tenancy Act to act under s 195 or 476 of the Code and direct a prosecution under 188 of I P C in respect thereof LAKSHAN POP AND OTHERS v NARAYAN HAZRA
25 C W N 617

——— **False complaint**—*Order passed by successor to Magistrate who dismissed complaint legality of* A Sub Divisional Magistrate on a complaint being preferred to him recorded a finding that the complaint was false and called upon the complainant to show cause why he should not be prosecuted under s 182 of the Penal Code The Magistrate was then transferred and his successor on the matter coming up before him referred it to a Subordinate Magistrate for hearing complainant and witnesses and report On receipt of the report the Sub Divisional Magistrate dismissed the complaint and two months later passed an order under s 476 of the Code of Criminal Procedure directing the prosecution of the complainant under s 211 of the Penal Code *Held* that the Sub Division Magistrate had jurisdiction to direct the prosecution of the complainant *Held* also that the procedure adopted by the Sub Divisional Magistrate in referring the enquiry to a Subordinate Magistrate for the purpose of hearing the complainant's witnesses and for report was irregular and that this irregularity was cured by s 537 of the Code of Criminal Procedure *Per* ATKINSON J —If an irregularity takes place and is allowed to pass unheeded and unnoticed and a fresh prosecution follows founded upon the irregularity and conviction follows then after conviction the accused party cannot raise the intermediate irregularity in an antecedent proceeding as a ground for challenging the validity of the subsequent conviction BAIJNATH SINGH v KING EMPEROR 1 Pat L J 553

——— **Power of Appellate Court**—*of revoking aside grant of sanction* The District Judge has power to convert proceedings to obtain or to revoke sanction refused or granted in a lower Court under s 195 of the Criminal Code into proceedings under s 476 AMBICA PROSAD v KING EMPEROR
1 Pat L J 607

——— An applicant obtained an *ex parte* decree in a Small Cause Court in the Darbhanga District The decree was transferred to the Chapra District for execution The defendant in that suit then sued in the Munsiff's Court at Chapra to have the decree set aside on the ground that it had been obtained by fraud and having obtained a decree he applied to the Munsiff for sanction to prosecute the applicant and others who had assisted him in the false suit The Munsiff refused to grant sanction but on appeal against that order the District Judge directed the applicant to be prosecuted for various offences specified in his order *Held* that under s 476 of the Code of Criminal Procedure 1898 the District Judge was authorised to send the case for enquiry and trial to the nearest Magistrate of the first class at Chapra LAKHMI SINGH v BIRJMOHAN LAL
1 Pat L J 586

——— **Offence committed in another Province**— *In the course of a judicial proceeding* The first petitioner instituted a suit in the Small Cause Court at Bilaspur in the Central Provinces against a resident of Arrah and obtained an *ex parte* decree At the petitioner's instance the decree was transferred to the Court of the Subordinate Judge at Arrah for execution The judgment debtor then brought a suit in the Court of the Munsiff at Arrah to have the decree of the Bilaspur Court set aside on the ground of fraud and obtained a decree The petitioner appealed to the District Judge of Arrah who confirmed the Munsiff's decision and directed the prosecution of the three petitioners under ss 209 and 210 of the Indian Penal Code 1860 as he found that they had combined to bring a false suit in the Bilaspur Court and had obtained a decree in that suit by concealing from the defendant the institution of the proceedings and by tampering with the service of summonses *Held* that the District Judge had jurisdiction under s 476 of the Criminal Procedure Code 1898 to order the prosecution of the petitioners The hearing of the appeal by him was a judicial proceeding and the offences alleged to have been committed by the petitioners were brought to his notice in the course of that proceeding *Per* SHARFUDDIN J —S 476 is a self-contained section and the reference in it to s 195 is only for the purpose of avoiding enumeration of the sections mentioned in s 195 RAJ KUMAR SINGH v KING EMPEROR
1 Pat L J 298

——— "In the course of a judicial proceeding"—*Application to Small Cause Court for sanction to prosecute refusal of—Appeal to District Judge—Appeal dismissed but prosecution ordered* *A* sued *B* in a Court exercising the powers of a Small Cause Court and obtained an *ex parte* decree *B* then sued to have the *ex parte* decree set aside on the ground of fraud and succeeded He then applied to the Court which tried the first suit for sanction to prosecute *A* The Court rejected the application *B* appealed under s 195 (6) of the Criminal Procedure Code 1898 to the District Judge who refused to revoke the sanction but passed an order under s 476 for the prosecution of *A* *Held* that as the District Judge had no jurisdiction to entertain the appeal or application under s 195 (6) the matter did not come to his notice in the course of a judicial proceeding within the meaning of s 476 *Per* CHAMIER C J —With reference to Small Cause Court suits the District Judge is not "the Principal Court of original jurisdiction" within the meaning of s 195 ( ) (c). AMBICA TEWARY v KING EMPEROR 1 Pat L J 296

——— **Revenue Court**—*whether Certificate Officer under the Public Demands Recovery Act (B and O IV of 1914) is—in the course of a judicial proceeding* A Certificate Officer while proceeding under the powers conferred upon him by the *B* and *O* Public Demands Recovery Act 1914 for the reco[...] public demand or adjudicating upon [...]led in respect thereof by a perso[...]n a demand

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 476—*contd*

is made is a Revenue Court and has power to direct a prosecution under s 476 of the Code of Criminal Procedure 1898 A Certificate Officer issued a demand for road cess on two co sharers and one of them, A filed a petition which purported to be on behalf of both of them but was signed by K only pleading payment and he produced a *challan* in support of his plea The Certificate Officer directed an inquiry to be made in his office as to the fact of payment and having come to the conclusion that the *challan* was forged he called upon A to show cause why he should not be prosecuted Eventually he directed the prosecution of both the co sharers although only K had been called upon and had alone appeared to show cause *Held* (i) that the offence committed had been brought to the notice of the *Certificate Officer in the course of a judicial proceeding* and (ii) that although neither of the accused was entitled to notice yet in the circumstances of this case K s co sharer should also be called upon to show cause why he should not be prosecuted. MATHURA PRASAD *v* THE KING EMPEROR 4 Pat L J 475

——— Procedure—*Application for stay of proceedings thereunder initiated by a Civil Court —Question at issue in the criminal proceedings also sub judice in a civil case—Procedure—Jurisdiction* Proceedings initiated by a Civil Court subordinate to the High Court under s 476 of the Code of Criminal Procedure may be stayed by the High Court in the exercise of its general powers of superintendence though not under the provisions of either the Code of Civil Procedure or the Code of Criminal Procedure As regards the general question of the stay of criminal proceedings when these on the face of them raise a question of fact which is still under adjudication by a Civil Court of competent jurisdiction the better procedure is to move the Civil Court for the expediting of the hearing of the case before it and then to move that the Criminal proceedings be stayed until the determination by the Civil Court of the question at issue before it *Muthura Kunuar* v *Durga Kunwar Weekly Notes 1905 p 251*, referred to RAJ KUNWAR SINGH *v* EMPEROR I L R 43 All 189

——— Civil Court must come to a finding as to which of the parties committed offence *Held* that a *Civil Court ought not to take action* under s 476 of the Criminal Procedure Code without coming to a finding as to which of the parties sent for trial had committed the offence *Crown* v *Pirbhu Dyal* (163 P L R 1905) followed AMAR NATH *v* MAM RAJ I L R 2 Lah 68

——— *Criminal Procedure Code— In the course of judicial proceeding meaning of—Petition for return of documents filed before Clerk of Court if can be made the subject matter of enquiry and order under the section* After the disposal of two rent suits in the Court of the Munsif the petitioner it was alleged filed two petitions before the clerk in charge of rent suits in the Munsif s Court asking for the return of the documents filed by one B whose interest had since been acquired by the petitioner in the said rent suits These petitions purported to bear the signature of the pleader of B who acted for him in the said rent suits but it was alleged that this signature was forged The Munsif after holding a preliminary enquiry made an order under s 476 Criminal Procedure Code directing the prosecution of the petitioner for offences under ss 463 471 Indian Penal Code *Held* that the petitions in question were not filed in the course of a judicial proceeding and the Munsif had no jurisdiction to make the order The words committed before it in s 476 Criminal Procedure Code are qualified by the words in the course of a judicial proceeding GIRIJANDA KALI MITRA *v* THE EMPEROR

26 C W N 680

——— s 476 and 478—*Commitment made by a Munsif in the United Provinces to the Court of a Sessions Judge in the United Provinces in respect of offences alleged to have been committed in Bengal* Where in the course of a judicial proceeding before the Munsif of Fatehabad in the district of *Agra* certain offences under ss 193 209 216 467 and 471 of the Indian Penal Code which appeared to have been committed in Bengal were brought under the notice of the Court and the Munsif committed the persons suspected of such offences for trial to the Court of Session at Agra *Held that the Court* had jurisdiction under s 478 read with s 476 of the Code of Criminal Procedure to make the commitment EMPEROR *v* KHUSHALI RAM (1917) I L R 40 All 116

——— s 477—*Scope of section—Accused not allowed an opportunity of defending himself—Irregular exercise of jurisdiction—Procedure* S 477 of the Code of Criminal Procedure gives to the Court of Session power to charge a person for any offence referred to in s 195 and committed before it It further gives the Court of Session the power to commit for trial and to try the person for the charge it has framed but the section nowhere lays down that the trial is to be a summary trial nor does the section anywhere demand a decision which is to be more prompt and speedy than that of any ordinary trial The section was not intended so to be used as to give the accused no opportunity of defending himself against the charge framed EMPEROR *v* HADIYAR KHAN (1918) I L R 41 All 197

——— s 477A—

See COURT FEE STAMP I L R 47 Calc 71

——— s 478—

See s 195 I L R 34 Bom 88

L P 43 Mad 361

See s 476 I L R 40 All 116

——— *Procedure—Commitment made by Munsif without following procedure laid down in the section—Commitment quashed* A Munsif holding an inquiry under the latter portion of s 478 of the Code of Criminal Procedure with a view to making a commitment to the Court of Session is bound to follow substantially the provisions of Ch XVIII of the Code Where in such circumstances the Munsif neither examined the witnesses in the presence of the accused nor

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 478—*contd*

explained the charge to them the commitment was quashed as being bad in law EMPEROR *v* BABU PRASAD (1917) I L R 40 All 32

——— s 488 (1) (3) (6)—

See s 369 21 C W N 344

See MAINTENANCE I L R 41 Calc 88

——— *Maintenance order if can be enforced against estate of deceased husband* After the death of the person against whom an order for maintenance was made there is no claim enforceable under s 488 Cr P C against the estate of the deceased and the order for maintenance cannot be enforced in respect of arrears accrued due during the lifetime of the person who was ordered to pay maintenance EAD ALI *v* LAL BIBEE (1913) 17 C W N 1130

——— *Maintenance—Child meaning of—Prostitution not a profession which the law will recognise* The word child in s 488 (1) Criminal Procedure Code (Act V of 1898) means a person who has not attained the age of majority The attainment of puberty cannot be taken as the age when childhood ceases The law will not treat prostitution as a profession by which a girl might earn her livelihood and maintain herself under s 488 Criminal Procedure Code It is against public policy to do so KRISHNASWAMI AYYAR *v* CHANDRAVADANA (1914) I L R 37 Mad 565

——— *Maintenance—Criminal revision petition to the High Court—Order of a single Judge—Appeal against if maintainable—Letters Patent cl 15—Criminal trial orders* No appeal lies under cl 15 of the Letters Patent against an order of a single Judge of the High Court dismissing a criminal revision petition filed against an order of a Joint Magistrate passed under s 488 of the Code of Criminal Procedure (Act V of 1898) APPADU *v* APPAMA (1915) I L R 39 Mad 472

——— *Unable to maintain itself meaning of—Child entitled to maintenance from its mother's tavazi not entitled to order for maintenance from father* A child that possesses a right to maintenance from its mother's tavazi is not entitled under s 488 Criminal Procedure Code (Act V of 1898) to an order for maintenance against its father *Kariyadan Pokkar* v *Kayat Beeran Kutti I L R 19 Mad 461* followed *In re Parathy Valappal Moideen (1913) Mad W N 997* not followed The words unable to maintain in s 488 are not confined to physical inability but include also pecuniary inability CHANTAN *v* MATHU (1915) I L R 39 Mad 957

——— *Jurisdiction of Court within whose local limits the husband temporarily resided on the date of the institution of the case and some days previously* Where in a case under s 488 Criminal Procedure Code instituted before the Chief Presidency Magistrate it appeared that the husband ordinarily resided outside Calcutta but was temporarily there on the date the application was filed and for some days previously *Held* that this temporary residence was sufficient to give the Calcutta Court jurisdiction under sub s (9) of s 488 Criminal Procedure Code JOLLY *v* JOLLY (1917) 21 C W N 872

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 488 (1) (3) (6)—*contd*

——— *Mutual Consent —Wife's maintenance fixed by* panchayet—*Claim by wife for payment whether Magistrate has power to entertain* Where the differences between husband and wife are referred to the arbitrament of a *panchayet* and the *panches* award the wife a certain stipend as maintenance a Magistrate has power under s 488 of the Code of Criminal Procedure 1898 to entertain a claim by the wife for the maintenance awarded to her even though the reference to the *panchayet* was by consent of the parties NATHUN SONAR *v* MUSAMMAT MATURWA KUER 4 Pat L J 109

——— *Fresh application under section if may be entertained after previous application dismissed for default* Where an application under s 488 Cr P C for the maintenance of an illegitimate child was dismissed for default and the Magistrate entertained a fresh application *Held* that there was no bar to the Magistrate entertaining the fresh application inasmuch as there was no adjudication of the first application MONMOHAN DE *v* SURABALA DASI 24 C W N 32

——— s 488 489—*Magistrate—Order for maintenance to wife—Subsequent decree for restitution of conjugal rights—Decree puts an end to order for maintenance—Subsequent application by wife for increase in rate of maintenance not competent* In 1910 a wife obtained an order for maintenance under the provisions of s 488 of the Criminal Procedure Code 1898 In 1912 the husband obtained a decree against his wife for restitution of conjugal rights The decree was never executed and the husband continued to pay without objection the allowance directed by the Magistrate's order of 1910 In 1918 the wife applied for and obtained from the Magistrate an order under s 489 of the Code for an increase in the amount of maintenance The husband having applied to the High Court *Held* that the decree of 1912 having as a matter of law determined or put an end to the Magistrate's order under s 488 an application under s 489 of the Code was not competent to the wife CHANDULAL PANCHHOD *In re* (1919) I L R 43 Bom 885

——— s 491—

See EXTRADITION WARRANT I L R 42 Calc 793

See HABEAS CORPUS I L R 39 Calc 164
I L R 44 Calc 76
I L R 46 Calc 52

See JURY TRIAL BY I L R 44 Calc 723

——— *Grounds on which it may be issued—Habeas Corpus right to if may be taken away by Indian Legislature—Exclusion of right if must be express or by necessary implication—The Extradition Act (33 & 34 Vict c 52) how far applicable to India—Indian Extradition Act (XV of 1903) ss 3 and 4 sub s (1) if excludes jurisdiction of High Court in Habeas Corpus—Extradition warrant issued after enquiry by Govern

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s 491—*contd*

ment if bar to High Court s entertaining application, Evidence Act (I of 1872) ss 2 78 86—Foreign records authentication of—Hearsay evidence admitted by foreign Court if admissible—Copy of document proved in foreign Court if admissible The jurisdiction of the High Court to give directions in the nature of Habeas Corpus under s 491 of the Criminal Procedure Code is not excluded by the issue by the Government of India of a warrant under s 3 sub s 8 of the Extradition Act The Government can only issue a warrant by virtue of the provisions of the Legislature authorising it and if those provisions have not been carried out the warrant and the custody thereunder may be found to be illegal under s 491 Criminal Procedure Code though with the extradition proceedings themselves the High Court cannot except as allowed by the Act directly interfere *Quære* Whether a supreme right like that to a Habeas Corpus can be taken away or limited by the Indian Legislature *Held* that if it can be so taken away it must be clearly shown that it has been expressly taken away *Per* MOOKERJEE J —The burden lies heavily on those who assert it to show that it has been taken away by such implication as is absolutely necessary for the interpretation of the Statute *Leyinger v The Queen I R 3 P C 282 289* referred to But the High Court in such a proceeding would not weigh the evidence before the Magistrate Where the Magistrate has jurisdiction it is sufficient that there is some evidence on which the Magistrate may reasonably act *In re Siletti 87 L T 332 334 71 L J K B 935* followed *Per* CURIAM The Evidence Act does not contain the whole law of evidence applicable to British India Where therefore the records of a German Court were not authenticated in accordance with the Indian Evidence Act but in the manner prescribed by the English Extradition Act which is applicable in this country the records were admissible under it *Quære* Whether hearsay evidence admitted in evidence in the proceedings in Germany is admissible in extradition proceedings in India When the original Bill which the prisoner was alleged to have obtained by cheating was put in and proved by witnesses at the enquiry in the German Court *Held* that a copy of the document sent as part of the authenticated depositions and papers was admissible in evidence There may be cases where the production of the original may be necessary for an enquiry in India *In re* STALLMAN (1911) I L R 39 Calc 164
15 C W N 1053

——— *Directions of the nature of a habeas corpus—Application to be made to Judge on the Original Side of the High Court—S 54 scope of —Circumstances justifying arrest—Credible information and reasonable suspicion meaning of* An application under s 491 Criminal Procedure Code is to be made to the High Court in its Ordinary Original Criminal Jurisdiction The petitioner who was the managing agent of a certain Provident Company of Calcutta was arrested by the Calcutta Police under s 54 Criminal Procedure Code on receipt of a letter written by an Inspector of Police in a certain district in the Bombay Presidency to the Commissioner of Police Calcutta in which it was stated that on enquiries into complaints against the Company and their local agent in Bombay it appeared there being *primâ facie* evidence to that effect that the managing agent and the local agent committed offences under ss 409 420 Indian Penal Code The letter contained a request to cause the arrest of the petitioner and was forwarded by the District Magistrate with a note that the petitioner might be arrested under s 54 Criminal Procedure Code and sent to the Magistrate 1st class of the District to be tried by him *It was admitted that* the officer effecting the arrest in Calcutta relied solely on the aforesaid letter and had no personal knowledge of the facts of the case *Held* that the arrest of the petitioner under s 54 Criminal Procedure Code was not proper That s 54 Criminal Procedure Code gives wide powers to a police officer to make an arrest without an order from a Magistrate and without a warrant only in certain circumstances limited by the provisions contained in the section and it is necessary in exercising such large powers to be cautious and circumspect The section gives a police officer personal authority and involves personal responsibility and the reasonable suspicion and credible information must be based upon definite facts which the police officer must consider for himself before he acts under the section He cannot delegate his discretion or take shelter under the belief or judgment of another police officer In the circumstances of the case the High Court under s 491 Criminal Procedure Code directed the release of the petitioner *In the matter of* CHARU CHANDRA MAJUMDAR (1916)
20 C W N 1233

——— s 492—

See PUBLIC PROSECUTOR I L R 41 Calc 425

See SANCTION FOR PROSECUTION I L R 41 Calc 446

——— s 494—

See s 247 I L R 40 Mad 976

See WITNESS I L R 46 Calc 700

See WITHDRAWAL OF PROSECUTION I L R 48 Calc 1105

——— *Prosecution against one of two accused withdrawn—Such accused if competent witness—Confession and prior statements of such accused if should be produced for cross examination and contradiction* The petitioner along with one *M* was placed on his trial under s 411 of the Penal Code but the prosecution against *M* was withdrawn under s 494 Criminal Procedure Code although no formal order of discharge was recorded *M* was thereupon examined as a witness for the prosecution It appeared that *M* had made a confession to a Magistrate and this confession was subsequently verified by the same or another Magistrate to whom *M* made further statements The confession and these further statements were not placed on the record and copies of these were refused to the petitioner *Held* that notwithstanding the omission to record a formal order of discharge *M* ceased to be on trial with the petitioner as soon as the prosecution against him

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s 494—*contd*

was withdrawn and that being so he became a competent witne s but for the purpo e of cross examination and if necessary for contradiction the prior statements of the witne s should have been made acce ible to the accu ed SHERATI SHEIKH v THE KING EMPEROR (1904)

18 C W N 1213

———— *Withdrawal of prosecution by public pro ecutor with leave of Court—Court must record rea ons for granting leave—S 1 0—Power of Superintendent of Police to control discretion of investigating police officer* In according or withholding con ent to an application by the public pro ecutor for withdrawal under s 494 (a) the Court acts in a judicial capacity and for its order as for every order judicially made the Court mu t give and record it rea on so that the High Court may be in a position to say whether th di cretion ve ted in the Court has been properly exercised *Quære* Whether the di cretion ve ted in the inve tigating police officer by s 170 Criminal Procedure Code can be controlled by the Superintendent of Police UMESH CHANDRA ROY v SATISH CHANDRA ROY (1917)

22 C W N 69

———— An order under this section allowing withdrawal of pro ecution is a judicial order and reasons should be given UMESH CHANDRA RAY v SATIS CHANDRA ROY

25 C W N 615

———— s 496—

See s 107 I L R 36 Mad 474

See EXTRADITION ACT (XV OF 1903) ss 7 8 AND 8A

I L R 43 Bom 310

———— ss 497 498—

See BAIL.

———— s 498—

See HABEAS CORPUS

I L R 44 Calc 76

———— s 501—

See s 90 I L R 38 Mad 1088

———— s 503—

See COMPLAINT I L R 42 Calc 19

———— s 512—

———— *Evidence taken against an accused person who has absconded—Condition precedent to the use of such evidence against accused when arrested* Evidence purporting to have been recorded under the provisions of s 512 of the Code of Criminal Procedure cannot be used against the person concerning whom it was taken unless it can be shown that before such evidence was recorded it was proved to the sati faction of the Court that the accused had absconded and that there was no immediate prospect of arresting him EMPEROR v RUSTAM (1915)

I L R 38 All 29

———— *Evidence taken against accused persons who have absconded—Conditions precedent to the use of such evidence against accused when arrested* A Magistrate recording evidence under the provi ions of s 512 of the Code of Criminal Procedure put on record a finding that the accused had ab conded but did not further state that there was no immediate prospect of their arrest There was however evidence on the record from which he might have rea onably inferred that there was no immediate prospect of their arrest *Held* that the evidence so recorded was admissible against the accused when subsequently arrested *Emperor* v *Rustam I L R 38 All 29* distinguished EMPEROR v BHAGWATI (1918) I L R 41 All 60

———— s 514—

See s 107 I L R 1 Lah 310

———— *Surety bond to produce accused before Sessions Court—Proceeding for forfeiture if may be taken by a Magistrate* Where a surety bond has been executed for the appearance of an accused person before a particular Court under s 514 of the Criminal Procedure Code proceedings to have the bond forfeited can be initiated only by that Court HIRA LAL SHAHU v EMPEROR (1909) 14 C W N 259

———— *Forfeiture of bond—Bond for appearance taken under the City of Bombay Police Act (Bom IV of 1902) ss 106 107—Jurisdiction of Chief Presidency Magistrate to order forfeiture* The Presidency Magistrate of Bombay has no jurisdiction under s 514 of the Criminal Procedure Code to order forfeiture of bonds taken under ss 106 and 107 of the City of Bombay Police Act 1902 CRAWFORD *In re* (1918) I L R 42 Bom 400

———— *Forfeiture of bond against surety where principal is not bound—Indian Contract Act IX of 1872 s 128* One P K was arrested in Gwalior under a warrant issued at Montgomery He was released on bail on C S standing surety for him He failed to appear before the Magistrate at Montgomery and that officer forfeited C S s security The arre t of R K was thereafter found by the High Court to have been illegal and C S then applied for revi ion of the order of forfeiture *Held* that although R K the principal was under the circumstances not liable on his bond the surety C S was not free from liability on that account S 128 of the Contract Act only explains the *quantum* of a surety s obligation when the terms of the contract do not limit it and has no reference to the nature of the obligation of the principal *Kashiba* v *Shripat Narshiv (I L R 19 Bom 697)* and *Sohan Lal* v *Puran Singh (54 P R 1916)* followed CHAJJU SINGH v THE CROWN

I L R 2 Lah. 204

———— *Bail bond—Bail prisoner on committing suicide—Discharge of sureties* When a person who has been let out on bail commits suicide the sureties are discharged from their obligation to produce him. VIJIARAGHAVALU NAIDU *Re* (1914) I L R 37 Mad. 156

———— s 516—

See s 514 14 C W N 259

———— s 517—

See s 439 18 C W N 959

See s 5_4 5 Pat. L. J 321

———— *Immovable property* S 51[illegible] Code

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s 517—*contd*

has no application to immovable property BISESUR SINGH v KING EMPEROR (1913)
18 C W N 1146

———— *Setting aside of order by High Court—Re delivery of possession* The petitioners were convicted under s 4?6 of the Penal Code The Magistrate directed the Police under s 517 to deliver po ession of a garden over which the petitioners were alleged to have ob tained posses ion by means of trespass The order under s 517 was set aside by the High Court in revision on the application of the petitioners but the Magistrate refused to re deliver posses ion of the garden to them *Held* that the order of the High Court setting aside the order under s 517 Criminal Procedure Code carried with it the incident of restoration of the garden in question to the petitioners The High Court directed the Magistrate to restore possession of the garden in question to the petitioners through the Police SHEONANDAN SINGH v BHOLANATH PATTAK (1913)
18 C W N 1147

———— *Order as regards dis posal of property—Discretion in making orders to be judicially exercised—Currency note—Property passes by delivery* The accused stole a currency note which he offered to a goldsmith as price for gold ornaments purchased by him The goldsmith not having had sufficient cash got the note cashed by a neighbouring shop keeper (appli cant) who cashed it in good faith At the trial of the accused the note was attached from the applicant The accused was convicted of crimi nal breach of trust of the currency note which belonged to Government and the note was ordered to be delivered to the Crown The appli cant having appealed *Held that as property in a currency note passed by mere delivery* the applicant had obtained a good title to the note notwithstanding that the accused had no title *The Collector of Salem 7 Mad H C P 233* and *Empress* v *Joggessur Mochi I L R 3 Calc 379* followed Orders under s 517 of the Criminal Procedure Code (Act V of 1898) are discretionary but the discretion is open to correction where it has been exercised in violation of accepted judicial principles *In re* PANDHARINATH PUNDLIK 1915)
I L R 40 Bom 186

———— *Delivery of property under—Order of delivery of property on joint receipt—Validity of such order* On the discharge of an accused person on a charge of theft of articles admittedly found in possession of that person on the ground that the accused had a *bona fide* belief in a claim of right to their possession that per son cannot claim return of the articles under s 517 *Criminal Procedure Code as a matter* of course Under s 517 Criminal Procedure Code even where a party is charged with theft and that charge is dismissed or the party is dis charged an order can be made for the delivery of the subject matter of the alleged theft to some party other than the party in whose possession the property was found at the date of the alleged theft *K Pappammal* v *Ramaswamy Udayan Crl R C No 477 of 1905* (unreported) followed Property part of which is joint family property and part the self acquisition of an undivided member of the family may rightly be handed by the Court to the manager of the undivided family and the undivided member on their joint receipt *Chalakonda Alasani* v *Chalakonda Ratnachalam 2 Mad H C 56* distinguished KANAGA SABAI v EMPEROR
I L R 34 Mad 94

———— ss 517 and 520—

———— *Appeal—Jurisdiction—Power of Appellate Court to pass orders regarding property in respect of which an offence has been committed* S 520 of the Code of Criminal Pro cedure gives to an Appellate Court the same power as the Court which originally tried a case to pass orders under s 517 of the Code *Baloram Gogai* v *Chintaram Kohta 9 C W N 519* followed *In re Devidin Durgaprasad I L R 22 Bom 844* distinguished EMPEROR v AZMAT SHAH KHAN (1913)
I L R 35 All 374

———— *Power under to con fiscate property produced before Court—Conviction for gambling under ss 6 and 7 of Madras Towns Nuisances Act (III of 1889) ss 6 and 7—Con fiscation of money not actually used for gambling but found on gambler's person validity of* On a conviction for gambling under s 6 and 7 of the Madras Towns Nuisances Act (III of 1889) an order to confiscate money found with the gamblers can only be passed under s 517 of the Criminal Procedure Code and only in respect of such money as has been actually employed in gambling and not in respect of other money found on the person of the gambler *Per* AYLING J—Although s 517 is in its terms wide confis cation of property produced before a Criminal Court is not justifiable unless it has been used for an offence or an offence has been committed regarding it *Per* PHILLIPS J—The powers under s 517 are very large and the Magistrate's discretion is wide and the section empowers him to make such order as he thinks fit for the disposal of property produced before him but the discretion must be exercised judicially and not arbitrarily *Re* APPAJI AYYAR (1918)
I L R 41 Mad 644

———— *Confiscation of pro perty found with a vagrant ordered to give security under s 109 (b) and 118—Validity of order of confiscation—Enquiry in s 517 which in cludes inquiry under s 117* Under s 517 Criminal Procedure Code (Act V of 1898) a Court can order confiscation not only of property which has been used for the commission of an offence or regarding which an offence has been committed but also of any other property which has been produced before it A proceeding under s 117 Criminal Procedure Code is an inquiry within s 517 *In re Govindaraja Padayachi 31 I C 827* and *Jagannathan* v *Varadaraja Mudaliar* (Criminal Revision Case No 570 of 1915—un reported) dissented from *Rassul Bibee* v *Ahmed Moosajee I L R 34 Calc 347* followed PYNE RAMANNA *In re* (1918)
I L R 42 Mad 9

———— s 520—

See s 439
18 C W N 939

———— *Magistrate—Order as to disposal of property—On appeal to the Sessions Court the order left untouched—Application to the District Magistrate to revise the order—Juris diction—Notice to the other side—Practice* In

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s. 520—*contd*

trying a case of theft a Magistrate of the First Class convicted the accused and passed an order disposing of the property produced before him The Sessions Court on appeal confirmed the conviction but left untouched the order as to the disposal of property An application was then made to the District Magistrate to raise the order and he varied it without issuing notice to the other side *Held* reversing the order that the terms of s 520 of the Criminal Procedure Code did not give any jurisdiction to the District Magistrate to interfere and that he could only interfere as a Court of Revision where there had been no appeal to the Sessions Court *Held* also that the District Magistrate ought not to have disposed of the matter without giving notice to the other side *In re* LAXMAN RANGU RANGARI (1911) I L R 35 Bom 253

——— *Order as to disposal of property—Order can be varied only by a Court of Appeal or Court of Revision entitled to act in the case* In acquitting an accused person of the charge of theft of cattle the trying Magistrate ordered the cattle to be returned to him This order was modified by the Sessions Judge who ordered the cattle to be given up to the complainant The accused having applied to the High Court *Held* that the Sessions Judge had no jurisdiction under s 520 of the Criminal Procedure Code to make the order he had made since he was neither a Court of Appeal nor a Court of Revision in the case *In re Laxman Rangu Pargari I L R 35 Bom 253* followed *Queen Empress v Ahmed I L R 9 Mad 448* dissented from *In re* KHEMA PUKHAD (1918) I L R 42 Bom 664

——— s 522—

See s 145 I L R 37 All 654

——— *Restoration of immovable property—Appellate Court power of—Jurisdiction* An order under s 522 of the Criminal Procedure Code can only be made by the Court which convicts of an offence attended with criminal force An Appellate Court has no power to make such an order restoring possession of immovable property *Narayan Govind v Visaji I L R 23 Bom 494* referred to BHAGBAT SHAHA *v* SADIQUE OSTAGAR (1912) I L R 39 Calc 1050

——— *Propriety of order in the absence of finding as to dispossession of immovable property* An order under s 522 Criminal Procedure Code is not sustainable where there is no finding that the complainant has been dispossessed of any immovable property MOHAR KHAN *v* GANZUDDIN SHEIKH (1913) 18 C W N 399

——— *Penal Code (Act XLV of 1860) ss 167 319—Restoration of possession of immovable property—Criminal force meaning of—Rioting with the common object of causing violence to inanimate object—Applicability of s 522* When the accused was convicted of rioting for causing violence in the prosecution of a common object viz by destroying the complainant's fencing and raising a new fencing on the complainant's land *Held* that violence having been caused in this case to the fencing only and not to any person there was no criminal force as defined in s 349 of the Penal Code and no order directing delivery of possession could be made under s 522 Criminal Procedure Code SADASIB MANDAL *v* EMPEROR (1913) 18 C W N 1160

——— *Appellate Court if can set aside order while maintaining conviction—S 423 cl (d)—Incidental order* An Appellate Court has power under s 423 cl (d) which authorises the Appellate Court in appeal to make an incidental order to set aside an order under s 522 while affirming the conviction UJIR SHEIKH *v* SYED ALI SHEIKH (1915) 19 C W N 990

——— *Order restoring possession of immovable property—Impropriety of setting aside order in the absence of party affected* Where an order under s 522 was made in respect of a bari on a conviction of rioting and hurt and the Sessions Judge in appeal set aside the conviction of rioting finding that the complainant who claimed to be the auction purchaser of the property did not get possession and directed the order to be in abeyance pending a reference to the High Court but subsequently in the absence of the complainant declared it to be void *Held* that the Sessions Judge's order should not have been made behind the back of the party affected by it MAJIDALI SARDAR *v* ALI ASRAB (1919) 23 C W N 862

——— ss 522 145—*Infructuous order directing restoration of immovable property if bar to proceeding under s 145* An infructuous order under s 522 Criminal Procedure Code which was never carried out is no bar to the jurisdiction of the Magistrate taking proceedings under s 145 Criminal Procedure Code in respect of the same property PROBHAT CHANDRA CHATTERJI *v* PROSANNO KUMAR SEN (1914) 18 C W N 1088

——— s 523 524—

See RIGHT OF SUIT I L R 40 Bom 200

——— ss 524 517 88 and 89—*Disposal of property produced in Court or seized by police—Suit to contest order of disposal—Limitation—Forfeiture validity of—Construction of Statutes—Secretary of State liability of for costs* The power of a Criminal Court with regard to property dealt with in s 517 or 524 of the Code of Criminal Procedure 1898 is limited to making arrangements for the custody and protection of the property while in the custody of Government and to making a transfer of possession to such person as it thinks proper These sections do not empower the Government to confiscate the property or conclude the right of the person from whose possession the property has been taken or of any other person to contest the decision of the Criminal Court by civil suit Such an order of confiscation being illegal and without jurisdiction the plaintiff's suit for recovery of possession is not barred by reason of their omission to institute a suit within one year of the order for the purpose of having it set aside The words ... the disposal ... Government in s 524 ... ally be ... preted as meaning that ... shall ... to sell the property or t... true

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— ss 535 537 (a)—

See CHARGE I L R 40 Calc 168

———— s 537—

See s 4 1 Pat L J 392

See s 90 I L R 38 Mad 1084

See s 195 I L R 37 All 283

See s 233 19 C W N 972 I L R 41 Calc 66

See s 234 I L R 32 All 57

See s 235 I L R 1 Lah 562

See s 236 I L R 45 Bom 834

See s 250 I L R 26 All 132

See s 268 I L R 43 All 125

See s 421 I L R 39 Mad 527

See s 462 I L R 33 All 385

See s 476 1 Pat L J 553

See COUNTERFEIT COIN I L R 44 Calc 477

See FALSE INFORMATION I L R 43 Calc 173

See JURISDICTION OF CRIMINAL COURT I L R 40 Calc 360

See SANCTION FOR PROSECUTION I L R 48 Calc 867

See UNITED PROVINCES EXCISE ACT (IV OF 1910) s 63 I L R 35 All 358

See WARRANT 3 Pat L J 493

———— *Penal Code (XLV of 1860) ss 182 and 211—Acquittal upon ground of absence of sanction—Practice—Revision—Application by private prosecutor against order of acquittal* *Held* that a Court of criminal appeal was not justified in setting aside a conviction under s 182 of the Indian Penal Code on the sole ground that the offence if any which the appellants had committed was one under s 211 of the Code and that no sanction for a prosecution under that section had been obtained In this case under special circumstances the High Court entertained an application in revision presented by a private prosecutor against an order of acquittal GUR BAKSH SINGH *v* KASHI RAM (1914) I L R 37 All 110

———— *Complaint referred to accused for report—complaint dismissed—validity of order* It is not merely irregular but illegal for a Magistrate to whom a complaint is made to call upon the person accused for a report as to the truth or falsity of the charge preferred against him Such an illegality *ipso facto* renders void an order made as a consequence of it S 537 of the Code of Criminal Procedure 1898 deals merely with irregularities in procedure so far as such irregularities involve breaches of the rules of procedure provided by the Code itself HAR NARAIN HALWAI *v* KARIMAN AHIR 5 Pat. L J 61

———— *Two false suits filed by same plaintiff—Order directing prosecution ambiguous as to whether it referred to both suits or only one but construed by trying magistrate as referring to both—Convictions upheld* Two suits were filed on the same day by the same plaintiff (1) against one B P in the Court of the City Munsif of Bareilly (2) against C D a relative of B P in the Court of the Subordinate Judge It was alleged and found that both suits were instituted with the same object of harassing B P Both suits were dismissed as false In relation to the suit in his Court the Subordinate Judge took proceedings against the plaintiff under s 476 of the Code of Criminal Procedure and in the course of these proceedings sent for and examined the record of the case in the city Munsif s Court The Subordinate Judge then recorded an order under s 476 of the Code directing the prosecution of the plaintiff under s 209 of the Indian Penal Code This order was ambiguously worded and did not leave it beyond doubt whether the Subordinate Judge intended to direct the prosecution of the plaintiff in respect of both suits or only in respect of the suit in his own Court The Magistrate however before whom the case came tried the plaintiff for offences in relation to both and convicted him in respect of both *Held* on application in revision—it not being made to appear that the accused had suffered any prejudice—that the case was covered by s 537 of the Code of Criminal Procedure and the conviction of the plaintiff of offences in relation to both suits was not illegal *Emperor* v *Zahir Singh I L R 37 All 283* referred to EMPEROR *v* BABU RAM I L R 42 All 12

———— s 540—

See s 244 I L R 36 All 13

———— s 552—

See MAGISTRATE JURISDICTION OF I L R 39 Calc. 403

———— s 555—

See WARRANT 3 Pat L J 493

———— s 556—

See COMPLAINT I L R 46 Calc 854

See LOCAL INSPECTION I L R 37 All 340

———— Personally interested—*Magistrate ordering prosecution as president of octroi sub committee—Jurisdiction* A Magistrate as the president of the octroi sub committee of a Municipal Board ordered the prosecution of the accused and with the consent of the accused tried the case himself *Held* that the Magistrate must be deemed to have been personally interested within the meaning of s 556 of the Code of Criminal Procedure and was not qualified to try the case of the applicant whose consent could not confer jurisdiction upon him *Emperor* v *Mohan Lal I L R 24 All 24* distinguished *In the matter of the petition of Inayat Husain All Weekly Notes (1899) 74* referred to EMPEROR *v* BISHESHAR BHATTACHARYA (1910) I L R 32 All 635

———— *Whether District Magistrate can try a case under the Indian Factories Act XII of 1911 where he himself as Inspector of Factories ordered inquiries and sanctioned the prosecution* *Held* that a District Magistrate who as Inspector of Factories ordered an enquiry to be made and in the same capacity sanctioned the prosecution is disqualified by s 556 of the Code of Criminal Procedure from trying the

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd

———— s 556—contd

case *Mangal v Emperor (5 P W R 191)* referred to *Queen Empress v Chekchi Reddi (I L R 24 Mad 235)* distinguished LOBINDA RAM v THE CROWN I L R 1 Lah 35

———— s 562—

See s 439 I L R 37 All 31

———— not applicable to aggravated forms of cheating

See PENAL CODE s 420

I L R 1 Lah 612

———— *Penal Code (Act XLV of 1860) s 420—S 56 whether applicable to a conviction under s 420* The word cheating in s 562 of the Code of Criminal Procedure does not cover the form of cheating punishable under s 420 of the Indian Penal Code *Emperor v Ramjan Dad bhai 16 C L J 81* approved and followed *Harnarain v Pranji Das 12 All L J 465* dissented from SUNDARAM AYYAR v THE KING EMPEROR (1917)

I L R 41 Mad. 533

———— s 562 of the Code of Criminal Procedure 1898 describes the offences to which it applies by the short marginal descriptions given in the Penal Code in the sections dealing with those offences and the section does not warrant the construction that dishonest misappropriation and cheating include every offence under the headings of Criminal Misappropriation and Cheating in the Penal Code EMPEROR v DEVA KANTA JHA 5 Pat L J 267

———— *The accused a young* man of 20 was convicted of theft for having picked the pocket of complainant of Rs 10 and sentenced to 2 months rigorous imprisonment The High Court in revision directed the accused to be released on furnishing a bond with sureties under the section. ABDUL KADER v MONOMOHAN GOPE

25 C W N 720

———— s 565—

———— *Indian Penal Code (Act XLV of 1860) s 75—Whipping (Act IV of 1909) s —Sentence of whipping only passed on accused—Order to accused to notify his residence—Validity of the order* S 565 of the Criminal Procedure Code (Act V of 1898) must be strictly construed. The order contemplated by the section can only be made at the time of passing sentence of transportation or imprisonment upon a convict It cannot be made where the Court instead of passing that sentence passes a sentence of whipping EMPEROR v TULJI DITTA (1910)

I L R 35 Bom 137

———— *Notification as to residence or change of residence —Temporary absence for a night not notified—Whether an offence under Indian Penal Code (Act XLV of 1860) s 176* Where all that was proved was that the accused who had been ordered to notify his residence and change of residence under s 565 Criminal Procedure Code (Act VI of 1898) was absent from his house for a single night without notifying his absence *Held* that such temporary absence did not amount to a change of residence and that the accused was not guilty of an offence under s 176 Indian Penal Code (Act XLV of 1860) *Re* CHENGADU (1917)

I L R 40 Mad 789

———— Sch III (8)—

See TRESPASS I L R 39 Calc 953

———— Sch V form M VII—

See WARRANT I L R 38 Calc 789

CRIMINAL PROCEEDINGS

See LEAVE TO APPEAL TO PRIVY COUNCIL

See PRACTICE

See PRIVY COUNCIL—PRACTICE OF

I L R 42 Calc 739

———— Legal institution of—*Police report not disclosing nature of information—First information report omitting to state the information received—Information given by police officer to himself—Criminal Procedure Code (Act V of 1898) ss 154 173 190 (1) (b)* A prosecution is not legally instituted under s 190 (1) (b) of the Criminal Procedure Code when the police report under s 173 does not set forth the nature of the information and the first information report under s 154 is equally defective in this respect LEE v ADHIKARY (1909) I L R 37 Calc 49

———— Pendency of civil suit—*Letter alleged to be forged set up as a defence—Genuineness of letter a principal issue in the case—Subsequent institution of criminal proceedings for forgery in respect of the same* Where after the institution of a civil suit on a promissory note the defendant was called upon to furnish security and set up as an answer to the plaintiffs claim a letter which was alleged to bear a forged signature and in respect of which criminal proceedings under ss 465 and 467 of the Penal Code were taken by one of the plaintiffs *Held* that inasmuch as the letter was a necessary part of the defendants case and the question of its genuineness a principal issue in the suit the criminal proceedings ought to be stayed pending the decision in the civil suit SHASHI BHUSHAN SEAL v EMPEROR (1910)

I L R 38 Calc 106

CRIMINAL PROSECUTION

———— agreement to stifle—

See CONTRACT ACT (IX OF 1872) s 2

I L R 42 Bom 33

———— limitation of time for—

See CALCUTTA MUNICIPAL ACT (BENG III OF 1899) ss 341 (1) ETC

I L R 37 Calc 384

CRIMINAL REVISIONAL JURISDICTION

See CRIMINAL PROCEDURE CODE s 439

See HIGH COURT

See HIGH COURT JURISDICTION OF

———— *Practice—Jurisdiction of High Court—Rule issued on one or more of several grounds in a petition and ultimately discharged—Fresh Rule on the grounds of the same petition* When a Rule has been granted on one or more of several grounds contained in a petition and is ultimately discharged the High Court has no juris

CRIMINAL REVISIONAL JURISDICTION—*contd*

diction to issue a fresh Rule in the same case on the other or some of the other grounds of the petition which were considered on the first occasion unless permission was given to the party at the time of the discharge of the first Rule to renew the application on the other grounds or some of them *Rai Radha Gobind* v *Gossain Mohendra Gir* 6 *C W N 340* and *Bibhuty Mohan Roy* v *Dasimoni Dassi 10 C L J 80* referred to JOYMANGAL PERSHAD NARAIN SINGH *v* JHAGROO SAHU (1911) I L R 38 Calc 933

———————— *Dismissal of complaint reasons for—Criminal Procedure Code (Act V of 1898) s 203—Grounds not taken in the first Court of Revision might be taken in the High Court—Government Circular its effect—Statute law—Practice* Grounds which were not urged in the first Court of Revision might be taken in the High Court Under s 203 of the Criminal Procedure Code (Act V of 1898) reason for dismissing the complaint must be recorded No circular of the Government can authorize Magistrates to infringe or in any way alter the Statute law MANIRUDDIN SIRCAR *v* ABDUL RAUF (1912) I L R 40 Calc 41

———————— *Practice—Time limit of applications to High Court in criminal revision—Application made after the expiry of 60 days from the date of the order* As a matter of practice the High Court will not save in exceptional circumstances entertain an application in criminal revision unless it is made within sixty days excluding the time necessary to obtain copies from the date of the order complained of *In the matter of* KHETRA MOHAN GIRI (1916) I L R 43 Calc 1029

CRIMINAL SESSIONS HIGH COURT

———— power to direct enquiry—
See PERJURY I L R 43 Calc 542

CRIMINAL TRESPASS

See CRIMINAL PROCEDURE CODE 1898 S 106 I L R 42 All 345

See PENAL CODE (ACT XLV OF 1860) SS 441 442 AND 447

See THEFT I L R 44 Calc 66

See TRESPASS

———————— *Mischief—Entry by a servant upon land in the possession of the Court of Wards and cutting bamboos thereon under the order of the owner—Penal Code (Act XLV of 1860) s 4 6 747* A servant of a proprietor who has voluntarily surrendered his estate to the Court of Wards does not commit criminal trespass or mischief by cutting or removing bamboos etc growing there on for the benefit of his master under the circumstances of this case PARMESWAR SINGH *v* EMPEROR (1910) I L R 38 Calc 180

———————— *Unanimous verdict of Jury—Criminal Procedure Code (Act V of 1898) s 307—Reference to High Court whether permissible in such a case—Penal Code (Act XLV of 1860) ss 148 304 326 149—Absence of charge—Acquittal* Criminal trespass depends on the intention of the offender and not upon the nature of the act and when the man s intention is to save his family and property from imminent destruction it cannot be said that because he commits civil trespass on his neighbour s land and cuts a portion of the *bund* belonging to his neighbour which he ordinarily would not be justified in doing he is guilty of any criminal offence Where the verdict of the Jury is unanimous and the Judge has agreed with it he can make no reference under s 307 of the Criminal Procedure Code Where the accused were charged under ss 148 [illegible] and [illegible] and the Jury found them guilty under s 326 only *Held* that the verdict of the Jury under s 326 was a judgment of acquittal inasmuch as there being no charge under that section independently there could be no verdict given upon it *Ria uds* v *King Emperor 16 C W N 1017* *Panchu Das* v *Emperor I L R 34 Calc 698* referred to EMPEROR *v* MADAN MANDAL AND OTHERS (1913) I L R 41 Calc 662

———————— *High Court power of to allow composition of an offence on revision—Criminal Procedure Code (Act V of 1898) ss 345 (5) 23 (1) (d) 439—Necessity of criminal intent—Entry on land under* bona fide *claim of right—Penal Code (Act XLV of 1860) ss 441 447* The High Court has no power as a Court of Revision under s 439 read with s 423 *(1) (d)* to sanction the composition of an offence when entered into after the conviction of the accused *Adhar Chandra Dey* v *Subodh Chandra Ghosh 18 C W N 1212* *Sankar Rangayya* v *Sankar Ramayya 16 Cr L J 750 29 Mad L J 591* and *Emperor* v *Ram Chandra I L R 37 All 127* followed *Emperor* v *Ram Piyari I L R 32 All 153* *Naqi Ahmad* v *King Emperor 11 All L J 13* *Nidhan Singh* v *King Emperor 1 Cr L J 509 5 Punj L R 257* *Ram Sarup* v *Emperor 11 Cr L J 496 13 O C 161* and *Lall* v *Emperor 15 Cr L J 587 17 O C 92* dissented from *Abadi Begam* v *Ali Husen (1897) All W N 26* distinguished To sustain a conviction under s 447 of the Penal Code it is necessary to prove not only entry on land in the possession of the complainant but also one of the intents specified in s 441 Where a person was charged under ss 447 and 504 of the Penal Code and convicted only under the former *Held* that the intent to commit an offence or to intimidate insult or annoy not having been established the conviction was bad If a person enters upon land in the possession of another in the exercise of a *bonâ fide* claim of right without any such intent he cannot be convicted under s 447 though he may have no right to the land *Empress* v *Budh Singh I L R 2 All 101* *Re Sheshadhur Parui 9 B L R App 19* and *Jurakhan Singh* v *King Emperor 7 C L J 238* followed AKSHOY SINGH *v* RAMESHWAR BAGDI (1916) I L R 43 Calc 1143

CRIMINAL TRIAL

See EVIDENCE I L R 42 Calc 784

See JURISDICTION I L R 41 Calc 305

———— prosecution of accomplice—
See CRIMINAL PROCEDURE CODE s 339 I L R 37 All 331

———— rectification of defective charge—
See CHARGE I L R 42 Calc 957

CRIMINAL TRIBES ACT (III OF 1911)

——— s 5—The District Magistrate in granting or refusing an application to take the name of a person out of the register kept under s 5 of the Criminal Tribes Act does not perform any judicial functions his functions are administrative and the High Court is not entitled to interfere with any order made by the Magistrate in this respect HASAN ALI BEPARI v KING EMPEROR
I L R 47 Calc 843
24 C W N 624

——— ss 8 and 28—
See CRIMINAL TRIBES ACT
I L R 47 Calc 843

——— s 23—

1 ——— *First conviction for scheduled offence after the Act—Conviction for such offences prior to the Act—Punishment* An accused person who belongs to a tribe notified to come under the Criminal Tribes Act (III of 1911) and who is for the first time after the enactment of that Act convicted of an offence specified in the schedule to that Act is liable to be punished under cl (a) and not cl (b) of s 23 (1) of the Act though he may have been convicted once or several times of such offence before the passing of the Act SELLAMANI *Re* (1916) I L R 40 Mad 923

2 ——— *Member of criminal tribe—Second conviction for scheduled offence—Enhanced punishment* The second conviction contemplated by cl (a) of s 23 of the Criminal Tribes Act 1911 need not be the second conviction after the Act nor is it necessary that it should be second in fact Taking the conviction or convictions prior to the Act as one group constituting one conviction the first one after the Act would be the second conviction for the purpose of the section though in point of fact it may be one more in a series of convictions prior to the Act A third conviction within the meaning of cl (b) of the section must be at least the second after the Act *In re Sellamani (1916) 40 Mad 923* followed EMPEROR v TUKA NANA (1920)
I L R 45 Bom 1082

CRITICISM OF GOVERNMENT
See SEDITION I L R 38 Calc 253

CROSS APPEAL
See CONTRACT I L R 39 Mad 509
See PRIVY COUNCIL, PRACTICE OF
I L R 37 Calc 623

CROSS CLAIMS
——— under same decree—
See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXI R 19
I L R 40 Bom 60

CROSS DECREES
See CIVIL PROCEDURE CODE 1908—
O XXI R 18 I L R 38 All 669
O XXI RR 18 19 20
I L R 33 All 240

CROSS EXAMINATION
——— exhibiting documents during—
See RIGHT OF REPLY
I L R 43 Calc 426

CROSS EXAMINATION—*contd*

——— of prosecution witnesses—
See JURISDICTION OF MAGISTRATE
I L R 39 Calc 885

——— paper put to witness—Right of opposite Counsel to see—
See PROBATE I L R 39 Calc 245

——— question put in—
See DEFAMATION I L R 41 Calc 514

——— *Prosecution witnesses cross examination of after charge—Failure to name on date of the charge the witnesses required for cross examination—Subsequent application before close of the case—Right of cross examination continuance of—Waiver—Criminal Procedure Code (Act V of 1898) s 256* S 256 of the Criminal Procedure Code merely lays down that after the plea of the accused is taken he shall be required to state whether he wishes to cross examine any and if so which of the prosecution witnesses whose evidence has been taken but it does not state at what particular time he is to be asked this question nor up to what time he has this right Where therefore the accused were asked on the day the charges were framed whether they would call any of the prosecution witnesses for cross examination and did not name any but made an application to recall some of them for that purpose on the next court day and before the case had closed *Held* that they were entitled to have the prosecution witnesses recalled for the purpose of cross examination and that there was no waiver of their right under the section INDER RAI v C R BROWN (1909) I L R 37 Calc 236

——— If a cross examining counsel after putting a paper in the hands of witness merely asks him some questions as to its general nature of identity his adversary will have no right to see the document but if the paper is used for refreshing the memory of the witness or questions are put respecting its contents or regarding the handwriting his opponent may claim to see the paper Taylor on Evidence *452* referred to and approved *In the goods of* GOPESSUR DUTT (1911) 16 C W N 265

——— *Postponement Sessions trial—Application by defence counsel to postpone cross examination till next day—Trial for murder—Refusal by Judge effect of—Prejudice to accused—Re trial—Practice* Where at a Sessions trial the defence counsel applied after the examination in chief of the first prosecution witness for postponement of the cross examination of the witnesses till the next day on the ground of his unpreparedness but did not ask for an adjournment of the trial itself *Held* that the application was a reasonable one which the Judge should under the circumstances have allowed Though the accused is not entitled to such postponement as of right the Court may in a proper case grant the indulgence Where the result of the refusal of such application was that the witnesses examined on its date four of whom were important were not cross examined by counsel or pleader and the witnesses subsequently examined were inefficiently cross-examined and the cross examination of the former witnesses might have elicited matters as to which the subsequent witnesses might [illegible] cross-examined. *Held* that the accused [illegible] ced and that

CROSS EXAMINATION—*contd*

there should be a re trial by another Judge SADASIV SINGH v EMPEROR (1913)
I L R 41 Calc 299

—————— *Practice—Accused right of—Leading questions—Evidence Act (I of 1872) ss 143 154* In India as in England the accused are entitled in cross examination to elicit facts in support of their defence from the prosecution witnesses wholly unconnected with the examination *in chief* In the course of cross examination of this character the defence are entitled in view of the generality of s 143 of the Indian Evidence Act to ask leading questions Under s 154 the Court *has the discretion to permit the prosecution to test* by way of cross examination the veracity of their own witnesses with regard to the (unconnected) matters elicited by the defence in cross examination AMRITA LAL HAZRA v EMPEROR (1915)
I L R 42 Calc 957

—————— The usual practice where some dependants support plaintiff s case is to order that they shall be at liberty to cross examine the plaintiff s witnesses first if they desire to do so and to call their evidence and address the court before the defendants who oppose the plaintiff s case do so In the special circumstances of this case the High Court in the exercise of its powers of superintendence interfered with the order of the lower court refusing to allow the defendants who opposed the plaintiff's claim to cross examine the latter s witnesses after the other defendants had cross examined them MOTIRAM MARWARI v LALIT MOHAN GHOSH 5 Pat L J 545

CROSS-OBJECTION

See CIVIL PROCEDURE CODE 1908 s 82 I L R 40 Bom 541

O XLI r 22

See COURT FEES 3 Pat L J 443

See COURT FEES ACT (VII OF 1870) SCH I ART I I L R 40 All 93

See OBJECTION

See SALE I L R 43 Calc. 790

—————— memorandum of—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XLI r 22
I L R 38 Mad 705

—————— *Dismissal of substantive appeal for failure to give security—whether such dismissal is a dismissal for default—Code of Civil Procedure (Act V of 1908) O XLI r 22(4)* Where the respondent has filed a cross objection and where the parties have entered into contest before the Court on several occasions and the appeal is dismissed upon the appellant s failure to furnish security such a dismissal is a dismissal for default and the respondent is therefore entitled to have his cross objection heard and determined MOWAR SHEOBAKSH SINGH v MOWAR THAKUR DEYAL SINGH 4 Pat L J 164

—————— *Appeal by one defendant as against plaintiff—Co-defendants impleaded as formal respondents cross-appeal by defendant respondent when appeal by him is barred—Code of Civil Procedure (Act V of 1908) O XLI rr 4 32 and 33—Covenant of title—Transfer of Property Act (IV of 1882) ss 45 and 65 (c)* Where one of several defendants against whom a decree is passed has allowed the period for appealing to elapse O XLI r 22 of the Code of Civil Procedure 1908, was not intended to revive his right merely because a co defendant has instituted an appeal against the plaintiff on entirely different grounds An appeal was filed by one of several defendants in which the plaintiff was the real respondent and the other defendants were merely formal respondents The appeal was directed against the decree *in so far as it affected the appellant s liability* towards the plaintiff only Of the defendant respondents the only one who appeared in the appeal was defendant No 1 He was affected by the decree in so far as it declared that a mortgage of the plaintiff respondent s property which had been made to him had been satisfied and that the plaintiff was entitled to possession of the mortgaged property The time to appeal from the decree having elapsed defendant No 1 preferred a cross appeal as against the plaintiff respondent *Held* that the defendant No 1 was not entitled to prefer the *cross appeal* O XLI r 22 (1) in so far as it relates to a cross objection was provided to meet the case where a respondent although the decree is not entirely in his favour is content to let matters *rest provided his opponent* does not appeal but who may not be willing to run the risk of having the findings in his favour varied or reversed without an opportunity of appealing against the findings which are adverse to him The rule should ordinarily be confined to cases of cross objections urged against the appellant but O XLI r 33 gives the court a wide discretion where justice requires it *that cross objections against* a co respondent should be heard The rule should not be invoked to enable a litigant to avoid the provisions of other statutes such as the Limitation Act or the Court Fees Act In 1895 *C* transferred half of his mining rights in a certain *mauza* to *S* In 1904 *C* having died in the meanwhile *S* released to *C*'s estate for consideration the right title and interest which he had acquired by the transfer of 1895 *Held* that it was not competent to the administrators of *C*'s estate to complain that there was a defect in the title which *C* *himself represented to S* as subsisting THE OFFICIAL TRUSTEE OF BENGAL v CHARLES JOSEPH SMITH 5 Pat L J 328

—————— *Held* that r 22 of O XLI of the Civil Procedure Code is not applicable to an appeal under cl 15 of the Letters Patent and a memorandum of cross objection cannot be entertained in these appeals BROJENDRO CHANDRA SARMA v PROSANNA KUMAR DHAR.
24 C W N 1010

CROSS SUITS

See ACCOUNT 15 C W N 930

CROWN

See SECRETARY OF STATE

—————— applicability of Transfer of Property Act (IV of 1882) to—

See LEASE I L R 40 Mad. 910

—————— delegation of authority to Secretary of State

See EXECUTION OF DECREE.
I L R 38 Calc 754

—————— escheat to—

See MULGENI LEASE
I L R 42 Mad. 327

CROWN—*contd*

——— right of to prosecute—

See CONSPIRACY I L R 42 Calc 957

——— right of in Rivers—

See MADRAS IRRIGATION ACT 1865 s 4 I L R 37 Mad 322

CROWN DEBT

——— priority of—

See ADMINISTRATION I L R 45 Calc 653

See CIVIL PROCEDURE CODE 1882 s 411 I L R 34 All 223

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 69 I L R 40 Mad 767

CROWN GRANTS

——— rule of construction of—

See INAM I L R 40 Mad 268

CROWN GRANTS ACT (XV OF 1895)

——— *s* 2—

See HINDU LAW—INHERITANCE I L R 40 All 470

——— ss 2, 3—

See REGISTRATION ACT (XVI OF 1908)

Ss 17 90 I L R 36 All 176

S 90 I L R 43 Mad 65

——— s 3—*Government s power to prescribe by sanad rule of descent for grants by it contrary to the law—Subject s power to do same—Other property treated by grantee as part of sanad property if governed by sanad—Property given by Government in exchange for property granted if devolves according to sanad—Property given for the use of grantee as such if governed as to descent by sanad—Moveable property if so governed* The Crown has in British India power to grant or to transfer lands and by its grant or on the transfer to limit in any way it pleases the descent of such lands But a subject has no right by express declaration still less by *mere volition actual or presumed to impose upon* lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable to the case *B* died possessed of properties descendible under a Government sanad according to the rule of primogeniture and others not governed by the sanad *Held* that Government had power to give to *B* in exchange for any land covered by the sanad other lands and the lands so acquired by *B* in exchange would be subject to the rule of descent prescribed in the sanad *Held* also that the rule of descent prescribed in the sanad governed a house which Government had allotted to *B* for his use as Taluqdar of the village the subject matter of the sanad although it was not covered by the sanad and no express grant of the house was produced or even shown to have existed That the moveable property left by *B* not being covered by the sanad was not governed by the rule of descent prescribed therein RAJENDRA BAHADUR SINGH *v* RANI RAGHUBANS KUMAR (1918) 23 C W N 101

CRUELTY

See DIVORCE I L R 38 Calc 907
I L R 39 Calc 395

CRUELTY—*contd*

See MAHOMEDAN LAW—RESTITUTION OF CONJUGAL RIGHTS I L R 40 All 332

CRUELTY TO ANIMALS

See DISTRICT POLICE ACT (BOMBAY) I L R 45 Bom 203

See PREVENTION OF CRUELTY TO ANIMALS ACT (XI OF 1890) s 3 CL (*b*)

CULPABLE HOMICIDE

See PENAL CODE (ACT XLV OF 1860)

Ss 37 302 304 I L R 35 All 506 560

S 304 I L R 42 All 272

Ss 304 AND 325 I L R 40 All 103
I L R 42 All 302

Ss 325 300 EXCEPTION 4 I L R 40 All 686

——— sentence of transportation for 14 years—If Legal—

See PENAL CODE s 59 25 C W N 514

CUMULATIVE SENTENCES

——— *Rioting—Separate sentences for rioting and causing hurt—Penal Code (Act XLV of 1860) ss 147 323* Separate sentences for the offences of rioting and hurt are legal where it is found that each person took an individual part in the assault *Nilmony Poddar v Queen Empress I L R 16 Calc 442 Mohur Mir v Queen Empress I L R 16 Calc 725 Ferasat v Queen Empress I L R 19 Calc 105* referred to RAM ANGUTHA SINGH *v* EMPEROR (1913) I L R 40 Calc 511

CURATORS' ACT (XIX OF 1841)

See SUCCESSION (PROPERTY PROTECTION) ACT (XIX OF 1841)

——— ss 3 4 and 14—*Oaths Act (V of 1840)—Death of representative Vatandar—Deceased's widow representative Vatandar—Death of the widow—Application by the nearest heir of the deceased male Vatandar for possession—Six months calculation of—Property claimed by right in succession—Inquiry upon solemn declaration—Affidavit upon solemn affirmation* One Kotrappa representative Vatandar of Deshagat Vatan died in 1897 His widow Basawa was entered on the Vatan Register as representative Vatandar and she held the Vatan property until her death in 1907 Within six months of Basawa s death Kanappa who claimed to be the nearest heir of Kotrappa applied for possession of the property under the Curators Act (XIX of 1841) and the Judge granted his application One of the opponents to the application thereupon moved the High Court under the extraordinary jurisdiction contending that (i) under s 14 of the Curators Act (XIX of 1841) the provisions of the Act could not be put in force because Kotrappa died more than six months before the date of the application and (ii) in granting the application the Judge did not follow the procedure *which is made imperative by the words of s 3 of the Curators Act (XIX of 1841) that is* there was no inquiry upon sole [illegible] tion of the complainant (applicant) [illegible] ing the order

CURATORS' ACT (XIX OF 1841)—*contd*

———— ss 3, 3 and 14—*contd*

that (i) the decease of the proprietor whose property was claimed by right in succession' referred to in s 14 of the Curators Act (XIX of 1841) included the decease of Basawa because she was between the death of her husband and her own decease the proprietor of the property claimed All that was to be decided was who should be put into possession of the property in succession to the last deceased holder (ii) The Judge having acted upon the application of the claimant in addition to his affidavit on solemn affirmation the statements in the affidavit furnished sufficient grounds for action under s 4 of the Curators Act (XIX of 1841) having regard to the provisions of the Oaths Act (V of 1840) BHIMAPPA v KHANAPPA (1909) I L R 34 Bom 115

CURRENCY NOTE

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 517 I L R 40 Bom 186

———— Delivery of halves of—*Such delivery does not pass the property in the notes—Creditor receiving halves of notes from debtor not entitled to insist on delivery of the other halves* The delivery by a debtor of halves of currency notes to his creditor with the intention of paying off the debt by remitting the other halves does not pass the property in the notes to the creditor so as to enable him to claim delivery of the other halves *Smith v Mundy 29 L J Q B 172* followed. The debtor does not by simply sending the first halves without anything more become a trustee or bailee in respect of the other halves of the notes *Per* ABDUR RAHIM J—S 92 of the Indian Contract Act does not apply to money or currency notes although the definition of goods in s 76 of the Contract Act is wide enough to cover coins and currency note *Per* BAKEWELL J—*The delivery of the half notes to the creditor was only one step* towards or preparatory to the actual delivery of the notes and indicates only an intention to transfer and does not constitute a delivery of the notes KOTI VENKATA RAMIAH v OFFICIAL ASSIGNEE OF MADRAS (1909) I L R 33 Mad 195

CURRENT ACCOUNT

See LIMITATION ACT 1908 SCH I ART 85 I L R 1 Lah 12

CUSTODY

See COUNTERFEIT COIN I L R 44 Calc 477

See EVIDENCE ACT (I OF 1872) s 26 I L R 42 Bom 1

See JUTE I L R 44 Calc 98

CUSTODY OF CHILDREN

See GUARDIAN I L R 38 Mad 807

See GUARDIANS AND WARDS ACT (VIII 1890) s 25 I L R 39 Bom 438

See KIDNAPPING I L R 41 Calc 714

See MINOR L R 41 I A 314

CUSTOM

See ADOPTION I L R 40 Calc 879

See AGARWAL BANIAS OF ZIRA I L R 40 Calc 879

See BAKHSHA GRANT I L R 42 Calc 582

CUSTOM—*contd*

See CIVIL PROCEDURE CODE (1908) s 100 I L R 36 All 256

See COMMON LAND I L R 1 Lah 249

See CUSTOM OF CASTE

See CUSTOM OF THE TRADE.

See CUSTOM OF USAGE I L R 45 Calc 2853

See HINDU LAW—ADOPTION I L R 32 All 247

See HINDU LAW ALIENATION I L R 43 Calc 417

See HINDU LAW—CUSTOM I L R 32 All 363
42 Calc 582

See HINDU LAW IMPARTIBLE ESTATE 2 P L J 339

See HINDU LAW PARTITION I L R 45 Bom 740

See HINDU LAW—SUCCESSION 14 C W N 770
I L R 48 Calc 997

See INSURANCE I L R 36 Bom 484

See JAGIR I L R 42 Calc 305

See JEWISH LAW I L R 38 Calc 708

See JURISDICTION I L R 35 Bom 264

See KHOD KAST JOTES I L R 48 Calc 359

See KUNJPURA STATE OF SUCCESSION TO I L R 39 Calc 711

See LANDLORD AND TENANT I L R 32 All 125
I L R 34 All 545

See MAHOMEDAN LAW—PRE EMPTION I L R 38 Bom 183

See MAHOMEDAN LAW—SUCCESSION 14 C W N 59

See MAPPILLAS OF NORTH MALABAR I L R 38 Mad 1052

See MEMONS I L R 43 Bom 647

See OCCUPANCY HOLDING 15 C W N 752

See OCCUPANCY RIGHT I L R 48 Calc 43

See PALAS OF TURNS OF WORSHIP I L R 42 Calc 455

See PRE EMPTION

See PRIMOGENITURE. 18 C W N 55

See PROVINCIAL SMALL CAUSE COURT ACT 1887 SCH II CL 13 I L R 43 All 681

See RAILWAY RECEIPT I L R 38 Mad 664

See RE MARRIAGE

See SCHOOL MASTER I L R 44 Calc 917

See SOHAG GRANT I L R 42 Calc. 582

———— Adoption by Jains in Idar State—

See HINDU LAW—ADOPTION I L R 45 Bom 754

CUSTOM—*contd*

———— adoption of daughter's son—
See PUNJAB COURT ACT 1918
I L R 2 Lah 167

———— adoption by widow without authority by Mahesris of Delhi—
See DECLARATORY SUIT
I L R 1 Lah 92

———— adoption of daughter's son by Brahmins of Amritsar—
See PUNJAB COURT ACT 1918 s 41
I L R 2 Lah 167

———— adoption of an orphan boy among Jains in the Idar State—
See HINDU LAW—ADOPTION (74)
I L R 45 Bom 754

———— Bombay Silver Market—
See CONTRACT ( ) I L R 42 Bom 224

———— enabling tenant to build—
See MALPAS ESTATES LAND ACT (I OF 1908) s 9 11 151 157 187 (g)
I L R 37 Mad 432

———— evidence etc in relation to written contract—
See DOWL KABALIYAT 25 C W N 13

———— expert evidence in proof of—
See CUTCHI MEMONS
I L R 41 Bom 181

———— finding as to existence of—
See CIVIL PROCEDURE CODE 1908 s 100
I L R 41 Mad 374

———— khanadamadi—
See PUNJAB COURTS ACT 1914
I L R 1 Lah 245

———— modifying ordinary Law—
See ILLEGITIMATE SON 25 C W N 433
See CUSTOM I L R 45 Calc 450

———— of caste—
See HINDU LAW—MARRIAGE
I L R 39 Bom 538

———— of Impartibility—
See HINDU LAW—JOINT FAMILY
I L R 41 Mad 778

———— of Succession (Mohomedan)—
See OUDH ESTATE ACT II 1869 I L R 38 All 552

———— of inalienability—
See IMPARTIBLE ESTATE
I L R 36 Mad 325

———— of Mohesirs of Delhi—
See DECLARATORY SUIT
I L R 1 Lah 92

———— of Marwari merchants—
See HUNDI SHAH JOG
I L R 39 Bom 513

———— of Nattukottai Chetties in Madura
See HINDU LAW—PARTITION
I L R 44 Mad. 740

———— privacy in Gujarat—
See EASEMENT I L R 44 Bom 496

———— plea of—
See THEFT I L R 41 Calc 433

CUSTOM—*contd*

———— primogeniture—
See CUSTOM 1 Pat L J 109
See HINDU LAW 24 C W N 60

———— recorded in Wajib ul arz—
See PROVINCIAL SMALL CAUSES ACT 1887 SCH II CL. 13
I L R 43 All 681

———— transferability of agricultural tenancies—
See TRANSFER OF PROPERTY ACT 1882 s 43 25 C W N 420

———— up country cotton merchants—
See CONTRACT ACT (IX OF 1872) ss 178 179 I L R 42 Bom 205

———— temple—disqualification of females to perform duties in—
See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXIII r 3
I L R 38 Mad 850

———— Adoption—

———— *Of brother's daughter's son—Jats—Jullundur Tahsil*—onus probandi—Riwaj i Am *Held* that the plaintiff the adopted son on whom the *onus* lay had failed to prove that by custom among Jats of *Mauza* Manko *tahsil* and district Jullundur the adoption of a brother's daughter's son is valid *Palla* v *Budha* (*50 P R 1893 F B*) *Suram Singh* v *Jawahir Singh* (*0 Indian Cases 839*) *Pala* v *Waryam Singh* (*94 P P 1913*) and *Natha Singh* v *Mangal* (*90 P R 1914*) referred to also *Sant Singh* v *Megha Civil Appeal No 1232 of 1907* (*unpublished*) and the *Riwaj i Am* *Uttam Singh* v *Kesra Singh* (*159 P R 1890*) dissented from JAMIAT SINGH v UJAGAR SINGH
I L R 1 Lah 15

———— *Of a stranger—Jats of* tahsil *Fatehabad district Hissar*—onus probandi—*estoppel—where adoption was the result of a compromise to which the challenger's grandfather was a party* *Held* that the *onus* of proving that the adoption of stranger (*viz* the illegitimate child of the widow of a brother) is valid by custom among Jats of Bangroom *tashil* Fatehabad district Hissar rests on the adopted child and that this *onus* had not been discharged in the present case *Rattigan's Digest of Customary Law page 54 and paragraph 37 (b)* referred to *Malagir* v *Jagir* (*93 P R 1893*) distinguished *Held however* that as the defendant who challenged the adoption was the grandson of a party to the compromise under which the adoption was made and under which he received a material benefit and who was present and consenting when the ceremonies were performed the defendant was stopped from disputing the adoption and was bound by his grandfather's action. *Labhu* v *Mussamma Nihali* (*7 P R 1905*) *Devi Dial* v *Utam Devi* (*37 P R 1907*) *Habib Khan* v *Muhammad* (*68 P R 1912*) *Bhagat Ram* v *Gokal Chand* (*150 P R 1908 p 697*) and *Chuhar* v Mussammat *Jas Kuar* (*69 P R 1917*) referred to MOHAN v *Mussammat* DHANNI
I L R 1 Lah 31

———— *By an adopted son of his brother—Hindu Jats—Ludhiana District—Riwaj i Am* *Held* that it had not been shown that among Hindu Jats of the Ludhiana District a sonless proprietor who happens himself to have been an adopted son, is debarred from exercising the

CUSTOM—*contd*

——— **Adoption**—*contd*

general power possessed by a proprietor in the central and eastern parts of the Punjab of appointing one of his kinsmen to succeed him as his heir Rattigan s Digest of Customary Law paragraph 35 and the judgment of the District Court of Ludhiana dated 9th October 1914 (Civil Appeal No 124 of 1914 Hira v Dewa Singh) referred to *Mehra* v *Mangal Singh (90 P R 1914)* and *Ralla* v *Budha (50 P R 1893 (F B)* distinguished *Held also* that the plaintiffs collaterals on whom the *onus* lay had failed to prove that the adoption of a brother is invalid among these Jats *Sant Singh* v *Mula (44 P R 1913)* and *Waryam Singh* v *Jiwan Singh (205 P L R 1913)* referred to—also Rattigan s Digest paragraph 36 and introduction to Chapter III and the Ludhiana Customary Law of 1911 page 98 *Semble* that the suggested rule that no adoption can be valid in which the mother of the person adopted is debarred from marrying the adoptive father does not apply amongst agriculturists of Ludhiana *Gordon Walker s Customary Law page 93* referred to JIWA SINGH v *Mussammat* CHANDI **I L R 1 Lah 39**

——— *Adoption of daughter s son—Manj Rajputs tahsil Nakodar district Jullundur—Riwaj i am* *Held* that by custom a *Manj Rajput* of *tahsil* Nakodar district Jullundur is authorised to adopt his daughter's son who is also an agnatic relation SAMAND KHAN v KHAWAJE KHAN **I L R 2 Lah 193**

——— *Of daughter s son*—Dhanoi Jats—Tahsil *Kharar District Ambala*—Wajib ul arz—*value of* *Held* that by custom among *Dhanoi Jats of Tahsil* Kharar the adoption of a daughter s son is valid *Surder Singh* v *Mst Mano (68 P R 1888)* followed *Ralla* v *Budha (50 P R 1893 F B)* referred to and distinguished *Held also* that a *Wajib ul arz* being part of a Revenue Record is of greater authority than a *Riwaj i am* which is of general application and is not drawn up in respect of individual villages GURBAKHSH SINGH v *Mst* PARTAPO **I L R 2 Lah 346**

——— *Hindu Law—Will by adoptive father of entire estate in favour of natural son born after the adoption—whether valid.* The plaintiff appellant was adopted by his adoptive father in 1905 about five years later the adoptive father got a natural son the defendant respondent The plaintiff sued the defendant for a share in the estate of his adoptive father The defendant resisted the suit on the grounds (1) that the plaintiff being the daughter s son of his adoptive father could not be validly adopted, (2) that the adoptive father (deceased) left a will by which he devised his entire estate to the defendant *Held* that under Hindu Law the adoption of a daughter s son is invalid but that the plaintiff had succeeded in establishing a custom recognizing the validity of the adoption of a daughter s son among the *Khatris* of the town of Amritsar and that he must therefore be treated as the validly adopted son of his deceased adoptive father Sardar *Diwan Singh* v Mussammat *Subhan (72 P R 1878)* *Atma Singh* v *Jatta Singh (61 P J 1883)* *Tara* v *Shib Charn (162 P R 1883)* *Ganda Mal* v Mussammat *Jadhi (67 P P 1886)* and *Harnaman* v *Atma Ram (91 P R 1900)* referred to *Held also* that as soon as the plaintiff was adopted he became a co parcener with his adoptive father and that the latter could not dispose of any property which belonged to the joint family His will therefore could operate only upon his separate property and was invalid *qua* the joint property All the property in the hands of the members of a joint family should be treated as joint property unless the contrary is proved *Held further* that the adopted son takes one fourth of the entire estate in those provinces which follow the *Mitakshara* School of law *Mayne s Hindu Law paragraph 163* referred to PARMA NAND v SHIV CHARN DAS **I L R 2 Lah 69**

——— **Alienation**—

——— *Ancestral property—just antecedent debt —nature of enquiry to be made by the alienee —rule laid down in Devi Ditta v Saudagar Singh (65 P R 1900)* explained The main question for determination in this case was whether an alienee of ancestral immoveable property from a person governed by custom is bound to prove *necessity* or enquiry as to *necessity* with respect to a debt which was due by the alienor to an antecedent creditor and which had been discharged by the alienee In other word is it the duty of the alienee to enquire not only into the existence of the antecedent debt but also into the nature and necessity thereof? *Held per* SHADI LAL J that an alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof and that this is in accord with the rule laid down in *Devi Ditta* v *Saudagar Singh (65 P R 1900 F B)* *Muhammad Hayat Khan* v *Sandhe Khan (55 P R 1908)* and *Muhammad Islam* v *Hari Lal (7 P W P 1914)* approved *Maharaj Singh* v *Balwant Singh (I L R 28 All 508 541)* and *Trevelyan s Hindu Law page 310* referred to But the law enunciated above only helps an honest alienee who acts in perfect good faith. An alienee paying off an antecedent creditor gets no advantage if he has knowledge of the true nature of the debt or acts in bad faith or where he and the antecedent creditor are in effect one and the same person *Held per* LEROSSIGNOL J that the principle laid down in *Devi Ditta* v *Saudagar Singh* is that the initial *onus* lies on the outsider alienee to show that the debts were due and when he has discharged that *onus* the turn of the opposite party then comes to show that the alienee made no proper enquiry or that if he made one he must have learnt of the real nature of the debts The words made no enquiry whatever in *Devi Ditta* v *Saudagar Singh* refer to an enquiry as to the *existence* of the debts but include also an enquiry as to their *nature* if the party challenging the alienation can show that the result of the first enquiry should have raised doubts in the minds of an ordinary prudent man as to the morality or reasonableness of the debts *Held per* CURIAM that in this case all the circumstances including the fact that the alienor was a neighbour of the alienee showed that the alienee must have known that the debts were contracted as an act of reckless extravagance and could not be regarded as just debts JHANDU v NIAMAT KHAN **I L R 1 Lah 472**

——— *Ancestral property—will in favour of daughter in presence of a half brother —Kahuts—Mauza Adharwal tahsil Chakwal district Jhelum—Riwaj i Am* *Held*, that it has been proved that by custom among Kahuts of *tahsil* Chakwal district Jhelum a sonless proprietor has the power to make a free disposition of

CUSTOM—contd

——— **Alienation—contd**

his ancestral land to a daughter in the presence of brothers or other collaterals *Khuda Bakhsh v Waham Ali (SS P R 1911)* *Nur Khan v Sarfra (100 P R 191)* *Nura v Tera (46 P R 1900)* *Fa Bakhsh v Jahan Shah (90 P R 190)* *Hayat v Mussammat Ghilan (S P R 1918)* and *Mussammat Rahmat v Fateh Muhammad (98 P R 1912)* referred to *Mussammat Nur Bhari v Dilla (56 P R 18)* not followed MUHAMMAD KHAN v *Mussammat* KERAN I L R 2 Lah 170

——— *Necessity—Sale price enhanced by a fictitious item—whether the actual transaction can be upheld* The plaintiffs the nephews sued in 1914 to challenge a sale of 18 *kanals* 3 *marlas* ancestral land made by their 2 uncles in 1908 for Rs 1 500 on the ground that it was without consideration and necessity The District Judge found that Rs 288 of the consideration was fictitious probably inserted with the intention of scaring away pre-emptors and decreed plaintiffs claim on payment of their share in the balance of the purchase money The defendants appealed to this Court *Held* that in cases like the present the real issue is what was the contract between the vendor and the vendee and if it is found that by consent of the vendor and the vendee a fictitious amount was included in the ostensible sale price the only matter which remains for consideration is whether the real contract is one which should be binding on the collaterals Civil No 210 of 1905 (unpublished) followed *Kesar v Sundar Singh (27 P R 1903)* not followed *Held also* that as in this case the actual sale price of Rs 1 212 for 18 *kanals* of land paying a revenue of Rs 5 only was apparently the full market value and the vendors were in a necessitous condition and considering the delay in taking action the sale should be upheld and the plaintiffs suit dismissed PUNJAB SINGH v ARJAN I L R 2 Lah 22

——— **Family Primogeniture in Chota Nagpur**—*One branch of a family is evidence of its applicability to another branch* There is a custom in Chota Nagpur that an estate granted by the Maharaja of Chota Nagpur is impartible and is governed by the rule of primogeniture This is not merely a family custom prevailing in the Maharaja s family but it is also the *lex loci* of Chota Nagpur Where a custom prevails in one branch of a family it is strong evidence to be relied on that it applies with equal force to another branch of the same family *Per* CHAPMAN J The Privy Council decision to the effect that the words *putra putradi* occurring in a modern Hindu Will would convey an estate unconditional and unlimited are based upon the ground that these words had by 1868 acquired a technical significance It is quite impossible to say that in 1765 before the British had acquired jurisdiction in Chota Nagpur that the words *putra putradi* had acquired that technical meaning *Per* ATKINSON J A grant of land containing the words *putra putradi* conveys an absolute perpetual estate in the lands descendible from generation to generation coupled with full powers of alienation *Query* Whether in Chota Nagpur this rule is subject to a proviso ?? so long as there are lineal male descendants entitled to inherit LAL GAJENDRA NATH SAHI DEO v LAL MATHURLAL NATH SAHI DEO 1 Pat L J 109

——— **Evidence of presumption**—*Inference of existence of a custom from continued use of land for a particular purpose* It is open to a Court to infer from long enjoyment not exercised by permission stealth or force the existence of a custom If after considering the evidence the Court comes to the conclusion that an alleged custom is unreasonable or that the privilege is enjoyed as a result of permission given or that it is exercised by stealth or force the Court is entitled to find against the custom *Kuar Sen v Mamman I L R 17 All 87* referred to SHADI LAL v MUHAMMAD ISHAQ KHAN (1910) I L R 33 All 257

——— **Maintenance claim**—The Plaintiffs were two Mahomedan concubines and their illegitimate sons by a deceased Hindu claiming against the Legitimate son for maintenance on the ground of family custom *Held* custom not proved CHARANJIT SINGH v AMIR ALI KHAN I L R 2 Lah 243

——— **Inheritance**—*Customary Law of Punjab—Sheikh Ansaris Tribe of—Gift by father to daughter—Estate taken by donee—Evidence and proof of custom—Acquiescence and consequent estoppel—Partition by agreement of parties as acquiescence in title of allottees—Limitation Act (XV of 1877) Sch II Art 118—Ineffective adoption—Mahomedan Law* The appellants claimed possession of the property in suit on the allegation that it was ancestral property to which they were entitled as reversioners The defence was that the respondent was in possession under a gift from the last owner a Mahomedan lady who had adopted him as her heir and who had herself received the property in dispute as a gift from her father in lieu of her mother s dower and that the suit was barred by limitation The parties were Sheikh Ansaris of a Pathan tribe of Punjab Mahomedans and the appellant s case was that according to a custom prevailing in the family no woman could take by gift a greater interest in ancestral property than an estate for life and without power of alienation and that the gift to the respondent was therefore void In dismissing the appeal from the Chief Court of the Punjab *Held* by the Judicial Committee on the documentary evidence as to the course of litigation concerning the property and the circumstances connected with its devolution since 1847 and on the other evidence in the case that not only had no such custom as alleged applying to the family been proved but the evidence relating to the devolution of the property was inconsistent with the existence of such a custom and in fact disproved it nor was it supported by evidence as to the limited rights by custom of a widow in her deceased husband s property nor by evidence of a custom preventing a Mahomedan father from giving his property to one son to the exclusion of another *Held* also that there was strong evidence of the appellant s acquiescence in the respondent s title in the fact that in 1895 96 the principal lands which had been held in undivided shares by the parties were by agreement partitioned each having allotted to him lands which represented his share and that the respondent s share on the partition represented lands which had come to him from the gift which the appellants now disputed as being void *Semble* That the omission to bring within the period prescribed by Art 118 of Sch II of the Limitation Act (XV of 18) a suit to obtain a declaration that an adoption was invalid or never in fact took place was no bar to a suit like the present for possession of property *Tir uwan Bahadur Singh v Ram*

CUSTOM—*contd*

eshur Bakhsh Singh I L R 28 All 727 L R 33 I A 156 followed Under the general Mahomedan law an adoption cannot be made and even if it be made can carry with it no right of inheritance MUHAMMAD UMAR KHAN v MUHAMMAD NIAZ UD DIN KHAN (1911) **I L R 39 Calc 418**

———— **Timber**—*Tenants of raiyati and appropriate timber trees—Reasonableness or unreasonableness of custom if question of law or fact—Custom not unreasonable* The reasonableness or unreasonableness of a custom is a question of law *Bralburn v Foley 3 C P 129 135* followed Where a customary right claimed by tenants to cut and appropriate trees upon the holding was upheld in the First Court but the Judge on appeal declared the custom to be unreasonable in so far as it permitted the appropriation of timber trees *Held* that there was nothing unfair or dishonest or contrary to the public good in the custom and it was not unreasonable GURAI KAR v RANI KUAR MONI SINGHA MANDHATA (1915)

19 C W N 1188

———— **Succession—Among tribal communities in the Punjab**—*Agnates—General custom excluding daughters exceptions to—Succession of daughter when married to near collateral who is in her father's house as khana damad (resident son in law)—Riwaj i am or official record of customs value of as evidence* A Mahomedan Jat belonging to the sub community of Dabs settled in the Jhang District of the Punjab died without male issue and leaving a widow and a daughter who was married to a near collateral of the deceased who was also his *khana damad* or resident son in law In a suit by the respondents who as collaterals based their claim to a share of the property of the deceased on a general custom of agnatic succession in the community or tribe to the exclusion of the daughter and her descendants the appellant the son of the daughter of the deceased who was the devisee of his will, alleged that a daughter married to a near collateral who takes up his residence in the father in law s house as a *khana damad* succeeded to her father s inheritance in preference to the agnatics and produced in support of this special custom the Riwaj i am or official records of custom in addition to a considerable amount of oral testimony *Held* (reversing the decision of the Chief Court) that on the death of the widow who had inherited the entire estate the daughter and her son were entitled to succeed in preference to the respondents Assuming that such a general custom as that relied on by the respondents existed as to which the decisions of the Punjab Chief Court were by no means uniform specially in the case of Mahomedan tribes who were endogamous it was clear that the rule was admittedly subject to many exceptions see Rattigan s Digest of Customary Law for the Punjab Chap II para 23 where they are enumerated and Roe s Tribal Law in the Punjab where particular stress is laid on the value of the Riwaj i am as a record of tribal customs and it is said that son in law of the house is a regular institution *Held* also that the Riwaj i am was a public record prepared by a public officer in discharge of his duties and under Government rules and was clearly admissible in evidence to prove the facts therein entered subject to rebuttal. And their Lordships were of opinion that the statements in the Riwaj i am for the Jhang District formed a strong piece of evidence in support of the custom set up by the appellant which it lay upon the respondents to rebut and they had failed to do so BEG v ALLAH DITTA (1916) **I L R 44 Calc 749**

———— **Inheritance**—*Evidence admissible to prove custom at variance with the Mahomedan law—Exclusion of daughters from inheritance—Riwaj i am —Value of the riwaj i am as evidence.* One Saiyid Asghar Ali a native of Qasba Palwal in the Gurgaon district of the Punjab and the owner of a small amount of land in Palwal though not a Biswadar nor a member of an agricultural family entered the service of the Government of the North Western Provinces and became a tahsildar He rendered distinguished service during the mutiny and was rewarded by Government with the grant of a village called Wair Badshahpur in the Bulandshahr district After his retirement Asghar Ali retired to his native town He died in 1876 leaving him surviving two widows two daughters and a minor son On the petition of the widows the Bulandshahr estate was taken over by the Court of Wards When the son came of age the Court of Wards released half the estate in his favour but retained half for the benefit of the widows and the daughters and their heirs After the death of the widows and one of the daughters the son Ali Asghar sued to recover possession of the remaining half of the Bulandshahr property on the ground that according to the custom of the Punjab and the local custom of the biswadars of Palwal in particular daughters were not entitled to any share in the paternal inheritance in the presence of a son *Held* that evidence was admissible to prove the custom alleged by the plaintiff notwithstanding that such custom was contrary to the Mahomedan law but that the plaintiff had failed to prove that any such custom as that set up by him applied to his family The value as evidence of the document known as *Riwaj i am* discussed. ALI ASGHAR v THE COLLECTOR OF BULANDSHAHR (1917)

I L R 39 All 574

———— There is a custom in Chota Nagpur that on estate granted by the Maharaja is impartible and governed by the rule of primogeniture LAL GAJENDRA NATH SAHI DEO v LAL MUTHUBALAL NATH SAHI DEO

1 Pat L J 109

———— *Proof of custom modifying Mahomedan Law—Custom excluding women from share of inheritance of paternal relation—Bombay Regulation IV of 1827 s 26—Punjab Laws Act 1872 s 5—Essentials in proving custom—Family custom—Position and relationship of members of family—Denial by prominent member of family of existence of custom—Failure to produce Revenue Records as evidence.* On the death of a wealthy Shia Mahomedan in Sind intestate and leaving no widow or child the nearest surviving relations were a nephew (the plaintiff appellant) and a sister and her son the first and second defendants respondents The appellant s case was that the question as to the rights of inheritance was governed not by Mahomedan Law but by a custom which excluded women from any share in the inheritance of a paternal relation *Held* that under s 26 of Bombay Regulation IV of 1827 which had been extended to Sind no presumption can be made in favour of the existence of a usage or custom where it is known that such usage or custom is prevalent but it was incumbent on the appellant to allege and prove the custom on which

CUSTOM—*contd.*

he relied. *Dova Ram* v *Sohel Singh 41 Punj Rec 399 per* ROBERTSON J is a case under s. 5 of the Punjab Laws Act 1872 the words of which are more strongly in favour of the appellant s contention than those of s. 26 of Bombay Regulation IV of 1827 Custom binding inheritance in a particular family has long been recognized in India See *Soorendro Nath Roy* v *Heeramonee Burmoneah 12 Moo I A 81* and the principles applicable to the proof of customs in England were not to be applied in considering such a custom as that claimed in the present suit Nor was it necessary to reject as useless for proving such a custom all the instances mentioned by CROUCH J in his judgment in the Judicial Commissioner s Court. An example of each of the conditions there laid down ought certainly to be established by some witness but it was not necessary that all should be proved in every case as that might greatly weaken the evidence by tradition to which in a custom of the character under consideration great weight was due *Ramalakshmi Ammal* v *Sivanantha Perumal Sethurayar 14 Moo I A 570* referred to as to what was essential to the proof of special usages modifying the ordinary law of succession *Held* also assuming that the custom relied on which had not been precisely defined by the appellant was a custom by which in the event of intestacy daughters of the deceased were excluded in favour of their brothers and sisters in favour of male paternal relations that such a custom had not on the evidence been sufficiently proved. The position and relationship of the different members of the family must always be considered in determining whether claims were not met because the rights to which they related did not exist or whether they were put on one side because in the circumstances there was no need for asserting them *Miralies* v *Villayanna I L R 8 Mad 464* referred to The fact that prominent members of the families concerned denied that such a custom as alleged existed and the non production of the Revenue Records one of which showed a division according to Mahomedan Law and not according to the custom here set up were both evidence strongly against the custom In the opinion of their Lordships though there was much in history for the custom and some evidence by which it received support yet on the whole the evidence fell short of the standard to which it must attain in order to succeed in altering the devolution of property according to Mahomedan Law to a devolution determined by a family custom ABDUL HUSSEIN KHAN v SONA DERO (1917)

I L R 45 Calc 450

——— Marriage—Pogha (*bride price*)—*due to nearest male relative of a woman married without his consent*—Pathans *of ilaqa Makhad—District Attock—woman of full age—whether the custom can be legally enforced—Muhammadan Law—Indian Contract Act IX of 1872 s 26* The plaintiff N K claimed to recover a sum of Rs 400 from the defendants A a minor and G father of A as bride price due to him as the nearest male relative of *Mussammat* B J the 19 years old daughter of his uncle The allegation in the plaint was that A had abducted and married B J without the consent of the plaintiff and was by custom liable to pay to the latter the compensation known as *rogha* The first Court decreed the claim holding that there was a universal custom amongst these *Pathans* that if a woman whether virgin married or widow, is abducted without the consent of her nearest relative or guardian the abductor is liable to pay a sum of money to that relative or guardian In appeal the District Judge upheld the decision relying on *Shah Rahman* v *Ismail Khan (87 P R 1904)* The defendants preferred a second appeal to the High Court *Held* that the existence of the custom of *rogha* is established but it is not enforceable as it is immoral and opposed to public policy *Mussammat* B J being 19 years of age and competent to enter into a contract of marriage with any man of her own religion the claim for compensation in the present case is in the nature of a claim for loss of a chattel or for the plaintiff s abstaining from committing an illegal act that is to say abstaining from any attempt to murder or otherwise injure the defendant *Venkata Krishnayya* v *Lakhmi Narayana (I L R 32 Mad 185 F B)* referred to *Shah Rahman* v *Ismail Khan (87 P R 1904)* distinguished Gazetteer of the Attock District page 56 and Settlement Report of the Kohat District, pages 76 to 79 and paragraph 159 referred to *Per* DUNDAS J The Courts in this country are not bound to enforce a payment by a person who has performed an act which he was legally entitled to perform and which does not expose him to any contractual liability because by a barbarous custom the alternative is the enmity of the relatives of the bride which is likely to take the form of attempts upon his life *Per* SCOTT SMITH J To enforce such a custom would be tantamount to saying that a woman of full age cannot marry a man unless the latter pays a large sum which it may be impossible for him to do to her nearest male relative It would be a custom in restraint of marriage and opposed to the principle of s 26 of the Contract Act ABBA KHAN v NUR KHAN I L R 1 Lah 4

——— *Tribal Custom—Marriage custom requiring husband to live in wife s parent s household the children being additions to wife s clan—Custom not immoral or opposed to public policy—Suit for restitution of conjugal rights by husband against wife—Removal of wife from parent s house if may be decreed* There is nothing immoral or opposed to public policy in a tribal custom which requires a son in law to reside in the family of his father in law in order to have access to his wife *Quære* Whether Lalungs are governed by Hindu Law Assuming that they are Hindus *Held* that their marriage relations must be governed by customs which prevail amongst the tribe provided that the customs are neither immoral nor opposed to public policy Their marriage custom according to which the parents of the girl find a husband for her and take him to their house—as a member of their family—the offsprings of the marriage entering the clan of their mother—is a valid custom and is a good defence to a suit by the husband for restitution of conjugal rights by removal of the wife from her father s house It was not injurious to the public interests that is to the interests of the tribe to which the parties belonged nor was it in conflict with any express law of the ruling power *Tekait Monmohini* v *Basanta Kumar Singh I L R 28 Calc 751 s c 5 C W N 673* referred to LENGAHALUNG v PENGURI LALUNGUI (1915) 20 C W N 406

——— Partition—A custom was found among the Nattakottai Chetties in Madura why a Chetti during the life of his wife married another he appropriated out of his property a portion called

CUSTOM—*contd*

moopu for the first wife s maintenance that portion descending to her son if she had one and the rest of the property was nationally divided one moiety going to the son or sons by the first wife and the other moiety to the son or sons by the second wife In a suit for partition brought by the only son of a first wife against his father and the sons by the second wife the Judicial Committee applied the custom without however determining what the father s share would be in the circumstances as the question did not arise before their Lordships The authorities as to the custom of patnibhaga or the division according to wive considered [*Judgment of the High Court reversed*] PALANIAPPA CHETTIAR v ALAGAN CHETTI (1921)

I L R 44 Mad (P C) 740

———— Pre-emption—*Urban immoveable property—Delhi—Pahar Ganj—proof of custom—value of previous judgment based upon a compromise* *Held* that the plaintiff on whom the law had failed to prove that the custom of pre emption prevails in Pahar Ganj a suburb of Delhi The custom of pre emption has been held *onus* to prevail generally throughout the city of Delhi but that applies only to the city proper as circumscribed by the city walls constructed during the *Moghal* period and has no application to a suburb which has grown up since the British Rule *Held also* that a judgment based upon a compromise or confession although of some probative force cannot be placed on the same footing as one in which after contest a custom was held to be proved or negatived IMPERIAL OIL SOAP AND GENERAL MILLS CO v M MUSHAH UD DIN I L R 2 Lah 83

———— Religious institutions—Darbar Sahib (*Golden Temple*) *Amritsar—Succession to office of* granthi—*Son or* chela—*whether an infant can become a* chela The plaintiff sued for a declaration that he as son of Harnam Singh deceased the late *granthi* of the *Darbar Sahib* Amritsar was entitled to succeed his father in the office of *granthi* in preference to the defendant a brother of Harnam Singh who claimed to have been duly appointed as *chela* and nominated by deceased as his successor and duly elected and installed *Held* that the office of *granthi* to the *Darbar Sahib* Amritsar is of a religious character and not secular *Held also* that the question of succession to the office must be decided by the custom and practice of the institution as proved by the evidence and a son merely as such had no right to succeed *Held further* that it had been established that one of the qualifications for the office of the *granthi* is that the candidate must be a good Sikh and a properly initiated *Singh* and next he must become a *chela* and be nominated by his predecessor and this must be followed by an election and installation *Nowrang Singh* v *Bhugut Singh* (No 4 P R 1878) and Bhai *Bhagat Singh* v *Harnam Singh* (No 43 P R 1899) followed Macauliffe s History of the Sikh Religion Chapter VII pages 55 59 60 and 65 and Encyclopædia Britannica Cambridge Edition 1911 Volume XXV pages 84 87 referred to *Held also* that there is no clear rule laid down as to the initiation of a *chela* or as to the nomination of a successor or election of a *granthi* but a person is created a *Singh* by the ceremony called *Khandala Pahul* or Baptism by the sword and the candidate must have reached an age of discrimination and capacity to remember obligations so that plaintiff as an infant less than a year old could not have been created a *Singh* Encyclopædia Britannica Volume XXV page 86 referred to INDER SINGH v FATEH SINGH

I L R 1 Lah 511

———— Darbar Sahib—(*Golden Temple*), *Amritsar—Succession to properties in the hand of a* granthi—*Son or successor to the office—Relevancy of previous decision on points at issue—Indian Evidence Act I of 1872 ss 11 13 and 43* The plaintiff as duly appointed successor to Harnam Singh the late *granthi* of the Sikh religious institution known as *Darbar Sahib* or Golden Temple at Amritsar sued the son of Harnam Singh for possession of certain properties, and the question was which of the properties in possession of Harnam Singh were dedicated to the office of *granthi* and which were his self acquired property and not dedicated to the religious uses. A previous judgment which was given in a suit contesting the right of the then *granthi* Jawahar Singh (the predecessor of Harnam Singh) to alienate certain shops was referred to by plaintiff as proving that these shops were *waqf* and attached to the *gaddi* as found by the Court Defendant objected to the relevancy of this judgment *Held* that in regard to properties dedicated to the office of *granthi* of the *Darbar Sahib* Amritsar succession goes to the person succeeding to the office while properties acquired by the *granthi* himself out of his income and not proved to have been dedicated to the office descend to his natural heir There is a pre emption that property which has descended from one *granthi* to another to the exclusion of natural heirs has been dedicated to religious uses, even if there is no positive evidence of actual dedication *Ram Singh* v *Nehal Singh* (No 106 P R 1889 *page 470*) and *Har Parshad* v *Bhadu* (No 31 P W R 1916 *page 96*) approved *Held also* that a previous judgment in a suit contesting the right of the then *granthi* to alienate certain shops wherein it was held that these properties were *waqf* and attached to the *gaddi* and could not be alienated by the *granthi* could only be treated as admissible in evidence for the purpose of showing that at that time also the right of the *granthi* to alienate certain property was called in question The finding of the Court that the property was *waqf* and was attached to the *gaddi* is not relevant in the present case *Gujja Lal* v *Fatteh Lall* (*I L R 6 Calc 171 F B*) *Ramasami* v *Appavu* (*I L R 12 Mad 9*) and *Muhammad Amin* v *Hassan* (*I L R 31 Bom 143 157*) followed Ameer Ali and Woodroffe s Law of Evidence 5th Edition page 170 *et seq* referred to INDAR SINGH v FATTEH SINGH I L R 1 Lah 540

———— Dohli tenure—*Explained—sale for mortgage by* Dohlidar—*is absolutely void and can be impeached by the* Dohlidar s *successor* *Held* that the *Dohli* tenure is a rent free grant of a small plot of land by the village community for the benefit of a temple mosque or shrine or to a person for a religious purpose So long as the purpose for which the grant is made is carried out it cannot be resumed but should the holder fail to carry out the duties of the office the proprietors can eject him A tenure of this kind cannot be alienated by sale or mortgage and any such alienation by the *Dholidar* is absolutely void and can be impeached by the *Dholidar* s successor FEWA RAM v UDEGIR

I L R 2 Lah 313

———— Succession—*Existence from time immemorial—Grant purporting to create family*

CUSTOM—*contd*

custom—Proof of long line of succession Whereby a confirmatory grant dated the 4th February 1797 a Raja after confirming a previous grant of a similar nature by his predecessor gave to a Rani certain properties as *Joutuk Ranian Britti* and laid down in the sanad of grant that she and the future Ranis were not entitled to sell or make a gift of the *Britti* but to enjoy the profits only for life and prescribed a rule of succession to the effect that only Ranis of the family were to succeed to the properties for life and no Rajas could claim or *alter the course of succession as aforesaid* *Held* that the grant in so far as it laid down a rule of succession was absolutely void as it prescribed a right of succession unknown to Hindu Law It was also void as it purported to create successive life estates in favour of unborn persons the estate itself being undisposed of Even if the rule of succession laid down in the sanad of 1797 had actually been followed it could not be treated as binding upon the family unless it had ripened into a family custom *Held* also that in order to establish a custom it must be shown that the custom had existed *from time immemorial* and where the custom set up was peculiar only to a single family the rule was more strictly enforced than ever A family custom of proved antiquity was entitled to be recognised by the Courts irrespective of the position and rank of the family but where the origin of custom was known it must be shown that there had been a long line of succession in accordance with the usage *Samrun Singh* v *Khedun Singh 2 S D A Sel Rep 116* *Pertab Deb* v *Surup Deb Paikut 2 S D A Sel Rep 249* *Ramalakshmi Ammal* v *Sivana tha Perumal Sethurayar 12 B L R 396 14 Moo I A 570* *Garuradhwaja Prasad Singh* v *Superundhwaja Prasad Singh I L R 23 All 37 L R 27 I A 238* *Prince Mahomed Bukhtyar Shah* v *Rani Dhoramani 2 C L J 20* referred to AMBALIKA DASI v APARNA DASI (1918) I L R 45 Calc 835

———— Primogeniture—*Hindu Law* A Custom of primogeniture found and established becomes the law of the family regulating succession to the family estate another ordinary Hindu Law does not apply to it save so far as it was not inconsistent with the Custom RAO KISHORE SINGH v MUSAMMAT GAHENABAI 24 C W N 601

———— Succession—*Acquired property—Sisters or collaterals in 9th degree*—Jats—*Jhelum District*—Riwaj i am—*Where custom is not established whether Courts can fall back on the personal law of the parties—Punjab Laws Act IV of 1872 s 5* The parties to the suit out of which the present appeal has arisen were *Jats* of the Jhelum District The plaintiffs were the sisters of the last male holder while the defendants were collaterals in the ninth degree Plaintiffs relied upon custom but neither they nor defendants succeeded in proving a custom The entry in the *Riwaj i am* was against succession of sisters The property was non ancestral The Lower Courts dismissed the suit holding that plaintiffs had failed to prove their right to succession by custom *Held* that no custom having been ascertained as to the rights of sisters as against collaterals of the 9th degree in the case of acquired property the Courts should have fallen back on the personal law of the parties for the decision of the case and that the suit must consequently be decreed in favour of the sisters Mussammat *Sardar Bibi* v *Sayad Ali Shah (4 P R 1888)* *Khanan* v Mussammat *Jatti (116 P R 1897)* and *Khuda Bakhsh* v Mussammat *Fateh Khatun (13 P R 1919)* followed Mussammat *Harnamon* v *Santa Singh (198 P W R 1912)* Mussammat *Uttar Kour* v *Atma Singh (4 P L R 180)* and *Ali Muhammad* v *Suraj ud Din (13 P R 1912)* distinguished also Rattigan's Digest of Customary Law paragraph 24 *Held also* that unless there is a provision to the contrary the rules laid down in a *Riwaj i am* refer to ancestral and not acquired property Mussammat *Raj Kour* v *Talok Singh (38 P R 1916)* and *Budhi Parkash* v *Chander Bhan (123 P P 1918)* followed *Mussammat* FATIMA BIBI v SHAH NAWAZ I L R 2 Lah 9

———— *Self acquired property—sisters or collaterals in 8th degree*—Onus probandi—*Muhammadan Rajputs*—tahsil *Nakodar district Jullundur*—Riwaj i am *Held* that in questions of succession to self acquired property between collaterals of the 8th degree and sisters the *onus* of proving that they have a preferential right is in the first instance on the latter *Hamira* v *Ram Singh (134 P R 1907 F B)* and Mussammat *Harnaman* v *Santa Singh (98 P W R 1912)* referred to also Rattigan's Customary Law Art 34 *Bholi* v *Kahna (35 P R 1909)* distinguished *Held also* that in regard to Muhammadan Rajputs of the Jullundur District the *onus* was also clearly on the sisters in view of the entries in the *Riwaj i am* of the district and that they had failed to discharge that *onus* *Beg* v *Allah Ditta (45 P R 1917 P C)* referred to *Mussammat* HUSSAIN BIBI v NIGHIA I L R 1 Lah 1

———— *Daughter or near collaterals—Sipras of Miana Hazara* Tahsil *Bhera District Shahpur—entries in* Wajib ul arz *and* Riwaj i am—*value of—whether applicable to both self acquired and ancestral property* *Mussammat* G B the widow of plaintiffs uncle G R on 19th April 1910 made a gift of her husband's landed property in 3 villages in *tahsil* Bhera in favour of her daughter and her deceased daughter's son The plaintiffs sue for a declaration that the gift shall not affect their reversionary right after the death or re marriage of the widow It was found by the High Court on appeal that some of the property was ancestral and some was not The entries in the *Wajib ul arz* of the villages concerned and in the *Riwaj i am* were against married daughters succeeding as heirs to their father's property *Held* that the portions of a *Wajib ul arz* which refer to custom are not provisions intended to enure for the duration of the Settlement only but are statements that a certain custom exists *Rahiman* v *Bala (8 P P 1897)* and *Masta* v *Pollo (52 P R 1896)* followed *Also* that there is a certain presumption as to the correctness of such entries *Dilsukh Ram* v *Nathu Singh (98 P R 1894 F B)* *Daltus Khan* v *Ghulam Kasim Khan (I L P 45 Calc 793 P C)* *Digambar Singh* v *Ahmad Sayad Khan (I L P 37 All 129 P C)* *Aulia* v *Alu (49 P R 1898)* *Ahmad Shah* v *Khuda Baksh (33 P R 1903)* *Mala Ram* v *Ram Mohar (65 P P 1903)* and *Muhammad Faiza Ali* v *Bihari (I L R 40 All 56)* followed *But* that though such entries are evidence the presumption as to their correctness is a rebuttable one *Held also* that entries in the *Riwaj i-am* also carry with them certain presumptions of correctness *Sham Ram* v Mussammat *Hemi Bai (* *P P 1896)* *Ali Muhammad* v *P P 1901)* *Sharan* v Mussammat *Sh* *P 1901)* *Mehr Khan*

CUSTOM—*contd*

v *Karam Ilahi* (*13 P R 1902*) *Sher* v *Alam Sher* (*91 P R 1915*) *Beg* v *Allah Ditta* (*45 P R 1917 P C*) and *Saide Khan* v Mussammat *Amir un Nisa* (*94 P R 1918*) followed These presumptions are also rebuttable and when positive instances are given the *Riwaj i am* cannot be regarded as over riding them *Nidhu* v *Ram Singh* (*2 P R 1909*) Mussammat *Zainab Bibi* v *Badar ud Din* (*43 P R 1913*) *Lelu* v *Ram Chand* (*23 P R 1916*) Mussammat *Raj Kour* v *Talok Singh* (*38 P R 1916*) and *Budhi Parkash* v *Chander Bhan* (*123 P R 1919*) followed *Held further* that in the case of self acquired property the general custom is that daughters are preferred to collaterals Rattigan s Customary Law Article 23 (2) referred to And as the entries in the *Wajib ul arz* of the villages concerned do not distinctly state that they relate to self acquired property as well as ancestral property they should be read as referring merely to the latter *Samand* v Mussammat *Jindwand* (C 4 No 665 of 1905 unpublished) followed *Held consequently* that in this case in the absence of proof to the contrary the daughter is heir to the self acquired property of her father and her mother s gift stands good to that extent but will not bind the rights of the plaintiffs in respect of the ancestral property GHULAM MUHAMMAD v *Mussammat* GAUHAR BIBI

I L R 1 Lah 234

——— *Self acquired property —daughters or collaterals—Arains of Ludhiana —meaning of acquired property* *Held* that by custom a daughter is generally preferred to collaterals in the succession to acquired property of her father and by acquired property is meant property not necessarily acquired by the father himself but property acquired by him of any of his ascendants short of the common ancestor *Lokha* v *Hari* (*64 P R 1893*) Mussammat *Ichhri* v *Jowahira* (*18 P R 1896*) *Sham Ram* v Mussammat *Hemi Bai* (*73 P R 1896*) *Khuda Yar* v *Sultan* (*103 P R 1900*) *Nidhu* v *Ram Singh* (*2 P R 1909*) and *Partab Singh* v Mussammat *Panjabu* (*25 P R 1912*) followed—also Rattigan s Digest of Customary Law s 23 (2) *Mussammat* JAIVAN v NUR MUHAMMAD I L R 1 Lah 265

I L R 2 Lah 366

——— *Self acquired property —sister or collaterals in 6th degree—Mussalman Rajputs—Jullundur District—Riwaj i am* *Held* that among Mussalman Rajput agriculturists of the Jullundur District the *onus probandi* was on the plaintiff the sister of the deceased to prove that she is entitled to succeed to her brother s land in preference to the defendants collaterals in the 6th degree the entry in the *Riwaj i am* being against her although the land was non ancestral *qua* the defendants *Ranjha* v Mussammat *Jindwaddi* (*104 P R 1914*) and *Bholi* v *Kahna* (*35 P R 1909*) distinguished *Mussammat* JEWI v SANDHI

I L R 1 Lah 433

——— *Ancestral property—daughter or collateral in 7th degree—Birk Jats of Mauza Birkakal Phillaur—district Jullundur—estoppel* The plaintiffs collaterals in the 7th degree of Suchet Singh a *Birk Jat* of *Mauza Birk* and the heirs of the latter s *pichhlag* sons and others after his death for possession of his land and house property They had previously sued for declarations in respect of one exchange of land in favour of the *pichhlags* and other in respect of a will in their favour and obtained decrees In those cases the daughter of Suchet Singh had not been mentioned In the present case it was however urged that plaintiffs had no *locus standi* in the presence of the daughter who was a preferential heir *Held* that the plaintiffs on whom the *onus* lay had failed to prove that by custom thus collaterals in the 7th degree exclude the daughter Also that the old law to the effect that in the Jullundur District generally and particularly in the Phillour *Tahsil* agnates of any degree exclude daughters (*vide* Roe s Tribal Customs 1895 p 135) is no longer correct The customary Law of the Jullundur District 1918 by *Rai Bahadur Bhai* Hotu Singh referred to also *Beg* v *Allah Ditta* (*45 P R 1917 P C*) *Bholi* v *M Singh* (*86 P R 1908*) *Khaire Khan* v *Ghulam Ghaus* (*32 P R 1911*) Mussammat *Partapo* v *Asa Ram* (*96 P R 1915*) *Jiwan Singh* v Mussammat *H Kaur* (*41 P R 1914*) *Saide Khan* v Mussammat *Amir un Nissa* (*94 P R 1918*) and Mussammat *Ishri* v *Bhola Singh* (*52 Indian Cases 152*) *Held also* that the plaintiffs could not be allowed to rely on Suchet Singh s will to exclude the daughter from succession seeing that they had already obtained a declaration that it is invalid in a suit against the same defendants BHOLA SINGH v BABU I L R 1 Lah 464

——— *Held* that a Custom of Pogha (Bundi price) exists amongst Pathans but is not enforceable as being immoral and against public policy ABBAS KHAN v MIR KHAN

I L R 1 Lah 574

——— Sayads of Kharkhauda Rohtak District—*Family custom allowing special concessions to females—Daughter of predeceased brother or son of predeceased sister—Whether females possess the right of representation—mesne profits* B A a *Sayad* of Kharkhauda in the Rohtak District died in 187- The whole of his property ultimately passed into the hands of his last widow *Mussammat* B B and her donees After her death three suits for possession were instituted (1) by *Mussammat* N N the daughter of S A a predeceased brother of B A (2) by A A the son of a sister who survived B A but died before his widow *Mussammat* B B and (3) by *Mussammat* A N a collateral in the fourth degree *Held* that the *Sayads* of Kharkhauda have for a very long period followed custom *Kadar Ali* v *Sultan dar Ali* (*67 P R 1878*) *Civil Appeal No 2995 of 1916* (*unpublished*) *Mir Mumtaz Ali* v *Jawad Ali* (*82 P R 1887*) *Bunyad Ali* v *Faiz Muhammad* (*173 P R 1889*) *Aman Ali* v *Mussammat Amina Begam* (*46 P R 1899*) *Mussammat Umat ul Ala* v *Mussammat Said ul Nissa* (*143 P R 1893*) *Mussammat Nasib ul Nissa* v *Mansur Ali* (*100 P W R 1909*) and *Faz ul Din* v *Aman Ali* (*143 P W R 1910*) followed *Held however* that in matters of succession they have been somewhat influenced by their personal law and have widely recognised the right of succession of females *Mir Mumtaz Ali* v *Jawad Ali* (*82 P R 1887*) *Faz ud Din* v *Aman Ali* (*143 P W R 1910*) *Mussammat Nasib ul Nissa* v *Mansur Ali* (*100 P W R 1909*) and Civil Appeal No 2295 of 1916 (unpublished) followed *Held also* that on the death of a male holder the whole of his estate vests in the widow and as the husband s life is assumed to continue in her person succession does not open out until the date of the death of the widow Both *Mussammat* N N and A A were therefore respectively the daughter and son

CUSTOM—*contd*

of a predeceased brother and sister The brother having admittedly a priority over a sister the rights of *Mussammat* N N a brother's daughter were superior to those of A A a sister's son It was also proved that the same would have been the result if A A had been the son of a surviving sister *Moni Ram* v *Keri Kolitani* (*I L R 5 Calc* 6 *I C*) *Jarli Ammal* v *Narcyarasami* (*I L R 29 Mad 654 P C*) and *Mussammat Phaja* v *Muhammad* (*15 Indian Cases 704*) followed *Held further* that the right of representation exists in favour of females among the *Sayeds* of Kharkhauda at least in the absence of near male heirs *Mir Mumta Ali* v *Jawad Ali* (*8 P P 188*) *Fazal ud Din* v *Aman Ali* (*143 P W P 1910*) *Mussammat Nazib ul Nisa* v *Sanaur Ali* (*10 P B P 1909*) and Civil Appeal No 2995 of 1916 (unpublished) followed *Held also* that as a daughter who succeeds by the right of representation has in every way the rights of a male *Mussammat* N N had the right to contest alienations made by the widow of B A *Maqsud ul Nisa* v *Kani Johra* (*135 P P 1908*) per Robertson J *Mir Mumta Ali* v *Jawad Ali* (*87 P R 1884*) and *Fazal ud Din* v *Aman Ali* (*143 P W P 1910*) followed *Held further* that under O XX r 12 Civil Procedure Code a decree should have been passed in favour of *Mussammat* N N directing an enquiry as to the rent or *mesne* profits from the institution of the suit until the delivery of possession to the decree holder *Must* NASIB UN NISA v *Mst* AMADI UN NISA I L P 2 Lah. 383

——————— *Self acquired property —collaterals in 9th degree or daughters—Gaur Brahmans of Thanesar Tahsil district Karnal—Village deserted and after 25 years re acquired by some of the descendants of the common ancestor—whether land remains ancestral—*Riwaj i am—*costs* The plaintiffs collaterals in the 9th degree of one *M* brought the present suit for a declaration that two gifts made by the widow of *M* of land inherited partly from husband and partly from one *Mst* S in favour of her two daughters and the son of a brother in law of *M t* S should not affect their reversionary rights It appeared that the village in which the land was situate was deserted about the year A D 1800 and the village had then passed out of cultivation and that 25 years later some of the original proprietors or their descendants returned and re founded the village and brought the land again under cultivation The entries in the *Riwaj i am* of the *tahsil* were to the effect that daughters could not inherit their father's property *Held* that the land became the self acquired property of the persons who returned to the village 25 years after its desertion and re acquired it and could no longer be considered to be ancestral property of the descendants (such as plaintiffs) of the common ancestor who may have originally possessed the whole village *Held also* that the burden of proof that by custom among Gaur Brahmans of *Mauza* Chhapri in the Thanesar *Tahsil* of the Karnal District collaterals in the 9th degree exclude daughters in succession to non ancestral property rested on the plaintiffs and was not shifted on to the defendants by entries in the *Riwaj i am* which were quite opposed to all principles of customary law and unsupported by instances *Abdul Karim* v *Sahib Jan* (*5 P P 1908*) *Bhola* v *Man Singh* (*56 P P 1908*) *Wazira* v *Mst Maryan* (*84 P P 1917*) and *Khuda Bakhsh* v *Fateh Khatun* (*13 P P 1919*) followed also Rattigan's Digest of Customary Law article 23 *Beg* v *Allah Ditta* (*45 P P 1917 P C*) distinguished *Held further* that the mere entries in the *Riwaj i am* in favour of the plaintiffs case were not a sufficient reason for holding that the defendants should not be allowed their costs MANOHAR v *Mst* NAURI I L R 2 Lah 366

——————— *Whether land gifted to a stranger reverts to the line of the donor on death of donee without lineal heirs* The plaintiff a *Jat* sued for redemption of land which was mortgaged by M L a *Khatri* to the second defendant C D Plaintiff asserted that the land had been gifted by his father to M L and that as the latter died without leaving any lineal heirs the land reverted to the line of the donor by Customary Law *Held* that the rule of reversion to the donor's line on death of the donee without lineal heirs under Customary Law is not applicable where the donee is a stranger to the donor *Nihala* v *Rahmatullah* (*133 P R 1908*) per Lal Chand J and *Ahmad Hussain* v *Rup Indar Singh* (*14 Indian Cases 73*) followed *Sita Ram* v *Raja Ram* (*12 P R 1892 F B*) and *Barkat Ali* v *Jhandu* (*107 P P 1904*) distinguished MULA SINGH v AMIN CHAND I L R 2 Lah 283

——————— Ancestral property—Ferozpore District—*Lessee not carrying out conditions of lease—Government afterwards granting proprietary rights to the sons of the lessee* One *C* was one of the lessees under Government whose position is described in paragraph 258 *et seq* of Wilson's Settlement Report of the Ferozepore District 1879 83 He had to fulfil certain conditions in order to preserve even his lease He died in 1875 without fulfilling these conditions and the Government was legally entitled to evict him Later in 1883 Government decided to grant proprietary rights to such lessees and these rights were actually granted to *C's* sons *Held* that the land was not ancestral property in the hand of the sons of *C* *Bhuman* v *Aziz* (*85 P W P 1909*) followed *Raj Kishore Das* v *Jaint Singh* (*I L R 36 All 387*) referred to HARJIT CHAND MAL I L P 2 Lah 195

——————— Unreasonable or Uncertain—*Inundated lands—Remission of rent* Where in a suit for rent the tenants set up a custom of total remission of rent on the ground that a certain portion of the land was subject to inundation resulting in the destruction of crops the extent of such destruction not being specific and that crops were so destroyed during one of the years for which rent was claimed *Held* that such custom was both unreasonable and uncertain and consequently unenforceable in law *Tyson* v *Smith 9 A & E 406* *Mahamaya Debi* v *Haridas Haldar I L R 42 Calc 455* *Salisbury Gladstone 9 H L C 692* referred to SHIBANARAIN MOOKERJEE v BHUTNATH GUCHAIT (191) I L P 45 Calc 475

CUSTOM OF TRADE

See CONTRACT ACT (IX OF 1872) 118 I L R 41 Bom 518

——————— proof of—

See SCHOOL MASTER I L P 44 Calc 917

CUSTOM OR USAGE

——— *Facts proving existence of custom or usage whether questions of law—Actual proof thereof question of fact—Second Appeal* The question whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law which may be discussed in second appeal the question whether such a state of facts has been proved by the evidence is merely a question of fact *Kakarla Abbayya* v *Raja Venkata Papayya Rao I L R 29 Mad 24* dissented from KAILASH CHANDRA DATTA v PADMAKISORE ROY (1917) **I L R 45 Calc 285**

CUSTOMARY LAW

——— After customary law has been stereotyped in the form of a statute in which there is no provision saving the custom it is not open to the Court to give effect to custom TANI ORAON v LEDA ORAON **1 Pat L J 225**

——— *In Kuzhikanam lease—Compensation for improvements—Right of tenant to possession until payment—Possession by tenant after period of lease nature of—Possession if adverse Notice to quit if necessary—Customary law of Malabar—Malabar Compensation for Tenants Improvements Act (Madras Act I of 1900) principles of if applicable* Under the customary law of South Kanara a *Kuzhikanam* lessee is as in Malabar entitled to remain in possession of the holding after the expiry of the period fixed in the lease until he is paid the value of the improvements consequently he does not acquire title by adverse possession by remaining in possession of the lands for more than twelve years after the expiry of the lease *Srinivasa Pillai* v *Venkatammal 24 Mad L J 296* and *Kummatha Vittil Kunhi Kuthalai Haji* v *Reverend Antoni Goveas (1913) Mad W N 339* referred to *Subbaraelu Ramiah* v *Gundala Ramanna I L R 33 Mad 260* distinguished A *Kuzhikanam* lessee who remains on the land after the period fixed in the lease awaiting the payment of compensation for improvements is not holding over as a tenant and in the absence of evidence of a sent by the landlord to the continuance of the tenancy is not entitled to a notice to quit S 5 of the Malabar Tenants Improvements Act (I of 1900) only embodies the customary law of Malabar and South Kanara THEMA v KUNHI PATHUMMA (1917) **I L R 41 Mad 118**

CUSTOMARY LAW OF THE PUNJAB

See CUSTOM **I L R 39 Calc 418**

CUSTOMARY RIGHT

See GROVE LAW **I L R 42 All 634**

See MAHOMEDAN LAW—PRE EMPTION **I L R 39 Calc 915**

——— to cut and appropriate trees—

See INCUMBRANCE **I L R 37 Calc 322**

CUTCHI MEMONS

See MAHOMEDAN LAW—MAINTENANCE **I L R 37 Bom 71**

See WILL **I L R 43 Bom 641**

——— *Custom—Onus of proof—Expert evidence in proof of custom—Opinions of practising lawyers no relevant—Opinion and belief of leading members of community influence by judicial and professional prepossessions not relevant—Custom must be established by deliberate acts of volition—The Indian Evidence Act (I of 1872) ss 32 cl (3) and 48—Extent to which Cutchi Memons are governed by Hindu law—Cutchi Memons governed by the Hindu law of succession and inheritance as applying to an intestate separated Hindu possessed of self acquired property—The Hindu law of joint family not applicable to Cutchi Memons—No distinction between ancestral property joint family property and self acquired property—Cutchi Memons may will away entire property—Cutchi Memons wills to be interpreted according to Mahomedan and not Hindu law—Bequests in connection with Khairat i e charity work not void for vagueness—Alternative bequests in favour of charity not void as gifts conditioned in futuro—The Indian Limitation Act (IX of 1908) Art 127—Costs* A Cutchi Memon disposed of the whole of his property by will part in favour of the next of kin and part in favour of charity The provisions in favour of charity were as under I direct my executors and trustees as follows They shall out of my *punji* set apart Rs 3 00 000 (namely three lacs) and shall therewith purchase Government Promissory Loan Notes or Port Trust Bonds or they shall invest the said moneys for a short time in any of the other securities written (mentioned) in the twentieth section of the Indian Trusts Act My executors and trustees shall spend according to law the said sum or certain portions thereof in connection with some good works or charity in such manner as they may think just and proper such as Hospital Sanitarium Suvavadkhana (lying in hospital) Musafarkhana (resting house for travellers) Madrassas (schools) Scholarships Dharamshalas Medical Dispensaries &c (i e) in connection with any such Khairats that is charity work that is in connection with such different works of charity But the said sum shall not be expended in any other way or my heirs or the residuary legatee whom I have appointed in this my will shall not have any right to the same I give full authority to my executors and trustees in that behalf

Should no son be born to me agreeably to what is written above or should (one) be born and should he die without leaving a son or heirs (daughters are not included amongst heirs) then as regards my whatever *punji* that there may be left I give the whole thereof to my executors and trustees and direct them as follows They shall utilize the whole of the said *punji* or portions thereof in such manner as they in their discretion think proper in connection with the above mentioned or any other good works of Khairat (charity) and I give full authority to my executors and trustees in that behalf It was contended *inter alia* that the testator could not validly dispose of more than one third of his property by will and that the above dispositions in favour of charity were void on two grounds (a) that they were bad for uncertainty (b) that they were bad because they were conditional *Held* (i) that Cutchi Memons had acquired by custom the power of disposing of the whole of their property by will; (ii) that it was not proved in this case and never had been proved affirmatively that the Cutchi Memons had ever adopted as part of their customary law the Hindu law of the joint family as a whole or the distinction existing in that law between ancestral family and joint family and

CUTCHI MEMONS—*contd*

ll acquired property (iii) that Cutchi Memons were subject by custom to the Hindu law of succession and inheritance as it would apply to the case of an intestate separated Hindu possessed of ll acquired property and no more (iv) that the will challenged in this suit was a good and valid will in all respect and that the bequests to charity were neither void for uncertainty nor bad under the Mahomedan law as offending against the radical principle that a gift must be made in *presenti* and not conditioned *in futuro* *The Kojahs and Memons Case (1847) Perry O C 110* considered *Mahomed Sidick v Haji Ahmed I L R 10 Bom 1* dissented from *Jan Mahomed v Datu Jaffer I L R 38 Bom 449* followed and the judgment therein incorporated *Abraham v Abraham 9 Moo I A 195* *Ahmedbhoy Hubibhoy v Cassumbhoy Ahmedbhoy I L R 13 Bom 534* *Shivji Hasam v Datu Mavji Khoja 12 Bom H C R 81* *Herba v Gorbai 1? Bom H C R 294* and *Cangibai v Thavar Mulla 1 Bom H C R 71* referred to *Jalnaba v P D Sethna I L R 34 Bom 604* and *Chunilal Parvat Shankar v Bai Samrath I L R 38 Bom 399* referred to and distinguished. ADVOCATE GENERAL OF BOMBAY *v* JIMABAI (1915) **I L R 41 Bom 181**

CYPRES DOCTRINE

See CHARITABLE TRUST **I L R 48 Calc 124**

See LIMITATION ACT 1877 SCH II ART 123 **I L R 36 Bom 111**

See TRUSTEES AND MORTGAGEES POWERS ACT (XXVIII OF 1866) s 43 **I L R 35 Bom 380**

D

DACOITY

See PENAL CODE SS 390 AND 396 **I L R 2 Lah 275**

See SEARCH WITHOUT WARRANT **I L R 38 Calc 304**

——— organization to commit—

See SECURITY FOR GOOD BEHAVIOUR **I L R 46 Calc 215**

——— preparation to commit—

See MAGISTRATE **I L R 39 Calc 119**

——— *Conviction for if proper when less than five of the accused charged actually convicted—Charge of dacoity if sufficient notice of complicity with others not specified—Verdict of jury—Weight of evidence High Court if should discuss—Misdirection* Where 8 persons were each of them separately charged with dacoity but the jury acquitted four of them but found the other one guilty the evidence before them being that there were more than five persons concerned in the offence even if the four who were acquitted were not there *Held* that the charge as against each of dacoity was sufficient notice to each of the accused that they were charged with four or more others and the conviction by the jury of dacoity would import a finding that there were four or more others engaged

DACOITY—*contd*

——— preparation to commit—*contd*

with each dacoit The mere fact that the evidence was not sufficient to convict four of the accused actually charged would not in any way affect the question of the number of persons engaged It is not necessary that the charge should in such cases specify that other persons besides those convicted and acquitted took part in the dacoity or that they should be referred to in the charge Although in this case the evidence was not perhaps such as would commend itself to minds professionally trained to weigh testimony for the High Court to express any opinion on its weight would be to usurp the functions of the jury It had only to see that there had been no error of law in the proceedings and no misdirection to the jury RASHIDAZZAMAN *v* EMPEROR (1911) **15 C W N 434**

——— *Assessors — Questioning Assessors before delivery of their opinion—Charge alleging preparation to commit dacoity by assembling with masks arms and implements—Acquittal of preparation and conviction of assembling—Repugnancy in the findings effect of—Appellate Court power to alter finding of acquittal into one of conviction—Search—Irregularities in search effect of—Right of accused to urge technical points—Necessity of cross examination by accused on point when allegations of fraud and dishonesty are made—Presumption of knowledge from possession of incriminating articles—Criminal Procedure Code (Act V of 1898) ss 103 309 423—Distinction between offences of preparation and assembling—Penal Code (Act XLV of 1860) ss 399 and 402— Occupant of the place* A Judge ought not to put a long list of questions to the assessors before they have stated their own opinions and then record their answers to them He should allow them in the first instance to give their opinions in their own language and way and he may then put to them such questions as are necessary to elucidate or supplement their opinions Where the accused were charged under s 399 of the Penal Code with making preparations to commit dacoity by assembling together with masks arms and implements which might be used for that purpose and the Judge found that there had been such assembly with such articles but that there was not sufficient evidence of preparation and acquitted them under s 399 but convicted them under s 402 of the Penal Code *Held* that there was no repugnancy in his findings as though he was of opinion that the accused did not commit an offence under 399 by assembling with masks arms and implements he had found that they did assemble within the meaning of s 402 and that the discovery of these articles with the other circumstances of the case showed that the purpose of the assembly was to commit dacoity In a popular sense assembling to commit dacoity may be an act of preparation for it but a mere assembling without further preparation is not preparation within s 399 of the Penal Code Section 402 applies to mere assembling without proof of other preparation A person may not be guilty of dacoity yet guilty of preparation and not guilty of preparation yet guilty of assembling Evidence of the findings of masks, arms and implements at the place of the assembling is not necessary to constitute the s 402 but only to indicate the assembling

DACOITY—*contd*

———— preparation to commit—*contd*

Per Curiam Even if there was a repugnancy in the [illegible] finding the High Court has power to alter the finding of acquittal under s 399 of the Penal Code into one of conviction there under [illegible] the sentence *Queen Empress v J* [illegible] *I L R* [illegible] *Calc* [illegible] [illegible] *v* [illegible] *I L R* 40 *Calc* 1 3 [illegible] *v P* [illegible] *I L R* 34 *Mad* 545 [illegible] *v Emperor I L R* 35 *Mad* [illegible] and *Emperor v* [illegible] *I L R* [illegible] 115 followed [illegible] *Chandra Das v Queen Empress I L R* [illegible] [illegible] *Emperor I L R* 39 *Cal* 596 held no in point *Per* BEACHCROFT J —There is no provision in the Code justifying interference with a conviction on the ground of repugnancy in the record. Repugnancy in the verdict of a Jury in India is not by itself a sufficient ground, in view of s. 423 (2) of the Code to quash the conviction. *Per* WOODROFFE, J —A search is irregular if it is conducted in violation of the police rules relating thereto such as the omission to make at the time a note of the articles found and where found the permission of unauthorized persons to go in and out of the place searched, and the omission to send up the articles found as soon as possible to the Magistrate The exclusion of the occupant of the place during the search is not a technical but a substantial violation of the law The effect however of such irregularities is to necessitate a careful scrutiny of the evidence of search, but if notwithstanding the irregularities the Court holds that no advantage has or could have been taken of them, they have no further effect *Per* BEACHCROFT J —The spirit of [illegible] 103 requires that an option be given to the occupant of the place searched to be present at it and not that he is to be allowed to be present only on demand. The words occupant of the place refer to persons residing in, or being in charge of the place but it is desirable in practice that any person against whom an inference may be drawn from the finding of articles should be present at the search. If the *bona fide* of the search is impeached, it must be shown that the law has been ignored, and an inference against *bona fides* will not arise from the mere failure to exercise a wise discretion on the part of the officers conducting the search. *Per* WOODROFFE, J —The accused are entitled to urge any defence open to them, technical or otherwise and to have the Court's judgment on it, but (per BEACHCROFT J) the technicality must be one found in the Code and not based on peculiar rules of the English law It is not for the accused to supplement or explain [illegible] [illegible] circumstances in the prosecution case They may refer to them to [illegible] character of the evidence but if they put forward a case of fraud, or if the prosecution evidence is not ambiguous, they should cross examine the witnesses on the point [illegible] to give the prosecution an opportunity of explanation. If incriminating articles are found in a place knowledge of their being there cannot without other evidence be imputable to any one other than the occupants, nor would the presumption operate even against him if they might have been placed there without his knowledge *Per* BEACHCROFT J —When an article is found in a [illegible] house the ordinary presumption is that the owner of the house is aware of its existence provided that no other person has access to that particular place If the house is occupied by more persons than one having access to the particular place there is no presumption against them individually that they have put the article where it is found, though if it has been for a considerable time in a place to which all have frequent access it might reasonably be presumed that all were aware of its existence PANCHU CHANDRA PANDEY *v* EMPEROR (1913) I. L. R. 41 Calc. 35[illegible]

DAKORE TEMPLE.

———— Sanctuary of and Levy of fees—

See HINDU TEMPLE.

I. L. R. 44 Bom. 150

DAMAGES

See AGRADANI BRAHMIN

14 C W N 1005

See ATTACHMENT BEFORE JUDGMENT

I. L. R. 39 Mad. 952

See BOMBAY DISTRICT MUNICIPAL ACT 1901 [illegible]

I. L. R. 35 Bom. 492

See COMMON CARRIER, LIABILITIES OF

I. L. R. 38 Calc. 28

See COMPANY 14 C. W N 158

See CONTRACT I. L. R. 48 Calc. 42[illegible]

I. L. R. 42 Bom. 499

See CONTRACT ACT ss. 53 and 63

I. L. R. 43 All. 25[illegible]

See CONTRIBUTORY NEGLIGENCE

I. L. R 41 Calc. 398

See EASEMENT I. L. R. 39 Calc. 59

I. L. R. 3[illegible] Mad. 5[illegible]

I. L. R. 42 Cal. 46

See ELECTRICITY ACT (IX OF 1910) ss. 18 19 I. L. R. 39 Bom. 124

See FOREIGN CURRENCY

I. L. R. 48 Calc. 886

See INSURANCE I. L. R. 3[illegible] Bom. 153

See IRRIGATION ACT (BOMBAY), 1879

I. L. R. 38 Bom. 116

See LIQUIDATED DAMAGES.

See LOSS OF GOODS.

I. L. R 46 Calc. 55

See OWNER.

23 C. W N [illegible]

See RAILWAYS ACT (IX OF 1890) s. [illegible] (1) ( ) AND (3)

I. L. R. 43 Bom. 555

See REVENUE SALE.

I. L. R. 3[illegible] Cal. 559

See SECRETARY OF STATE.

I. L. R. 3[illegible] Mad. 55

I. L. R. 39 Mad. [illegible]31

See SPECIFIC PERFORMANCE.

I. L. R. 43 Calc. 59

See SURVEYS AND BOUNDARIES ACT s. 12.

I. L. R. 34 Mad. 108

See TORT I. L. R 42 Mad. [illegible]8

DAMAGES—*contd*

———— action for—

See TRADE MARK I L R 42 Calc 262

———— actual when necessary to support action—

See EASEMENT I L R 37 Mad. 527

———— against manager of a joint Hindu family—

See CONTRACT ACT (IX OF 1872) s 3 I L R 40 Mad 338

———— arbitrators powers to amend—

See AWARD I L R 44 Bom 780

———— ascertainment of—

See CONTRACT BREACH OF I L R 38 Mad. 801

———— assessment of—

See LIBEL I L R 37 Calc 760

See PRACTICE I L R 42 Calc 819

———— decree against father for—

See HINDU LAW—FATHER'S DEBT I L R 39 Calc 862

———— breach of Contract of marriage—

See HINDU LAW I L R 44 Bom 446

———— earnest money—Forfeiture of—

See CONTRACT (BREACH OF) I L R 38 Mad 801

———— for negligence of agent—

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 6 (e) I L R 38 Mad. 138

———— for wrongful attachment—

See APPEAL I L R 37 Calc 426

———— malice—Inference of—

See MALICIOUS PROSECUTION I L R 45 Bom 227

———— interest on—

See TRUSTEE I L R 38 Mad 71

———— measure of—

See ACTIO PERSONALIS MORITUR CUM PERSONA I L R 35 Bom 12

See CONTRACT I L R 39 Calc 568
I L R 42 Bom 224
I L R 45 Bom 129

See CONTRACT ACT (IX OF 1872) ss 39 55 63 73 I L R 37 Mad 412
s 73 I L R 41 Mad 709

See SALE OF GOODS I L R 43 Calc 305

See SALE OF GOODS ACT (56 AND 57 VICT c 71) ss 45 AND 47 I L R 34 Bom 640

See VENDOR AND PURCHASER I L R 1 Lah 380

———— principle of assessment—

See DAMAGES IN TORT I L R 36 Mad 580

———— on failure of condition precedent—

See CONTRACT I L R 44 Bom 503

DAMAGES—*contd*

———— quantum of—

See NEGLIGENCE I L R 38 Bom 553

———— remoteness of—

See DAMAGES IN ACTIONS ON TORT I L R 36 Mad 580

See SECRETARY OF STATE I L R 37 Mad 55
I L R 39 Mad 781

———— suit for wrongful dismissal of a Municipal Officer—

See DISTRICT MUNICIPAL ACT (BOM III OF 1901) ss 2 46 AND 167 I L R 39 Bom 600

———— suit for—

See CARRIERS I L R 47 Calc 1027

See CAUSE OF ACTION I L R 41 Calc 825

See INJUNCTION I L R 42 Calc 550

See LEASE I L R 40 Mad 910

See LIMITATION I L R 40 Calc 898

See MADRAS ESTATES LAND ACT (I OF 1908) s 189 I L R 39 Mad 239

See RAILWAY RECEIPT I L R 38 Bom 659

See SHAWLS I L R 39 Calc 1029

See TORT I L R 39 Mad 433

———— suit for against the Secretary of State for India—

See TORT I L R 39 Mad. 351

———— suit for by representative—

See RAILWAY COMPANY I L R 41 All 488

———— time at which should be computed—

See CONTRACT ACT (IX OF 1872) ss 39 55 63 73 I L R 37 Mad 412

———— unliquidated claim for—

See LESSOR AND LESSEE I L R 39 Mad 939

	Col.
(a) FOR BREACH OF CONTRACT	1474
(b) IN TORT	1477

(a) BREACH OF CONTRACT

1 ———— Penalty or liquidated damages —Test—*Contract breach of—Damages real but difficult to assess and prove—Stipulation in contract to pay a liquidated sum as damages for breach when reasonable to be enforced—Language used of material—Plaintiff if should be asked to prove actual damage—Contract interpretation—Language used by merchants in their trade interpretation of* Plaintiff and defendant who were partners in a business of exporting and selling tea grown upon certain estates belonging to the defendant in 1895 dissolved their partnership by a deed in which it was stipulated *inter alia* that for 10 years after the 30th July 1896 when the plaintiff took over the whole business the defendant should sell the whole or any part of the crops grown on the said estates to the plaintiff at a valuation so long as the plaintiff should to the defendant year a sum of £75 for

DAMAGES—*contd*

(b) IN TORT—*contd*

have use then *primâ facie* the *Karta* of the family is responsible But in either case it is only a presumption which may be rebutted and if the Police act on the information which they believe showing that the article found in a house is in the exclusive possession of one member of the family and the article is found in a portion of the joint family residence of which all the members of the family have the use then the head of the family is not liable to arrest merely on the ground that the article is found in a portion of the house to which all the family can resort *Queen Empress v Sangam Lal I L R 15 All 129* relied on The rules contained in what is known as the Jail Code are rules framed by the Local Government under the powers contained in the Prisons Act and subsequently sanctioned by the Governor General in Council Rules when so framed and approved have the same force as the Statute and it is not open to any person to set aside the provisions of such rules A careful and accurate record of the first information has always been considered as a matter of the highest importance by the Courts in India the object of the first information being to show what was the manner in which the occurrence was related when the case was first started *Emperor v Kamp i Kuki 11 C W N 594* referred to As the first information can be used in evidence under ss 157 and 158 of the Evidence Act to corroborate or impeach the testimony of the person lodging the first information such a document becomes valueless if drawn up by some person other than the proper informant As the first information in this case which related to a charge of criminal conspiracy at Midnapore was drawn up by a police officer employed in the Criminal Investigation Department in Calcutta and settled by an attorney *Held* that it was of no value The object of recording case diaries under s 172 Criminal Procedure Code is to enable Courts to check the method of investigation by the Police and this object was defeated in this case as the provisions of the law for recording case diaries from day to day had been deliberately disobeyed by the Police during the most important period of the investigation *Queen Empress v Mannu I L R 19 All 390* referred to PEARY MOHAN DAS *v* D WESTON (1911) **I L R 40 Calc 898**
16 C W N 145

2 ——————————— **Malicious abuse of civil process**—*If and when actionable—Decree wrongful execution under erroneous belief in its validity—Trespass actionable without proof of malice and want of reasonable cause—Want of reasonable and probable cause if question of law—Second appeal—Damages for trespass—Principle of assessment—Exemplary and nominal damages—Limitation Act (IX of 1908) if creates rights to sue* Where there has been arrest of person or seizure of property in consequence of a civil action which is unfounded vexatious and malicious an action for damages may lie against the plaintiff Whether there was reasonable or probable cause is a mixed question of fact and law and the High Court in second appeal though bound to accept the facts found is entitled to examine whether the inference drawn from those facts is legitimate If a litigant executes any form of legal process which is invalid for want of jurisdiction irregularity or any other reason and in so doing he commits any act in the nature of trespass to person or property he is liable therefor in an action of trespass it is not necessary to prove any malice or want of reasonable or probable cause Where therefore the defendant had obtained an attachment of the property of the plaintiff under an erroneous impression that he had a decree capable of execution the defendant was liable to be sued by the plaintiff for damages for trespass *Clissold v Cratchley [1910] 2 K B 244* followed Where land with standing crop on it was attached by the defendant in execution of a decree which he erroneously believed he held against the defendant but the plaintiff did not ask the direction of the Court or make any the slightest effort for the protection of the crop which in consequence deteriorated and ultimately became valueless *Held* that the attachment was not the proximate cause of the loss of the crop and the defendant could not be made liable for the value of the crop The plaintiff was also not entitled to recover the amount she had to pay to the pleader whom she employed to search the records and ascertain whether there was a valid decree against her in favour of the defendant For an act of trespass for which no blame attached to the defendant he could not be held liable to pay exemplary damages Only nominal damages (which is not necessarily small damages) should be allowed in recognition of the fact that there has been an infraction of a legal right which is actionable without proof of actual damage or harm PIARUN SINGH *v* A W N WYATT (1911)
16 C W N 540

3 ——————————— **Wrongful attachment**—*Suit for damages for—Want of reasonable and probable cause and malice must be proved—Malice what amounts to—Special damage proof of amount of* In a suit for damages for attachment before judgment the plaintiff is bound to prove want of reasonable and probable cause for applying for attachment and malice in fact The provisions of s 95 of the new Code of Civil Procedure and s 491 of the old Code which empowered Courts to award compensation when the attachment was applied for on insufficient grounds were not intended to affect the applicability of the aforesaid rule of law in regular suits brought for compensation Malice means any improper or indirect motive i e some motive other than the one which should actuate the party No hatred or enmity is required Where the motive for the attachment is not to defeat any intended fraud on the part of the debtor but to enforce speedy payment it will amount to malice The plaintiff in such a suit must prove special damage It is not necessary however to show pecuniary loss or that the plaintiff was affected in a specific manner It will be sufficient if it is shown that the allegations made against him must damage his reputation and credit It will be sufficient if the plaintiff must have sustained some damage such as the law takes notice of *Quartz Hill Gold Mining Company v Eyre 11 Q B D 674* referred to *Kumarasami Pillai v Udayar Nadan I L R 3 Mad 1 0* followed The fact that the defendant is a man of slender means ought not to be taken into consideration as a ground for reducing the amount

DAMAGES—*contd*

(*b*) IN TORT—*contd*

awardable as damages to the plaintiff SANJAPPA CHETTIAR *v* GANAPATHI GOUNDEN (191) I L R 35 Mad 598

———— for attachment before judgment—

See ATTACHMENT BEFORE JUDGEMENT I L R 39 Mad 952

4 ———— **Malicious prosecution**—*Onus of proof*—*S r e f d f pr sec tcr at e stit to n ater el I ev e r setl ro p new er c t s— u ef j r t r f complete l ntless cf his co l fntl* I laid a charge of criminal tre pa s aga in t (ho was discharged (thereupon ued I f i malicious prosecution P s d fence wa that he instituted the charge on information of his servants wl om he believed and in good faith *Held* that an *an m s i j rice* *ie* malice, canno be inferred from the mere fact that prosecution has failed and the accused has been acquitted In an action for malicious prosecution the burden of proving malice and the absence of rea onabl cause for the prosecution lies on the plaintiff The crucial point in almost all such actions is the state of mind of the prose cutor at the time he institutes the charge After the decision of the case in defendant s favour by the Appeal Court it was urged on behalf of the plaintiff upon review that the defendant should be held liable for the acts of his servants *Held* that the Court had properly refused to permit a new case to be set up at that stage A counsel who had advised the prosecutor to insti tute the charge was a competent witness C E VICTOR S CORREA *v* HENRY JOSEPH PLIRI (1909) 14 C W N 86

5 ———— **Principle of assessing**—*Dama ges too remote cannot be recovered*—*Principle of assessing damages in actions on contract com pared*—*Duty of plaint ff to take means to reduce the damag s*—*Easements Act (V of 1882) s 33* In a suit for damages sustained by the plain tiff in consequence of the defendant s obstruc tion of the plaintiff s right to way of his field owing to which the plaintiff did not cultivate his land their Lordships *held* (i) that non culti vation of the lands was too remote a con equence of the defendant s wrongful act of obstruction as the plaintiff had not shown that there were no other means of cultivating and that it was in consequence of the wrong it was not rea onably possible for him to cultivate (ii) that damages for the loss of crops could not be given but that all that he was really entitl l to was the extra cost which he would be put to for the cultivation of his land in consequence of the right of way being obstructed and (iii) *that the plaintiff was* entitled to substantial damages for interference with the evidence of his right Sedgwick on Damage paragraphs 202 and 215 referred to s 33 of the Easements Act (V of 1882) and *Brij nath Singh* v *Teias Choudry 6 C W N 197* applied *Per* CURIAM Though the rule is the same in actions on contract and in tort ei that the damages which the plaintiff is entitled to mu t result directly from the wrongful act of the defendant and that no claim can be made to damages which are only too remotely connected with it there may be differences in the applica tion to actions on tort of this ba ic principle which is common to both kinds of actions in a contract it is the duty of the plaintiff as a prudent man to take measures to reduce the damages as far as possible for a breach of contract consi ts in the defend nt s failure to do a certain act that he is bound to do and it would be quite open to the plaintiff to take other measures to obtain the re ult he expected from the defendant s performance a tort on the other hand may con ist in the def ndant s failing to do an act which he is bound to do or in doing one which he ou ht not to do or in preventing the plaintiff from doing an act which he is entitled to do KARIBASVANA GOWD *v* VEERABHADRAPPA (1913) I L R 36 Mad. 580

6 ———— **Grounds of interference by the Court of Appeal**—*Co ts order for if can be interfered with by the Co rt of Appeal*—*Cases where a succesful l tigant can be deprived of his co ts*—*Civil Procedure Code (Act V of 1908) s 98 if applicable to Letters Patent Appeals* *Per* SANDERSON C J —The Court of Appeal should not interfere unless the decision of the trial Judge on a question of damages appears to be clearly erroneous *The Englishman v Lala Lajpat Rai I L R 37 Calc 760 s c 14 C W N 715 (1910)* approved The costs were in the discretion of the Judge Such discretion must of course be a judicial discretion to be exercised or legal principles not by chance medley nor by caprice nor in temper Dictum of Lord Coleridge C J in *Huxley v West London Ex Ry Company 17 Q B D 373 at p 376 (1886)* approved The trial Judge should not have taken into consideration matters which must involve speculation on his part as to the attitude of the respective parties Principles on which a successful litigant should be deprived of his cost discussed *Jones* v *Curling 13 Q B D 262 at p 268 (1884)* approved Every thing which increases the litigation and the costs and which places on the defendant a burden which *he ought not to bear in the litigation is a perfectly* good cause for depriving the plaintiff of costs *Huxley* v *West London Extension Railway Com pany 14 A C 26 at p 39 (1889)* approved *Per* WOODROFFE J —The English cases which dealt with the question of revision of damages by the Court of Appeal have no application in this country where the jury system does not prevail Here the question of damages is to be dealt with by the Court of Appeal as any other portion of the case *Englishman Limit d* v *Lajpat Rai I L R 37 Calc 760 s c 14 C W N 713 (1910)* followed The conduct of the plaintiff s next friend can in no way affect the damages to be paid to his infant son for actual injury and suffering There is nothing wrong in itself in claiming exem plary *damages for the Courts themselves award* such damages The ordinary rule is that costs do follow the events The Court may however direct otherwi e but under the Code (s 35) if it does so it must state its rea ons in writing This provision was enacted both to secure a proper exercise of discretion and in order that the Court of Appeal may be in a po ition to control the order and ee whether there is good cau e for departing from the gen ral rule It is not sufficient answer to say in such c se in an appeal from the judgment that the co ts are in the discre ion of the Court T pellate Court mu itself decide whethe l le sustained that is wheth quired to be stated are good the facts of the

DAMAGES—*concld*

(*b*) IN TORT—*concld*

case There are certain well known principles on which a successful party may be deprived of his general costs But where the Court purports to act on these principles it is open to the Appellate Court to enquire whether on the facts these principles have been rightly applied The Court can get no nearer to a perfect test than the enquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that costs should follow upon success Dictum of Bowen C J in *Forster* v *Farquhar* [1893] *1 Q B 564* The mere fact that the plaintiff claims more than he gets is no ground of depriving him of costs unless it is shown that the cost of the action has been increased by his claim As regards the judgment about the costs of the appeal the Judges having differed it was held that s 98 C P C was not applicable but s 36 of the Letters Patent applied and the opinion of the Chief Justice prevailed JUSTAIN HULL *v* ARTHUR FRANCIS PAULI **24 C W N 352**

———— for trespass on land—*Question of title raised in such a suit if may be tried* Although a decision on a question of title to land in a suit for damages for trespass thereto may not be conclusive the Court is not for that reason precluded from trying and deciding that question in such a suit SAHARALLI MOLLAH *v* BHOLA MOLLA (1919) **23 C W N 647**

DAMDUPAT (RULE OF)

See LIMITATION **I L R 37 Bom 326**

———— *Decree in mortgage suit between Hindus—Interest accruing after date fixed for redemption whether rule applicable to* The rule of *damdupat* applies to Hindus only so long as the relation between the parties is contractual and ceases to apply when the matter has passed from the realm of contract into that of judgment Where a decree has been passed on a mortgage the rule does not apply to the interest accruing after the date fixed for redemption *In the matter of Hari Lall Mullick I L R 33 Calc 1269* followed *Ram Kanye Adhikary* v *Cally Churn Dey I L R 21 Calc 840* not followed *Sundar Koer* v *Sham Krishen I L R 34 Calc 150 L R 34 I A 9* referred to NANDA LAL ROY *v* DHIRENDRA NATH CHAKRAVARTI (1913) **I L R 40 Calc 710**

———— *Damdupat application of the rule of—Mortgage—Assignment of mortgage—Transfer of Property Act (IV of 1882) s 2 (d)* The fact that the person entitled to sue on a mortgage happens by assignment to be a Parsee cannot affect the (Hindu) mortgagor's right to claim the advantage of the rule of *damdupat* if it existed when the mortgage was entered into It is not proper to infer that because it has been expressly enacted that nothing in Chapter II of the Transfer of Property Act (IV of 1882) shall be deemed to affect any rule of Hindu Law the Legislature has deprived a Hindu mortgagor of the protection afforded him by the rule of *damdupat* The right of a mortgagee to sue for his principal and interest arising from a contract must be taken to be made subject to the usages and customs of the contracting parties JEEWANBAI *v* MANORDAS (1910) **I L R 35 Bom. 199**

DAMDUPAT (RULE OF)—*contd*

———— *Mortgage between Hindus whether the rule of Damdupat applies to—Transfer of Property Act (IV of 1882) s 4—Contract Act (IX of 1872) s 37* There is nothing in the Transfer of Property Act (read with the Contract Act) to preclude the rule of *damdupat* from applying to mortgages between Hindus *Madhwa Sidhanta Onahini Nidhi* v *Venkataramanjulu Naidu I L R 26 Mad 662* not followed *In the matter of Hari Lall Mullick I L R 33 Calc 1269 Nanda Lal Roy* v *Dhirendra Nath Chakravarti I L R 40 Calc 710 Jeewanbai* v *Manordas Lachmondas I L R 35 Bom 199* and *Sundarabai* v *Jayavant I L R 24 Bom 111* referred to KUNJA LAL BANERJI *v* NAPSAMBI DEBI (1915) **I L R 42 Calc 826**

DANABANDI AND BATAI SYSTEMS OF TENANCY

———— *Presumption as to contract of tenancy from contract of tenancy in respect of adjoining lands—Record of rights published after institution of suit if can be relied on—Non attendance of landlord at apportionment—Liability of tenant if he appropriates whole of crops—Bengal Tenancy Act (VIII of 1885) s 69* The plaintiff claimed that certain lands were held by the tenants under the *danabandi* system but the Courts below found that they were held under the *batai* system In two other suits against the tenants of the same village the Court found that the tenants held under the *danabandi* system There was no proof that there was an invariable custom prevalent in the village The lower Appellate Court in deciding the case relied upon the record of rights which was finally published long after the institution of the suit *Held* that the mere circumstance that the contract of tenancy in respect of some land was of one description does not necessarily indicate that the contract was of the same description in respect of different lands in the same village held by other tenants and the Court was free to conclude upon the evidence that the lands were held under the *batai* system That the lower Appellate Court did not act improperly in relying on the record of rights KAMALESHWARI PERSHAD SINGH *v* KANHABI SINGH (1913) **17 C W N 1159**

DANCING WOMAN

———— illegitimate son of Sudra by—

See HINDU LAW **I L R 39 Mad. 136**

DANDA

See HINDU LAW—DEBT **14 C W N 659**

DANDIDARI RIGHT

———— *Dandidari right if a monopoly or a legal right to be recognised by Courts of Justice—Such right if personal or if can be transferred—Transfer if must be by registered instrument—Estoppel application of rule of to employés and contracting parties—Assignee of right having enjoyed profit if can deny assignor's title* At a public auction held at the instance of Government the plaintiff as the highest bidder purchased the road side lands on the bank of a river together with the *dandidari* right for one year It appeared from the lease granted to him by Government that he became entitled to occupy the lands for one year and to exercise the calling of a broker in

DANDIDARI RIGHT—*contd*

the market held thereon during that period The defendants took an assignment from the plaintiff of the *dandidari* right and they commenced at once to exercise the calling of a broker in the market place by virtue of the Government license which was made over to them but they withheld payment of the money they had agreed to pay The plaintiff sued for recovery of the consideration with damages for unlawful detention of his money *Held* that the term *dandidar* literally means a measurer and is applied to signify a broker who negotiates the sale of paddy and other produce in a market place and receives as remuneration for his service a commission from the seller and the buyer who may choose to employ him That the contention of the defendants that the alleged *dandidari* right tended to create a monopoly and should not be recognised as a legal right by any Court of Justice was untenable The principle that every arrangement which places a restriction upon a man's right to exercise his trade or calling tends to create a monopoly and is void as against public policy has no application to the present case There is nothing illegal or contrary to public policy in Government allowing a market to be held on its land and taking measures to restrict the admission of brokers That the *dandidari* right was not a right personal to the grantor from Government and could be transferred The very fact that the right was granted by Government to the highest bidder affords some indication that the personal element does not enter into consideration when the grant is made That the *dandidari* right was transferable only by a registered instrument That the defendants were at least licensees under the plaintiff and as they had exercised their calling without interruption or interference they at any rate were not entitled to contend that the plaintiff had no title or that they themselves had acquired none from him LAKHAN JENA *v* ARJUN NAIK (1914) **18 C W N 1194**

DANGEROUS ARTICLE

See GAS COMPANY **14 C W N 158**

DARBAR SAHIB—

See GOLDEN TEMPLE AMRITSAR **I L R 1 Lah 511 540**

DARBHANGA RAJ

See BABUANA GRANT

See HINDU LAW—CUSTOM **I L R 42 Calc 582**

DARPATNI (TENURE)

See LEASE **I L R 45 Calc 940**

DASTURAT

See MALIKANA **15 C W N 1029**

——— *Nature of the right of—Immoveable property interest in—Circumstances justifying inference as to the existence and lawful origin of—Limitation—Limitation Act (XV of 1877) Sch II Art 131— Refusal meaning of* The plaintiffs sued for a declaration of their right to recover certain sums of money as *dasturat* specified annual rates and for recovery of the sums as a charge on properties in the possession of the defendants It appeared that the plaintiffs claim for *dasturat* was asserted and allowed in Courts of law since 1795 sometimes in spite of opposition on other occasions without opposition *Held* that the inference drawn by the lower Courts that the right alleged by the plaintiffs did exist and had a lawful origin was legitimate and the plaintiffs had an enforceable right to realise the sums claimed as *dasturat* from the defendants That Art 131 of the Second Schedule of the Limitation Act of 1877 was applicable to the case That refusal in Art 131 plainly implies a previous demand and as the plaintiffs asserted that there had been no demand and refusal within twelve years of the commencement of the present suit the burden was cast upon the defendants to establish that the plaintiffs did make a demand and that the defendants did refuse and as there was no evidence of this demand and refusal the suit was *primâ facie* not barred under Art 131 That the right claimed was clearly in the nature of an interest in immoveable property being a right vested in the proprietors of a specified estate to receive certain sums of money periodically from proprietors of other estates in their character as such Under the Limitation Act of 1859 a suit to recover such an interest would have to be brought within twelve years from the date when the cause of action arose upon the denial or refusal of the right and as it was not shown that there was any refusal while the Act of 1859 was in force it must be held that the right was not extinguished before the Limitation Act of 1871 came into force HEM CHANDRA CHAUDHURI *v* ATUL CHANDRA CHAKRABARTTY (1913) **19 C W N 386**

DASTUR DEHI

See PRE EMPTION **I L R 35 All 478**

DATE OF BIRTH

See EVIDENCE **L R 43 I A 256**

DATE OF SALE

See SALE **I L R 45 Calc 151**

DATTAKA CHANDRIKA

See ADOPTION **26 C W N 1**

——— **s 5 paras 24 & 25—**

See HINDU LAW—PARTITION **I L R 40 Bom 270**

DAUGHTER

See HINDU LAW—DAUGHTERS ESTATE **I L R 35 All 481**
38 All 111

See HINDU LAW—INHERITANCE **I L R 38 Mad 1144**
I L R 43 Calc 30

——— **bequest to—**

See HINDU LAW—WILL **I L R 41 Calc 1007**

See WILL **I L R 44 Calc 181**

——— **marriage of—**

See **I L R 38 Calc 327**

DAUGHTER—*contd*

——— succession of—

See CUSTOM I L R 44 Calc 749
I L R 1 Lah 284 365 464
I L R 2 Lah 368

——— suit by for possession of father's estate—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 2 CL (11) O XXII R 1
I L R 39 Mad 382

——— *Hindu Law—Mitakshara—Daughters inheriting property from their father—Shares separate and absolute—Tenants in common* In the Bombay Presidency a daughter taking property from her father inherits it as *stridhan* and daughters take their shares separately and absolutely When the property so inherited is not physically divided it is held by the daughters as tenants in common and not as joint tenants and there is no survivorship between them In cases affecting inheritance the rule is to adhere to the decisions of the Court to which the district from which the case arose is subject VITHAPPA *v* SAVITRI (1910)
I L R 34 Bom 510

DAUGHTER IN-LAW

——— adoption by—

See HINDU LAW I L R 44 Bom 508

——— right to maintenance—

See HINDU LAW—MAINTENANCE
I L R 37 Mad 396

DAUGHTER'S SONS

See CUSTOM (ADOPTION)
I L R 2 Lah 193

See WILL I L R 38 Bom 697

——— Adoption of, Khatris of Amritsar—

See CUSTOM (ADOPTION)
I L R 2 Lah 69

——— of the great grandson of the great-great-grandfather—

See HINDU LAW—STRIDHAN
I L R 40 Calc 82

DAYABHAGA

See HINDU LAW—AYAUTUKA STRIDHAN
I L R 37 Calc 86

See HINDU LAW—INHERITANCE
I L R 38 Calc 603
I L R 48 Calc 643

See HINDU LAW—SUCCESSION
I L R 43 Calc 1

See HINDU LAW—MINOR
26 C W N 954

——— It governs Koches of Assam—

See HINDU LAW 24 C W N 173

DEAD LOCK.

See COMPANY I L R 47 Calc 654

DEAF AND DUMB ACCUSED

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 341
I L R 40 Bom. 598

DEATH

——— of pleader in personal action—

See PERSONAL ACTION
I L P 2 Lah 189

——— presumption of—

See LIMITATION ACT (IX OF 1908) ART 140 141 I L R 40 Bom 239

——— sentence of—

See PRIVY COUNCIL PRACTICE OF
I L R 42 Calc 739

——— Presumption of—*Evidence Act (I of 1872) s 108—Person not heard of for seven years—Time as to when presumption arises—Onus of proof* When a person is not heard of for seven years the presumption that arises under s 108 of the Evidence Act is that he is dead at the time when the question is raised and not at some antecedent date *Fani Bhushan Banerjee v Surjya Kanta Ray Chowdhry I L R 35 Calc 25* followed. *Moolla Kassim v Moolla Abdul Rahim I L R 33 Calc 173* referred to NARKI *v* LAL SAHU (1909)
I L R 37 Calc 103

See ALSO EVIDENCE ACT ss 107 AND 108
37 Mad 443

DEBIT

See MORTGAGE I L R 39 Mad 419

DEBT

See CIVIL PROCEDURE CODE (1908) O XXI RR 46 and
I L R 37 Mad 51

See HINDU LAW—DEBT
I L R 39 Bom 113
I L R 36 Bom 68

See HINDU LAW—JOINT FAMILY
I L R 34 Bom 72
I L R 43 Bom 17

See PAYMENT TOWARDS DEBT

See SUCCESSION CERTIFICATE
I L R 38 Calc 182

See TIME BARRED DEBT
I L R 42 Bom 444

——— attachment of—

See LIMITATION ACT (IX OF 1908) SCH I ARTS 29 62 AND 120
I L R 38 Mad. 972

——— contracted in Singapore—

See BANKRUPTCY
I L R 40 Mad. 581

——— extinguishment of—

See MORTGAGE I L R 38 Calc 342

——— part of—

See SUCCESSION CERTIFICATE
I L R 42 Calc 10

——— payable in kind—

See INTEREST ACT (XXXII OF 1839)
I L R 38 Mad 464

DEBT—*contd*

———— son s obligation to pay—

See Hindu Law—Debt

I L R 41 Mad 136

I. L. R 41 Bom 341

———— () e — 4 ij ne l —*Transfer of Property Act (IV o 188) s 55 sub-s (4)* There i n autl ority for the conten tion that a charg a h as tl or mention d in s [?] eal s (4) of tl e Tran f r of Iroj rty Act is merely a personal ri ht which cannot be trans ferred to an a igne The l l t could undoubt edly be tran ferred and ther is no rea on why the security for the debt should not al o be trans ferred with it *Ha i Pii v De apat Singh I L P 9 Cale 16* and *Moti l v Plaguin Di I L I 31 All 443* distinguished Sheo Nandan Lal v Zainal Abdin (1911)

I L P 42 Calc 849

———— *Hypo ece of debt has the right to s e for the deb l yp tl ecated—Tra fe of Property Act (IV of 1882) s 131* The hold r of a charge on a debt due to his debtor is a transferee of an actionable claim and entitled to re over the debt from the tran feror s debtor S 134 of the Transfer of Property Act shows that the mortgagee is a transferee and entitled to sue in his own name for tl e recovery of the original debt Where the original creditor is added as a party the chargeholder though not entitled to the whole amount may recover the amount Pamasami Pillai v Muthu Chetti (1910)

I L R 34 Mad 53

———— *carrying interest—Payment without specific appropriation—Creditor s right to apply payment in di charge of interest first* Where a debt is due which carries interest and moneys are received without a definite appro priation on the one side or on tl e other the rule which is well established in ordinary cases is that the money is first applied in payment of interest and then when hat is satisfied in payment of the capital Meka Venkatadri Appu Row v Raja P A Row 26 C W N 33

———— *Due with inter st—Indefi it payment—Right of creditor to appropriate towards interest—Position when debtor makes specific appropriation—Entry in creditor s bool as evid nce of acceptance of d btor s appropriation* A creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor to the payment of interest A debtor might in making a payment stipulate that it was to be applied only to principal If he did so the creditor need not accept the payment on the e terms but th n he must give bacl the money or cheque by which the money was proffered P P Sett Nemichand v Sett Iadha Kishen

26 C W N 153

DEBTOR

See Embarrassment

I L R 42 Calc 652

See Mortgage 23 C W N 817

See Provincial Insolvency Act (III of 1907) s 31 I L. R 37 All. 383

DEBTOR—*contd*

———— part payment by literate—

See Presidency Small Cause Courts Act (XV of 1882) s 69

I L R 38 Mad 438

———— rights of surety against—

See Negotiable Instruments Act (XXVI of 1881) ss 30 47 59 74 and 94 I L R 39 Mad 965

See Insolvency I L R 44 Calc 535

DEBTOR AND CREDITOR

See Insolvency I L R 44 Calc 899

See Transfer of Property Act (IV of 1882) s 53 I L R 43 Calc 521

———— *Acknowledgment of deb t r s liability by another and acceptance of same by creditor—Rights of creditor—Novation—Con sideration —Administration of justice in Courts in India on general principles of equity and justice —Contract Act (IX of 1872) ss 2 (d) and 62* Where the tran feree of a debtor s liability has acknowledged his obligation to the creditor for the debt to be paid by him und r the provisions of the registered instrument conveying to him all the moveable and immoveable properties of the original debtor and the acknowledgment was communicated to the creditor and accepted by him *Held first* that the arrangement between the creditor and the transferee did not amount to a *novat on* within the meaning of s 62 of the Contract Act *secondly* that the obligation under taken by the transferee was for and intended to be for the benefit of the creditor and *lastly* that the creditor is entitled to sue the tran feree on the registered instrument *Tweddle v Atkinson 1 B & S 393 121 E R 762* is inapplicable in British Courts in India *Khwaja Muhammad Khan v Husaini Begam I L R 32 All 410 I R 37 I A 152 Gregory and Parker v Williams 3 Mer 582 36 E R 224 Touche v Metropolitan Railway Warehousing Company L R 6 Ch App 671* and *Gandy v Gandy 30 Ch D 57* referred to The definition of consideration in the Indian Contract Act is wider than the require ment of the English law The aim of the mofussil Courts of justice in British India is to do complete justice in one suit according to the general prin ciples of justice equity and good conscience *Rambux v Chittangeo Modoosoodhun Paul Chowdhry B L R Sup Vol 675 7 W R 377* referred to Debnarayan Dutt v Chunilal Ghose (1913) I L. R 41 Calc 137

———— *Creditor an alien enemy firm—Interest on debt—Debtor not entitled to claim suspension of interest from the date of outbreak of war to the date when the enemy firm obtains a license to trade* Where a person ind bted to an alien enemy had paid interest in respect of a transaction entered into befo e the outbreak of hostilities and sought a refund of the amount paid for the period between the outbreak of hostilities and the date of a license to trade obtained by the enemy firm *Held* following the opinion expres ed in *Hugh Stevenson and Sons v Aktie ge sellschaft fur Cartonnag n Ind st ie [1918] A C 239* that he was not entitled to such refund as there was no suspen ion of interest in respect of such tran actions during that period Valli ed v Berthold Peip (1919) 44 Bom. 1

DECREE—*contd*

See TRANSFER OF PROPERTY ACT—
s 85 I L R 34 Bom 354
ss 88 89 I L R 40 Bom 321

——— after adverse possession—
See LIMITATION I L R 44 Bom 934

——— against a deceased p rson—
See CIVIL PROCEDURE CODE (1908) O XXI R 7 I L R 40 All 423

——— against a company before liquidation—
See COMPANIES ACT (VII OF 1913) s 207 I L R 38 All 407

——— against a father—
See HINDU LAW—JOINT FAMILY I L R 43 Bom 17

——— against recorded tenant effect of—
See LANDLORD AND TENANT I L R 37 Calc 75

——— against Talukdar—
See GUJARAT TALUKDARS ACT (BOM ACT VI OF 1888) s 29E I L R 43 Bom 44

——— against widow for husband's debt—
See HINDU LAW—WIDOW I L R 39 Mad 565

——— against wife—
See RESTITUTION OF CONJUGAL RIGHTS I L R 44 Bom 454

——— alteration of—
See PRIVY COUNCIL PR CTICE I L R 37 Calc 623 649

——— as ignment of—
See SPECIFIC PERFORMANCE I L R 43 Calc 990

——— based on perjured evidence—
See FRAUD I L R 37 All 535

——— by instalments—
See CIVIL PROCEDURE CODE 1908 O XXXIV R 14 I L R 44 Bom 981

——— by mutual consent—
See HUSBAND AND WIFE I L R 38 Calc 629

——— conditional on money being paid into Court—
See EXECUTION OF DECREE I L R 39 All 193

——— construction of—
See CIVIL PROCEDURE CODE (1908 O XXXIV RR 4 5 AND 10 I L R 40 All 109
See EXECUTION OF DECREE I L R 37 All 97

——— execution—Claim to property—
See ATTACHMENT I L R 45 Bom 1020

——— ex pa te—
S CIVIL PROCEDURE CODE 1908 ss 4 AND 141 I L R 44 Bom. 702

DECREE—*contd*

——— ex parte—*contd*
s 148 O IX r 13 I L R 36 All. 77
See EX PARTE DECREE
See PROVINCIAL SMALL CAUSES ACT 1887 s 17 I L R 43 All 438

——— extension of time for payment limited by—
See CIVIL PROCEDURE CODE 1908 148 151 O XXXIV R 8 I L R 42 All 635
— I L R 43 All 2

——— for balance—
See MORTGAGE I L R 47 Calc 370

——— for costs—
See CONTRIBUTION I L R 32 All 585

——— for joint possession—
See HINDU LAW—HUSBAND AND WIFE I L R 38 Mad 1036

——— for less than amount claimed—
See CIVIL PROCEDURE CODE (1908) O XXXIII RR 10 AND 11 I L R 38 All 469

——— for money—
See EXECUTION OF DECREE I L R 39 Calc 298
See EASEMENT I L R 39 Calc 59
See LANDLORD AND TENANT I L R 37 Calc 75

——— for ord r of abatement of suit—
See CIVIL PROCEDURE CODE 1908 O XXII RR 3 5 9 I L R 1 Lah 493

——— for redemption—
See CIVIL PROCEDURE CODE (ACT V OF 1908) ss 11 47 I L R 42 Bom 246

——— for re titution of conjugal rights—
See CIVIL PROCEDURE CODE 1908 O XXI R 33 I L R 44 Bom 972

——— for sale—
See ESTOPPEL I L R 48 Calc 591
See MORTGAGE I L R 37 All 309
47 Calc 370 662

——— in preemption case—
See PRE EMPTION DECREE I L R 2 Lah 281

——— form of—
See CIVIL PROCEDURE CODE (1908)—
O XIII R 7 I L R 43 All. 318
O XXI R 35 I L R 34 All 150
See HINDU LAW—ALIENATION I L R 40 Calc 966
See HINDU LAW—JOINT FAMILY I L R 37 Mad. 435
See MORTGAGE I L R 36 All 36 & 123
I L R. 40 Calc 378
I L R 38 Bom. 24

DECREE—*contd*

——— in terms of award—

See CIVIL PROCEDURE CODE 1882 s 443 I L R 44 Bom 202

——— knowledge of—

See SUBSTITUTED SERVICE I L R 38 Calc 394

——— mistake whether a ground for altering—

See RES JUDICATA 1 Pat L J 313

——— modifying decree of Lower Court—

See CIVIL PROCEDURE CODE 1908 s 110 I L R 43 All 220

——— modification of after appeal—

See PRACTICE I L R 37 Calc 548

——— mortgage suit—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 47 O XXII R 10 I L R 39 Mad 488

——— mortgage of—

See MORTGAGE I L R 33 Mad 429

——— nature of—

See LIMITATION ACT (IX OF 1908) ss 132 AND 75 I L R 39 Mad 981

——— of Appellate Court—

See MORTGAGE I L R 39 Calc 925

——— of Revenue Court—

See PUNJAB LAND REVENUE ACT 188 s 117 I L R 1 Lah 223

——— of Small Cause Court—

See AMENDMENT OF DECREE I L R 1 Lah 342

——— on compromise—

See COMPROMISE DECREE I L R 1 Lah 344

——— part assignment of—

See CIVIL PROCEDURE CODE 1908 O XXI R 16 I L R 35 All 204

——— passed in ignorance of the death of one of the respondents—

See APPEAL PARTIES TO AN I L R 39 Mad 386

——— payable by instalments—

See LIMITATION ACT (IX OF 1908) SCH I ART 18 (7) I L R 39 All 230

——— payment or adjustment of—

See CIVIL PROCEDURE CODE 1908 O XXI R I L R 46 Bom 91

——— power to alter—

See LIMITATION I L R 44 Calc 759

——— reversed in appeal—

See ASSIGNEE OF A MONEY DECREE I L R 38 Mad 36

——— revivor of—

See CIVIL PROCEDURE CODE 188 s 44 14 C W N 257

See LIMITATION ACT (IX OF 1908) SCH I ART 183 I L R 40 Mad 1127

——— satisfaction of—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 257A I L R 38 Bom 219

——— security for performance of—

See CIVIL PROCEDURE CODE (1908) s 145 I L R 39 All 225

——— setting aside of—

See JURISDICTION L R 46 I A 140

See MISTAKE I L R 43 Calc 217

——— suit on—

See EXECUTOR DE SON TORT LIABILITY AS I L R 33 Mad 423

——— transfer of—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 47 AND 50 I L R 38 Mad 1076

s 48 O XXI I L R 35 Bom 103

s 144 I L R 40 Mad 899

See POLITICAL AGENT AT SIKKIM I L R 38 Calc 859

——— upon compromise—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 48 I L R 39 Bom 256

——— whether creates a mortgage—

See MORTGAGE I L R 2 Lah 53

——— without evidence—

See EX PARTE DECREE I L R 43 Calc 1001

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1	ALTERATION AMENDMENT ETC	1502
2	CONSTRUCTION ETC	1505
3	EXECUTION	1510
4	FORM	1515
5	TRANSFER AND ASSIGNMENT	1515

1 ALTERATION AMENDMENT AND SETTING ASIDE OF DECREE

See LIMITATION 2 Pat L J 206

See PRACTICE I L R 37 Calc 649

See PRIVY COUNCIL PRACTICE I L R 27 Calc 623

———by Court which granted it—

See AMENDMENT OF DECREE I L R 1 Lah 342

1 ——— By Subordinate Judge of his decree after it had been affirmed by the High Court on appeal—*Future interest struck out of decree not being in accordance with judgment—Amendment limited to one decree holder of joint decree on appeal to High Court—Civil Procedure Code 1882 ss 206—209* A joint and several mortgage decree passed by the court of a Subordinate Judge under s 88 of the Transfer of Property Act (IV of 188) which gave future interest on the amount decreed was affirmed on appeal by the High Court Subsequently on the application of the judgment debtor (the respondent who had deposited in the court the whole amount due under the decree including future interest) the Subordinate Judge notwithstanding objections by the decree holders, amended his decree by striking out the future [illegible] the ground that such interest was [illegible] with the

DECREE—contd

1 ALTERATION AMENDMENT AND SETTING ASIDE OF DECREE—contd

judgment on which the decree was based The decree holders (the appellant and another who was a transferee of the original decree holders) made separate applications to the High Court for revision of the Subordinate Judge's order On the application of the transferee decree holder a Bench of the High Court held that the Subordinate Judge had no jurisdiction to amend a decree which had been affirmed by the High Court and set aside his order but only so far as it affected the transferee decree holder On the appellant's application the same Bench held that under the circumstances it was not a case in which they ought to exercise their discretionary power of revision *Held* by the Judicial Committee that if the order of amendment was without jurisdiction as altering a decree after it had been amended on appeal the alteration was equally ineffectual in the appellant's case as in the case of the other decree holder and should not have been allowed to stand and the appeal was therefore decreed BRIJ NARAIN v TEJBAL BIKRAM BAHADUR (1910) **I L R 32 All 295**

2 ———— Decree of competent Court if may be challenged in a fresh suit—*Fraud practised on the Court to be proved—Ex parte mortgage decree set aside against one defendant—Re hearing fresh decree against all—Application for order absolute in respect of later decree opposed by defendants against whom previous decree not set aside—Objection overruled and decree made absolute—Suit to set aside decree on same grounds of competent—Merger of first decree in second whether there is—First decree whether impliedly set aside* Upon an application to set aside an ex parte mortgage decree passed against A R and B it was found that there was no proper service of summons upon B and upon a re hearing a new and comprehensive decree against all three defendants was passed The decree holder's application for an order absolute in respect of this decree was opposed by R on the ground that he was no party at the re hearing and that the previous decree against him never having been set aside a second decree in respect of the same matter could not be legally made against him The objections were overruled and a decree absolute was made against all the defendants R then brought the present suit for a declaration upon the same grounds that the second decree was ineffectual and void as against him *Held* that the suit was equivalent to a suit for the rescission and destruction of a former decree of a competent Court—a relief which could not be obtained except on the ground of fraud practised upon the Court which made the decree A challenge of the method of the exercise of the jurisdiction of a Court—a challenge which has reference to the merits of the case—can never in law justify a denial of the existence of such jurisdiction PARWANT PRASAD PANDE v MAHANT RAM RATAN GIR (1915) **20 C W N 35**

3 ———— Conditional decree—*Ordering a plaintiff to make a payment within a specified time—Court not competent to extend time limited—Civil Procedure Code (1908) s 114—Review of judgment—Jurisdiction* Except in the case of mortgage decrees where a Court by its decree orders a party to make a payment or take certain action within a specified time and provides that certain detrimental consequences shall follow in the event of non compliance with its order the Court itself has no jurisdiction to extend the time limited by the decree save on an application for review under s 114 read with O XLVII r 1 of the Code of Civil Procedure *Nand Ram v Bhagwan Chand 15 A L J 511* overruled. SAJJADI BEGAM v DILAWAR HUSAIN (1918) **I L R 40 All 579**

4 ———— Clerical or arithmetical mistake—*Whether successive applications for amendment of decree maintainable—Civil Procedure Code (XIV of 1882) ss 13 206—Inherent power of Court* A Court is competent to entertain successive applications for amendment of clerical or arithmetical mistake in a decree or of error arising therein from any accidental slip or omission Such applications for amendment of a decree are not barred by the rule of *res judicata* But if an application for amendment has been heard and disposed of on the merits a subsequent application may not be maintained in the same matter and it may be barred upon general principles of law The power to amend a decree so as to correct a clerical or arithmetical mistake therein or an error arising from an accidental slip or omission is inherent in every Court and may be exercised at any time the error is discovered although the Court cannot exercise such power unless the error is of the description mentioned in s 206 of the Code of 1882 LANGAT SINGH v JANKI KOER (1911) **I L R 39 Calc 265**

5 ———— Rectification of—*Suit if lies to rectify a decree in a previous suit* Where a decree was passed by a Court which had jurisdiction and authority to make it and the judgment debtors failed to adopt the remedies for correcting the decree which were open to them by law by reason of their omission to a certain the terms of the decree in time a suit to rectify the decree is not maintainable *Chand Mea v Asima Banu 10 C W N 104 Jogeswar Atha v Ganga Bishnu Ghattack 8 C W N 473 Sri Gopal v Pirthi Singh 6 C W N 889* referred to BHANDI SINGH v DOWLAT RAI (1912) **17 C W N 82**

6 ———— Decree incapable of execution—*Amendment of decree—Limitation—Time if runs from date of amendment* A decree which does not specify the reliefs granted is incapable of execution and cannot be considered as time barred and legally dead even though three years have elapsed from the date of the decree An application for execution of a decree for rent which was originally incapable of execution is not barred by limitation although presented more than three years after the date of decree but within three years from the date of amendment of the decree making it capable of execution MOHAMAYA PROSAD SINGH v ABDUL HAMID (1913) **18 C W N 266**

7 ———— Not in accordance with judgment—A decree must be self contained and must be executed as it stands If it is not in accordance with the judgment application should be made for its amendment BHIKARI SUKUL v GADADHAR RAMANUJ DAS (191) **1? C W N 87**

DECREE—*contd*

1 ALTERATION AMENDMENT AND SETTING ASIDE OF DECREE—*contd*

8 ———— **Mistake**—To justify rectification there must be very strong ground such as that the decree was obtained by some grave mistake vitiating the whole character of the decree so that its execution would amount to an abuse *Jogeswar Atta* v *Ganga Bishnu Ghattack 8 C W N 4 3* and *Chand Mea* v *Srimati Asima Banu 10 C W N 1024* referred to SREENATH DASS v GHANESHYAM NAIK (1917) **3 Pat L J 465**

9 ———— **Mortgage decree**—*Application for decree absolute after expiry of limitation and without notice to mortgagor—Suit to set aside* A suit will not lie to set aside a decree absolute merely on the ground that the application was barred by limitation and no notice given to the mortgagor BHAIJA PARWA v JANNA KHAN **3 Pat L J 478**

10 ———— **Compromise**—If a decree expiry of a compromise is inaccurate the only cause is a separate suit to set it aside for grave mistake etc RAM LAYAN SAHU v RAM BIRICH KOER **5 Pat L J 205**

11. ———— **Fraud**— *Decree power of court set aside for fraud*—The mere fact that a decree is obtained by fraud is not *per se* sufficient for the Court to set it aside—If obtained in respect of a non existant subject matter a court can set aside even its own decree *Nanda Kumar Halder* v *Ramjiban Halder I L R 4 Calc 990* approved CHATTU SINGH v RAI PADHA KISHEN **4 Pat L J 187**

2 CONSTRUCTION OF DECREE

1 ———— **Decree in suit**— *Suit by mortgagor for account—Application for redemption decree in appeal—Redemption decree passed by Court in appeal—Decree in the suit—Interpretation—Dekkhan Agriculturists Relief Act (XVII of 1879) s 15D cl (3) Held* dismissing the second appeal that when the decree of the lower Court is reversed or varied in appeal the decree of the Appellate Court becomes the decree in the suit which is to be executed in execution proceedings NAVLAJI SARDARMAL v RAMA DHONDI (1909) **I L R 34 Bom 158**

2 ———— **Decree for rent**— *Bengal Tenancy Act (VIII of 1885) ss 65 159 160 167—Suit for entire rent by person for the time being found to be sole landlord subsequently held to be a co sharer —Decree if rent decree or money decree—Purchaser at rent sale if may annul subordinate interest without annulling superior interest immediately under him—Remand—Transfer of analogous case for trial by one Court* Where certain persons who were alleged to be only co sharers being found by the Court of first instance to be the 16 annas proprietors of certain zamindari properties took possession of the whole of the properties in execution of their decree pending an appeal to the High Court and were maintained in possession even after the High Court had set aside the decree and until it was decided by the Privy Council agreeing with the High Court that they had only a two thirds share in the properties *Held* that a decree for the entire rent obtained by them during this period in a suit instituted after they had got themselves registered as 16 annas

DECREE—*contd*

2 CONSTRUCTION OF DECREE—*contd*

proprietors under the Land Registration Act was a decree for rent within the meaning of s 65 of the Bengal Tenancy Act That they were then the only persons competent to maintain a rent suit and for the purposes of that suit they completely represented the estate of the landlords The purchaser of a tenure at a rent sale cannot annul a subordinate interest leaving untouched a superior interest immediately subordinate to the interest purchase by him MAFIJUDDIN SARDAR v ASHUTOSH CHAKERBUTTY (1910) **14 C W N 352**

3 ———— **Order dismissing an appeal for default**—*Appeal from such an order—Civil Procedure Code (Act V of 1908) s 2 sub s (2) O XLI r 17* An order dismissing for default an appeal under O XLI r 17 of the Code of Civil Procedure is not a decree within the meaning of s 2 of the Code and as such is not appealable *Radha Nath Singh* v *Chandi Charan Singh I L R 30 Calc 660 Ramchandra Pandurang Naik* v *Madaw Purushottam Naik I L R 16 Bom 23 Pohkar Singh* v *Gopal Singh I L R 14 All 361* referred to PURNIMAMAYI DASI v PARAN CHANDRA BHERA (1910) **I L R 39 Calc 341**

4 ———— **Whether executable or merely declaratory**—*Appeal against preliminary order after passing of final order maintainability of—What orders in execution are appealable—Civil Procedure Code (Act V of 1908) ss 2 47* A decree which does not direct possession of any of the suit lands to be given to plaintiff who sued for possession of all the lands in suit but merely declared the right of the defendant to remain in possession of a portion of the lands of the whole of which he was in possession is one that is not capable of execution by the plaintiff by way of possession of the rest being given to him especially when there was not even a declaration of plaintiff's right to the rest of the lands A question whether a decree is executable or not is certainly one that comes within ss 2 and 47 of the Civil Procedure Code (Act V of 1908) the former of which enacts that the determination of any questions within s 47 is a decree an appeal lies from such determination under s 2 The determination of a mere issue by the executing Court made prior to the passing of the final order would not be regarded as an adjudication between the parties against which an appeal would lie *Velagiri Iyer* v *Sadagopachariar 14 Mad L J 359* referred to Orders in execution which declare (i) that execution shall issue and that a Commissioner be appointed for carrying out execution (ii) that interest is payable and (iii) that a party is entitled to mesne profits are appealable though the final orders determining the extent of amount will have to be passed only thereafter *Narayana Pattar* v *Gopalakrishna Pattar I L R 28 Mad 305 Ram Kirpal* v *Rup Kuar I L R 6 All 269 Bhup Indar Bahadur Singh* v *Bijai Bahadur Singh I L R 23 All 152 Maharaja of Burdwan* v *Tara Sundari Debi I L R 9 Calc 619* and *Deoki Nandan Singh* v *Bansi Singh 14 C L J 35* referred to *Held* that an appeal against a preliminary order in execution can be filed even after the date of the final order which merely carries out and is consequential on the preliminary order though no appeal has been filed against

DECREE—*contd*

3 EXECUTION—*contd*

———— **Order for stay of execution not appealable—**

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 47

I L R 45 Bom 241

1 ———— **Decree for rent**— *Suit for redemption—Taking of accounts under the Dekkhan Agriculturists Relief Act (XVII of 1879)—Result of account showing that mortgagee over paid himself from rents and profits—Mortgagee s right to execute decree for rent* In virtue of a decree for four years rent passed at a time when the provisions of the Dekkhan Agriculturists Relief Act did not apply the plaintiff (mortgagee) became entitled to recover a certain sum from the defendant (mortgagor) After the introduction of the Dekkhan Agriculturists Relief Act the latter sued the former for redemption of the mortgage of the land in respect of which the rent note sued on had been passed on taking accounts in the way directed by the Act it was found that the plaintiff as mortgagee had overpaid himself from the rents and profits of the land The plaintiff thereafter applied to execute his decree for rent Both the lower Courts dismissed the application on the ground that the plaintiff had already recovered more than was due to him as mortgagee from the rents and profits of the land On appeal —*Held* that the rent decree must be executed as it stood having regard to the fact that the provisions of the Dekkhan Agriculturists Relief Act did not apply when it was passed and that the accounts which were taken for the purposes of the subsequent decree were taken for a special purpose—that is for enabling the defendant to redeem on favourable terms and did not entitle him to recover anything from the plaintiff by way of set off MUGAPPA *v* MAHAMADSAHEB (1909)

I L R 34 Bom 260

2 ———— **Legal representative** —*Who ought to be made representative—Person with the best primâ facie title sufficiently represents estate* A decree holder who has to apply for execution against the legal representative of the deceased judgment debtor may select from among several rival claimants as legal representative the one whom he believes honestly to have best *primâ facie* title and the representation in the absence of fraud or collusion will be sufficient even though it is subsequently found out some other person is the true legal representative *Khiarajmal v Daim I L R 32 Calc 296* explained RAMASWAMI CHETTIAR *v* OPPILAMANI CHETTI (1909)

I L R 33 Mad. 6

2(a) ———— **Until a decree nisi is made absolute** (which must be by proper application in Court) there is no decree capable of execution SIR JEHANGIR COWASJI *v* THE HOPE MILLS LTD

I L R 33 Bom 273

3 ———— **Preliminary in suit for accounts appeal against**—*Final decree made pending appeal—Preliminary decree set aside on appeal—Application to execute final decree—Executing Court if can treat the final decree as superseded though not formally set aside* On 21st March 1908 a preliminary decree was passed directing the defendant to render accounts to the plaintiff On [illegible] May the defendant preferred an appeal and did not thereafter appear in the proceedings for taking accounts which went on in the first Court and did not take any part in those proceedings which ended in a decree in favour of the plaintiff for a definite sum on the 28th May 1908 On 11th August 1908 the Appellate Court set aside the preliminary decree holding that the defendant was not bound to render any account and that decree was affirmed by the High Court in second appeal on 30th August 1910 On 22nd February 1911 the plaintiff having applied for execution of the final decree of 28th May 1908 *Held* that the passing of the final decree did not take away the jurisdiction of the Appellate Court to hear the appeal against the preliminary decree *Mackenzie v Narsinga Sahai 10 C L J 113, Baikuntha Nath v Salimulla 6 C L J 547* and *Madhusudan v Kumini Kanta I L R 32 Calc 1123* distinguished That the final decree which was dependent on and subordinate to the preliminary decree was superseded by the decision of the Appellate Court setting aside the preliminary decree and it was not necessary for the defendant to have the final decree formally set aside That it was competent to the executing Court to refuse to execute the final decree on the ground that it had been superseded and ceased to be operative RAM NATH SINGH *v* BASANTA NARAIN SINGH (1913)

17 C W N 868

4 ———— **Mahomedan family**—*Decree for debts of a deceased Mahomedan against the heir in possession—Other heir not a party to the suit whether bound by the decree —Representation* A Mahomedan died leaving as his heirs a son *M* two widows *S* and *B* and three daughters He bequeathed all his property to *M* On *M* s death the property was inherited by his heirs a daughter *A* and his widow *P* who remained in possession of the property A money decree was obtained against the estate of *M* in a suit by a creditor in which the defendants were *B S* and an illegitimate son of *M A* was not made a party to the suit In execution of the decree *M* s right title and interest in house No 371 was sold and purchased by defendant No 4 Subsequently *A* having died her interest in the property was conveyed by her heir to the plaintiff who sued to recover by partition *A* s share in house No 371 *Held* that the plaintiff was entitled to succeed as *A* s share in the house was not bound by the creditors decree as she was not made a defendant in the suit and her interest could not be represented by *P* *Dawa lava v Bhimaji Dhondo I L R 20 Bom 338* discussed BHAGIRTHIBAI *v* ROSHANBI (1918)

I L R 43 Bom 412

5 ———— **Instalment decree**— *Decree directing interest to be paid annually and principal after twenty five years and in default of payment of interest interest and principal to be recovered at once—Defaults made in payment of interest—Proceedings taken from time to time for recovery of interest—Defaults mutually condoned—Subsequent application for execution for arrears of interest and principal amount —Execution not barred* A decree was passed in favour of the plaintiff on the 19th February 1894 It provided for the payment of a certain sum by way of interest every year and for the payment of the principal

DECREE—*contd*

3 EXECUTION—*contd*

on the expiration of twenty five years but if the interest was not paid *in any year then* the principal and interest in one sum was to be recovered at once The judgment debtor made default in payment of annual instalments of interest Execution proceedings were therefore taken from time to time for a series of years till 1914 in order to get payment of the instalments *of interest due under the decree* In 1916 the judgment creditor issued a Darkhast praying for execution for the whole amount principal and interest The judgment debtors contended that the execution was entirely barred because the judgment creditor had not taken advantage of the default clause The trial Court dismissed the Darkhast on the ground that the principal had not become due that only three years interest was recoverable but that had not been claimed On appeal to the High Court *Held* that the judgment-creditor and debtor having mutually condoned all previous defaults it was open to the judgment creditor after 1914 when continued default in payment of interest was made to take advantage of the decree and apply in execution further instalment which was in arrear and for the principal amount *Raichand Motichand* v *Dhondo Laxman 1918 42 Bom 728* referred to AMRIT KHANDERAO *v* GOVIND RAMCHANDRA 1920

I L R 44 Bom 840

6 ———— **Mistake**—*In partition effected by Collector—Partition not in accordance with the direction of the decree—Wrongful distribution of shares—Collector's power to re open partition—Court's duty to rectify mistake of its agent* One Atmaram Bhagwant a member of a Mirasi family brought a suit for partition of his 1 36th share in three villages In November 1888 a decree was passed directing that the half share of the Desai family in each of the three villages should first be separated and the remaining share divided between the members of the Mirasi family in accordance with the decree Atmaram applied for execution of the decree in Darkhast No 177 of 1893 but before partition was made on this application defendant No 8 filed Darkhast No 404 of 1894 for his share These Darkhasts were disposed of in 1898 when defendant No 8's share was separated and given into his possession The appellants (defendants Nos 10—12) then applied for separate possession of their share in 1900 but when the surveyor prepared a list of lands remaining over after the first partition as the share of the appellants the latter found that the Khasgi land in one of the villages remaining for their share was less than what they were entitled to and that the plots below and adjoining their houses had been allotted to the share of defendant No 8 They then applied to the Collector to re open partition The Collector declined to do this and referred the matter to the Court on the ground that the appellants refused to take possession of their shares The appellants therefore applied to the Court for fresh partition and determination of their legitimate share The lower Courts dismissed their application as being barred by *res judicata* On appeal to the High Court *Held* granting the application that the Court would not allow a mistake of one of its agents in carrying out its directions to work permanent injustice

DECREE—*contd*

3 EXECUTION—*contd*

RAMCHANDRA DINKAR *v* KRISHNAJI SAKHARAM (1915) I L R 40 Bom 118

7 ———— **Baroda Court**—*Application for execution presented to Baroda Court though within time according to Baroda law still out of time according to British Indian law—Transfer of decree to British Indian Court—Execution barred by limitation* A decree was passed by the Baroda Court in 1909 The *first application to execute the* decree was made in 1913 it being within the time prescribed by the law in Baroda The decree was transferred to the Ahmedabad Court (British) for execution in 1915 where the judgment debtor contended that no application to execute the decree having been made within three years of its date the execution of the decree was barred *Held* that the decree was incapable of execution in the Ahmedabad Court having been barred according to the British Law of Limitation which governed the case NABIBHAI VAZIRBHAI *v* DAYABHAI AMULAKH (1916)

I L R 40 Bom 504

8 ———— **Instalment decree**—*Entire decretal debt to become payable on failure to pay any one instalment—Application to execute the decree three years after default* An instalment decree was made on June 28 1909 It provided that the debt be paid in eight annual instalments and that on failure to pay any one of the instalments before the next had become due the creditor could call in the whole amount of debt with interest at the agreed rate It was found that no instalment was ever paid In September 1915 the creditor presented the Darkhast but the lower Courts held it time barred On appeal to the High Court it was contended that it was optional with the creditor to waive all breaches on the part of the debtor to fulfil his obligations under the instalment decree and so at the end of eight years the creditor could sue for at least three instalments in arrears then due *Held* that on the terms of the decree a complete legally enforceable right had accrued to the judgment creditor on failure to pay the first annual instalment in June 1910 and the *period of limitation allowed to him within which* to enforce it was three years and no longer The darkhast was therefore barred by limitation RAICHAND MOTICHAND *v* DHONDO LAXMAN (1918) I L R 42 Bom 728

9 ———— **Limitation**—*Application for execution time barred—Subsequent application to execute the decree—Application allowed—Order not reversed in appeal—Further application presented in time—Application not barred* A decree was passed on 18th February 1899 The first Darkhast was presented on 20th March 1907 second on 31st March 1910 and a third on 12th September 1910 when the defendant appeared and contended that the Darkhast of 31st March 1910 was barred The Court decided that the Darkhast of 12th September 1910 was in time and directed that the money due should be paid by instalments On 26th March 1913 Rs 2 0 were paid to plaintiff The last Darkhast was filed on 19th November 1915 to recover the balance due The lower appellate Court dismissed the Darkhast as time barred on the ground that the *decree was dead on 31st* March 1910 and even though the further Darkhast was admitted thereafter that would not have the effect of reviving the decree On appeal to

DECREE—*contd*

3 EXECUTION—*contd*

the High Court *Held* that the Darkhast was within time as the order made on the Darkhast of 12th September 1910 not having been reversed on appeal was valid *Mungal Pershad Dichit* v *Girja Kant Lahiri Choudhry* (1881) *L R 8 I A 123* relied on DESAIPPA v DUNDAPPA

I L R 44 Bom 227

10 ———— **Surety-bond** *for restitution—Suit* Where a bond is passed as security for restitution in the event of the decree being reversed in appeal a suit based upon such bond can be maintained MOTILAL VIRCHAND v THAKORE CHANDRASANGJI (1911)

I L R 36 Bom 42

4 FORM

———— *Irregularity — Decree not drawn up—Contents of decree—Costs—Practice* It is the duty of a Court to draw up a decree after a case has been decided and the decree should show the costs incurred by the parties SARAT CHANDRA MANDAL v DIGAMBAR MANDAL (1910)

I L R 38 Calc 125

5 TRANSFER AND ASSIGNMENT

See SPECIFIC PERFORMANCE

I L R 43 Calc 990

1 ———— **Transfer takes effect from date of transfer** *and not from date of its recognition by Court* Where a decree is transferred by an instrument in writing such transfer takes effect from the date of such instrument and not from the date of its recognition by the Court *Puthiandi Mammed* v *Avalil Moidin* *I L R 20 Mad 157* considered The transfer of a decree may in the absence of a contract to the contrary be regarded as conditional upon the Court granting the transferee permission to execute The transferee before repudiating the transfer is bound to do all that is reasonably necessary to obtain such permission SADAGOPA CHARIAR v RAGHUNATHA CHARIAR (1909)

I L R 33 Mad 62

2 ———— **Assignment to defeat creditors** *—Transfer made for valuable consideration but not bona fide—Transfer of Property Act (IV of 1882) s 53—Statute 13 Eliz c 5—Validity of transfer of moveable property—Practice of Privy Council—Point not before Courts below* In this case the Judicial Committee upheld the decision of the High Court as to the invalidity of certain assignments which though for good consideration were made to defeat creditors and *held* that the question whether any of the parties could establish right based not on the assignments but on other grounds such as the actual payment of debts was a point not before the Courts below and therefore their Lordships would not decide it CHIDAMBARAM CHETTIAR v SRINIVASA SASTRIAL (1914)

I L R 37 Mad 227

3 ———— **It may be questioned as benami in execution proceeding**—*Decree assigned to judgment debtor's pleaders —Effect—Pleader trustee bound to reconvey on terms—Proper procedure stay of suit* The assignment of a decree to the pleader of the judgment debtor does not extinguish the judgment debt and release the judgment debtor from liability The pleader holds the decree on trust for his client and is bound if called upon by the latter to assign the decree to him but no Court will decree such an assignment except upon equitable terms A question that the assignee of a decree is *benamidar* for some body else cannot be gone into in execution proceeding When the judgment debtors alleged that the assignee was a *benamidar* for their pleader *Held* that it was not practicable in execution proceedings to go behind the decree and alter the liability of the parties after investigation of the sum which would be equitably payable by the judgment debtor to the assignee of the decree to entitle him to obtain a reconveyance thereof This should be the subject of investigation in a suit the execution proceedings being stayed to enable the judgment debtor to institute such a suit NAGENDRABALA DASSI v DEBENDRA NATH MAHISH (1917)

22 C W N 491

DECREE AGAINST A MAJOR AS MINOR

———— *Court sale in execution of decree validity of—Limitation Act (IX of 1908) Art 12 applicability of* A decree obtained against a person treating him as a minor while in reality he was a major on its date is not a nullity, consequently a sale in execution of such a decree cannot be set aside on the ground that the Court had no jurisdiction to pass the decree The period of limitation to apply to set aside the court sale is one year as provided by Article 12 of the Limitation Act SESHAGIRI RAO v HANUMANATHA RAO (1915)

I L R 39 Mad. 1031

DECREE FOR DIVORCE

See DIVORCE ACT (IV OF 1869) s 37

I L R 39 Bom 182

DECREE FOR INJUNCTION

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 2 (11) 53

I L R 42 Bom 504

DECREE FOR MONEY

———— **payment of—**

See CIVIL PROCEDURE CODE 1908 O XXI r 1 I L R 35 Bom 35

DECREE FOR PARTITION

See LIMITATION ACT (IX OF 1908) ART 182 I L R 45 Bom 952

———— *Decree made absolute unnecessarily— Application to execute the decree if made within three years of the final decree is in order*

DECREE FOR POSSESSION

———— *Decree holder obtaining possession of the property without executing the decree—Subsequent dispossession—Maintainability of a fresh suit—Doctrine of merger where applicable* The doctrine of merger does not apply to a decree for ejectment If a party obtains a decree for a debt or for damages for tort the

DECREE FOR POSSESSION—*contd*

original cause of action merges in the decree but a decree in ejectment differs very much from other decrees *Plaintiff obtained a decree for* possession of certain immoveable property which she did not put into execution for over three years but had obtained actual physical possession over the property *She was subsequently* dispossessed and brought a suit for possession *Held* that as she had been in actual possession of the property a fresh cause of action had accrued and her suit was maintainable being within twelve years of such dispossession *Quære* Whether a suit is maintainable upon a decree when the execution of it has become time barred DHANRAJ SINGH v LAKHRANI KUNWAR (1916)
I L. R 38 All 509

DECREE FOR RENT

See LANDLORD AND TENANT
I L. R 41 Calc 926

See MORTGAGE **I L. R 38 Calc 923**

——————— *Right of Landlord to choose manner of execution* *Held* that it was not competent for a Court to direct in what manner the landlord shall execute a decree for rent and he cannot be compelled to proceed first against the holding and then against the person of the tenant MAHARAJAH KESHO PRASAD SINHA v LALGI PAY
1 Pat L J 138

DECREE-HOLDER

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 258 **I L R 34 Bom 575**
39 Mad 1026

See INSOLVENCY **I L R 41 All 274**

See LIMITATION ACT (XV OF 1877) s 8 SCH II ART 179 EXPL I
I L R 34 Bom 672

See LIMITATION ACT (IX OF 1908)—
s 2 **I L R 38 Mad 837**
SCH I ARTS 99 62 AND 120
I L R 38 Mad 972

See PROVINCIAL INSOLVENCY ACT 1907
ss 16 AND 34 **1 Pat L J 235**

——— fraud of—

See CIVIL PROCEDURE CODE (ACT V OF 1908) ss 47 AND 60
I L R 38 Mad 1076

——— Rival—

See RATEABLE DISTRIBUTION
I L. R 38 Mad. 221

——— status of—

See SALE **I L R 43 Calc 294**

——————— *Petition for execution —Sale of properties not mentioned in the decree— Personal decree—Civil Procedure Code (Act V of 1908) O XXXIV r 6—Application if necessary—Court's power to amend—Code of Civil Procedure (Act V of 1908) s 153* A decree holder cannot ignore the terms of a decree directing him to bring the properties mentioned in it to sale before proceeding against other properties of the judgment debtor *Ma ti Ramoj v Chodimalla Ramamurthy 3 Mad I T 335 Varadiah v Raja Perumal Raja Bahadur Appeal Against O 257 of 1909* followed But when the judgment debtor has no saleable interest in the

DECREE HOLDER—*contd*

properties directed to be sold the decree holder need not go through the farce of putting them up to sale A decree directing the defendant to pay a certain sum and in default directing the hypothecated property to be sold is a personal decree *Raja of Kalahasti v Varadachariar 21 Mad L J 1036* followed When there is a personal decree no application for another personal decree under O XXXIV r 6 can be granted *Dinabandhu v Mashida 16 C L J 318* referred to S 153 of the Code of Civil Procedure (Act V of 1908) enables the Court under the above circumstances to order if necessary an amendment of the execution petition PERIYASAMI KONE v MUTHIA CHETTIAR (1913)
I L R 38 Mad 677

DECREE IN FORECLOSURE

See MORTGAGE **I L R 39 Calc 925**

DECREE NISI

See DEKKHAN AGRICULTURISTS RELIEF ACT (XVII OF 1879) s 15B
I L R 43 Bom 477

See MORTGAGE
I L R 43 Bom 334

——————— *Decree for possession on payment of a certain sum within six months in default forfeiture of the right to recover possession—Appeal—Confirmation of decree—The term of six months to run from the date of the final decree* The plaintiff brought a suit to recover possession of property as purchaser from defendants 1—6 and to redeem the mortgage of defendant 7 The first Court having dismissed the suit the appellate Court on plaintiff's appeal passed a decree directing the plaintiff to recover possession on payment to defendants 1—6 of a certain sum within six months from the date of its decree and then to redeem defendant 7 and on plaintiff's failure to pay within six months from the date of the decree he should forfeit his right to recover possession All parties being dissatisfied with the decree the plaintiff preferred a second appeal to the High Court and the two sets of defendants filed separate sets of cross objections The High Court confirmed the decree and the plaintiff's second appeal and the defendants cross objections were dismissed Within six months of the date of the High Court's decree the plaintiff deposited in Court the amount payable by him and applied for execution. Defendant 7 contended that the plaintiff not having complied with the terms of the decree of the first appellate Court his right to recover possession in execution was forfeited The lower Courts upheld the defendant's contention and dismissed the *darkhast* On second appeal by the plaintiff *Held* reversing the decree that the time for executing a decree nisi for possession ran from the date of the High Court's decree confirming the decree of the lower Court for what was to be looked at and interpreted was the decree of the final appellate Court *Raja Bhup Indar Bahadur Singh v Bijai Bahadur Singh I L R 27 I A 209* and *Vanchand v Vithu I L R 19 Bom. 258* followed SATWAJI BALAJIRAV v SAKHARLAL ATMARAMSHET (1914) **I L. R 39 Bom. 175**

DECREE ON MORTGAGE

See LIMITATION ACT (XV OF 1877) SCH II ART 179
I L R 39 Bom 20

DECREE OVER

See CIVIL PROCEDURE CODE 1908 O XXXIV R 6
I L R 42 All 519

DEDICATION

See HINDU LAW—ENDOWMENT
I L R 46 Calc 951

———— These can be dedicated by a *joint family and no deed is necessary* TADI BULLI TAMMIREDDI *v* TADI BULLI GANGIREDDI
I L R 45 Mad 281

DEDICATED PROPERTY

———— acquisition of—

See SHEBAIT I L R 40 Calc 895

DEED

See EVIDENCE ADMISSIBILITY OF
I L R 38 Calc 892

———— construction of—

See CONSTRUCTION OF DEED

See PROMISSORY NOTE
I L R 36 Mad. 370

———— execution of—

See PARDANASHIN LADY
I L R 47 Calc 175

———— form of proof of—

See EVIDENCE I L R 44 Calc 345

———— *Interpretation of deed —Reference to conduct where language unambiguous if permissible* Where the language of a written instrument is clear no reference is permissible for its interpretation to the conduct of the parties *POHIU BAKSH MANDAL v SHAJAD AHMAD* (1914)
19 C W N 1311

———— *Material alteration of —Destruction of right of suit—Negotiable Instruments Act (XXVI of 1881) s 87* An alteration in a document which has the effect of enabling the payee to sue on the document in a Court where he could not have sued on it in its original form is a material alteration and as such destroys the right of action on the document Altering a negotiable instrument by causing the words or order to disappear and making it non negotiable is a material alteration under ordinary law and also under s 8 of the Negotiable Instruments Act (XXVI of 1881) The facts that the payee eventually filed the suit in another Court different from the one intended at the time of the alteration and that it was not necessary for him to rely on the altered state of document to enable him to succeed therein do not make the alteration any the less material *Gour Chandra Das v Prasanna Kumar Chandra I L R 33 Calc 812* followed *De ro x Verley et Cie v Meyer & Co 25 Q L D 343* distinguished LAKSHMAMMAL *v* NARASIMHA RAGHAVA AIYANGAR (1913)
I L R 38 Mad. 746

DEED—contd

———— *Easements advantages appurtenances held and enjoyed as part of the house meaning of* Words in a sale deed of a house such as the *following* — All my right title and interest in and to the said house and ground with all the buildings fixtures rights easements advantages and appurtenances whatsoever to the said house and ground appertaining or with the same held and enjoyed or reputed as part thereof or appurtenant thereto are wide enough to convey not only actually existing easements but also (*a*) a way formerly enjoyed as an easement but as to which the right had been suspended by unity of possession of the two tenements and (*b*) a way which during the unity of possession had never existed as an easement but was in fact used for the convenience of one of the tenements afterwards served *Churder Coomer Mookerjee v Koylash Chunder Sett I L R 7 Calc 665* followed If on a disposition of property belonging to the same owner tenements are served and conveyed to different people either simultaneously or at different times but as part of one transaction *quasi easements* apparent and continuous and necessary for the enjoyment of the several tenements as they were enjoyed at the time of severance will pass to the grantees thereof In either case the conveyances are regarded in equity as one transaction and each grantee who takes his tenement with the knowledge that the other tenements are being conveyed at the same time or will be conveyed as part of the same transaction is deemed in the absence of express stipulation to take the land burdened or benefited as the case may be by the qualities which the previous owner had a right to attach to the different portions of his property before severance VENKIAH *v* KRISHNAMOORTHY (1913)
I L R 38 Mad. 141

DEED OF CONVEYANCE

See VENDOR AND PURCHASER
I L R 37 Calc 362

DEED OF ENDOWMENT

See RELIGIOUS TRUST
I L R 40 Calc 251

DEED OF SALE

See VENDOR AND PURCHASER
I L R 42 Calc 56

DEED OF TRUST

See TRUST I L R 40 Calc 232
I L R 41 Calc 19

DEFAMATION

See ACQUITTAL I L R 37 Calc 604

See EVIDENCE ACT (I OF 18–) s 13–
I L R 40 All 271
I L R 43 All 92

See LIBEL

See MALICIOUS PROSECUTION
I L R 38 Calc 880

See PENAL CODE (ACT XLV OF 1860) s 498
I L R 37 Mad. 110

See PENAL CODE s 499

DEFAMATION—*contd*

See PRIVY COUNCIL PRACTICE OF
I L R 41 Calc 1023

See TORT I L R 39 Mad 433

——— made outside British India—

See TORT I L R 39 Mad 433

——— suit for—

See CIVIL PROCEDURE CODE 1908 O XXI r 1 I L R 35 Bom 421

1 ——— Subsequent prosecution—*Acquittal under s 182 of the Penal Code—Subsequent complaint under s 500 by the person defamed in respect of the same statement—Subsequent prosecution not barred—Criminal Procedure Code (Act V of 1898) s 403* An acquittal under s 182 of the Penal Code in respect of false information contained in a petition to the manager of an estate is no bar to a subsequent prosecution for defamation under s 500 of the Penal Code on the same statements *Sharbekhan Gohain v Emperor 10 C W N 85* distinguished. RAM SEBAK LAL v MUNESWAR SINGH (1910)
I L R 37 Calc 604

2 ——— By pleader—*Questions put in cross examination on instructions without ascertaining their truth or falsity—Absence personal malice—Presumption of good faith—Rebuttal of presumption—Duty of Advocate—Public good—Penal Code (Act XLV of 1860) s 499 Exception (9)* A pleader is entitled to the presumption that the questions he asks in cross examination are put in good faith for the protection of his client s interest within Exception (9) to s 499 of the Penal Code To rebut the presumption it is not sufficient merely to show that the client knew the imputation to be untrue but there must be convincing evidence that the pleader was actuated by an improper motive personal to himself and not by a desire to protect or further his client s interest *Upendra Nath Bagchi v Emperor I L R 36 Calc 375 13 C W N 340* followed It is the duty of the pleader to present his client s case but it is not his duty to enquire whether it is true or false so far at any rate as the purpose of a prosecution for defamation is concerned It is for the public good that a person charged with the responsibility of an advocate should as far as may be feel unfettered by any control other than that of the Court in the use of every weapon placed at his disposal by law for the defence of his client NIKUNJA LEHARI SEN v HARENDRA CHANDRA SINGH (1913)
I L R 41 Calc 514

3 ——— Expulsion from caste — *Words imputing loss of caste where actionable—Privilege—Caste usage* It is open to one member of a caste to refuse to associate with another for what he considers to be an infringement of caste rules and no Court can call upon him to assign a reason for not associating It is not however open to one member to call another an outcaste The caste or the majority of them may expel a member from the caste The Courts will interfere if he is so expelled without being given a proper opportunity for explanation Words which impute unworthiness to remain a member of the caste are defamatory and give rise to a cause of action and where the words used are ambiguous it must be decided on evidence whether they were intended to bear a libellous meaning Where a libellous communication is made regarding a member of a caste the mere fact that the person making such communication is a member of the caste will not of itself suffice to make the communication privileged COOROOSAMI CHETTY v DURAISAMI CHETTY (1909)
I L R 33 Mad 67

4 ——— Pleader's comment *in Court that the Plaintiff forged documents by means of fraud if amounts to—Suit for defamation against pleader—Defence pleader s comment that the Plaintiff forged documents by means of fraud if amount to defamation—Legitimate comment privilege of—Question of malice and of personal charge* In a suit for rent the defence pleader while commenting on certain exhibits used the expression that the Plaintiff (a lady) forged documents by means of fraud In a previous rent suit brought by the husband of the Plaintiff the collection paper were held to have been manufactured *Held*—That there was no malice and the pleader was not liable for making legitimate comments on the case The expression used by the pleader did not necessarily imply any personal charge against the lady who might have had nothing personally to do with the suit beyond the fact that she was the Plaintiff in it What the pleader did was in the professional discharge of his duty and in good faith for the protection of the interest of his client and his remarks were not irrelevant but were pertinent to the enquiry which was being made before the Judge and had a direct bearing on the case SHIVA KUMARI DEBI v BECHARAM LAHIRI
25 C W N 835

5 ——— Statement by accused—*made in application to District Magistrate for transfer of case—Absolute or qualified privilege—English law applicability of in the mofussil—Construction of Statutes—Penal Code (Act XLV of 1860) s 499* S 499 of the Penal Code is exhaustive and if a defamatory statement does not fall within the specified Exceptions it is not privileged The English common law doctrine of absolute privilege does not obtain in the mofussil in India A defamatory statement made in bad faith by an accused against whom a trial is pending in a Criminal Court and contained in a petition to the District Magistrate for a transfer of the case is not absolutely privileged but is punishable under s 500 of the Penal Code *(re ? Delaney 14 W P Cr ? Augada Pam Shal ? ? ? Chand Shet ? I L P 3 Calc 86* and *Kal ath Gupta v G b d Chand Bas ? ? ? 3* followed *Petiraj Venkata Reddy v Emperor ? Cr L J 5* dissented from *Baba ? ? I ? Singh v Mugeeram Choudhary 11 B L R 1 Ebhim ber Singh v E charam Sircar I L R 1? Calc 264 Woolfu L b ? Jearat Sheikh I L ? ?7 Calc 6? Golap Jan v Bhola ? Khetty I L R ?8 Calc 880* distinguished *Ha dar ? v ? ? Ma I L R 3 Calc ?6* referred to *Kar ? n h v Emperor I L R 40 Calc 441* (note) explained The proper course in construing an Act is to ascertain the natural meaning of its language and not to assume that it was intended to leave the existing law unaltered except when such intention is stated *Bank of England v Vagliano [1891] A C 10* and *Arendra Nath Sircar v Kamalla ? Lae I L R ?3 Calc 56?* followed The ? nce of a Code is to be exhaustive in the ? in respect of which it

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DEFAMATION—*contd*

declares the law and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction *Gokul Mandar* v *Pudmanund Singh I L R 29 Calc 707* followed KARI SINGH v EMPEROR (1912) **I L R 40 Calc 433**

6 ———————— *D famatory statements by a party to a judi ial proceeding—Absolute or qualified privilege—Distinction between civil and criminal liability—Penal Code (Act XLV of 1860) Preamble and ss 1 2 5 and 499—Charter Act (24 and 25 Vict c 104) s 9—L tters Patent 1865 cl 30—Common Law of England as to defamation—Reference to previous history of legislation—Construction of Codes—Illustrations as aid to construction—Refusal of san tion not bar to prosecution for d famation—Criminal Procedure Code (Act V of 1898) s 403—Powers of th Suprem and High Courts in con tempt* A defamatory statement on oath or otherwise by a party to a judicial pro eeding falls within s 499 of the Penal Code and is not absolutely privileged Under cl 30 of the Letters Patent 1865 the provisions of such Code must be followed and the Court cannot engraft thereon exceptions derived from the Common Law of England or based on public policy The civil liability for defamation in India does not stand on the same basis as the criminal A suit for damages for a defamatory statement made on oath or otherwise by a party to a judicial proceeding in the absence of statutory rules on the subject is governed by the principles of justice equity and good conscience whi h according to a large pre ponderance of judicial opinion are id ntical with the corr sponding relevant rules of En lish Com mon Law The preamble to the Pen il Code and ss 1 and 2 read with s o prescribe that all acts or omissions contrary to the provisions of the Code or of special and local laws or o her laws enumera ted in s 5 of the Code and none others are punish able as offences *H C Pro 2° Sept 1866 3 Mad H C Ap XI XVII* referred to Reference to the previous history of legislation is legitimate only when there is a reasonable doubt as to the construction of a statute *Ishuree Persad Narain Sing* v *Lal Chutterput Sing 3 Moo I A 100 130 Brown* v *McLachlan L P 4 P C 543 550* referred to But in the construction of Codes the language of the statute and its natural meaning must be first examined uninfluenced by any considera tion of the previous law on the point and an interpretation cannot be placed on the plain language of a statute incon istent therewith on the supposed policy of the Legislature not to depart from the English Law on the subject *Bank of England* v *Vagliano Bros [1891] A C 107 Robinson* v *Canadian Pacific Ry Co [1892] A C 481 Narendra Nath Sircar* v *Kamalbasini Dasi I L R 23 Calc 563* followed The history however of the Penal Code shows an intention to deviate in many respects from the English Law of defamation Drafts of the Penal Code 1837 Note R of 1840 and 1847 Chap XXXV referred to The Court must administer the law as prescribed by the Legislature and neither enlarge nor restrict its scope *Egerton* v *Brownlow 4 H L C 1 123* referred to An illustration is a useful indication of the intention of the Legislature but is not binding when inconsistent with the language of the section *Dubey Sahai* v *Ganeshi Lal I L P 1 All 34 35 Queen Empress* v *Fakirapa I L R 15 Bom 491 Kojlash Chunder Ghose* v *Sonatun*

DEFAMATION—*concld*

Chung Baroose I L R 7 Calc 132 referred to The Court should accept the illustrations when it can do so in aid of construction and they should not be rejected for inconsistency with ideas derived from another system of jurisprudence nor except in a very special case for an assumed repugnancy *Mahomed Syedol Ariffin* v *Yeoh Ooi Ga k [1916] 2 A C 575* referred to The refusal of an applica tion for sanction to prosecute a party to a judicial proceeding under ss 182 193 I P C is not a bar under s 403 Cr P C to his prosecution for defamation *Ram Sebak Lal* v *Muneswar I L P 37 Calc 604*, referred to The Supreme Court had power to punish summarily for con tempts under the Common Law of England such part thereof having been introduced into the Presidency Towns by their Charters and the High Courts have the same power either by inheri tance under s 9 of the Charter Act 24 and 25 Vict c 104) replaced by the Government of India Act 1915 (5 and 6 Geo V c 61) s 106 or as inherent in them as Courts of Record unrestricted by cl 30 of the Letters Patent 1865 *Surendra Nath Banerjee* v *C J and Judges of the High Court I L R 10 Calc 109 131 McDermot* v *Judges of British Guiana 5 Moo P C (N S) 466 497 Legal Remembrancer* v *Matilal Ghose I L P 41 Calc 173* and *P Motilal Ghose I L R 45 Calc 169* referred to Similarly the power and autho rity exerci ed by the Supreme Court outside the Presidency Towns as indicated in *Re Maharanee of Lahore (1848) Tay 428* has become vested in the High Court subject however to the provi sions of the Le ters Patent and the legislative power of Governor General in Council. Autho rities reviewed SATISH CHANDRA CHAKRAVARTI v RAM DOYAL DE (1920) **I L R 48 Calc 388**

DEFAULT

See CIVIL PROCEDURE CODE 1908 O IX

See CONSENT DECREE **I L R 44 Bom 544**

See DEKKHAN AGRICULTURISTS RELIEF ACT (XVII OF 1879) s 15B CL. (2) **I L R 35 Bom 190**

See EXECUTION OF DECREE **I L R 38 Calc 482**

See MORTGAGE **I L R 39 Mad 981**

See WAIVER **15 C W N 10**

———— dismissal of suit for—

See APPEAL **I L R 37 Calc 426**

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 10 **I L R 38 Mad. 867**

———— in filing annual list of members—

See COMPANY **I L R 45 Calc 490**

———— in payment of instalments—

See LIMITATION **I L R 38 Mad. 374**

DEFAULTER

See INCUMBRANCE **I L R 37 Calc 322**

See SALE FOR ARREARS OF REVENUE **I L R 41 Calc 1092**
I L R 44 Calc 412

DEFECT

See CHARGE I L R 41 Calc 66

DEFECTIVE DECLARATION

See INSURANCE I L R 41 Calc 581

DEFECTIVE INSTALLATION

See GAS COMPANY 14 C W N 158

DEFENCE

See HABEAS CORPUS I L R 39 Calc 164

———— opportunity for—

See MUTT I L R 40 Mad 177

———— struck out—

See FOREIGN JUDGMENT I L R 39 Mad 95

DEFENCE OF INDIA ACT 1915

See CONTRACT ACT 1872 s 23 I L R 44 Bom 6

———— s 2—

1 ———— *Defence of India (Consolidation) Rules 1915 rr 23 29 and 30—Procedure—Criminal Procedure Code s 191* Upon a statement made to a District Magistrate not upon oath and not signed by the informant the Magistrate issued warrants against four persons in respect of an offence under r 23 of the Defence of India (Consolidation) Rules 1915 These four persons were tried for and convicted of such offence and were sentenced to twenty months imprisonment *Held* that the trial was bad Either the Magistrate was acting under s 191 (c) of the Code of Criminal Procedure in which case he was bound to ask the accused if they objected to being tried by him and this he did not ask them or he was acting as on a complaint in which case he was bound to record the informant s statement upon oath Furthermore with reference to rule 30 of the rules in question the District Magistrate should have recorded a formal proceeding intimating his opinion that the initiation of a prosecution against the persons implicated by the informant s statement was advisable *Held* also that the rule under which the conviction had been recorded was inapplicable to the facts of the case because it is not possible to dissuade a person from doing something which he has already done EMPEROR v MAHADEO SINGH (1918) I L R 41 All 164

2 ———— *Rules framed under creating offences—Time from which acts specified in rules are offences—Special tribunals no creation of—Trial by Magistrates as under Criminal Procedure Code validity of—Sanction for prosecution by Acting District Magistrate validity of—General Clauses Act (X of 1897) s 17 cl (1)* Rules framed under s 2 of the Defence of India Act must be read as part of that section and are effective from the date of their publication and are not dependent on the remainder of the Act being brought into operation *Held* accordingly that a person in the Presidency of Madras who in contravention of the rules dissuades anyone from entering into His Majesty s Military Service is guilty of an offence though the remainder of the Act had not been brought into operation in this province *Held* further that in the absence of a notification creating special tribunals for the trial of such offences under the Defence of India Act such offences are triable by the ordinary Magisterial Courts of the country in the manner provided by the Criminal Procedure Code as offences against other laws within schedule II of the Code By virtue of s 17 cl (1) of the General Clauses Act (X of 1897) an Acting District Magistrate is competent to sanction a prosecution in all cases where a District Magistrate can sanction the same KANDASAMI PILLAI v EMPEROR (1918) I L R 42 Mad 69

———— s 4— *Power to create Court*—S 22 of the Indian Council Act read with s 9 of the High Court Act is wide enough to empower the Governor General in Council to create new tribunals as contemplated by s 4 of the Defence of India Act A High Court has power to declare an Act of the Indian Legislature *ultra vires* PARAMESWARAPPA v EMPEROR 3 Pat L J 537

———— ss 7 8 and 11—*Jurisdiction of High Court—Held* that the High Court had no jurisdiction to superintend the proceedings of Commissioners appointed under the Act SHEONANDAN PRASAD SINGH v KING EMPEROR 3 Pat L J 581

———— rules 23 29 and 30—

See DEFENCE OF INDIA ACT 1915 2 I L R 41 All 164

DEFENDANT

See PROBATE I L R 41 Calc 819

———— addition of—

See PARTIES I L R 46 Calc 48

———— changing character of—

See PARTIES I L R 37 Calc 229

———— duty of—

See PLEADING I L R 37 Calc 856

———— misdescription of—

See PLAINT I L R 43 Calc 441

———— right to offer evidence—

See PRACTICE I L R 40 Calc 119

———— *Death of — Legal representative not brought on record—Decree subsequent to such death validity of—Objection to such decree in execution* A decree passed after the death of the defendant and before his legal representative was brought on the record is a nullity *Janardhan v Ramachandra I L R 26 Bom 31, Radha Prasad Singh v Lal Sahab Rai I L R 13 All 53* and *Indad Ali v Jagan Lal I L R 17 All 478* followed *Goda Coopooramier v Soondrammall I L R 33 Mad 16* distinguished Objection to that effect can be taken in the execution proceedings SUBRAMANIA v VAITHINATHA (1913) I L R 38 Mad. 682

DEITY

See PARTIES I L R 46 Calc. 877

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879)

See Civil Procedure Code (Act V of 1908), s [illegible] O [illegible] r 11 [illegible] (2) I L R 35 Bom 393

s 11 I L R 3[illegible] Bom 549

See Decree I L R 31 Bom 230

See Mortgage I L R 43 Bom 70[illegible]

—————— Wife of an agriculturist—Status—[illegible] by mortgage [illegible] possession—Decree [illegible] principal and interest [illegible] Decree [illegible] principal and interest [illegible] [illegible] Contractual relation [illegible] [illegible] decree—Redemption suit—[illegible] Under the provision of the Dekkhan Agriculturists Relief Act (XVII of 1879) the wife of an agriculturist cannot claim to be an agriculturist. A decree obtained by a mortgagee in the year 19[illegible] to recover possession of the mortgaged property set out that the plaintiff [illegible] was suing to recover possession of the mortgaged land [illegible] that the possession should be [illegible] until the mortgage money was paid [illegible] should be awarded at the rate [illegible] The decree [illegible] ordered that the mortgagor should pay to the plaintiff (mortgagee) 330 and interest [illegible] [illegible] principal [illegible] double interest should be paid [illegible] from 30th July 18[illegible] and [illegible] the mortgage [illegible] land [illegible] [illegible] should be [illegible] in the agreement and the defendant should redeem the land [illegible] having [illegible] money [illegible] [illegible] redemption and [illegible] amount was [illegible] that the plaintiff [illegible] amount [illegible] by reason of [illegible] decree. Held, that the [illegible] the decree [illegible] decree [illegible] [illegible] right to account. The decree did not [illegible] the contractual relation [illegible] putting the mortgage into [illegible] [illegible] the contract [illegible] [illegible] [illegible] [illegible] in a mortgage [illegible] the [illegible] [illegible] [illegible] BABBABAI RAMCHANDRA VISHNU v. RAMCHANDRA VISHNU BABBABAI (1910) I L R 35 Bom 23

—————— Redemption suit—Taxes advanced by Government [illegible] In [illegible] [illegible] [illegible] [illegible] One [illegible] [illegible] [illegible] the defendant [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] mortgage [illegible] obtained [illegible] [illegible] [illegible]

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879)—contd

No 211 which was included in the mortgage. In 19[illegible] survey No 211 was sold by public auction for the arrears of taxes and was purchased by defendant No 1 through his mukhtar defendant No 2. On the 4th August 190[illegible] defendant No 1 assigned his mortgage rights to defendant No 3 and on the same day defendant No 2 sold survey No 211 to defendant No 3. In 191[illegible] the plaintiff sued to redeem the survey number along with the other mortgaged property under the provisions of the Dekkhan Agriculturists' Relief Act [illegible]. The defendant No [illegible] contended that since the sale the plaintiff had no right [illegible] survey No [illegible] and was not entitled to redeem [illegible] On these pleadings the question arose for consideration whether the taxes due were a charge of a public nature which the mortgagee was bound to pay and whether the sale having taken place the provision of s 5[illegible] of the Land Revenue Code would apply so as to leave no room for the application of s 90 of the Indian Trust Act with reference to the conduct of the mortgagee. Held [illegible] [illegible] [illegible] advance [illegible] [illegible] [illegible] [illegible] [illegible] the Transfer of Property Act [illegible] Government demand [illegible] in respect of [illegible] land which [illegible] [illegible] [illegible] Held also that the sale having taken place [illegible] the default [illegible] [illegible] the Indian Trust Act [illegible] [illegible] further that [illegible] of the Land Revenue Code did [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] Land Revenue Code to the application [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] land [illegible] [illegible] [illegible] [illegible] [illegible] (1911) I L R 40 Bom 48[illegible]

—————— Owner deprived of property by fraud—[illegible] [illegible] [illegible] [illegible] redemption [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] suit [illegible] [illegible] [illegible] which the [illegible] [illegible] [illegible] had been deprived by fraud was [illegible] [illegible] which [illegible] [illegible] granted under the Dekkhan Agriculturists' Relief Act [illegible] [illegible] [illegible] (1910) 15 C W N 2[illegible]

—————— s 2—

1 —————— Agriculturist—Definition—[illegible] the [illegible] [illegible] agriculturist [illegible] [illegible] [illegible] [illegible] Dekkhan Agriculturists' Relief Act (XVII [illegible] (1912) I L R [illegible] Bom [illegible]

2 —————— [illegible] Dekkhan

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM XVII OF 1879)—*contd*

——— s. 2—*contd*

Agriculturists Relief Act 1879 irrespective of the proportion which his strictly agricultural income may bear to any other income accruing to him A *bharwad* (shepherd) who engages personally in agricultural labour is an agriculturist although his income from non agricultural (*i e* pastoral) sources may be greater than his other income BHIKHA FAKIRA *v* RAICHAND MANJI (191)

I. L. R 37 Bom 398

3 ——— *Assignee of Government revenue not an agriculturist* The income derived from tenants by an Inamdar which is to a certain extent attributable to the fact that he is the assignee of Government revenue and therefore does not have to pay over a portion of that income to Government but may keep it for himself cannot be taken into consideration in estimating whether or not he earns his livelihood wholly or principally by agriculture and therefore is not an agriculturist within the meaning of the Dekkhan Agriculturists Relief Act (XVII of 1879) KASHINATH RAMCHANDRA *v* VINAYAK GANGADHAR (1911)

I. L. R 35 Bom 266

4.——— *Sources of income —Agriculture—Scholarship or stipend received by a student is not income from non-agricultural sources* The income from agricultural sources of two brothers was R250 a year They had two houses which yielded as rent R30 a year One of the brothers held a scholarship of R15 a month and the other received a stipend of R7 a month at a training college The money they thus received from non agricultural sources amounted to R294 A question having arisen whether they were agriculturists within the meaning of s 2 of the Dekkhan Agriculturists Relief Act (XVII of 1879) *Held* that the brothers were agriculturists for the money they received either as scholarship or stipend were mere bounties PARVATIBAI *v* YESHVANT KRISHNA (1911)

I L R 36 Bom 199

5 ——— *Son of agriculturist is not an agriculturist* The minor son of an agriculturist who is depending for his support on his father is not an agriculturist within the meaning of s 2 Dependence for livelihood upon another who is an agriculturist is not the same thing as earning livelihood for oneself by agriculture To earn livelihood by agriculture is to obtain means of livelihood by it DAGDU *v* MIRASHEB (1912)

I L R 36 Bom 496

6 ——— *Gosavis—Earning livelihood by mendicancy and also from agriculture* The plaintiffs who were Gosavis had no lands of their own at the date of the suit but purchased some thereafter They were following two occupations one that of Gosavis and the other that of agriculture On a claim made by them to be agriculturists within the meaning of the term as defined in the Dekkhan Agriculturists Relief Act 1879 *Held* that the plaintiffs were not agriculturists for they adduced no proof to bring themselves under the first part of the definition and they could not take advantage of the second branch inasmuch as they being Gosavis the presumption would be that their ordinary occupation was that of mendicancy SAVALPURI *v* BALAVALAD YADAOSHET (1912)

I. L. R 36 Bom. 543

DEKKHAN AGRICULTURISTS RELIEF ACT (BOM XVII OF 1879)—*contd*

——— s 2—*contd*

7 ——— *Grant of a village as service vatan —Construction—Grant of revenue and not of soil—Holders not agriculturists* Where a Sanad evidencing grant of a village as service vatan did not go the length of granting anything more than a share of the revenue and provided that in certain cases the grant may be converted into private property which had not been done and a question having arisen as to whether the grant was one of soil and whether the holders were agriculturists within the meaning of the Dekkhan Agriculturists Relief Act (XVII of 1879) *Held* that the grant was a grant of a share of the revenue and not a grant of the soil and did not entitle the holders to be considered agriculturists in view of explanation (*b*) to s 2 of the Dekkhan Agriculturists Relief Act (XVII of 1879) CHUNILAL JAMNADAS *v* BHANUMATI (1911)

I L R 36 Bom 151

8 ——— *Interpretation* S 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) gives two definitions of the term agriculturist one in cl 1 and the other in cl 2 The former applies where a party to a suit is an agriculturist at the time the suit is filed by or against him The second clause which gives a special definition of the term agriculturist for the purposes of Chapters II III IV and VI and s 60 of the Act is not exhaustive but is merely inclusive and is intended for a special purpose The decision in *Mahadev Narayan Lokhande v Vinayak Gangadhar Purandhare I L R 35 Bom 504* does not lay down the proposition of law that a party to a suit is not entitled to the privileges of an agriculturist under the Dekkhan Agriculturists Relief Act 1879 if he was not an agriculturist at the time the liability in question was incurred even though it may be that he was an agriculturist within the meaning of the first clause of s 2 at the time of the suit DAMODAR NANDRAM *v* MANBAI (1909)

I L R 34 Bom 65

9 ——— *Amending Act (XXIII of 1881)—Ratnagiri District—Mortgage of 1881—Suit or account—Agriculturist* The plaintiff whose land and residence was in Ratnágiri District executed a mortgage in the year 1881 The Dekkhan Agriculturists Relief Act (XVII of 1879) which extended to the districts of Poona Satára Sholapur and Ahmednagar was not applicable to the Ratnagiri District in the year 1881 In the year 1896 the plaintiff brought a suit for an account of what was due on the mortgage under the provisions of s 15D of the Act (XVII of 1879) and contended that he was an agriculturist in 1881 that is when the liability under the mortgage was incurred *Held* that the plaintiff could not sue under s 15D of the Act (XVII of 1879) as he was not an agriculturist within the meaning of the Amending Act (XXIII of 1881) The expression *then* defined by law in s 2 cl 2 of the Act (XVII of 1879) relates to the time when *any part of* the liability was incurred SHANKAR RAMKRISHNA *v* KRISHNAJI GANESH (1909)

34 Bom 181

——— ss 2 (2) ... *(I of 1872) s 9?—Agriculturist ... of sale—Redemption suit—* ... *(I of ...) ... form ... lies*

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM XVII OF 1879)—*contd*

——— ss 2 (2) 10A—*contd*

at the time of the transaction The object of s 10A of the Dekkhan Agriculturists Relief Act (XVII of 1879) is not to enable a party to the suit to prove notwithstanding the words of the document what the real intention was at the time when the document was executed Regard must be paid to the date of the transaction and an agriculturist can only be allowed according to the provisions of s 10A to enjoy the special benefit of the favoured class in di regarding the provisions of s 92 of the Evidence Act (I of 1872) if he belonged to the favoured class as defined by the statute at the date of the transaction SAWANTRAVA v GIPIAPIA FAKIPAPPA (1913) I L R 38 Bom 18

——— *Agriculturist at time of transaction—Sale or mortgage—Oral evidence prove which—Defendant conveyed his land to plaintiff by document in form of sale deed—some time before ss 2 and 20 of Dekkhan Agriculturists Relief Act 1879 was extended to District in which defendant lived* The plaintiff having sued to recover possession of the land the defendant sought to prove by oral evidence that the transaction was a mortgage under s 10A of the Act *Held* that the defendant could not take the advantage of s 10A of the Dekkhan Agriculturists Relief Act 1879 since he could not prove that he was an agriculturist at the date of the transaction as at that time it could not be said that the Act was extended to the District merely because ss 2 and 20 had been extended CHANBASAYYA v CHENNAPGAVADA I L R 44 Bom 217

——— ss 3 cl (y) and 10 A—*Suit for possession under a sale deed—Contemporaneous lease—Nature of suit—Intention of parties* The plaintiff relying on his sale deed of 1887 sued to recover possession of the land in suit alleging that the defendant held it as his tenant under a lease of even date with the sale deed The defendant pleaded that his father and not the plaintiff was the purchaser under the deed of 1887 that the plaintiff was the savkar (creditor) who advanced money and the payment of interest was secured by the contemporaneous lease Both the lower Courts went into the question of intention of the parties under s 10A of the Dekkhan Agriculturists Relief Act and found the defendant s case established on facts On appeal to the High Court *Held* that the case was rightly disposed of under s 10A of the Dekkhan Agriculturists Relief Act The nature of the suit under cl (y) of s 3 of the Act should not be determined by the frame of the plaint but by the allegations of the parties which raised the question of mortgage or no mortgage GANTAM JAYACHAND v MALHARI (1916) I L R 40 Bom 397

——— ss 3 (w) 12 and 13—*Suit for redemption—Mortgage superseded by consent decree—Allegation of fraud—Form and reality of the suit* The plaintiff's father executed a mortgage in 1894 In 1899 the mortgagee sued the mortgagor for the recovery of the mortgage debt and for sale of the property In 1900 there was a consent decree by which a new sum was taken as capitalized principal and provision was made for payment of money by instalments. The security under this arrangement differed in some particulars from the security of the earlier mortgage On the same day as this consent decree was obtained Survey No 50 which was included in the older mortgage but was excluded from the purview of the consent decree was sold by the mortgagor to the mortgagee In 1903 the mortgagee obtained possession of the property and since then remained in possession In 1911 the plaintiffs brought a suit to redeem the mortgage of 1894 by setting aside the consent decree and the sale deed alleging that they were obtained by fraud coercion and misrepresentation *Held* that the suit though in form a redemption suit was in reality a suit to set aside a sale deed and a Court s decree and then to recover property of which the plaintiffs had been fraudulently deprived Such a suit is outside the provisions of the Dekkhan Agriculturists Relief Act 1879 *Bachi v Bikhchand 13 Bom L R 56* applied S 3 cl (w) of the Dekkhan Agriculturists Relief Act 1879 contemplates either *simpliciter* or primarily and substantially a mortgage suit VINAYAKRAO BALASHEB v SHAMRAO VITHAL (1916) I L R 40 Bom 655

——— ss 3 (w) 10 and 53—*Suit falling under s 3 (w)—Decision not appealable—Revision by District Judge* The decision in a suit falling under s 3 (w) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is not appealable according to the provisions of s 10 of the Act Under s 53 of the Act the District Judge alone and not the Subordinate Judge of the First Class is authorized in such a case to pass an order in *revision* SITARAM MORAPPA v VISHVANATH SERI KHANDOBA (1914) I L R 39 Bom 165

——— s 10A—

See S 2 I L R 38 Bom 18
I L R 44 Bom 217

See S 3 I L R 40 Bom 397

——— *Written instrument—Oral evidence to vary the terms—Enactment relating to procedure—Retrospective effect—pending proceedings—Suit—Appeal* The law embodied in s 10A of the Dekkhan Agriculturists Relief Act (XVII of 1879) is one of procedure and being retrospective in effect applies to pending proceedings whether in a suit or an appeal GOPAL GHELA v RAJARAM AMTHA (1911) I L R 38 Bom. 305

——— *Redemption suit—Sale in reality a mortgage—Evidence of oral agreement varying the written document—Evidence Act (I of 1872) s 92 pro I* The plaintiff brought a redemption suit under the provisions of the Dekkhan Agriculturists Relief Act (XVII of 1879) alleging that the deed which he had executed to the defendant though on its face a deed of sale was in reality only a deed of mortgage the defendant having promised at the time of the execution of the deed that he would allow redemption on payment of the money advanced The defendant replied that the transaction was sale The First Class Subordinate Judge of the Dharwar District to which s 10A of the Dekkhan Agriculturists Relief Act (XVII of 1879) was not extended found on the evidence that the deed passed by the plaintiff was not proved to be really a mortgage and dismissed the suit The plaintiff

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM XVII OF 1879)—contd

——— s 10A—contd

appealed urging that the proper issue in the case was as to whether the sale deed was not obtained or induced by the defendant by means of fraud or misrepresentation within the meaning of proviso I of s ‡ of the Evidence Act (I of 1872) and prayed for a remand *Held* confirming the decree that the plaintiff sought to make a new case in appeal in so far as he endeavoured to base his case not upon a separate oral agreement but upon some fraud which would invite the application of proviso I of s 92 of the Evidence Act (I of 1872) *Held* further that in the districts to which s 10A of the Dekkhan Agriculturists Relief Act (XVII of 1879) was not extended it was not open to the Court to enter upon a defence which consisted of an allegation of an oral agreement varying the written contract *Dagdu v Nana I L R 35 Bom 93* and *Sangiri Malappa v Ramappa I L R 31 Bom 59* followed *Bal Kishen Das v W F Legge I L R 22 All 149* referred to SOMANA BASAPPA v GADIGEVA KORNAYA (1910) I L R 35 Bom 231

——— *Transfer of Property Act (IV of 1882) s 41—Sale deed in the nature of mortgage—Bona fide transferee for value without notice of mortgage—Transfer executed less than twelve years before the institution of suit—Whether transferee protected* The second proviso to s 10A of the Dekkhan Agriculturists Relief Act does not protect a *bonâ fide* transferee for value without notice of the real nature of the transaction if he holds under a registered deed executed less than twelve years before the institution of the suit *Per* MACLEOD C J —The object of the Legislature in enacting s 10A of the Dekkhan Agriculturists Relief Act was to protect the mortgagor and not the transferee if the mortgagor was sufficiently diligent in seeking to redeem the property *Per* HEATON J —Where s 10A of the Dekkhan Agriculturists Relief Act applies s 41 of the Transfer of Property Act ceases to have any application and is replaced by the 2nd proviso to s 10A (of the former Act) PRANJIVANDAS v MIA CHAND I L R 45 Bom 87

——— s 12—Compromise by pleader—*Court's duty to record the compromise and pass decree in its terms—Pleader's compromising without authority from his client—Client to apply to cancel the compromise* There is nothing in the provisions of s 12 or in any other section of the Dekkhan Agriculturists Relief Act 1879 which expressly deprives the parties to a suit of the power of entering into a compromise and having that compromise recorded under s 375 of the Civil Procedure Code of 1882 which is the same as order XXIII rule 3 of the Code of 1908 A compromise means the settlement of a disputed claim Where a party complains that a compromise effected in his name by his pleader was unauthorised he must move the Court to cancel all that has been done and to revive the suit *Basangouda v Chirchigirigouda I L R 34 Bom 408* followed PIRAJI v GANAPATI (1910) I L R 34 Bom 502

cf I L R 35 Bom 190

——— ss 12 13—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 11 EXPL IV O II R 2 I L R 39 Bom 138

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM XVII OF 1879)—contd

——— ss 12 13—contd

——— Retrospective effect—*Indebtedness existing at the date of the passing of the Act as well as future indebtedness* The plaintiff sued to recover from the defendant a certain sum due on a money bond dated the 1?th May 1904 The suit was cognizable by the Court in its Small Cause jurisdiction The bond sued on was passed in adjustment of an existing debt which itself was the balance due on previous advances Some of the provisions including ss 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were made applicable to the district on the 1?th August 1905 and the present suit was filed on the ?6th March 1909 As the several advances which led to the bond were prior in date to the application of the provisions of the Dekkhan Agriculturists Relief Act (XVII of 1879) to the district the following question arose — Whether s 13 of the Dekkhan Agriculturists Relief Act (XVII of 1879) is retrospective so as to apply to the case of transactions entered into before the date of its extension to the district but the suit in respect of which is instituted after that date? *Held* in the affirmative that s 13 of the Act is retrospective Ss 12 and 13 of the Dekkhan Agriculturists Relief Act (XVII of 1879) show that it was the intention of the Legislature to open up all transactions between the parties having a bearing upon the claim out of which the suit arises from the very commencement This is one of the means adopted by the Legislature to carry out the intention expressed in the preamble of relieving the agricultural classes from indebtedness existing at the date of the passing of the Act as well as future indebtedness SIVLAL JETHABHAI v BHIKA RAMJAN (1909) I L R 34 Bom 220

——— *Several mortgages as part of the same transaction over the same property—Splitting up of security—Suit on one mortgage—Sale in execution of decree free from any incumbrance—Sale proceeds applied in paying off the mortgage in suit—Balance of sale proceeds—Second suit on remaining mortgages—Attachment of balance of sale proceeds—Second suit barred*

See CIVIL PROCEDURE CODE (ACT V OF 1908) O II R 2 I L R 45 Bom 55

——— s 13—

See CIVIL PROCEDURE CODE (ACT V OF 1908) ss 2 97 I L R 39 Bom 422

See STATUTE CONSTRUCTION OF I L R 35 Bom 307

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 66 I L R 45 Bom 117

1 ——— *Mortgage by Vatandar—Suit for account and redemption—Adverse possession by mortgagee—Hereditary Offices Act (Bom Act III of 1874) s 5—Mesne profits from the date of suit* One Madhavrao grandfather of the plaintiff by a deed, dated the 1?th July 1867 mortgaged with possession certain Vatan Inam lands to Babaji Anant an ancestor of the defendants Madhavrao ?83 and in 1909

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM XVII OF 1879)—*contd*

——— s 15B—*contd*

to carry out the compromise KISHANDAS SHIVRAM MARWADI v NAMA RAMA VIR (1910)
I L R 35 Bom 190

5 ——— *Civil Procedure Code (Act V of 1908) O XXIII r 3—Agriculturist mortgagor—Suit for account of principal and interest—Decree in terms of compromise—Compromise made without compliance with the special provisions of the Dekkhan Agriculturists Relief Act—Compromise valid* *Held* by the Full Bench that a compromise in a suit which came under the Dekkhan Agriculturists Relief Act (XVII of 1879) was not bad in law because it was made without compliance with the special provision (s 15B) of that Act SHIVAYAGAPPA v GOVINDAPPA (1913) I L R 37 Bom 614

6 ——— *Payment by instalments—Default in payment—Order for sale of necessary portion of property under s 15B (2)—Application to make the decree final under Order XXXIV rule 5 (2) of the Civil Procedure Code not necessary* A decree holder for sale upon a mortgage in default of payment of instalments order under s 15B (1) of the Dekkhan Agriculturists Relief Act (XVII of 1879) need not apply under Order XXXIV rule 5 (2) of the Civil Procedure Code to make the decree final before he can apply for sale of the necessary portion of the property under s 15B (2) of the Act KASHINATH VINAYAK v RAMA DAJI (1916) I L R 40 Bom 492

7 ——— s 15(d)—*Suit by mortgagor for account—Application for redemption decree in appeal—Redemption decree passed by Court in Appeal—Interpretation* In a suit for an account brought by a mortgagor under the provisions of the Dekkhan Agriculturists Relief Act (XVII of 1879) the Court found that a sum of R100 was due by the plaintiff to the defendant The defendant appealed The Appellate Court on the plaintiff's application that his suit should be treated as one for redemption passed a decree for redemption on payment of R19 2 0 by the plaintiff to the defendant The defendant preferred a second appeal contending that the words the decree in the suit in s 15D cl (3) of the Act meant decree in the original Court and not of the Court of Appeal *Held* dismissing the second appeal that when the decree of the lower Court is reversed or varied in appeal the decree of the Appellate Court becomes the decree in the suit which is to be executed in execution proceedings NAVLAJI SARDARMAL v RAMA DHONDI (1909) I L R 34 Bom 158

——— s 20—*Court—Instalments power to grant—Status of agriculturist not at the date of decree but in execution proceedings* The Court has no power to grant instalments under s 20 of the Dekkhan Agriculturists Relief Act (XVII of 1879) in the case of a judgment debtor who was not an agriculturist when the decree was obtained but who becomes one at the time of the execution by limiting himself exclusively to profits in land BALCHAND CHATURCHAND v CHUNILAL JAGJIVANDAS (1913)
I L R 37 Bom. 486

——— s 22—*Decree—Execution—Agriculturist—Exemption from liability to attachment of sale—Absence of proof of exemption—Jurisdiction of the Court to order sale—Civil Procedure Code (Act V of 1908) s 60* S 60 of the Civil Procedure Code (Act V of 1908) lays down the general rule that property liable to attachment and sale in execution of a decree is lands houses etc belonging to the judgment debtor An agriculturist in order to resist the application of that general rule must prove that he belongs to the privileged class so as to render s 22 of the Dekkhan Agriculturists Relief Act (XVII of 1879) applicable to his case In the absence of such proof the exemption from liability to attachment or sale does not exist for the purpose of execution proceedings and the executing Court has therefore complete jurisdiction to make the order for sale NARAYAN ANAND RAM v GOWBAI (191)
I L R 37 Bom 415

——— *House of agriculturist—Exemption from sale—Exemption not confined to cases of contractual debts but extends to restitution proceedings—Civil Procedure Code (Act V of 1908) s 144* The defendants paid into Court a sum which they had to pay under a decree and at the same time preferred an appeal against the decree The sum paid into Court was taken away by the plaintiff The appeal filed by the defendants was successful the decree was reversed and the suit ordered to be retried The defendants thereupon applied under the provisions of s 144 of the Civil Procedure Code for restitution of money paid by them and prayed for an order to sell the plaintiff's house in case he failed to make the restitution The plaintiff contended that he being an agriculturist his house could not be sold by virtue of the provisions of s 22 of the Dekkhan Agriculturists Relief Act 1879 The lower Courts negatived the contention on the ground that the provisions of s 22 applied only in cases of contractual debts and not to restitution proceedings The plaintiff having appealed *Held* that if the plaintiff was an agriculturist his house was immune from sale under s 22 of the Dekkhan Agriculturists Relief Act (XVII of 1879) The true construction of s 22 of the Dekkhan Agriculturists Relief Act (XVII of 1879) is first a general provision that immoveable property belonging to an agriculturist shall always be immune from sale and secondly a proviso directing that this immunity is subject to exception where the two following conditions are both satisfied that is to say (a) where the decree or order in question relates to the repayment of a debt and (b) where the agriculturist's property has been specially mortgaged for the payment of that debt The limiting words referring to a debt occur only in the proviso and cannot be imported into the main rule so as to restrict its express generality MAHADEO RANGNATH v RAMA TUKARAM (1915)
I L R 40 Bom 194

——— ss 39 48—*Conciliation—Time taken up in conciliation proceedings—Exclusion of time—Limitation* The plaintiff sued on a promissory note dated the 17th of June 1905 He first applied on the 23rd May 1908 for a conciliation certificate under s 39 of the Dekkhan Agriculturists Relief Act 18) and obtained it on the 31st August 1908 Then on the 10th September 1908 both

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM XVII OF 1879)—*contd*

——— ss 39 48—*contd*

be and the defendant made a joint application for conciliation The conciliator held that the first certificate that he had granted had become null and gave a fresh certificate on the 3rd December 1908 The suit was brought on the 11th December 1908 It was contended that the suit was barred by limitation *Held* that the suit was within time inasmuch as the whole proceeding from the 23rd of May 1908 to the 3rd of December 1908 was one and continuous and that period should be excluded under s 48 of the Act DEVIDAS *v* VITHALDAS (1911) I L R 36 Bom 183

——— ss 47 and 48—*Transfer of Property Act (IV of 1882) s 85—Limitation Act (IX of 1905) s 11 Art 11—Agriculturist mortgagor—Suit—Conciliator s certificate—Mortgagor necessary party along with other persons interested—Exclusion of time spent in obtaining Conciliator s certificate—Limitation* Defendants 1 and 2 brought a suit on a mortgage against defendant 3 and while the suit was pending defendant 3 mortgaged the same property namely a house along with other properties to the plaintiffs Defendants 1 and 2 having obtained a decree they applied for execution and sought to recover the decretal debt by sale of the house Thereupon the plaintiffs intervened and applied that the house should be sold subject to their mortgage lien The plaintiffs application being disallowed they brought a suit against defendants 1 2 and 3 to establish their right founded on their mortgage The suit was brought within one year of the order rejecting their application after the exclusion of the time taken up in obtaining the Conciliator s certificate under ss 47 and 48 of the Dekkhan Agriculturists Relief Act (XVII of 1879) defendant 3 being described in their mortgage as an agriculturist Defendants 1 and 2 contended that defendant 3 being not a necessary party the Conciliator s certificate was unnecessary and the suit was time barred *Held* that under the provisions of the Transfer of Property Act (IV of 1882) defendant 3 was a necessary party to the suit which was brought on the strength of the mortgage and he being an agriculturist the Conciliator s certificate was necessary and the suit was therefore not time barred EKNATH PANDOBA *v* DAGADURAM (1912) I L R 36 Bom 624

——— s 48—

See LIMITATION I L R 38 Bom 656

——— *The words period of limitation prescribed in the section construction of —Whether the words refer only to the period expressly provided in the Limitation Act—Decree—Execution—Conciliator s certificate—Civil Procedure Code (Act V of 1908) s 48—Limitation* A decree was obtained on October 28th 1899 and was followed by three *darkhast* which had been made within the time allowed The fourth *darkhast* was presented on August 23rd 1913 that is more than twelve years after the decree In July 1911 the judgment creditor applied for a conciliator s certificate the suit being governed by the Dekkhan Agriculturists Relief Act 1879 The certificate was obtained on March 29th 1913 A question being raised whether under s 48 of the Dekkhan Agriculturists Relief Act 1879 the judgment creditor was entitled to exclude the interval of time occupied in obtaining the certificate in computing the period of limitation prescribed by s 48 of the Civil Procedure Code, 1908 *Held* answering the question in the affirmative that the words the period of limitation prescribed for any suit or application in s 48 of the Dekkhan Agriculturists Relief Act 1879 were general and comprehensive and referred to the limitation prescribed in any law for the time being in force They could therefore control or modify the period of time allowed not only in the statute of limitation but also that in s 48 of the Civil Procedure Code 1908 *Dayaram v Laxman 13 Bom L R 254* distinguished SHIDAYA VIRBHADRAYA *v* SATAPPA BHARMAPPA (1918) I L R 42 Bom 367

——— s 71—*Civil Procedure Code (Act V of 1908) O XXI r 20 O XXXII r 7—Decree in favour of minor—Compromise of the decree with minor s mother—Compromise neither certified to nor sanctioned by the Court—Payment made under compromise to be taken into account under the decree* A decree passed on a mortgage provided for payment of Rs 662 15 0 in annual instalments of Rs 60 each commencing from the 15th April 1916 The decree holder having died his widow acting as natural guardian of her minor son compromised the decretal debt for Rs 350 the payment of which was endorsed on the decree though not certified to the Court Nor did the Court sanction the compromise Later the widow and the Nazir of the Court were appointed guardians of the property of the minor Early in 1907 they applied to recover the amount of the first instalment which had accrued due *Held* that under s 71 the Executing Court notwithstanding O XXI r 2 was entitled to take into account the payment made to the widow though it was not certified *Held* further that the judgment debtor was not entitled to take advantage of the compromise but could take into account the money actually paid CHHOGANLAL KALIDAS *v* PARASRAM KURNASHANKAR I L R 45 Bom 1128

——— s 72—*Agriculturist—Status at the time when the cause of action arises—Sons of original debtor not in existence at the date of the cause of action are yet within the statute— Person meaning of* The defendants father passed a registered bond to the plaintiff in 1900 the cause of action under which accrued in 1901 In 1912 the plaintiff filed a suit to recover moneys due under the bond and tried to bring his claim in time by reference to the provisions of s 72 of the Dekkhan Agriculturists Relief Act (XVII of 1879) The defendants contended that the section did not apply for at the time the cause of action arose in 1901 they were not only not agriculturists but were not in existence at all The lower Court negatived the contention and decreed the suit The defendants having appealed *Held* that the suit fell within the scope of s 72 of the Dekkhan Agriculturists Relief Act and that the plaintiff was entitled to the extended limitation The word person in s 2 of the Dekkhan Agriculturists Relief Act (XVII of 1879) is equivalent to the word defendant which occurs in s 3 cl (w) of the Act PIRAPPA *v* ANNAJI APPAJI (1916) I. L. R 40 Bom. 189

——— *Calcutta Municipal Act (Beng Act III of 1899) ss 18 102 (1) (c) 391 449—Sanction by District Building Surveyor of additions to contemplated building —Delegation of power by Chairman—Legality of sanction—Sanction of General Committee—Proceeding under s 449—Application thereunder to Magistrate signed for the Chairman by the Secretary to the Corporation and the General Committee—Irregularity* An addition to a contemplated building sanctioned by a District Building Surveyor to whom the power of sanction has been delegated by the Chairman under s 18 of the Calcutta Municipal Act 1899 is a duly authorized erection and the sanction of the General Committee under s 391 is not necessary S 391 applies only to alterations of and additions to existing buildings. Where the General Committee approved of the suggestion of the Building Sub Committee that certain additions to a building were unauthorized and that an application should be made to the Magistrate under s 449 of the Act and directed the Chairman to make it whereupon an application was made purporting to come from the Chairman but signed by the Secretary to the Corporation who was also Secretary to the General Committee —*Held* that the irregularity if any was cured by s 102 *(1) (c)* of the Act Kissori Lal Jaini *v* The Corporation of Calcutta (1910) I L R 37 Calc 585

DEMURRAGE.

See RAILWAY COMPANY I L R 42 All 655

DENATURED SPIRIT

See EXCISE I L R 41 Calc 694

DENIAL OF JUSTICE.

See DISPUTE CONCERNING LAND I L R 38 Calc 24

DE NOVO TRIAL.

See REMAND I L R 44 Calc 929

DEPENDENT RELATIVE REVOCATION

——— doctrine of—

See HINDU LAW—WILL I L R 39 Mad 107

DEPORTATION

See LIBEL I L R 37 Calc 760

DEPOSIT

See BENGAL TENANCY ACT s 173 A 15 C W N 760

See CONTRACT ACT (IX OF 1872) ss 39 63 64 65 73 74 AND 75 I L R 38 Mad 178

See PATNI SALE I L R 47 Calc 337

——— by co tenant under s 310A Civil Procedure Code 1882—

See CONTRIBUTION I L R 38 Calc 1

——— by judgment debtor—

See PAYABLE DISTRIBUTION I L R 40 Calc 619

——— forfeiture of—

See CONTRACT I L R 33 All 166
I L R 38 Mad 801
I L R 41 All 324
24 C W N 40

See CONTRACT ACT 1872 s 74 I L R 33 Mad 375

——— in Court—

See MORTGAGE I L R 37 Calc 282

——— of earnest money forfeiture of—

See CONTRACT BREACH OF I L R 38 Mad 801

——— of money—

See LIMITATION ACT (IX OF 1908) s 17 I L R 37 Mad 175

——— order to make—

See PRESS ACT (I OF 1910) s 3 I L R 37 Bom 555

——— right to on insolvency—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXXVIII R. 5 I L R 39 Mad. 903

——— *Contract Act (IX of 1872) ss 43 70—Deposit by co tenant not made party in co sharer landlord's suit for share of rent to set aside sale—Civil Procedure Code (Act XIV of 1882) s 310A—Sale set aside—Liability of other co tenants to contribute* A co sharer land

DEPOSIT—*contd*

lord brought a suit for his share of the rent against all except one of several co tenants and sold the holding in execution of the decree obtained therein A purchaser of the interest of the remaining co tenant applied under s 310A Civil Procedure Code and the sale was set aside on his making the required deposit *Held Per* JENKINS C J that on the findings of fact of the lower Appellate Court that the plaintiff did not intend to make the deposit gratuitously and that the defendants enjoyed the benefits thereof and the deposit having moreover been made lawfully in that it was done with the approval of the Court s 70 of the Contract Act applied That the plaintiff was entitled to sue the defendants in contribution but only in respect of their share of the decretal debt and not in respect of the penalty of 5 per cent on the purchase money payable under s 310A Civil Procedure Code *Per* DOSS J—That the plaintiff was entitled to recover the defendants share of the decretal debt not under s 70 as being a co tenant he was himself liable to the landlord for the whole debt but under s 43 his obligation to pay remaining notwithstanding that the decree was passed against the other co tenants only That the sale not having been confirmed and the sale proceeds withdrawn when the deposit was made the decree remained undischarged and was only satisfied when the money deposited by plaintiff was withdrawn MOHENDRA GHOSHAL *v* BHUBAN MARDANA (1910) 14 C W N 945

1 ——— Husband depositing money in wife s name in his shop——*Interest allowed over the amount—Depositee allowed to withdraw—Husband acknowledging trust—Creation of trust—Trusts Act (II of 1882) ss 5 and 6—Transfer of Property Act (IV of 1882) ss 5 and 54* D made a credit entry of R20 000 in his books in the name of his wife H carrying interest at 4½ per cent The entry was made on the 1st November 1891 as of the 30th November 1890 The amount of R20 000 was treated as belonging to H in the *saraya* (balance sheet) in the *samadaskat* book (a count book of deposits etc) and in the *vyaja tahi* (*interest account book*) In November 1895 H on the occasion of her going on pilgrimage withdrew some money from the account H died on the 2nd March 1901 On the 29th July 1901 D wrote a letter to his four daughters by H saying that the money above referred to was given by him to H as a gift that the four daughters had equal right to take the money but that it was to be divided after his death In February 1903 D debited the whole amount to H's account and credited the same to the sons of M one of the daughters of D and H This he confirmed by his will which he made shortly afterwards wherein he stated that the money was always his own and never belonged to his wife H After D s death which took place in March of the same year the three remaining daughters of D and H sued to recover their share of the money —*Held* that the plaintiffs were entitled to recover their share in the amount *Held* by CHANDAVARKAR J that the circumstances proved showed that D intended a trust in favour of his wife H and that that trust was carried into effect legally by him *Held* by HEATON J was no trust but that in the circumst D conferred on H a right to th he did not actually

DEPOSIT—*contd*,

give her money and this right he by his own acts and words made perfect by those means which were appropriate to the purpose BAI MAHAKORE v BAI MANGLA (1911)

I L R 35 Bom 403

2 ———— **Stakeholder**—*Valid assignment by depositor to his creditor—Neglect of the creditor to recover—Creditor chargeable with the amount* Where money deposited with a stakeholder was validly assigned by the depositor to his creditor in satisfaction of his debt and the creditor being able to recover the amount so assigned neglected to do so he was chargeable with the amount GANPATRAO PATKRISHNA BHIDE v MAHARAJA MADHAVRAO SINDE (1910) I L R 35 Bom 1

3 ———— **Contract for purchase of land**—*Every payment by a purchaser to the vendor is not in the nature of a deposit liable to be forfeited if the purchaser violates his Contract* It is incumbent on the Court in each case to ascertain the real intention of the parties from all the terms of the Contract NAWAB KHAJA HABIBULLAH v ARMEN DEWAN

24 C W N 40

DEPOSIT IN COURT

See MORTGAGE I L R 37 Calc 282

See SALE I L R 48 Calc 811

———— *time for*—

See EXPARTE DECREE

I L R 39 Mad 583

———— *Putni rent—Bengal Tenancy Act (VIII of 1885) ss 51 61 67 (2) 125 (e)—Putni Regulation (VIII of 1819)* S 61 of the Bengal Tenancy Act is applicable to a *putnidar* as it does not in any way affect the Regulation VIII of 1819 relating to *putni* tenures and it is open to him to deposit the *putni* rent in Court BATA KRISHNA RANO v JANKI NATH PANDE (1914) I L R 41 Calc 1000

———— *Judgment debtor—Transferee of the judgment debtor—Bengal Tenancy Act (VIII of 1885) s 174—Sale setting aside of* An application under s 174 of the Bengal Tenancy Act can be made by the judgment debtor alone and by no other person *Ranjit Kumar Ghosh* v *Jogendra Nath Ray 16 C L J 546* referred to SURENDRA NARAYAN SINGH v LACHMI KOER (1915) I L R 43 Calc 100

———— *Money paid under compulsion of Law—Want of bond fides—Action for recovery of money—Civil Procedure Code (Act V of 1908) O XXI r 46 cl (1)—Attachment of debt due to a stranger on the allegation that the garnishee's creditor was benamidar of the judgment debtor—Deposit by garnishee conditional on enquiry—Withdrawal of the money from Court by the attaching creditor without notice to the garnishee—Court's power of enquiry* Where debt due to a stranger was attached on the allegation that he was benamidar of the judgment debtor and the attaching creditor withdrew the money by leave of the Court without notice to the garnishee in a suit by the latter for the recovery of the money deposited it being found that there was no benami transaction as alleged *Held* that the rule that money paid under compulsion of a legal process was irrecoverable can only be pleaded where the party who has got the benefit of his

DEPOSIT IN COURT—*contd*

opponent's payments acts *bond fide* *Marriot* v *Hampton 7 T R 269* distinguished *Ward and Co* v *Wallis (1900) 1 Q B 675* followed Cl (3) r 46 of O XXI of the Civil Procedure Code does not contemplate of cases where the deposit was purely conditional on enquiry being held as to judgment debtor's rights and a withdrawal by the attaching creditor of the money so conditionally deposited without notice to the garnishee even though made with the leave of the Court is a grave abuse of judicial process It is true that O XLVI does not expressly contemplate of an enquiry as is enjoined by O V, rule 45 of the Rules of the Supreme Court in England but the Court has inherent power to enquire HARINATH CHOWDHURY v HARADAS ACHARJYA CHOWDHURY (1915) I L R 43 Calc 269

DEPOSIT OF TITLE-DEEDS

See TITLE I L R 37 Calc 239

DEPOSITION

See INSOLVENT I L R 46 Calc 996

See PERJURY—WITNESS

I L R 42 Calc 240

———— **corroboration of**—

See EVIDENCE ACT (I OF 1872) ss 21 157

I L R 34 Bom 599

———— **reading over of**—

See CHARGE I L R 42 Calc 957

———— **taken in absence of accused**—

See HABEAS CORPUS

I L R 39 Calc 164

———— **under compulsion**—

See FALSE EVIDENCE

I L R 37 Calc 878

———— *Criminal Procedure Code s 360—Deposition of witnesses to be read out to them in presence of accused* The disregard at trials in the mofussil of the provision of s 360 of the Criminal Procedure Code which requires that deposition of a witness should be read over to him in the presence of the accused or his pleader condemned JYOTISH CHANDRA MUKHERJEE v EMPEROR (1909) I L R 36 Calc 955

14 C W N 82

———— *Witness reading over his deposition in Court—Admissibility of same on subsequent trial for perjury—Misdirection—Material evidence recorded in anticipation of the examination of a witness not ultimately called—Direction to Jury to exclude such evidence—Power of High Court to substitute its own finding for verdict of Jury—Civil Procedure Code (Act V of 1908) O XVIII r 5—Evidence Act (I of 1872) ss 80 167—Criminal Procedure Code (Act V of 1898) s 423* The perusal of his deposition by a witness is a substantial compliance with r 5 O XVIII of the Civil Procedure Code and such deposition when duly signed by the Judge is admissible under s 80 of the Evidence Act without proof on a subsequent trial of the deponent for giving false evidence *Elahi Bakh Kazi* v *Emperor I L R 45 Calc 825* referred to *Empress* v *Mayadeb Gossami I L R 6 Cal 762 Mohendra Nath Misser* v *Emperor 12 C W N*

DEPOSITION—*contd*

845 Pallal Chandra Lala v Emperor I L R 45 Calc 508 Jyotish Chandra Mukerjee v Emperor I L R 36 Calc 955 and *Emperor v Jogendra Nath Ghose I L R 4 Calc 940* distinguished *Karuppa nallan Chetty v Emperor I L R 38 Mad 308 Pema v Emperor I L R 34 Mad 141* and *Meenga v Lariah (1918) Mad W N 94* referred to The essential requirement of s 80 are that the witness should be duly sworn and examined and that his deposition should be signed by the Judge A certificate at the end of the deposition that it was read over to or by the witness is not required by r 6 O XVIII and its omission does not affect the admissibility of the deposition under s 80 of the Evidence Act on the presumption arising thereunder Where certain material evidence was admitted at the trial in anticipation of the examination of a witness who was not however called and the Judge directed the jury to put it out of their minds —*Held* that such evidence might have had considerable influence on their minds and that its admission was a misdirection notwithstanding the Judge's direction to exclude it from consideration *Rex v Norton [1910] 2 K B 500* referred to *It is always dangerous to give in advance evidence the admissibility of which depends on what other witnesses may say when and if examined* and the Court should be very cautious in allowing such evidence to be given especially in jury trials Under s 16 of the Evidence Act if in the opinion of the Appellate Court there is sufficient legal evidence to justify *the decision* the improper admission of other evidence is not in itself a ground for interference But in jury trials the Appellate Court ought not to substitute its own verdict on the legal evidence for that of the jury *Wafadar Khan v Queen Empress I L R 21 Calc 955 Sadhu Shaikh v Empress 4 C W N 576* followed In such cases the Court should not confirm the conviction on the legal evidence as sufficient unless satisfied that the verdict would have been the same if no evidence had been wrongly admitted and this principle applies as well to cases of improper admission of evidence as to cases of misdirection Conviction and sentence set aside but no retrial ordered in the circumstances RAMESH CHANDRA DAS v EMPEROR (1919) **I L R 46 Calc 895**

——————— *Admissibility of deposition when not taken in accordance with law on subsequent trial for abetment of forgery and of user—Deposition signed by Judge and witness—No cross examination on the point at the trial—Presumption of compliance with the law—Civil Procedure Code (Act V of 1908)—O XVIII rr 5 6—Evidence Act (I of 1872) ss 80 91* The provisions of O XVIII rr 5 and 6 of the Civil Procedure Code (Act V of 1908) are directory and non compliance therewith does not render the deposition inadmissible on a subsequent trial of the deponent either for giving false evidence or for abetment of forgery and of dishonest user of a bond proved by him in the course of a civil suit *Empress v Mayadeb Gossami I L R 6 Calc 762 Kamatchi nallan Chitty v Emperor I L R 28 Mad 308* and *Emperor v Jogendra Nath Ghose I L R 4 Calc 940* commented on *Pogra v Emperor I L R 34 Mad 141* approved If a deposition has not been read over to the witness in the presence of the presiding Judge it does not prove itself under s 80 of the Evidence Act but it may still be proved in some other way *e g* by the Judge who recorded it or by the admission of the deponent S 91 of the Evidence Act even if it covers deposition merely excludes oral evidence of its content but does not make the document inadmissible in evidence nor does it deal with the question of its mode of proof otherwise Where the deposition bore the signatures of the presiding Judge and of the deponent in his own vernacular and the Judge and a pleader for the defendant on whose behalf the appellant had deposed were examined at the Sessions trial but not cross examined by the latter to show that the deposition had not been read over to him in the presence of the presiding officer and there was nothing to the contrary on record of the Sessions trial *Held* that the inference was that the deposition had been so read over to the deponent *Per* BEACHCROFT *J* A Court is not precluded from ascertaining from the document itself what is in it merely because the contents may not in fact be correct Failure to ensure the accuracy of the record may create doubt as to the correctness of its contents but does not affect its admissibility when it is otherwise proved ELAHI BAKSH KAZI v EMPEROR (1918) **I L R 45 Calc 825**

DEPUTY COLLECTOR

See COLLECTOR

——————— procedure by under the Rent Recovery Act—

See JURISDICTION OF HIGH COURT
I L R 38 Calc 832

DEPUTY COMMISSIONER

See PATNI LEASE
I L R 42 Calc 1029

——————— order of—

See HIGH COURT JURISDICTION OF
I L R 40 Calc 518

DEPUTY MAGISTRATE

See PUNITIVE POLICE
I L R 40 Calc 452

——————— in charge of the district—

See MAGISTRATE JURISDICTION OF
I L R 39 Calc 1041

DERAILMENT OF TRAIN

See NEGLIGENCE **I L R 48 Calc 757**

DESAI IN BELGAUM DISTRICT

See LIMITATION ACT (IX OF 1908) SCH 1 ART 159 **I L R 43 Bom. 376**

DESAIGIRI ALLOWANCE.

——————— *Surat District* In the District of Surat Desaigiri allowance is alienable *Bai Jadav v Narsilal (1900) I. L. R 25 Bom 4 0* referred to KHU HALBHAI v DULLABBHAI **I. L. R. 45 Bom. 948**

DESCRIPTION OF PROPERTY

See SALE IN EXECUTION OF DECREE
I L R 41 Calc 590

DESERTION

See DIVORCE I L R 44 Calc 1091
I L R 47 Calc 1068

DESHGAT INAM

See FORFEITURE I L R 36 Bom 539

DESHGAT VATAN

See GRANT I L R 39 Bom 68

See GRANT OF LAND
I L R 43 Bom 37

DESHMUKHI VATAN

See HEREDITARY OFFICES ACT (BOM ACT III OF 1874) ss 11 11A
I L R 37 Bom 37

DESHPANDE KULKARNI VATAN

See PENSIONS ACT (XXIII OF 1871) s 4
I L R 37 Bom 91

DESHPANDEGIRI CASH ALLOWANCE

See LIMITATION ACT (IX OF 1908) s 7
I L R 42 Bom 277

DESIGN

——————— *Wrist watch band—Registration—Application by outside party to expunge—Cancellation of registration by Controller—Jurisdiction of Controller—New and original design—Shape and configuration—Ornamentation and utility—Analogous designs—Different purposes and dissimilar use—Motion to the High Court by registered proprietor—Other specific and adequate legal remedy available—Specific Relief Act (I of 1877) s 45—Patents and Designs Act (II of 1911) ss 62 64 67* G registered a design for a wrist watch band which he called the Novelty band Subsequently Messrs B & Co copied the design and on threat of legal proceedings by G applied to the Controller of Patents and Designs under s 62 of the Patents and Designs Act for an order to remove the design from the register This the Controller did after having issued notice on G and having heard both parties G then in an application entitled In the matter of s 45 of the Specific Relief Act and in the matter of the Indian Patents and Designs Act 1911 moved the High Court for an order that the Controller had no jurisdiction to remove the registration of the design and that he should be required to restore the design to the register on the ground that the design was new and original The Court dealt with the matter under s 64 of the Indian Patents and Designs Act and discharged the Rule Messrs B & Co contending that the design in question had been anticipated by a bracelet produced by Messrs C & K On appeal by the petitioner *Held* that the Controller had no jurisdiction to cancel the registration and under the Act the proper and ordinary way of expunging the registration of a design was to apply to this Court under s 64 of the Patents and Designs Act *Held* also that s 62 of the Patents and Designs Act was limited to applications by the registered proprietor or by some person in whom his interest was vested and the action of the Controller was not justified by that section *Held* also that the Court had no power to revise the Controller s decision under s 64 *Held* also that this application which was made under s 45 of the Specific Relief Act was not barred by s 64 of the Patents and Designs Act *Held* also that the application of the shape of the Novelty band to a watch to be worn on the wrist was for a purpose so different from and for a use so dissimilar to the purpose of the bracelet that the design in question might be said to be original *Per* SANDERSON C J The shape and configuration of the metal band taken by itself cannot be said to be new or original *Per* WOODROFFE J A wrist band used to carry an ornament such as that produced by Messrs Cooke and Kelvey and a wrist band to carry a watch do not appear to me to be so analogous as to deprive the applicant of his claim to novelty Further the band is original and differs from the other band produced by its circular shape according to which it passes at the back of the watch and as a consequence of that produces a flattening GAMMETER *v* THE CONTROLLER OF PATENTS AND DESIGNS (1917)
I L R 45 Calc 606

DESTINATION

See TRADING WITH THE ENEMY
I L R 42 Calc 1094

DESTRUCTION OF IMAGE

See IMAGE I L R 41 Calc 57

DETECTIVE

See ACCOMPLICE I L R 38 Calc 96

——————— privilege of—

See CHARGE I L R 42 Calc 957

DETENTION IN CUSTODY

See POLICE OFFICER
I L R 46 Calc 591

DEVOLUTION OF INTEREST

See LIMITATION I L R 43 I A 113

DEUR RAJAH OF

See SANAD I L R 36 Bom 639

DEVASTANAM COMMITTEE MEMBER

See HINDU LAW—DEBT
I L R 37 Mad 458

DEVOLUTION SCHEME OF

See HINDU LAW—INHERITANCE
I L R 39 Calc 803

——————— difference of opinion—

See REVISION I L R 47 Calc 438

DHOLI TENURE.

See CUSTOM (RELIGIOUS INSTITUTIONS)
I L R 2 Lah 313

DIGWARS

——————— appointment of—

See DIGWARI TENURE
I L R 43 Calc 743

DIGWARS—*contd*

——— position of—

See LANDLORD AND TENANT
I L. R 39 Calc 696

DIGWARI TENURE.

See LANDLORD AND TENANT
I L. R 39 Calc 696

——— ——— *Digwars of Ghat Bharra in district Bankura—Appointments made by Government—Whether any relief thereto could be given by the Civil Courts—Declaratory decree effect of* Where the Magistrate of Bankura sanctioned the plaintiff's appointment as Digwar in succession to his deceased father the last holder but the Commissioner cancelled it on a misreading of the law as to his title and on appeal to the Government the plaintiff was directed to go to the Civil Court for relief *Held* that the Digwars of Ghat Bharra in Bankura were the holders of an office remunerated by the enjoyment of land and the history of the office established a general usage on the death of a Digwar holding office to appoint his heir in his place as the successor to his office That here the usage of the heir taking his predecessor s place could be traced back to the seventeenth century and so long a usage could not be disregarded as an exponent of the Digwari right On the contrary the force of law could safely be ascribed to it subject to the qualification that the heir s claim and tenure of office was dependent on the approval of the Government That the Civil Court could do no more than express its conclusion that the plaintiff was the heir of one of the last incumbents and his claim to succeed was subject to the approval of the Government and that the ground on which the Commissioner cancelled the Magistrate s sanction was erroneous in law *Jogendra Nath Singh* v *Kalicharan Roy 9 C W N 663* distinguished That in view of all the circumstances of the case a declaratory decree could be made defining the plaintiff's position though it may be that it was not really necessary for having regard to the Government s reply referring the plaintiff to the Civil Court it would probably be prepared to give or withhold its approval in accordance with the view expressed by the Civil Court seeing that it invited recourse thereto That in doing this it was necessary for the High Court out of a wreckage of procedure to construct the material for a just decision as the plaint was not happily drafted *Cockerell* v *Dickens 2 Moo I A 353 Durga Prasad Sureka* v *Bhagan Lal I L R 31 Calc 614 I L R 31 I A 12? Gopi Narain Khanna* v *Bansidhar I L R 27 All 325 L R 32 I A 123* referred to HEMENDRA NATH ROY *v* UPENDRA NARAIN ROY AND SECRETARY OF STATE FOR INDIA (1915)
I L R 43 Calc 743

DILUTION OF SPIRIT

See EXCISE I L. R 41 Calc. 694

DILUVION

See LANDLORD AND TENANT
I L R 41 Calc 683

See LIMITATION I L. R 44 Calc. 858

——— *Reformation in situ —Land settled with raiyat submergence of followed by non payment of rent—Abandonment—Accretion*

DILUVION—*contd*

The Plaintiff sued to recover possession of newly formed *char* lands as accretion to his raiyatijote The defence was that the land was reformation *in situ* of land held by the Defendant in a Government Khas Mahal and which had been submerged in the river It appeared that the lands diluviated in the same year that the Defendant obtained a lease of the land and remained under water for thirty years during which period no rent for it was paid by the Plaintiff and since re appearance the land was in the possession of the Defendant without any objection on the part of Government *Held* —That the land being reformation *in situ* could not be claimed by the Plaintiff as accretion to his estate The only person entitled to object to the Defendant s possession was the Government the owner of the Khas Mahal The land could not be held to be accretion to the Plaintiff s estate merely because the Defendant s rights under the lease might have been extinguished AMINADDI *alias* AMIRADDI *v* TARINI CHARAN MONDAL
24 C W N 211

——— *Abatement of rent on ground of —Rent suit for — Abatement on ground of diluvion—Shifting of onus of proof on landlord to prove amount recoverable on proof by tenant of fact of diluvion—Finding as to length of unit of measurement if can be assailed in second appeal* Where there is no express agreement to the contrary as soon as the fact of diluvion is established by the tenant in a suit for rent he is entitled to abatement and the burden is shifted to the landlord to prove the reduced amount of rent justly recoverable by him which can be done only by proof of the extent of the diluvion The finding of the lower Court on evidence as to the length of the unit of measurement cannot be assailed in second appeal KRISTA DAS LAW *v* ABDUL KARIM 25 C W N 325

DIRECTION

See THIRD PARTY
I L R 34 Bom 423

——— to administrator (High Court can give)—

See SUCCESSION ACT X OF 1865 ss 264 AND 239
I L R 44 Bom. 682

DIRECTOR

See COMPANIES ACT (IV OF 1882) ss 137 AND 141 I L R 40 Mad 706

See COMPANIES ACT (VII OF 1913) 38
I L. R 41 Bom 76

——— liability of—

See COMPANY
I L. R 45 Calc 486 490

——— of a Bank—

See PRESIDENCY BANKS ACT ss 3? 3 I L. R 39 Mad. 101

——— of a Company—

See COMPANY I L. R 42 Bom. 264

——— personal interest of—

See COMPANY I L. R 38 Mad. 991

——— powers of—

See I L. R 36 All 412

DIVORCE—*contd*

——————— *Husband's petition—Foreign domicile—Divorce Act (IV of 1869)—Territorial jurisdiction* The husband who was an Italian subject with an Italian domicile instituted proceedings for divorce on the ground of his wife's adultery The marriage had been solemnized in India and the parties were residing in British India *Held* that under the provisions of the Indian Divorce Act the Court was bound to grant a divorce on proof of adultery although the divorce would have no effect outside India *LeMesurier v LeMesurier* [1895] *A C 517* and *Shaw v Gould L R 3 E and I App 55* referred to GIORDANO v GIORDANO (1912)

I L R 40 Calc 215

——————— *Husband's petition—Security for wife's costs—Practice* In a husband's petition for dissolution of marriage where both parties are subject to s 4 of the Indian Succession Act (X of 1865) and the wife has no means of her own the Court has a discretion to order the petitioner to furnish security for the respondent's costs *Proby v Proby I L R 5 Calc 357 Young v Young I L R 23 Calc 916n Thomas v Thomas I L R 23 Calc 913 Thomson v Thomson I L R 14 Calc 580 Watling v Watling* (1910) *April 22* (unreported) *Jahans v Jahans 6 C W N 414* and *Mayhew v Mayhew I L R 19 Bom 293* considered BATEMAN v BATEMAN AND NICACHI (1914)

I L R 41 Calc 963

——————— *Evidence Act (I of 1872) ss 60 112 118 and 120—Non access competency of parties to testify to—Legitimacy of child—Expert opinion on legitimacy relevancy of* When in a suit for divorce the petitioner (*husband*) did not make any person a co respondent but simply averred that his wife was generally leading an immoral life a judge would be wrong in adding a person as co respondent *suo motu* without calling on the petitioner to amend the petition by making the necessary allegations against him In the absence of the adoption of such a course the proper order to make is to strike out the co respondent's name from the proceedings Whatever might be the English common law on the subject under ss 118 and 120 of the Indian Evidence Act both the parties to proceedings for divorce are competent to give evidence as to non access and illegitimacy of the child *Held* on the evidence in the case that a child born 11 months after the cessation of marital intercourse was illegitimate and that the petitioner was entitled to a divorce *Rosario v Ingles I L R 18 Bom 468* referred to Under s 60 of the Evidence Act a Court can consider and act upon the opinions of experts contained in treatises as regards the question whether a particular child could or could not have been begotten just before the period of non access JOHN HOWE v CHARLOTTE HOWE (1913) **I L R 38 Mad. 466**

——————— *Co respondent absence of—Leave of Judge for dispensing with co respondent when to be obtained—Jurisdiction of Court in case of want of such leave—Matrimonial Causes Act of 185" (20 and 21 Vict c 85) s 28—Divorce Court Rules (Engl h) 4 5 and 6—Indian Divorce Act (IV of 1869) ss 7 11* Where the husband was petitioner for divorce but could not name the alleged co respondents (the Master having issued citation) and at the hearing applied for leave to dispense with the co respondents *Held that the direction for such leave must be by* application to the Judge on motion founded on affidavit *before the hearing* of the petition *Held further* that the Court had no jurisdiction to entertain the petition where such leave had not been obtained COX v COX (1910)

I L R 45 Calc 525

——————— *Petition for divorce by wife—Husband and wife not living together but separately from each other at the date of the petition—High Court's jurisdiction to hear the petition—Indian Divorce Act (IV of 1869) s 3 (1)—Practice of Bombay High Court*—Under the Indian Divorce Act the High Court has jurisdiction to hear a petition if both parties are resident within its jurisdiction at *time* of presentation notwithstanding they were living separately *Durand v Durand 1870 14 W R 416* referred to *Xavier v Xavier 1892 P J 153* not followed BORGANHA v BORGANHA (1920) **I L R 44 Bom 924**

——————— *Petition by wife—Husband and wife not having permanent residence Last resided together in Bombay—Jurisdiction—Indian Divorce Act (IV of 1869) s 3 (1)—Practice* In a petition for divorce by wife the Court found (1) that the husband and wife had no permanent residence they having lived at several places since their marriage (2) that they last lived together at an Hotel in Bombay for a greater portion of a month the husband being then on leave from war service in Mesopotamia and (3) that both the parties were within the jurisdiction when the petition was filed and served on the respondent *Held* that there was a sufficient reason within the meaning of the Indian Divorce Act 1869 to give the Court jurisdiction to entertain the petition *Bright v Bright (1909) 36 Calc 964* followed. *Flowers v Flowers (1910) 32 All 203 and Wadia v Wadia (1914) 38 Bom 125* distinguished MURPHY v MURPHY (1920)

I. L R 45 Bom 547

——————— *Husband and wife—Petition by husband—Adultery—Condonation—Collusion—Conduct conducing to adultery—Desertion—Divorce Act (IV of 1869) ss 12 13 14* Condonation is a conclusion of fact not of law and means the complete forgiveness and blotting out of a conjugal offence followed by cohabitation the whole being done with full knowledge of all the circumstances of the particular offence forgiven The forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation and this must be shown by a re-instatement of the wife in her former position which renders proof of conjugal cohabitation with restitution of conjugal rights necessary Collusion is held to exist where the initiation of the proceeding for dissolution of marriage is procured and its conduct (especially if abstention from defence be a term) provided for by agreement or bargain between the spouses or their agents although it does not appear that any specific fact has been falsely dealt with or withheld The mere fact that the husband refused marital intercourse to the wife by itself is not such wilful neglect or misconduct as conduced to the adultery nor can the fact that the parties went their own way in the sense that they had

DIVORCE—*contd*

their own friends and interests be said to be conduct conducing to adultery even when coupled with the abstinence by the husband from marital intercourse The fact that the husband had abstained from marital intercourse without reason able cause and that the parties went their own way in the sense that they had their own friends and interests would not justify a finding of desertion on the part of the petitioner STE CROIX v STE CROIX (1917) I L R 44 Calc 1091

———— *Suit against wife —Wife found guilty of adultery—Decree nisi on husband's petition—Appeal—Wife's costs application for—Liability of husband—Practice and procedure* Where the wife has been herself found guilty of adultery by the Court of first instance and then actively brings the matter before the Court on appeal the husband cannot be justly called upon by her as a matter of right to provide for her costs *Robertson* v *Robertson 6 P D 119 Otway* v *Otway 13 P D 141 Holt* v *Holt 28 L J (P and M) 12* referred to *Per* MOOKERJEE *J* It is plain however that the doctrine in question is an encroachment upon the ordinary rule that costs follow the event and speaking for myself I am of opinion that every attempt to extend its operation should be cautiously scrutinised STE CROIX v STE CROIX (1916) I L R 44 Calc 35

———— *Adultery—Condonation—Desertion—Unreasonable delay—Indian Divorce Act (IV of 1869) ss 12 13 and 14* Condonation of past matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse so that if after condonation the offences are repeated the right to make the condoned offences a ground for divorce revives To constitute a revival of condoned offences the offending spouse need not be guilty of offences of the same character as those condoned *Peacock* v *Peacock 1 Sw and Tr 183 Keats* v *Keats 1 Sw and Tr 334 Ellis* v *Ellis 4 Sw and Tr 154 Ste Croix* v *Ste Croix I L R 44 Calc 1091 Wyndham* v *Wyndham 32 L J P M and A 89 9 Jurist N S 82 Thompson* v *Thompson I L R 39 Calc 395 Price* v *Price [1911] P 201 Moss* v *Moss [1916] P 155 Roberts* v *Roberts 117 L T 157 Blandford* v *Blandford 8 P D 19* referred to Although poverty is almost always a sufficient excuse for delay it is not to be supposed that there is no lapse of time where a line may be drawn *Mortimer* v *Mortimer 2 Hag Con 310 Coode* v *Coode 1 Curt 755 Short* v *Short L R 3 P and D 193 Harrison* v *Harrison 3 Sw and Tr 362 Nicholson* v *Nicholson L R 3 P and D 53 Mason* v *Mason 7 P and D 233 8 P and D 21 Edwards* v *Edwards 17 T L R 38 Pears* v *Pears 107 L T 505 Hughes* v *Hughes 32 T L P 62 Coppinger* v *Coppinger 34 T L R 588* and *Miller* v *Miller* 12 C W N 1009 referred to MORENO v MORENO (1920) I L R 47 Calc 1068

———— *Nullity of marriage—Impotency—Syphilis—Fraud—Indian Divorce Act (IV of 1869) ss 18 19* On a husband's petition for a declaration of nullity of marriage on the grounds of (i) impotency of the respondent at the time of the marriage due to syphilis and (ii) the petitioner's consent to the marriage being obtained by fraud *Held* that permanent and incurable impotency existing at such time and of such nature as to render complete and natural sexual intercourse between the parties practically impossible was a good ground for annulment of marriage Impotency has been taken to mean physical and incurable incapacity from entering into the marriage that is incapacity to consummate the marriage *Allen* v *Baker 41 Am Rep 444 A B* v *C B 8 F 603 4 Scot L P 441 Ryder* v *Ryder 44 Am St Rep 833* referred to BIRENDRA KUMAR BISWAS v HEMLATA BISWAS (1920) I L R 48 Calc 283

———— *Remarriage validity of—Indian Divorce Act (IV of 1869) ss 7 57—Alimony* A successful petitioner in a suit for dissolution of marriage entered into a second marriage within six months from the decree for dissolution of marriage becoming absolute *Held* that the second marriage was null and void *Warter* v *Warter L R 15 P D 152* referred to *Held* also that the reputed wife was not entitled to any permanent alimony TURNER v TURNER (1921) I L R 48 Calc 636
25 C W N 710

DIVORCE ACT (IV OF 1869)

See DIVORCE I L R 40 Calc 215

———— ss 2 4 7 45—*High Courts Act 24 and 25 Vict c 104 s 9—Amended Letters Patent of the Bombay High Court cl 35—Restitution of conjugal rights—Jurisdiction of the Bombay High Court to entertain a suit for the restitution of conjugal rights as against (a) a non Christian respondent and (b) a respondent not residing within the Presidency—Principles and Rules of English Court for Divorce and Matrimonial Causes acted on in India—Refusal of Court to grant relief by restitution of conjugal rights when the respondent is absent from the jurisdiction when the suit is instituted and remains absent —Civil Procedure Code (Act V of 1908 s 20 (corresponding to Act XIV of 1882 s 17) applicability of to matrimonial suits—Residence what amounts to in order to give the Bombay High Court jurisdiction to pronounce a decree for the restitution of conjugal rights—Costs of unsuccessful petition by wife rights of the petitioner's solicitors over monies deposited in Court by the respondent as security for the petitioner's costs and over monies deposited by a respondent appellant as security for the costs of the appeal* The respondent a Parsi married the petitioner a Christian in London Subsequently the parties lived together for some time in London and then came out to Bombay where they also lived together for some time Afterwards the parties returned to England but apparently owing to differences which had arisen between them immediately on their arrival in London at Victoria Railway Station the respondent deserted the petitioner and never thereafter lived together again the respondent having made up his mind about that time that he could not live with the petitioner The respondent remained in England but the petitioner returned to Bombay with the intention of taking legal proceedings against the respondent there and did sue the respondent in the Bombay High Court claiming restitution of her conjugal rights *Held* that under s 9 of the High Court's Act and cl 35 of the Amended Letters Patent of the Bombay High Court the jurisdiction exercised by the High Court in matrimonial matters previous to the coming into force of the Indian Divorce

DIVORCE ACT (IV OF 1869)—*contd*

———— ss 2 4,7 45—*contd*

Act had been confined to matters between British subjects professing the Christian religion *Held* further that as regards the jurisdiction confirmed to the Bombay High Court by s 4 of the Indian Divorce Act (which included jurisdiction to entertain suits for the restitution of conjugal rights) the powers of the Bombay High Court were still limited to Christian subjects within the Presidency so that the High Court had no jurisdiction to grant a decree of restitution either against a Parsi respondent or against any respondent not within the Presidency *Held* further that following the principles on which the Courts for Divorce and Matrimonial Causes in England have acted and given relief which principles are made applicable in India under s 7 of the Indian Divorce Act the Bombay High Court could not give relief by way of restitution of conjugal rights if the respondent named in the petition were absent from the jurisdiction at the time the suit was instituted and remained absent although residence at the date of the suit of both spouses whatever their domicile might be would be sufficient to give jurisdiction in suits of this nature *Firebrace* v *Firebrace 4 P D 63 Chichester* v *Chichester 10 P D 186* and *Armytage* v *Armytage* [*1898*] *P 178* followed *Semble* In the case of matrimonial offences including those other than adultery the application of the Civil Procedure Code s 20 (corresponding to s 17 of Act XIV of 1882) under s 45 of the Indian Divorce Act involves the necessity of either residence on the part of the defendant or the accrual of the cause of action within the jurisdiction in order to enable the Court to entertain the suit *Thornton* v *Thornton I L R 10 Bom 422* referred to *Semble* Also that mere residence in India at the time of the institution of a suit is not residence within the meaning of s 2 of the Indian Divorce Act and that the residence of the petitioner should be *bonâ fide* and not casual or as a traveller *Held* however that moneys deposited by a husband respondent as security for his wife's costs of a petition constituted a fund paid in for the benefit of her attorney who was entitled to have it applied for his benefit whatever the result of the petition provided that he had been in no way to blame and that that rule applied to moneys deposited by a respondent appealing from the decision of the lower Court as security for the costs of the appeal in accordance with the rules of the Bombay High Court NUSSERWANJEE WADIA v ELEONORA WADIA (1913)
I L R 38 Bom 125

———— s 3—

See DIVORCE. I L R 45 Bom 517

———— Residence—*Divorce—Jurisdiction—Reside* *Held* that a mere temporary sojourn in a place there being no intention of remaining there will not amount to residence in that place within the meaning of s 3 of the Indian Divorce Act 1869 so as to give jurisdiction under the Act to the court within the local limits of whose jurisdiction such place is situated FLOWERS v FLOWERS (1910) I L R 32 All 203

———— *Political Resident at Aden—District Judge—Jurisdiction to try suits under Indian Divorce Act—Aden Courts Act (II of 1864) s 3* The Political Resident at Aden not having been appointed a Commissioner of a Division is not a District Judge as defined in s 3 sub s (2) of the Indian Divorce Act 1869 and has no jurisdiction to try suits under the Act MOUNA v MOUNA (1912) I L R 37 Bom 57

———— ss 3 16 37 and 44—*Dissolution of marriage—Alimony—Jurisdiction—Nature of High Court s jurisdiction—Civil Procedure Code (Act V of 1908) s 24 (1) (a)—Transfer of proceedings* In a suit for dissolution of marriage under the Divorce Act (IV of 1869) a decree was passed in favour of the petitioner by the Divisional Judge Nagpur Division The said decree was confirmed by the High Court on the 20th November 1914 The successful petitioner thereupon having applied to the High Court praying that the opponent may be ordered to pay her proper sums by way of alimony *Held* that the Court which was empowered to make the order either for alimony or for the maintenance and education of the children was the Court of the Divisional Judge and not the High Court *Held* further that having regard to the nature of the personal jurisdiction which the High Court possessed over European British subjects under s 3 of the Divorce Act 1869 the Court of the *Divisional* Judge was not a Subordinate Court in the sense in which that expression was used in s 24 *(1) (a)* of the Civil Procedure Code so as to enable the High Court to transfer the proceedings of which notice had been served upon the respondent to the Divisional Court for disposal WALLACE v WALLACE (1915) I L R 40 Bom 109

———— s 37—*Practice—Alimony—Discretion of Court* *Held* that the power to make an order for alimony in favour of the wife after a decree for divorce *obtained* by the husband on the ground of adultery is discretionary In a case where there was no suggestion that the husband s conduct had led to the wife s misconduct and the wife was in fact under the roof of the co respondent the Court refused to exercise its discretion *Kelly* v *Kelly 5 B L R 71* referred to McGOWAN v McGOWAN (1916)
I L R 38 All 688

———— ss 4 6 7 8 and 15—

See BOMBAY CIVIL COURTS ACT (XIV OF 1869) s 16 I L R *39 Bom* 136

———— ss 7 45—

See DIVORCE I L R 37 Calc 613

———— ss 7 11—

See DIVORCE I L R 45 Calc 525

———— ss 12 13 14—

See DIVORCE I L R 44 Calc. 1091
I L R 49 Calc 1068

———— s 14—*Husband and Wife—Dissolution of marriage—Misconduct of husband petitioner—Grave and unexplained delay in filing petition—Discretion of the District Judge—High Court s power to interfere with the discretion* The petitioner who was the husband prayed for a dissolution of the marriage on the ground of his wife s adultery The District Judge exercising the discretion confided to him under s 14 of the Indian Divorce Act 1869 refused to grant a decree *nisi* in view of the following circumstances (i) that there was grave and unexplained

DIVORCE ACT (IV OF 1869)—*contd*

——— s 14—*contd*

delay before any complaint was made by the husband as regards his wife s abandonment of him (ii) that both husband and wife had combined to withhold facts from the Court (iii) that husband had been guilty not of an isolated act but of a persistent course of adultery *Held* that it was impossible for the High Court as a Court of Appeal to say that the District Judge s discretion was wrongly or improperly exercised adversely to the petitioner LALIER *v* PALMER (1916) **I L R 41 Bom 36**

——— ss 16 17—*Decree of dissolution of marriage—Rescission of by High Court—Withdrawal of petition on coming up for confirmation—English Procedure* A decree of dissolution of marriage passed by a District Court under s 14 of the Indian Divorce Act may be rescinded by the High Court at the request of the decree holder when it comes up for confirmation under s 17 The High Court has jurisdiction to rescind the decree of the District Court and allow the petition to be withdrawn There is nothing in the Divorce Act which requires a distinction to be drawn between ss 16 and 17 with reference to the power of the Court to rescind a decree where the relations of husband and wife have been resumed before the decree has been confirmed The power to make such order as to the Court seems fit is not limited to cases where further enquiry has been ordered The analogy of English procedure whereby on a petitioner withdrawing his petition the Court may set aside the decree *nisi* may be invoked in construing the Indian Divorce Act WILLIAM DARE *v* BELLE DARE (1910) **I L R 34 Mad 339**

——— ss 17 43 57—

See KIDNAPPING **I L R 41 Calc 714**

——— ss 18 19 20 and 57—

See DIVORCE **I L R 48 Calc 283**

——— s 19—*Consummation of marriage when practically impossible—Syphilis in one of the parties if it amounts to impotency—Syphilis as a ground for refusing performance of a promise to marry or a ground for nullity or divorce—Fraudulent concealment—Incurability of the disease—Physical examination—Inference when such examination is not allowed* Where syphilis was contracted prior to but was not known to exist at the time that the contract to marry was entered into or where such disease was contracted subsequent to the making of the contract to marry but through no wrongful act of the Defendant its existence furnished a good defence to an action for breach of promise *Atchison* v *Baker* 2 *Peake 103 (1796) Allen* v *Baker 41 Am Rep 444 86 N C 91 (1882) Hall* v *Wright E B and E 746 113 R R 861 (1858) Boast* v *Firth L R 4 C P 1 (1868)* and *Robinson* v *Davison L R 6 Exch 267 (1871)* referred to Capacity for sexual intercourse must exist at least *in posse* at the time that the marriage is entered into It is for this reason that permanent and incurable impotency existing at such time and of such nature as to render complete and natural sexual intercourse between the parties practically impossible is recognised as a ground for the annulment of the marriage A B *v* C L *8 F 603 43 Scot L R 411 (1906)* and *A B* v *C B 12 Rettie 36 22 Scot L R 461 (1885)* referred to Impotency means physical and incurable incapacity to consummate the marriage The capacity for sexual intercourse is not necessarily affected by the existence of syphilis and yet such disease may render coition practically impossible *Ryler* v *Ryler 44 Am St Rep 833 66 Vermont 158 (1894)* and *Smith* v *Smith 171 Mass 404 68 Am St Rep 440 41 L R A 800 (1898)* The *existence of syphilis in one of the parties to the* marriage may furnish good ground for divorce to the other on the ground of cruelty To constitute such a ground of cruelty it is usually required that the disease should have been actually communicated to the complainant that the complainant should have been ignorant of the existence or nature of the Defendant s disease at the time of its communication and that the Defendant should have infected the Petitioner knowingly and wilfully *Popkin* v *Popkin 1 Hagg Eccl 733 (note) (1794) Collect* v *Collect 1 Curt 678 (1837) Jones* v *Jones [1860] Searle and Smith 138 Brown* v *Brown L R 1 P and D 46 (1865) Strain* v *Strain 13 Pettie 132 (136) 23 Scot L R 90 (1885)* and *R* v *Clarence 22 Q B D 23 (1888)* referred to Concealment of a loathsome and incurable form of syphilis is recognised as a fraud sufficient to warrant divorce or annulment specially where the existence of the disease is discovered by the other party before the marriage is consummated and the parties immediately separate Such disease must be actually and probably incurable but annulment has been granted notwithstanding a mere remote possibility of a cure *Smith* v *Smith 171 Mass 404 68 Am St Rep 440 41 L R A 800 (1898) Vondal* v *Vondal 175 Mass 383 78 Am St Rep 502 (1900) State* v *Lowell 79 Am St Rep 358 at p 373 (1899) Lyon* v *Lyon 230 Ill 366 13 L R A (N S) 996 12 Am St Rep 25 (28) (1907)* and *Bunger* v *Bunger 85 Kan 564 26 Am St Rep 1 6 (134) (1911)* The Courts have a wide discretion in ordering physical examination of the party suffering from the disease and always do so subject to such conditions as will afford protection from violence to natural delicacy and sensibility *Briggs* v *Morgan 3 Phill 3 2 Hag Con 3 4 (18 0)* and *Harrison* v *Harrison 4 Moo P C 96* Where a party refuses to attend for medical inspection the Court may probably draw an unfavourable inference *F* v *P 75 L T 192 (1896) B* v *B [1901] P 39* and *W* v *S [1905] P 231* BIRENDRA KUMAR BISWAS *v* HEMLATA BISWAS

24 C W N 914
25 C W N 706

——— s 20—

See DIVORCE **25 C W N 710**

——— s 23—*Discretion of Court—Petitioner s adultery a ground for refusing a decree for judicial separation* Where the petitioner (the wife) in a suit for divorce or in the alternative for a judicial separation was found to have herself committed adultery to which the conduct of the respondent had in no way conduced it was *held* that this was a good ground for the refusal of a decree for judicial separation *Otway* v *Otway 1 P D 141* followed *Cons*

DIVORCE ACT (IV OF 1869)—contd

——— s 23—*contd*

tantinidi v *Constantinidi* [1905] *P D 248* distinguished RHINE v RHINE (1911)
I L R 33 All 500

——— s 37—*Decree for divorce—Permanent maintenance—Award of a lump sum—Payment* In a suit for divorce brought by the wife the District Judge has under s 37 of the Indian Divorce Act (IV of 1869) power to make the order for payment of a lump sum for the permanent maintenance of the wife *Per* HAYWARD J — The plain meaning of the words of s 37 of the Indian Divorce Act (IV of 1869) is that the gross sum of the money should be paid absolutely to the wife and that the annual sum of money should be limited for the period of her life TAYLOR (MISS) v CHARLES BLEACH (1914)
I L R 39 Bom 182

——— *Decree absolute dissolving marriage—Petition for alimony 15 years after decree—Power of Court to grant after such delay—Delay whether reasonable how determined— On any decree absolute in s 37 meaning of* A wife whose marriage was dissolved by a decree absolute passed in 190 petitioned to the Court in 1920 for grant of permanent alimony *Held* that the Court had no power to pass an order in her favour under s 37 of the Indian Divorce Act after such unreasonable delay after the passing of the decree absolute The words on any decree in s 37 of the Act should be construed as meaning at the same time as or after a reasonable time after the passing of the decree What is reasonable time must be determined upon all the circumstances of each case *Scott* v *Scott* (1921) *P 197* followed LLOYD v LLOYD (1921)
I L R 44 Mad 939

——— *Held* that the power to make an order for alimony after decree obtained by husband for adultery is discretionary W E McGOWAN v JOHN GEORGE McCOWAN
I L R 38 All 688

——— s 57—*Marriage—Remarriage petitioner in divorce proceedings within six months of the decree becoming absolute* Where the successful petitioner in a suit for dissolution of marriage entered into a second marriage within six months of the decree for dissolution of marriage becoming absolute it was *held* that the second marriage was void *Warter* v *Warter L R 15 P D 152 59 L J P & M 87* followed JACKSON v JACKSON (1911)
I L R 34 All 203

——— *Marriage solemnized before the expiry of six months as required by validity of* S 57 of the Divorce Act (IV of 1869) expressly prohibits remarriage within six months of the making of the decree absolute the Indian Law does not completely dissolve the tie of marriage until the lapse of a specified time after a decree of dissolution and the marriage is still in force within the meaning of s 19 (4) so as to give the Court jurisdiction under s 19 to pronounce a decree of nullity regarding such prohibited marriage *Jackson* v *Jackson I L R 34 All 203* followed *Chichester* v *Mure 32 L J 146* and *Warter* v *Warter L R 15 P D 152* referred to BATTIE v BROWN (1913)
I L R 38 Mad 452

DIVORCE COURT RULES (ENGLISH)

——— rr, 4 5 6—

See DIVORCE I L R 45 Calc 525

DOCTRINE OF PROTECTION

See OCCUPANCY HOLDING
I L R 42 Calc 745

DOCTRINE OF SATISFACTION

——— *Inapplicability of in India of doctrine of satisfaction—Indian Succession Act (X of 1865) s 164—General applicability in India of the principles of the Indian Succession Act in so far as they are not overriden by some special provision of local law or usage—Khojas—Law applicable to Khoja wills—The Indian Evidence Act (I of 1872) s 92* The plaintiff claimed to be entitled to a sum of money deposited by him with one Karmali Moledina deceased a Khoja Mahomedan and also to a legacy under the will of Karmali Moledina He therefore sued the executors of the will of Karmali Moledina for a declaration to that effect and for the administration if necessary of the estate of Karmali Moledina The defendants maintained *inter alia* that the legacy must be taken as intended as payment of the balance due on the deposit by the plaintiff from Karmali Moledina and that the plaintiff could not claim both the legacy and the debt *Held* that inasmuch as the principles of interpretation announced in the Indian Succession Act were intended by the Legislature to be universally applicable unless overriden by some special provision of local law or usage the doctrine of satisfaction which is abolished by s 164 of the Indian Succession Act must be considered as exploded in India *Held* further that if it be considered that the wills of Khojas are governed by Hindu Law the will of Karmali Moledina would be governed by s 164 of the Indian Succession Act but if such wills are governed by Mahomedan Law the will would have to be interpreted in accordance with the provisions of the general law of evidence and in particular would be governed by the provisions of s 92 of the Indian Evidence Act and that in either case the defence set up under the doctrine of satisfaction would be defeated *Quære* Whether the wills of Khojas are governed by Hindu or Mahomedan Law HASANALLY MOLEDINA v POPATLAL PARBHUDAS (1912)
I L R 37 Bom 211

DOCUMENT

See CONSTRUCTION OF DOCUMENT

See DISCOVERY

See DOCUMENTS CONSTRUCTION OF

See EVIDENCE ACT
s 92 I L R 35 Bom 231
I L R 42 Bom 512

See HINDU LAW—ADOPTION
I L R 39 Bom 441

See REGISTRATION OF DOCUMENTS
L R 46 I A 240

See SANAD CONSTRUCTION OF
I L R 36 Bom 639

See SEARCH BY POLICE OFFICERS
I L R 41 Calc 261

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 54
I L R 41 Bom 550

DOCUMENT—*contd*

——— admissibility of—

See CIVIL PROCEDURE CODE (1908) Sch II cl 11 I L R 38 Bom 60

See EVIDENCE ACT (I OF 1872) s 68 I L R 40 All 256

——— attested by one witness only—

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 59 I L R 38 All 461

——— alteration of—

See FORGERY I L R 38 Calc 75

——— bearing forged signature—

See PENAL CODE (ACT XLV OF 1860) s 30 467 I L R 38 All 430

——— construction of—

See CONSTRUCTION OF DOCUMENT

——— execution of—

See ATTESTATION I L R 37 Calc 526

——— exhibiting during cross examination—

See RIGHT OF REPLY I L R 43 Calc 426

——— granting exemption from assessment of rent—

See TRANSFER OF PROPERTY ACT ss 123 I L R 34 Bom 287

——— of title—

See VENDOR AND SUB VENDOR I L R 38 Calc 127

——— production of in Court—

See SANCTION FOR PROSECUTION I L R 44 Calc 1002

——— proof of—

See EVIDENCE ACT (I OF 1872) ss 68 69 I L R 39 All 109 112

——— secondary evidence of—

See EVIDENCE ACT (I OF 1872) ss 65 66 90 I L R 41 All 592

——— *Non production of where not called upon by opponent if matter for comment* It is open to a litigant to refrain from producing any documents not forming part of his case that he considers irrelevant if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper If he fails to do so neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents BILAS KUNWAR *v* DESRAJ RANJIT SINGH (1915) I L R 37 All 557 19 C W N 1207

——— *Release document written but not signed by executant if operates as—Name written at the commencement of document if sufficient* The place and manner of signature of a document is immaterial provided that the signature is inserted in such a manner as to authenticate the document and where the instrument is in the handwriting of the party to be charged it is sufficient if his name is inserted at

DOCUMENT—*concld*

the commencement Where this was the case *Held* that the document was operative as a release though not signed by the executant GANGARAM AGARWALA *v* LACHIRAM KISHEN DYAL (1914) 19 C W N 611

——— *Disclosure of duty of an attorney with regard to—Discovery—Affidavit of documents—Duty of the attorney to disclose—Non disclosure which amounts to a breach of duty—Documents subsequently discovered when to be disclosed* It is the duty of an attorney to be extremely careful in ascertaining from his client who has to make an affidavit of document exactly what materials and documents are in his possession It is further his duty the moment he finds that there are other documents which have not been disclosed at the very earliest moment to bring those documents to the notice of his opponent and give him an opportunity of inspecting them *Held* that though in this case the attorney was wrong in not disclosing the documents subsequently when they came to his knowledge his conduct was not such as to justify any further investigation by a Special Bench IN THE MATTER OF AN ATTORNEY 25 C W N 99

DOCUMENTS CONSTRUCTION OF

See CONSTRUCTION OF DOCUMENTS

See HINDU LAW—ADOPTION I L R 40 Bom 668

——— mortgage by conditional sale—

See SALE DEED I L R 44 Bom 964

DOCUMENTS INSPECTION OF

——— *Caste—Trustee of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste question—Application of Indian Trusts Act (II of 1882) ss 5 and 6 to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908) s 151* As a result of dissensions in a Hindu caste a suit was filed by the plaintiff a trustee of certain caste funds and member of the Managing Committee against the defendant a co trustee and the President of that Committee The plaintiff prayed for a declaration that he had the right to inspect all books and documents of the Mahajan Managing Committee Sub Committee and Trustees and for an injunction restraining the defendant from interfering with him in the exercise of such right The only two documents about which there was any real controversy were the minutes of the Sub Committee and the correspondence file of the Mahajan *Held* that as trustee of the Derasar and Sadharan funds the plaintiff had no right either in law or by virtue of any caste rules to the roving inspection claimed *Bank of Bombay* v *Suleman I L R 32 Bom 466 4 4* referred to *Held* further that the Mahajan fund of this caste being a purely secular fund the Indian Trust Act applied and the plaintiff could not claim to have been made a trustee of that fund merely by virtue of a caste resolution and his own letter of acceptance *Held* further on the evidence that there has been no express by the plaintiff to the proper refusal by the defendant such as we ry to enable a suit of this *Held* further that

DOCUMENTS INSPECTION OF—*contd*

where rights to property are not involved all matters of internal management must be left to the decision of the caste The question in dispute was in reality a question between the caste and a section apparently a small section of the caste led by the plaintiff, and as such it was outside the Court s jurisdiction in accordance with the decision in *Vemchand* v *Satai chand I L R 5 Bom 84 note Lalji Shamji* v *Walji Wardhman I L R 19 Bom 507* referred to and distinguished *Held* lastly that when according to well established principles certain questions have been removed from the jurisdiction of the Court they cannot be brought within the jurisdiction under s 151 of the Civil Procedure Code (Act V of 1908) JETHABHAI NARSAY v CHAPSEY COOVERJI (1909)
I L R 34 Bom 467

DOCUMENTARY EVIDENCE

See EVIDENCE

See MAHOMEDAN LAW—MARRIAGE
I L R 45 Calc 878

———— *proof of—Documents admitted in evidence without objection if can be objected to in the appellate stage—Civil Procedure Code (Act V of 1908) s 100 finding of fact when can be challenged in second appeal—Res judicata necessity of specifically raising the plea* In a suit for *Khas* possession the Defendants pleaded that they held under a lease The Court of Appeal below found that the lease required to be proved that there was no document evidencing settlement nor in fact any evidence of settlement at all and that though there were two rent receipts they were not properly proved. In the Court of first instance the said rent receipts were admitted in evidence without objection by the Plaintiffs Further as a matter of fact there was evidence both oral and documentary about the settlement *Held* that the rent receipts having been admitted in evidence without objection in the Court of first instance no objection could be taken in the Appellate Court that they were not properly proved *Held* further that when there was evidence of the settlement in question the finding of fact arrived at by the lower Appellate Court on the point could be successfully challenged in second appeal The question of *res judicata* though not specifically raised by the parties, may be gone into by the Court RAJESWARI DASI v PULIN BEHARI MITTER
25 C W N 881

DOMICILE

See DIVORCE **I L R 40 Calc 215**

See GUARDIANS AND WARDS ACT 1890 s 9 **I L R 34 Bom 121**

See MEMONS **I L R 43 Bom 647**

See PRIZE COURT **I L R 44 Bom 61**

See SUCCESSION ACT (X OF 1865) ss 7 9 10 **I L R 41 Bom 687**

DONEE

———— *Donee alienation by—Gift burdened with an obligation—Restrictions on alienation* When it is doubtful whether a deed embodies a complete dedication of property to a religious trust or merely creates a gift of that property subject to an obligation to perform certain services the question should be decided by reference to the deed itself In the former case the property would be inalienable and in the latter alienable subject to the obligation and notwithstanding restrictions as to selling or mortgaging the said property DASSA RAMCHANDRA v NARSINHA (1910) **I L R 35 Bom 156**

DONORS FAMILY

———— benefit to—

See MAHOMEDAN LAW—WAKF
L R 44 I A 21

DOWER

See COURT FEES ACT (VII OF 1870) SCH I ART I **I L R 36 All 32**

See LIMITATION ACT 1908 s 4
I L R 44 Mad 817

See MAHOMEDAN LAW—DOWER

See MAHOMEDAN LAW—GIFT
I L R 42 Calc 36

See MAHOMEDAN LAW—MARRIAGE
I L R 32 All 477

See MAHOMEDAN LAW—PRE EMPTION
I L R 37 All 522

See MAHOMEDAN LAW—WIDOW
I L R 32 All 551 563

See SUCCESSION CERTIFICATE ACT (VII OF 1889) ss 2 4 AND 7
I L R 32 All 335
I L R 33 All 327

s 4 **I L R 43 All 341 498**

———— payment of (discretion of Court)—

See MUHAMMADAN LAW
I L R 1 Lah 597

———— possession in lieu of—

See MAHOMEDAN LAW
I L R 36 All 558

———— relinquishment of—

See MAHOMEDAN LAW
24 C W N 335

———— Marriage of a Sunni with a pregnant woman—

See MAHOMEDAN LAW
I L R 45 Bom 151

DOWL BANDOBUST

See NAVIGABLE RIVER
I L R 46 Calc 390

DOWL KABULIAT

See KHOD KAST JOTES
I L R 48 Calc. 359

———— *The mere fact that a document is called a doul Kabuliat does not decide its nature* The document should be looked at as a whole and any evidence designed to shew customary incidents of tenure as attaching to the jotes must be rejected if and so far as it conflicts with what is contained in the dowls themselves Evidence of custom of transferability is thus excluded by an express statement in the dowl that is no-

c landlord s con ent
Prorotoyot Kumar
25 C W N 13

by Document
I L R 41 Bom 5

pality to—
Ncil.
I L R 38 Mad. 6

alcutta Municipal Act 99 and 5 4—Place charge of drainage—ging to the landlord s public drain by the iant A place law ...arge of drainage by the Corporation within the meaning of s .99 of Calcutta Municipal Act must be a place over which the Corporation have acquired by some procedure under the Act a right to make use of private property as a public drain A tenant of premises is not bound under s 299 to convey the drainage therefrom into a drain belonging to his landlord over which the Corporation have no such right GOBIND CHANDRA ADDY v CORPORATION OF CALCUTTA (1910) I L R 38 Calc 268

DRAWER

——— right of—
See BILLS OF EXCHANGE
I L R 46 Calc 524

DRINK.

——— unwholesome exposing for sale—
See MADRAS CITY MUNICIPAL ACT (II OF 1904) BY LAW 169
I L R 39 Mad. 362

DRUGS

See EXCISABLE ARTICLES
I L R 39 Calc 1053

DRUNKENNESS

See PENAL CODE (ACT XLV OF 1860) s 86 I L R 38 Mad 479

DUNNAGE

See CHARTER PARTY
I L R 41 Bom 119

DUPLICITY

See CHARGE I L R 41 Calc. 66

DVYAMUSHYAYANA ADOPTION

See HINDU LAW—ADOPTION
I L R 41 Bom 315
I L R 42 Bom 277

DWELLING

See JURISDICTION I L R 34 Mad. 257

DWIRAGAMAN CEREMONY

——— gift at—
See HINDU LAW—GIFT
I L R 37 Calc 1

E

EARNEST MONEY

——— credited on recovery of damages—
See CONTRACT BREACH OF
I L R 38 Mad 801

——— forfeiture of—
See AGREEMENT TO SELL
24 C W N 967
See CONTRACT I L R 33 All 166
I L R 41 All 324

——— receipt of—
See CONTRACT I L R 46 Calc 771

——— A deposit unless paid on any special terms is *prima facie* by way of earnest money but in each case the intention of the parties must be gathered from all the terms of the contract NAWAB KHAJA HABIBULLAH v ASMAN DEWAN 24 C W N 40

EASEMENT

See BENGAL FERRIES ACT 1885 s 11
5 Pat L J 500

See EASEMENTS ACT

See INCORPORATE RIGHTS

See LIMITATION ACT (IX OF 1908) s 20 SCH I ART 144
I L R 40 All 461

See LIGHT AND AIR

See MADRAS IRRIGATION CESS
L R 46 I A 302

See PROFIT *a prendre*
2 Pat L J 323

See WATER FLOW
I L R 38 Mad 149

———adverse Possession—
See BENGAL FIRMS ACT 1885
5 Pat L J 500

——— dedication of Road—
See PUNJAB MUNICIPAL ACT 1911
I L R 1 Lah. 117

——— infringement of—
See EASEMENT I L R 38 Mad 280

——— of necessity—
See EASEMENTS ACT (V OF 1882) s 13
I L R 33 All. 467

——— over Land forfeited to Government—
See MADRAS IRRIGATION CESS ACT 1865
I L R 43 Mad. 529

——— Suit relating to—*Easement—Servient owners if all must be parties* A decree based on an easement cannot be passed when all the servient owners are not parties MADAN MOHAN CHATTOPADHYA v AKSHOY KUMAR BARUR (1909) 14 C W N 15

——— Continuous easement—*Easement Act (V of 1882) ss 38 47—Drain a continuous easement—Mere non user does not extinguish continuous easement under s 38 or 47 of the Act* A drain from one land to another is a continuous es e ment within the Easement Act Where such a right of easement by drainage has been granted but was not possessed or enjoyed for more than twenty ye m the date of grant but no

EASEMENT—*contd*

obstruction to such use existed more than three years prior to the institution of the suit such non user without anything more does not extinguish the right under s 33 or s 47 of the Easement Act The non user without anything more is not an implied release or abandonment of the right The period of twenty years of non enjoyment which will extinguish the right under s 47 begins when the enjoyment was obstructed by the servient owner or rendered impossible by the dominant owner CHINTAKINDY IARVATAMMA v LANKA SANYASI (1910) I L R 34 Mad 487

——— Prescription—*Continuous user for irrigation purposes of water of bundh—Annual user if to be proved—Water taken from bundh at different points in different years—User if indefinite—Permissive user* Where it was proved that the defendant had been taking water from plaintiff s *bundh* for irrigating his paddy lands whenever occasion required for more than twenty years —*Held* that the defendant had acquired the right to the easement by prescription That it was not necessary for him to prove an annual user the statute only requiring enjoyment without interruption for twenty years and not actual user *Hollings* v *Verney L R 13 Q B D 304* not followed. *Budhu Mandal* v *Malsat Mandal I L R 30 Calc. 1077* and *Krista Das Chowdhry* v *Joy Narain Panja 8 C W N 158* relied on The mode of user of the water by the defendant was not indefinite merely because openings were made by him at different points in the embankment in different years according to the height of the water in the *bundh* The fact that the defendant had years ago paid Rs 50 for repair of the *bundh* did not prove the user to be permissive GHASIRAM MANDAL v ASIRBAD MAHTO (1910) 15 C W N 259

——— Natural channel—*Flow of water—Duty of owner of land through which a natural channel runs* The owner of land through which a river or other natural channel flows is bound within certain limits as between himself and other riparian owners not to do anything which shall obstruct the flow of the water or materially interfere with their rights But such owner is not bound to keep the channel clear so that the amount of water that can pass down it may not be diminished BALDEO SINGH v JUGAL KISHORE (1911) I L R 33 All 619

——— Flow of water—*Over servient tenement in a definite channel if necessary for acquiring right of easement* The fact that water flows over the surface of the servient tenement without a definite channel for its carriage cannot prevent the acquisition of an easement *Budhu Bhusan Palit* v *Beny Madhab Mazumdar 8 C W N 244* overruled MUNSHI MISSER v BHIMRAJ PAM (1913) I L R 40 Calc. 458

——— Overhanging eaves—*for discharge of water—Easement and not trespass* The possession of a *panch* or eaves for discharge of water overhanging the defendant s land is an easement and not an occupation of defendant s property CHOTALAL HIRACHAND v MANILAL GAGALBHAI (1913) I L R 37 Bom. 491

——— Discharge of water—*Stopped by owner of dominant tenement—Servient owner if may complain—Defined channel on dominant tenement effect of* An easement exists for the benefit of the dominant tenement alone and the servient owner acquires no right to insist on its continuance or to ask for damages on its abandonment The principle does not cease to be applicable where water has flowed in a defined channel on the dominant tenement before it reaches the servient tenement AFTAB CHOWDHURY v ASOKHADEM (1913) 17 C W N 1066

——— Ancient Lights—*Actionable Interference—Principle to be applied —Nuisance* The owner or occupier of a tenement in respect of which an easement of light has been acquired by prescription is entitled to a quantity of light the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind The actual user will neither increase nor diminish the right The question in an action for obstruction is whether the obstruction amounts to a nuisance The effect of *Jolly* v *Kine [1907] A C 1* is to establish that the law laid down in *Colls* v *Home and Colonial Stores [1904] A C 179* is as formulated by Lord Davey in that case at p 204 and as above stated PAUL v ROBSON (1914) I L R 42 Calc 46
L R 41 I A 180

——— Light and Air—*Damages for infringement* A mandatory injunction will be granted to remove an obstruction of an easement of light and air where the consequence is to darken the Plaintiff s house so as to make it uncomfortable and partly useless In such a case damages are not an adequate remedy MUTHU KRISHNA AYYAR v SOMALINGA MUNINAGANDREIN I L R 36 Mad 11

——— Water rights—*Distinction between surface water and water flowing in a definite channel* No claim can be made either as a natural right or as an easement by prescription to water which does not flow in a definite course but which should be regarded as surface water or surface drainage The right to the water of a stream does not cease when it ceases to flow in a confined water course unless it exhausts itself as a stream and merely soaks into the ground The chief characteristic of surface water is its inability to maintain its identity and existence as a water body When the flow of water on one person s land can be identified with that on another a right to such flow can arise although the water may flow along an intervening piece of land Water flowing into a field from a known channel and passing along the field onwards into another field though not over a confined track in the former field but along its whole area is not surface water Well defined existence arising from an ascertained course is the real test in coming to a conclusion against any body of water being regarded as surface water The question whether or not particular water is surface water is one of fact to be determined by the circumstances attending its origin and continued existence The right to the water of a stream is sustainable notwithstanding the fact that the water in the stream is not always sufficient for the purpose for which the right is claimed or that it reaches the plaintiff's land not directly but indirectly by flowing into another channel A river channel supplied the means of irrigation for the lands of the parties to the suit and the other ryots of the village A branch leading from the main channel passed

EASEMENT—*contd*

through the lands of defendants Nos 1 2 and 3 in a definite water course up to the fourth defendant s lands when it entered the fourth defendant s field and after irrigating it flowed over its bund and joined another channel which irrigated the plaintiff's lands Defendants Nos 1 2 and 3 blocked up the channel at a point higher than the fourth defendant s lands. In a suit by plaintiff for declaration of his right to the customary supply of water through the channel and for an injunction restraining the defendants from obstructing the water course *Held* that the water of the channel when it entered the fourth defendant s field could not be regarded as surface water but continued in a definite water course and plaintiff was entitled to the usual supply of water unobstructed. ADINARAYANA v RAMUDU (1914) I. L. R 37 Mad 304

——— Right of support—*Disturbance—Actual damage when necessary to support action—Temporary structure whether an easement of support acquirable in respect of* No actual damage is necessary to support an action for the disturbance of an easement of support for a building *Contra* where the disturbance is of a natural right *Backhouse v Bonomi 9 H L C 503* referred to The rule requiring actual damage is applicable only to an action for damages but actual damage is not necessary to entitle a person having a right of support to relief by way of injunction *Corporation of Birmingham v Allen 6 Ch D 284* followed. The question whether a right of support can be claimed for a temporary structure which has been in existence for the statutory period was not decided *Maberley v Dowson 5 L J K B 261* referred to RAMAKRISHNA v SEETHARAMA (1914) I L R 37 Mad. 527

——— Right to discharge surplus water across a public way—*If may be acquired by prescription—Right acquired before dedication of way to public* A person cannot by prescription acquire a right of easement to discharge surplus water from his own to another tenement through a channel across a public way intervening between the two tenements To establish such a right he must prove that the public way was formerly private property and the easement claimed had been acquired while it was still private property KAILASH CHANDRA NANDY v SURENDRA NATH SAMANTA (1913) 18 C W N 378

——— Light and Air—*An action for the infringement of the easement of light and air is founded not on trespass but on nuisance* To amount to an actionable nuisance the interference in the case of a house suitable for residence and business purposes where the selling and letting value has not been diminished must cause a sensible privation of light and air sufficient to render the occupation of the house uncomfortable and to a sensible degree less fit for the purposes of business In an action for infringement the character of the previous enjoyment of the dominant tenement must be taken into consideration but it does not furnish the decisive measure of the unlawful hurt or annoyance To determine whether a nuisance has been proved the existing state of things must be considered but subject to the qualification that light and air coming from other sources to which a right has not been acquired by grant or prescription ought not to be taken into account PAUL v ROBSON I L R. 39 Calc. 59

——— Prescriptive right to take water—*By means of definite mode of access—Whether owner of servient tenement may substitute some other means of access* When the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement and has for this purpose used a particular means of access for the statutory period he has acquired a right to reach the water by means of such definite mode of access the servient owner at his own discretion may not substitute for his use some other means of access JIBANANDA CHAKRABARTY v KALIDAS MALIK (1914) I L R 42 Calc 164

——— User of easement—*For less than the prescriptive period—No right to sue for infringement* Incorporeal rights such as easements are not capable in an exact sense of being possessed and unless an easement had ripened into a prescriptive one mere enjoyment of the easement for any length of time short of the full period of prescription gives no right for the enjoyer to maintain an action against any person infringing such a user Protection given in law to mere possession of corporeal things cannot be extended to such cases *Acchanna v Venkamma 5 Mad L J 24* and *Kondapa Rajam Naidu v Devara Konda Suryanarayana I L R 34 Mad 173* distinguished English authorities reviewed NARASAPPAYYA v GANAPATHI RAO (1913) I L R 38 Mad. 280

——— Right to discharge water—*Not claimed as easement but as ancillary to ownership of land* The plaintiffs were the owners of land on the south of that of the defendants on a higher level and the water falling on the land of the plaintiffs flowed on to the land of the defendants who built a bund on their land so as to obstruct the water accumulated on the plaintiff s land from flowing towards the north through the defendants land The plaintiffs alleged that they were entitled to have the water on their land discharged through the defendants land but they did not claim it as an easement but as a right ancillary to their property which they had not parted with *Held* that there was such a right as that claimed by the plaintiff although the plaintiffs did not claim the right to discharge their water and did not in fact discharge their water on to the defendants land by any definite channel That the duty of the defendants was to allow the water from the plaintiffs land to pass on through their land It was then opened to them to dispose of it in the way they thought best RAMADHIN SINGH v JADUNANDAN SINGH (1914) 19 C W N 54

——— Right of way—*Permanent tenures held under same landlord—One if may acquire right by prescription against the other—Prescription by tenant in possession enuring to owner s benefit—Grant implied upon severance in cases of continuous easements—Continuous easement right of way when—Permanent adaptation of tenement—Grant inferred from long user alone—Easement of necessity—Grant if may be presumed upon severance—Suit for declaration of right of easement—All servient owners if necessary parties—Cause of action* A dominant owner has no cause of action against servient owners who have neither caused obstructi[illegible] raised any objection to the exercise of [illegible] f easement In

EASEMENT—*contd*

———— ss. 18, 23—*contd*

there was a written agreement between the parties in the year 1870 whereby the defendant's father agreed that he would not make any opening in his back wall the plaintiff had the right to require the defendant to close the said apertures and window MULIA BHANA v SUNDAR DANA (1913) I L. R. 38 Bom 1

See also EASEMENT I L. R 44 Bom 496

———— s. 24—*Accessory easement—Extension of the doctrine of accessory easement* The plaintiff and the defendant owned neighbouring houses The wall of the plaintiff's house abutted on the defendant's land The plaintiff had acquired an easement of discharging rain water from eaves of his roof on to the defendant's land On the strength of the easement the plaintiff sued for an injunction to restrain the defendant from making any use of his land which would prevent the plaintiff from going upon it for the purpose of repairing the wall of his house The trial Court refused to grant the injunction The lower appellate Court found that the case fell under s. 24 of the Easements Act 1882 and that the repair of the wall was an accessory easement to the admitted easement of discharging the water through the eaves. On appeal to the High Court *Held* that the right to enter upon the defendant's land to repair the wall which would preclude the defendant from making any use of his land was no such an easement as the plaintiff was entitled to or was contemplated by s. 24 of the Easements Act 1882 HIMATLAL MAGANLAL v BHIKABHAI AMRITLAL (1918) I L. R 42 Bom 529

———— s. 28—

See EASEMENT I. L. R. 42 Calc. 46

———— s. 33—

See DAMAGES IN ACTIONS ON TORT I L. R 36 Mad 580

———— s. 47—

See s. 13 I L R. 45 Bom 80

———— ss. 59 60—*License—Revocation—Rights of transferee of property in respect of which a license has been given* *Held* that the rule laid down by s 59 of the Indian Easements Act 1882 is not independent of that laid down by s 60 and does not confer upon the transferee any higher rights than those possessed by the transferror I AS PEHARI LAL v ANJAI KUNWAR (1914)

I. L. R 37 All. 91

———— s. 60—*License—Denial by licensee of licensor's title.* *Held* that a licensee in possession does not like a tenant by denying the title of the grantor of the licence forfeit the license and become liable to immediate ejectment. *Dharam Kunwar v Fakira (II. Weekly Notes 1901 p 157* followed MALIK AKBAR ALI KHAN v SHAH MUHAMMAD (1917) I L. R. 39 All. 621

EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT (II OF 1907)

———— ss. 2, 3—

See BROTHEL I. L. R. 45 Calc. 301

EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT (II OF 1907)—*contd*

———— ss 2 to 6—

See HIGH COURT JURISDICTION OF I L. R 37 Calc. 287

———— ss. 2 and 7—

See DISORDERLY HOUSES ACT 16 C. W N 1049

———— ss 3 and 5 (e)—*The District Magistrate power of to interfere with order by a Criminal Court under s 3 of the Act* The District Magistrate has no power either under the E. B and Assam Disorderly Houses Act or any other law to interfere with an order passed by a Criminal Court in the exercise of its jurisdiction under s. 3 of the Act LOLIT MOHUN CHAKRAVARTY v HARENDRO KUMAR DEY (1917)

21 C W N 1135

———— ss 6 and 7— Inquiry—Authority if can be delegated S 7 does not authorise any one to enter the house if Magistrate can be satisfied in other ways that the nuisance still exists. FEROJA PESHKAR v KING EMPEROR

16 C W N 1049

EASTERN BENGAL AND ASSAM TENANCY ACT (I OF 1908)

———— In a suit for rent a decree was made on compromise and the tenant took some extra land a new rent being fixed when an execution was sought and objection was taken that s 147 had not been complied with. *Held* that objections raised to the validity of the decree could not be raised in execution proceedings. HEM CH CHOUDHURY v CHANDRA MOHAN NAMODAS

24 C W N 1070

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———— non liability of—

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———— rights of—

See HABEAS CORPUS I. L. R. 44 Calc. 459

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I. L R 36 Bom 29

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I L R 37 Calc 694

See JURISDICTION
I L. R 41 Calc. 915
I. L. R. 38 Mad 795

See LANDLORD AND TENANT
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I L R 34 Mad 161
I L R 39 Calc 903
I L R 43 Calc 164
I L R 41 All 654
I L R 43 Bom. 795
I. L. R 44 Calc 403
I L R 44 Bom 950

See LIMITATION I L R 48 Calc 65

See LIMITATION ACT 1908
ART 44 I. L. R 41 Mad 102
ART 142 5 Pat L J 724

See MADRAS ESTATE LAND ACT (I OF 1908) I L R 38 Mad. 163 608 843

See OCCUPANCY HOLDING
I L R 44 Calc 272

See OCCUPANCY RIGHT
I L R 46 Calc 43

See SUB LEASE I. L R 48 Calc 783

See TENANTS IN COMMON
I L R 39 Mad 1049

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 111 I L R 35 All 145

See UNDER RAIYAT
I L R 39 Calc 278

See WAIVER 2 Pat L J 595

———— conversion of suit for into one for partition—

See HINDU LAW—ADOPTION
I L R 37 Mad 529

———— from old waste grounds—

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 111 CL (*g*)
I L R 35 All. 145
I L R 42 Bom 195

See UNDER RAIYAT 23 C W N 437

———— property acquired by wife trading with husband—

See HINDU LAW
I L. R 38 Mad. 1036

———— suit for subsequent to alienation—

See MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894) ss 5 AND 10 CL. (1?)
I L R 39 Mad 930

———— suit in against trespasser—

See RIGHT OF SUIT
I L R 39 Mad 501

———— tenant on sufferance—

See LAND ACQUISITION
I L R 45 Bom 725

———— By Inamdar—*Right of to eject tenants —Presumption of such right* There is no presumption that an inamdar has a right to eject persons in possession of inam lands He must prove such a right MADDU YERRAYYA *v* YAD ULLA KANGALI NAIDU (1910)
I L R 34 Mad 246

———— Chota Nagpur Tenancy Act—(*Beng VI of 1908*) *ss 4 (3) 41—Non occupancy raiyats —Under raiyats ejectment of—Transfer of property Act (IV of 1882) s 106—Incidents of tendency created by contract or custom—Verbal notice sufficiency of* Where a raiyat sued an under raiyat in ejectment and got a decree but on appeal the Judicial Commissioner of Chota Nagpur dismissed his suit on the ground that the provisions of s 41 of the Chota Nagpur Tenancy Act had not been complied with as an under raiyat has at least the rights of a non occupancy raiyat *Held* that the view taken by the Judicial Commissioner was erroneous An under raiyat must for the purposes of that Act be treated as belonging to a class of tenants quite distinct from the class of non occupancy raiyats Those portions of that Act which dealt with tenants generally could be applied to under raiyats In a suit for ejectment of an under raiyat by a raiyat the Court can have regard only to the relations established between the parties either by contract or custom Where there is no evidence of a lease the tenancy would no doubt be ordinarily held to be a tenancy from year to year There is no statutory provision that the tenancy of an under raiyat in Chota Nagpur can be terminated only by a notice in writing GURU CHARAN HAJAM *v* SUKLAL HAJAM (1913)
I L R 40 Calc 858

———— Previous suit for compensation —*For use and occupation without prayer for ejectment effect of—Acquiescence—Limitation* That the effect of the plaintiff's predecessor bringing a suit fo compensation for use and occupation without a prayer for ejectment was not a waiver of the right to eject and a recognition of the defendants as tenants It is open to an owner of land first to sue a trespasser for compensation and then to bring a suit for ejectment to assert his right to the land RAJ KRISHNA RUDRA *v* PHAKIR DOME (1913) 19 C W N 478

———— Plaintiff to prove title—In order to succeed in an action of ejectment the plaintiff must strictly prove his title RAM CHANDRA MARTAND WALKER *v* VINAYAK VENKATESH KOTHEKAR (1914) I L. R 42 Calc 384
18 C W N 1154

———— Landlord and Tenant—*Right of lessee after expiry of lease to eject a trespasser* Where a lessee whose lease had expired prior to suit sued for possession of the land leased to him from a trespasser *Held* that the expiration of the lease did not necessarily imply the expiration of the lessee s right of possession and the lessee was entitled to a decree for possession as against trespassers a fortiori where the landlord

ELECTION—*contd*

——— of mahant of temple—

See HINDU LAW—ENDOWMENT

I L R 37 All 298

——— petition—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 195

I L R 37 Bom 365

See UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916) ss 19 TO 26

I L R 41 All 646

——— right of—

See BURMESE LAW

I L R 44 Calc 379

——— roll—

See MUNICIPAL ELECTION

I L R 45 Calc 950
I L R 46 Calc 132

——— Calcutta Municipal Act—*Beng III of 1899 s 56—Corrupt Practices—Impersonation—Coercion—Intimidation—Free election—Interference by the candidate or his agent* The election of a candidate as a Municipal Commissioner was challenged under s 56 of the Calcutta Municipal Act 1899 on the following grounds viz —(i) That five persons were impersonated four of them being dead and one absent from Calcutta (ii) That a voter was coerced to vote for the elected candidate (iii) That certain grogshop owners had been dissuaded by Hem Chandra Lahiry Inspector of Police and did not vote through fear (iv) That the said Inspector of Police interfered with the election intimidated voters and freely canvassed for the elected candidate *Held* that the election must stand inasmuch as the charges were not substantiated The Calcutta Municipal Act 1899 contains no provision regarding corrupt practices in elections *Mens rea* is an essential ingredient to constitute impersonation In this case there was nothing to show that the elected candidate or his agent fraudulently and wrongfully caused improper personification and so the charge of impersonation could not stand In order to avoid an election on the ground of intimidation and undue influence it must be shown either that (i) the rioting or violence was instigated by the candidate or his agents for whom he is responsible or that (ii) it prevailed to such an extent as to prevent the election from being an entirely free election MONORANJAN MUKHERJI v BROJO GOPAL GOSWAMI (1918) 22 C W N 678

——— Public body—*Vacancy—Election to fill up vacancy by less than a majority of voters validity of—Appointment of a minor as Muthawalli of a mosque validity of* According to a scheme framed by the High Court a mosque in Madras was governed by a managing committee of five members including the President and three *Muthawallis* working under them and vacancies in the committee were to be filled by election by an electoral body consisting of the remaining committee members and the three *Muthawallis* and the committee was to appoint competent men as *Muthawallis* for the mosque In 1906 one *M M* who was then eleven years of age was appointed by the committee as one of the *Muthawallis* In 1914 the electoral body consisted of the president three other members of the committee and two *Muthawallis* excluding *M M* Notice of a meeting to fill up a vacancy in the committee in 1914 was served on all the members of the electoral body except *M M* Three members of the electoral body attended the meeting at which the plaintiff was elected There was no rule or practice fixing the quorum for meetings of the electoral body *Held* (i) that plaintiff having been elected at a meeting attended by less than a majority of those entitled to vote his election was invalid (ii) that the election of *M M* as *Muthawalli* while he was a minor was invalid *ab initio* and (iii) that *M M* even though a major at the time of plaintiff s election was not entitled to vote and want of notice to him of the meeting was immaterial RAZA v ALI (1916) I L R 40 Mad 941

——— Specific Relief Act—*I of 1877 s 42—Civil Procedure Code (Act V of 1908) s 9—Discretionary Relief principles on which granted—Delay—Indian Councils Act 1909 (9 Edw VII c 4) s 6—Power of Governor General in Council to make Regulations—Civil Court jurisdiction of* When a plaintiff seeking to impugn the validity of an election held on February 14 1913 first made an application to the Governor General in Council in accordance with Regulations framed under s 6 of the Indian Councils Act 1909 which Regulations provided that the decision of the Governor General in Council on the intention construction or application of the Regulations should be final and afterwards when the election of the defendants had been declared to be valid by the Governor General in Council filed a suit on June 19 1913 praying for a declaration that the election was invalid and for an injunction restraining the defendants from exercising the function of the office to which they had been elected *Held* without deciding the question as to the jurisdiction of the Court and the power of the Governor General in Council to make Regulations excluding that jurisdiction that in the circumstances the Court should not exercise its discretionary jurisdiction under s 42 of the Specific Relief Act in favour of the plaintiff *The Court in interfering in cases of disputed elections should* apply the principles followed by the Courts of Common Law in granting or refusing prerogative writs BHUPENDRA NATH BASU v RANJIT SINGH (1913) I L R 41 Calc 384

ELECTRICITY ACT (IX OF 1910)

——— ss 14 19—*Responsibility of licensee to make full compensation for any damage detriment or inconvenience caused by him or by any one employed by him—Damage whether caused in the exercise of the powers granted to the licensee* A gas company laid a 3 inch main in a street in Bombay Subsequently an electric supply company caused cables contained in troughing to be laid over this main in such a manner that the main for the distance of some 36 feet was rendered inaccessible for the purpose of removing the same except by slinging the electric company s cables by reason of the position of the cables It was found that the work of laying the cables had not been executed nor must it be deemed to have been executed to the reasonable satisfaction of the gas company Subsequently the gas company desired to replace their 3 inch main with a 4 inch main and for this purpose opened up the street in question when they discovered the position of the cables On account of the position

ELECTRICITY ACT (IX OF 1910)—*contd*

——— s 14, 19—*contd*

of these cables the gas company were compelled to make a diversion in the route taken by their 4 inch main and claimed that the electric supply company should pay the cost thereof the latter company refused to do so *Held* that the damages, if any suffered by the gas company were damages recoverable under s 19 of the Indian Electricity Act of 1910 as the damage alleged lay in the gas company being deprived of access to its own property (the main) which was inflicted once and for all when the electric supply company laid their cables over the main and that it was a question of fact whether such damage had been committed *Held* further that the gas company were not compelled to proceed under s 14 of the Act and did not lose their remedies against the electric supply company by reason of their not having availed themselves of the provisions of that section *Quære* whether a licensee causing only as little damage detriment and inconvenience as may be is liable for damages under s 19 of the Indian Electricity Act (IX of 1910) *In re* BOMBAY GAS COMPANY LTD AND BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY LTD (1914) I L R 39 Bom 124

——— s 33—

See CRIMINAL PROCEDURE CODE s 43. I L R 39 Mad 686

ELEPHANT

——— *Nature and extent of liability for damage done by elephant—An elephant belongs to a dangerous class of animals Liability of owner and person in possession* It may be laid down as a rule of law that in India the elephant belongs to a dangerous class of animals A person who keeps an animal belonging to a class that is dangerous takes the risk of any damage it may do The absolute liability of a person for any harm done by his animal independently of any intent or negligence on his part does not depend on the manner or extent to which such animals are employed but upon the nature of the class to which such animal belongs or the particular kind of mischief committed Liability for damage done by an elephant attaches to the owner of the elephant as well as to a person in whose possession the elephant happens to be when it commits such damage VEDAPURATTI v KAPPAN NAIR (1912) I L R 35 Mad 708

EMBANKMENT

See SALE FOR ARREARS OF REVENUE I L R 42 Calc 765

——— *Bengal Embankment Act (II of 1882) s 76 cls (a) (b)— Addition to existing embankment meaning of—Increasing height of embankment—Essentials of offence under s 76 (b)* The words existing embankment in s 76 (b) of Beng Act II of 1882 mean an embankment existing at the time the addition is made *Ajodhya Nath Koila* v *Raj Kristo Bhar I L R 30 Calc 481* followed *Goverdhan Sinha* v *Queen Empress I L R 11 Calc 570* explained as overruled The only offence constituted by cl (b) as distinguished from cl (a) of s. 76 is the omission to obtain the sanction of the Collector to the addition to an existing embankment within a prohibited area irrespective of the question whether such a thing is likely to interfere with counteract or impede any public embankment and public watercourse RAMNATH PANDIT v EMPEROR (1911) I L R 38 Calc 413

——— *Poolbundi charges—Contract between emindar and putnidar as to payment of poolbundi charges—Change of law after contract—How far change affects the contractual relationship—Embankment Act (XXXII of 1855 and Beng VII of 1866)—Bengal Embankment Act (Beng II of 1882) ss 54 to 59 68 74* An agreement between the landlord and the *putnidar* entered into while the Embankment Acts (XXXII of 1855 and Beng Act VII of 1866) were in force that the *putnidar* was to be exempt from all charges to which the term *poolbundi* could be reasonably applied is operative even after those Acts were superseded by the Bengal Embankment Act of 1882 There is nothing in the Act of 1882 to render such an agreement contrary to the policy of the law or void for any other reason The *putnidar* is entitled to come to Court for the purpose of having his contractual rights vindicated as soon as he has reason to apprehend the breach of the contract on which he relies SHIBA PROSAD SAMANTA v RAKHALMANI DASEE (1913) I L R 41 Calc 130

——— *Addition to embankment—Proof of notification and due publication thereof—Failure to comply with the prescribed mode of publication—Effect of failure— Existing embankment meaning of—Lease by Collector before the passing of the Act giving power to erect and repair embankments— Application of the Act to such lease —Removal of unauthorised addition to an embankment—Bengal Embankment Act (II of 1882) ss 6 76 (b) 79 and 80* The provisions of ss 6 and 80 of the Bengal Embankment Act as to local publication of the notification are merely directory and not mandatory *Brindabun Ghose* v *Emperor 7 C W N 286* followed *Goverdhan Sinha* v *Queen Empress I L R 11 Calc 570* referred to An existing embankment in s 76 (b) means one existing when the addition is made *Ramnath Pandit* v *Emperor I L R 38 Calc 413* followed. The provisions of s 76 (b) apply to and supersede the terms of a lease granted by the Collector before the passing of the Act giving the lessee the power to erect and repair embankments LAKSHMI KANTA HAZRA v EMPEROR (1919) I L R 46 Calc 825

EMBARRASSMENT

——— of debtor—

See INTEREST I L R 42 Calc 652

EMBEZZLEMENT

See PENAL CODE ACT (XLV OF 1860) s 408 I L R 40 All 565

EMERGENCY LEGISLATION

See COMMERCIAL INTERCOURSE WITH ENEMY

See HABEAS CORPUS I L R 44 Calc 459

EMERGENCY LEGISLATION CONTINUANCE ACT (I OF 1915)

See HABEAS CORPUS I L R 44 Calc. 459

EMERGENCY LEGISLATION CONTINUANCE ACT (I OF 1915)—*contd*

———— *if ultra vires Ordinances III and V of 1914—Power of Governor General in Council to pass Act embodying provisions of ordinances—Ordinance III of 1914 s 11 effect of—Jurisdiction of Courts to question orders of internment passed under Emergency Legislation Continuance Act—Indian Councils Act 1861 (24 25 Vict c 67) ss 22 23* Under s 23 of the Indian Councils Act 1861 (24 25 Vict c 67) no ordinance can have any force of law for more than six months from its promulgation but the power of the Governor General in Council to pass an Act embodying the provisions of an ordinance is in no matter controlled or taken away by that section It is clear that the Governor General in Council has power to pass an Act like the Emergency Legislation Continuance Act (I of 1915) which embodies the provisions of Ordinances III and V of 1914 1914 which is embodied in the Emergency as s 11 of the Ordinance No III of 1914 which is embodied in the Emergency Legislation Continuance Act of 1915 seeks to oust the jurisdiction of the Courts it offends against s 22 of the Indian Councils Act 1861 that the Emergency Legislation Continuance Act of 1915 is not *ultra vires* of the Governor General in Council and the High Court has not power to call in question orders passed thereunder It is for the Governor General in Council to be satisfied on the materials before them and the Court cannot call for the materials or examine them In England the common law rule that when an Act is repealed and the repealing Act is repealed by another which manifests no intention that the first shall continue repealed the repeal of the second Act revives the first does not apply to repealing Acts passed since 1850 and the last repeal does not now revive the Act or provisions before repealed unless words be added reviving them The same principle or rule of law applies to this country S 3 of the General Clauses Act (I of 1868) expressly provided that for the purpose of reviving either wholly or partially a Statute Act or Regulation repealed it shall be necessary expressly to state such purpose and the same is the effect of ss 6 and 7 of the General Clauses Act (X of 1897) *In the matter of* JEWA NATHOO (1916)
20 C W N 1327

EMIGRATION

See HINDU LAW—INHERITANCE
I L R 48 Calc 30

———— **inducing—**

See ASSAM LABOUR AND EMIGRATION ACT 1901 s 20 164 **1 Pat L J 388**

———— **Unlawful recruitment**—*Assam Labour and Emigration Act (VI of 1901) s 164 — Emigrate meaning of—Inducement to go from a place in British India to Fiji—Subsequent inducement at another place to proceed to Sylhet—Locus delicti—Jurisdiction of Criminal Court—Criminal Procedure Code (Act V of 1898) s 177* A recruiter who induces a person at Cawnpore to go to Fiji but on the way takes him to a cooly depôt at Arrah and induces him to proceed to Sylhet in contravention of the Assam Labour and Emigration Act commits no offence under s 164 of Act VI of 1901 at Cawnpore but only at Arrah and a Magistrate of the latter place has jurisdiction to try such offence FAIZ ALI *v* EMPEROR (1909) **I L R 37 Calc 27**

EMOLUMENTS

———— **partition of—**

See MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894) ss 5 AND 10 CI (2)
I L R 39 Mad 930

ENCROACHMENT

See BOMBAY DISTRICT MUNICIPAL ACT (III OF 1901) ss 113 122
I L R 38 Bom 152

See BUILDING **I L R 39 Calc 84**

See MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884) s 168
I L R 38 Mad 456

See MUNICIPAL COUNCIL
I L R 38 Mad 6

See PUBLIC NUISANCE
I L R 42 Calc 702

———— **on public street**

See PROSECUTION
I L R 37 Calc 545

———— *Bengal Local Self government Act (Beng Act III of 1885) s 140—Infringement of bye law—Erection of fence on the slope and edge of a road without impeding the passage along it—Continuing Offence—Daily Fine* Where a bye law passed by the District Board prohibited encroachment on any part of a road maintained by it or its slopes or side ditches by the placing of fences thereon *Held* that the erection of a fence along the slope and the edge of such road without impeding the passage over it is an infringement of the bye law though the Board has no proprietary right in the road or in the land on which its slopes or side ditches stand A sentence of a daily fine in anticipation in the case of a continuing offence which may be committed after the date of the proceeding in which it was passed is illegal NILMANI GHATAK *v* EMPEROR (1910) **I L R 37 Calc 671**

———— *Municipal Act (Bengal III of 1884) s 217—Encroaching on a public road —Materials sufficient to determine road to be public* Where the petitioner was convicted under s 217 Bengal Municipal Act of encroaching on a public road upon a finding that the road in question which was given a name by the Municipality was made over the petitioner s land to a trenching ground and so used for some time and was subsequently given up with the closing of the trenching ground *Held* that this alone was not sufficient for the conclusion that the road was a public one NANDO LAL NEOGY *v* GORALIA MUNICIPALITY (1910) **22 C W N 599**

ENCUMBRANCE

See EXECUTION OF DECREE
I L R 40 Calc 623

See GUARDIANS AND WARDS ACT (VIII OF 1890) ss 7 (2) 29 30
I L R 37 Mad 38

See SALE **I L R 43 Calc 263**

———— **by co sharer—**

See JOINT ESTATE
I L R 43 Calc 103

ENCUMBRANCE—*contd*

——— discharge of—

See MADRAS REVENUE RECOVERY ACT (II OF 1864) ss 1 4
I L R 37 Mad 49

——— *Transfer of portion of non transferable occupancy holding if encumbrance—Exchange if for all purposes a sale—Bengal Tenancy Act (VIII of 1885) s 161* The transfer of a portion of a non transferable occupancy holding is not an encumbrance within the meaning of s 161 of the Bengal Tenancy Act *Abdul Rahman Chowdhury v Ahmadar Rahman I L R 43 Calc 558* followed *Rameshwar Singh v Raghunandan Khibas 1 Pat L J 403* and *Umar uddin Khan v Khoda Nawaz Khan 14 C W N 279* referred to *Chundra Sakai v Kali Prasanna Chuckerbutty I L R 23 Cal 254* distinguished An exchange is not for all purposes a sale BIJOY KRISHNA MUKHERJI v SURENDRA NATH BANERJI (1919) I L R 46 Calc 891

ENDORSEMENT

See RAILWAY RECEIPT
I L R 38 Bom 659

See VAKALATNAMA
I L R 43 Calc 884

——— fraudulently obtained suit on—

See SPECIFIC RELIEF ACT (I OF 1877) ss 39 40 42
I L R 39 All 103

——— of document (admitted as evidence)—

See MAHOMEDAN LAW—GIFT
I L R 38 All 627

——— of payments by mortgagor—

See MORTGAGE I L R 37 Calc 589

See MORTGAGE BY MINOR
I L R 38 Mad 1071

ENDOWMENT

See CONSTRUCTION OF DOCUMENT
I L R 39 All 311

See COURT FEE I L R 40 Calc 245

See HINDU LAW—ENDOWMENT

See HINDU LAW—SUCCESSION
I L R 32 All 461

See LIMITATION I L R 37 Bom 231

See MAHOMEDAN LAW
I L R 37 Calc 263

See MAHOMEDAN LAW—ENDOWMENT
I L R 40 Calc 297

See RELIGIOUS TRUST
I L R 40 Calc 251

——— *Conditions of valid endowment—Hindu Law—woman s estate—dedication to idol whether valid—Occupancy right acquisition of by firm* Where it is sought to establish that certain lands are the subject of a valid endowment it must be shewn (i) that an absolute grant of the lands was made with the intention that the properties should be applied to the purposes of the endowment (ii) that the properties have since the grant been so applied and (iii) that the members of the family of the settler have not treated the property as one the profits of which were mainly intended to be applied for their own benefit The dedication must be held to be nominal when there is no proof of the application of the income of the property for the purposes of the endowment and when the whole conduct of the parties is inconsistent with the hypothesis of a valid trust A woman having the estate of a Hindu mother cannot create a valid title in favour of an idol The members of a firm are capable of acquiring rights of occupancy in land SIRI THAKUR PARMOD BANABIHARI v C G ATKINS 4 Pat L J 533

——— *property—Alienation by trustee (Acharjya) to wife—Property claimed to be acquisition of Acharjya out of perquisites claim not proved* The head of an endowment having conveyed some properties to his wife his successor brought this suit for recovery on the allegation that the property was part of the endowed property The donee failed to prove that the property was acquired by the Acharjya with funds which belonged exclusively to him or which might be regarded as his official perquisites and the other evidence pointed to the property being part of the endowed property *Held* that the suit was rightly decreed MUSAMMAT KAMLA LACHMI v MAHANT BASDEO PRASAD (P C)
25 C W N 217

See COMMERCIAL INTERCOURSE WITH THE ENEMY

ENEMY

See SALE OF GOODS
I L R 45 Calc 28

——— attempting to trade with—

See TRADING WITH THE ENEMY
I L R 40 Mad 34

——— ship—

See CARGO I L R 42 Calc 334

ENEMY TRADING ACT (X OF 1916)

See CONTRACT WITH ENEMY
I L R 44 Bom 631

See ENEMY

See WAR LEGISLATION

ENFORCEMENT OF RIGHT

See MAHOMEDAN LAW—PRE EMPTION
I L R 44 Calc 47

ENFRANCHISEMENT

——— and resumption—distinction between—

See CHARITABLE INAMS
I L R 40 Mad. 939

——— of Shrotriyam villages effect of—

See INAM I L R 40 Mad 268

ENGAGEMENTS

——— construction of—

See MADRAS IRRIGATION CESS ACT (VII OF 1868) s 1
I L R 38 Mad. 997

ENGLISH LAW

——— applicability of—

See DEFAMATION
I L R. 40 Calc. 433

ENGLISH LAW—*contd*

——— applicability of—*contd*

See FISHERY I. L. R. 42 Calc. 489

See LIBEL 15 C W N 905

See PUBLIC NUISANCE. I. L. R. 46 Calc. 515

See STANDARD OF PROOF I. L. R 40 Calc 898

——— Decisions under—*How far applicable in India* Courts in this country are not bound by isolated d... in English cases not directly in point. Their applicability will depend upon their being consistent with principles of justice equity and good conscience MANJHOORI BIBI *v* AKEL MAHMUD (1913) 17 C. W N 889

ENHANCEMENT OF PUNISHMENT.

——— Power of High Court—

See CRIMINAL PROCEDURE CODE, 1898 439 I. L. R 1 Lah. 453

ENHANCEMENT OF RENT

See BOMBAY LAND REVENUE CODE 1879 s. 16 I. L. R. 45 Bom. 994

See CHOTA NAGPUR TENANCY ACT 1908 s. 27 I. L. R. 40 Calc. 518

See LANDLORD AND TENANT I. L. R. 47 Calc 280

See LAND TENURE IN BENGAL. L. R 46 I. A. 279

See LESSOR AND LESSEE. I. L. R. 38 Mad. 86

See MADRAS RENT RECOVERY ACT 1865 s. 11 L. R 45 I. A. 195

See OCCUPANCY RAIYAT 5 Pat. L. J 406

See SUIT I. L. R 40 Calc. 428

——— ground for—

See LANDLORD AND TENANT I. L. R 45 Calc 930

——— suit for—

See BENGAL TENANCY ACT s 183. I. L. R 38 Calc 270

See LANDLORD AND TENANT I. L. R 37 Calc 449 610 742

——— Bengal Tenancy Act (VIII of 1885) s 30 [illegible] *holding meaning of* [illegible] [illegible] the plaintiff and the [illegible] *Held* that the plaintiff [illegible] Act and as such the suit was [illegible] suit between the parties [illegible] it was held that the plaintiff had [illegible] enhance the rent of the defendant [illegible] was dismissed on the ground that the r[illegible]

ENHANCEMENT OF RENT—*contd*

by the defendants was not lower than the rate at which rent was paid by tenants of adjoining lands. In a subsequent suit between the same parties the question was raised by the plaintiff that his right to enhance the rent of the defendants was *res judicata*. *Held* that inasmuch as the decision upon the question of the right of the plaintiff to enhance the rent was not the basis of the decree ultimately made in the previous suit it was not *res judicata* between the parties PARBATI DEBI *v* MATHURA NATH BANERJEE (1912) I. L. R 40 Calc 29

——— Bengal Tenancy Act s 52—*Admeasurement—Onus of proof* In a proceeding for enhancement of rent under this section, if the landlord shows that by a contract between himself and the tenant it was agreed that a certain rental at a certain rate per bigha was to be paid for a certain area, then he is entitled to an enhancement of the rent even if that area was agreed upon without any actual measurement or even though there is no practice of measurement within the *pargana* within which the land is situated. It is not incumbent upon landlord to prove that there was an actual measurement or that there is a practice of measurement. A second appeal lies in a proceeding to enhance rent under s 52. MAHARAJA KESHO PRASAD SINGH *v* TRIBHUAN [illegible] (1917) 2 Pat. L. J 276

——— Bengal Tenancy Act ss 30 52 and 109 (a)—*Enhancement given for a rise in price when applied for on account of area* No second appeal lies from an order under s 30 (*b*) of the Bengal Tenancy Act 1885 enhancing the rent of a holding by reason of a rise in the price of staple food crops even though such order was passed on an application for enhancement of rent under s 52 JALDHARI SINGH *v* SHAM LAL MAHTO (1917) 2 Pat. L J 574

——— Undivided share—*Of holding main tainability of suit to enhance rent of* A suit does not lie to enhance the rent of an undivided share in a holding HARNANDAN RAI *v* MAHARAJA KESHO PRASAD SINGH (1917) 2 Pat L J 553

——— Practice—*Form of suit* It is not necessary to sue for a declaration that an entry in the Record of Rights that the defendants are *raiyats* at fixed [illegible] is wrong before instituting a proceeding [illegible] enhancement of rent under the Bengal Ten[illegible] 1885 Such record con stitutes [illegible] rebuttable piece of eviden[illegible] A claim [illegible] rent is a recurring [illegible] of action [illegible] governed by article [illegible] Limitation [illegible] 1908 and not by a[illegible] Limitation [illegible] from the date of re[illegible] rent at the [illegible] rate BRIJ BEHARI [illegible] SHEO SANK[illegible] (1917) 2 Pat. L. [illegible]

——— Illegal [illegible] *to false and* [illegible] *Jarce*— [illegible] contract [illegible] An ill[illegible] within th[illegible] of the [illegible] Tenancy [illegible] operate as [illegible] in [illegible] enhance [illegible] althou[illegible] ract [illegible] M[illegible]

ENHANCEMENT OF RENT—*contd*

assertion by the tenant that his rent cannot be enhanced not followed within 12 years by a suit for enhancement does not confer on the tenant a right to hold the land at a permanent rent. BIRENDRA KISHORE MANIKYA v DOULAT KHAN (1917) 22 C W N 856

———— *Bengal Tenancy Act (VIII of 1885) ss 105 109—Case under s 105 dismissed for non prosecution—Subsequent civil suit for same matter if barred under s 109* An application made under 105 whether it is withdrawn or whether it is dismissed for non prosecution is nevertheless an application made within the meaning of the provisions of s 109 of the Bengal Tenancy Act (VIII of 1885) The provisions of s 109 of the Bengal Tenancy Act (VIII of 1885) should be strictly enforced and not whittled down as appears to be the effect of the decisions in *Chedditin v Tulsi Singh I L R 40 Calc 498* and *Kamini Surdari Chowdhurani v Abdul Halim Moulavi 28 C L J 254* S 109 is an effective bar to a claim in the Civil Court for enhancement of rent on the ground of an increase in area which was the subject of an application previously made under s 105 of the Bengal Tenancy Act (VIII of 1885) but dismissed for non prosecution ABEDA KHATUN v MAJILALI CHOWDHURY (1920) I L R 48 Calc 157

ENHANCEMENT OF SENTENCE

See CRIMINAL PROCEDURE CODE s 423 I L R 36 All 485

See RAILWAY PASSENGER I L R 44 Calc 279

See SENTENCE ENHANCEMENT OF

ENJOYMENT

———— adverse—

See EASEMENTS ACT (V OF 1882) s 15 I L R 38 Mad 1

ENMITY OR HATRED

———— dissemination of—

See SECURITY FOR GOOD BEHAVIOUR I L R 43 Calc 591

ENQUIRY

See CRIMINAL PROCEDURE CODE s 117 242 I L R 34 Mad 139

ENTICING AWAY MARRIED WOMEN

See PENAL CODE s 498 I L R 42 All 401

EPIDEMIC DISEASES ACT (III OF 1897)

———— ss 2 3—

See PENAL CODE (ACT XLV OF 1860) ss 188 AND 269 I L R 38 Mad. 602

EQUITABLE ASSIGNMENT

See ADMINISTRATOR GENERAL'S ACT (II OF 1874) ss 28 34 AND 35 I L R 38 Mad. 500

EQUITABLE ESTOPPEL

See ESTOPPEL BY JUDGMENT I L R 37 Mad 270

EQUITABLE ESTOPPEL—*contd*

See LETTERS OF ADMINISTRATION 3 Pat L J 415

See WILL 24 C W N 529

EQUITABLE LIEN

See TRANSFER OF PROPERTY ACT ss 59 100 I L R 33 All 708

EQUITABLE MORTGAGE

See MORTGAGE I L R 43 Calc 895

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 59 I L R 38 Bom 372

———— *Transfer for Property Act (IV of 1882) s 59—One of several joint mortgagors possessing no property comprised in the title deeds deposited of properties within Ordinary Original Civil Jurisdiction of the High Court—Jurisdiction—Letters Patent cl 12—Mortgage decree* Where several joint mortgagors had effected an equitable mortgage by deposit of title deeds one of them having no interest in any of the properties covered by the deposited title deeds within the Ordinary Original Jurisdiction of the High Court —*Held* that the defendants having incurred a joint debt and that debt having been secured by them by a deposit of title deeds they were jointly responsible and the question whether one of the defendants was interested or not in any of no properties covered by the deposited deeds in the way affected the question of jurisdiction of the Court It is not relevant in such a suit to enquire what interest each one of the mortgagors had in the properties comprised in the title-deeds jointly deposited by them MATIGARA COAL CO LD v SHRAGERS LD (1911) I L R 38 Calc 824

———— *Deposit of title deeds—whether all title deeds should be deposited—what interest passes on foreclosure* The Transfer of Property Act 1882 is not exhaustive There are many mortgages known to English Law which it is difficult or impossible to bring within the terms of the Transfer of Property Act 1882 There is no technical rule that in an equitable mortgage all the title deeds should be deposited It is merely a question of intention. Where a share in an indigo concern is mortgaged the parties must be taken to intend that when foreclosure or sale takes place at some subsequent date the share shall pass to the purchaser as it stands at the date of foreclosure or sale This would include not only what strictly could be held to be accessions but also changes in good will rights under contracts etc *West v Lawday 11 H L C 375* approved BHUPENDRA NATH BASU v MUSSAMMAT WAJIHUNNISSA BEGAM 2 Pat L J 293

EQUITABLE RELIEF

See CONSENT DECREE I L R 44 Bom. 544

EQUITABLE SECURITY

See MORTGAGE I L R 39 Calc 810

EQUITABLE SET OFF

See CONTRACT I L R 37 Calc 334

———— *Order disallowing plea before remand if may be reviewed at final hearing* *Held* that in the circumstances of the case the Court of the Judicial Commissioner was right in

EQUITABLE SET-OFF—*contd*

allowing the defendant's plea of equitable set off at the final hearing after a remand it had ordered for certain *inquiries although at the previous* hearing it had upheld the decision of the lower Court rejecting the plea SHEO NARAIN SINGH v BISHUNATH SINGH (1913) 18 C W N 426

EQUITIES ON PARTITION

See TRANSFER OF PROPERTY ACT (IV OF 1882) ss 60 AND 91
I L R 38 Mad 310

EQUITY JUSTICE AND GOOD CONSCIENCE

———— rule of—

See HINDU LAW—MAINTENANCE
I L R 37 Mad 396

EQUITY OF REDEMPTION

See MORTGAGE I L R 34 Mad. 115
I L R 39 Bom 55
I L R 38 All 411
I L R 44 Bom 723

See MORTGAGOR AND MORTGAGEE.
I L R 41 Bom 357

See REDEMPTION

See TITLE I L R 37 Calc 239

———— acquisition of, by trespassers—

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 65 (*c*)
I L R 39 Mad. 959

———— assignment of to sureties—

See MORTGAGE I L R 45 Calc 702

———— clog on—

See MORTGAGE I L R 32 All 651

See MORTGAGE 5 Pat L J 423

———— sold and pre-empted—

See BUNDELKHAND ALIENATION ACT (II OF 1903) s 3 I L R. 37 All 467

———— suit by Transferer of—

See CIVIL PROCEDURE CODE O XXXIV RR 2 3 4 AND 5 5 Pat L J 595

———— Transferee of part of—

See MORTGAGE
I L R 48 Calc 22

———— *Entry in Revenue records more than 12 years old—whether sufficient for acquisition of title—adverse possession* In 1888 on the death of *Mussammat* Bhuri the surviving widow of Kasam Shah plaintiff succeeded in having his name entered in the Revenue records as owner of the land originally owned by Kasam Shah and mortgaged by *Mussammat* Tajo one of his widows in 1868 with possession to the defendants 1 to 3's predecessors. Plaintiff sued in 1911 for redemption of the mortgage and the question was whether he had acquired a title to the equity of redemption by reason of the entries in the Revenue records in his favour since 1889 *Held* that the plaintiff could not and did not acquire ownership of the equity of redemption by merely having an entry in his favour in the Revenue records. *Kanwar Sen* v *Darbari Lal (34 Indian Cases 171)* followed *Anhoo Lal* v *Mussammat*

EQUITY OF REDEMPTION—*contd*

Manki Bibi (6 C W N 601) and *Hubdar Khan* v *Gajadhar Chaube (25 Indian Cases 600)* distinguished SHAH NAWAZ v SHEIKH AHMAD
I L R 1 Lab 549

———— *Purchase of by mortgagee—Right of mortgagor to redeem* A purchase of mortgaged property by a mortgagee at a sale held in contravention of s 99 of the Transfer of Property Act 1882 voidable not void. The mortgagor must therefore have the sale set aside before he can redeem the property PANDIT SHEO NARAIN OJHA v RAM JATAN OJHA (1917)
2 Pat L J 587

———— *Extinguishment—Mortgagor passing a rajinama to mortgagee for the land—Mortgagee executing kabuliyat to pay Government assessment* In 1876 the plaintiff mortgaged the land in dispute to the defendants and in 1879 passed a rajinama relinquishing all his occupancy rights in the said land in favour of the defendants. The latter at the same time gave a complementary *kabuliyat* agreeing to pay Government assessment on the land The plaintiff having sued to redeem the mortgage *Held* dismissing the suit that the *rajinama* and *kabuliyat* effectually extinguished the plaintiff's equity of redemption VENKAJI NARAYAN v GOPAL RAMCHANDRA (1914)
I L R 39 Bom 55

ERRONEOUS DECISIONS AND ORDERS

———— on a question of law—

See LIMITATION ACT (XV OF 1877) SCH II ARTS. 178 AND 179
I L R 36 Mad 553

See RES JUDICATA
I L R 39 Calc 848

ERROR

———— of fact—

See SALE BY GOVERNMENT
I L R 44 Calc 328

———— of Law—

See CHARGE I L R 40 Calc 168

ERROR OMISSION OR IRREGULARITY

See CHARGE I L R 40 Calc 16

———— correction of—

See REMAND I L R 44 Calc 929

ESCAPE FROM CUSTODY

See ARREST BY PRIVATE PERSON
I L R 41 Calc 17

See PENAL CODE s 2 3B
I L R 32 All 116
I. L. R. 43 All. 185

ESCHEAT

See MAHOMEDAN LAW
I L R 44 Bom 947

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 91 I L R 33 All 111

———— failure of Husband's heirs on widow's death—

See HINDU LAW—WIDOW
I. L. R. 45 Bom 1106

ESTATE

See MADRAS ESTATES LAND ACT (I OF 1908) s 3 I L R 38 Mad 33

———— absolute or limited—

See HINDU LAW—WILL I L R 38 All 448

———— falling into possession—

See EXPECTANCIES I L R 39 Mad 554

———— in common Tenancy—

See SALE FOR ARREARS OF REVENUE I L R 39 Calc 353

———— of deceased person (Liability of)—

See MAINTENANCE I L R 41 Calc 88

———— Tanjore Palace—

See MADRAS ESTATES LAND ACT (I OF 1908) s 3 (2) (d) I L R 40 Mad 389

ESTATE LAND ACT

See MADRAS ACT I OF 1908

ESTATES PARTITION ACT (BENG VIII OF 1876)

———— *Division of tenancy* There is nothing in the Estates Partition Act 1876 to prevent the partition of a tenancy into separate tenancies without the consent of the tenants RAMLOCHAN KUER *v* AGERNATH MISSER 1 Pat L J 270

———— ss 7 111 149—

See TITLE SUIT FOR I L R 37 Calc 662

———— ss 23 25 29 45 46 119—S 25 does not bar a suit for a declaration that a 3rd person passing as a tenant is in reality not a tenant LAKHI CHOWDHRANI *v* AKLOO JHA 16 C W N 639

———— s 7—*Previous partition when a bar to fresh partition—Actual joint possession of parts of the property at the time when partition is applied for if enables a partition to be made although there had been a previous partition—Civil Court jurisdiction of to declare estate unfit for partition by Collector* S 7 of the Estates Partion Act contemplates a formal division of the lands of an estate by metes and bounds agreed to by all co owners and a possession of separate lands held in severalty by each such co owner Where it was found that there had been a previous arrangement by which the co sharers had possession of different lands but there had not been a complete partition by metes and bounds and an *ijmali* share was retained and some co owners who were ignored in that partition subsequently obtained an *ijmali* share in each of the mouzahs *Held* that there was no complete partition as contemplated by s 7 of the Estates Partition Act such as would bar partition under the Act *Semble* If a complete partition is once effected no subsequent partition under the Act can take place except on a joint application by all the proprietors even though after such partition each of the separate parcels becomes, or some of them become jointly vested in more proprietors than one so that it might be said that there was joint ownership in the property at the time of application under the Act.

ESTATES PARTITION ACT (BENG VIII OF 1876)—*contd*

———— s 7—*contd*

Where there were several co sharers holding *ijmali* shares in all the mouzahs and the lower Court had declared that the land was not fit to be partitioned and thereby barred all future partitions *Held* that the order was wrong and that the *ijmali* share holders might if they chose ask for a partition of the entire taluk. *Quære* Whether a Civil Court has jurisdiction to prohibit absolutely a partition to be made by the revenue authorities TAJAMAI ALI *v* MUSSUD ALI (1910) 14 C W N 632

———— ss 11 113 and 114—

———— Revisional Powers of the Board of Revenue discussed BIRABHADRA RUTH AND ORS *v* JANARDAN PROHERAJ NOHAPALIA 1 Pat L J 491

———— s 12—

See PARTITION 4 Pat L J 29

———— ss 23 24 26 77 94 and 99—*Private partition of bakasht lands effect of—sale of separated plot by proprietor in possession—rights of purchaser* Ss 23 24 26 and 77 show that a Civil Court has jurisdiction to decide a question of title or extent of interest not only between a proprietor and a stranger but also between the proprietors themselves after a partition has been completed BAHURIA KANAKDULARI KUER *v* BINDESHWARI GIR 5 Pat L J 456

———— ss 25 and 29—

See LIMITATION 6 Pat L J 41

See PARTITION 3 Pat L J 188

———— ss 25 119—*Civil suit for declaration of tenancy right where Collector decides against it in partition proceedings—Maintainability—Defect of parties objection when must be taken* Where in the course of partition proceedings before the Collector the defendants set up a claim that they were tenants in respect of that land to which the plaintiffs who were some of the joint proprietors objected and the objection was overruled by the Collector *Held* that a suit by the plaintiffs for a declaration that there was no tenancy right of the defendants was not barred LAKHI CHOUDHRY *v* AKLOO JHA (1911) 16 C W N 639

———— ss 26 29 and 94—

See ORDER IN COUNCIL 2 Pat L J 496

———— s 99—

See JOINT ESTATE I L R 43 Calc 103

———— ss 82 and 119—Where a Revenue Court has passed an order under s 82 refusing a partition on the ground that the land is rent free property s 119 does not bar a suit for partition in the Civil Court JITAGANDHAN SINGH *v* MUSAMMAT SUDHA KUER 6 Pat. L. J 689

———— ss. 111, 149—*Decision of title in proceedings under if bars civil suit—Miras tenure circumstances proving—Permanent sire tur of proof of permanency of tenure* S 111 except 3 of the Estates Partition Act applies only to permanent tenures the existence of which is admitted by the tenure holders and has no application where this is denied by any of them S 149 of the Estates Partition Act does not bar a separate suit for the establishment of a miras title found against by the revenue officer though the *mirasdar*

ESTATES PARTITION ACT (BENG VIII OF 1876)—*contd*

——— ss 111 149—*contd*

happens to be a part proprietor The object of s 149 is only to exclude the jurisdiction of Civil Courts in cases where the question relates to the determination of Government Revenue or to the details of partition it does not oust the jurisdiction of the Civil Court in matters which involve a question of title *Ananda Kishore v Daije Thakurain I L R 36 Calc 726* relied on Where it was found that a tenure had been in existence for at least 75 years that the origin of the tenancy was unknown that substantial structures were erected on the land that the conveyance of the tenure referred to the tenure as *miras* tenure that while the transferable character of a jote purchased along with the tenure was disputed the purchasers were left in undisturbed possession of the tenure —*Held* that from these circumstances it could be legitimately inferred that the tenure was of a permanent character *Upendra Krishna Mandal v Ismail Khan I L R 32 Calc 41 s c 8 C W N 809 Nilratan Mandal v Ismail Khan I L R 32 Calc 51 s c 8 C W N 895 Naba Kumari Debi v Behari Lal Sen I L R 34 Calc 902 s c 11 C W N 865* relied upon *Abdul Wahid v Shaluka Bibi I L R 21 Calc 496* distinguished JANOKI NATH CHOWDHURY v KALI NARAIN RAY CHOWDHURY (1910)

15 C W N 45
I L R 37 Calc 662

——— ss 119, 88—*Suit against order of Revenue Court when lies* On the application of defendant a co sharer for the partition of his share in a *taluk* proceedings under the Estates Partition Act were taken Throughout the proceedings no question was raised under s 88 and no order was passed under that section The plaintiff another co sharer objected only to the mode in which the common lands were divided but never took the objection that more land was allotted to the estate under partition than that estate was entitled to The plaintiff's objection was rejected by all the revenue authorities up to the Board of Revenue and the final order for partition was made The plaintiff then brought a suit for declaration of title to and possession of certain land alleging that by reason of fraud practised by one of the defendants in connection with the preparation of the record of rights on which the partition proceedings were based land belonging exclusively to him had been partitioned as joint land *Held* that under s 119 of the Estates Partition Act the plaintiffs not being persons aggrieved by an order under s 88 had no right of suit in the Civil Court FLETCHER J—That the plaintiff could not be allowed to recover land allotted to defendant whilst retaining lands allotted to him by the same partition RICHARDSON J—Where there is no dispute as to the *quantum* of interest each co sharer has in joint lands but the question is as to whether a particular piece of land is part of the joint lands or is the exclusive property of a co sharer the question is not one under proviso (i) to s 119 of the Act GURBUKSH PROSAD TEWARI v KALI PROSAD NARAIN SINGH (1914)

19 C W N 1322

ESTOPPEL

See ADMINISTRATOR PENDENTE LITE.
I L R 41 Calc 771

See ADOPTION **I L R 34 All 8**

ESTOPPEL—*contd*

See ADVERSE POSSESSION
I L R 40 Calc 173
I L R 37 Mad. 373

See AGRA TENANCY ACT (II OF 1901) s 16 **I L R 41 All 223**

See ARBITRATION ACT 1899
I L R 43 All. 456

See BENAMI
I L R 37 All 507
I L R 46 Calc 566

See BOMBAY CITY LAND REVENUE ACT (BOM II OF 1876) ss 30 35 39 40
I L R 39 Bom 664

See BOMBAY CITY IMPROVEMENT ACT (BOM. ACT IV OF 1898) s 48 (11)
I L R 42 Bom 54

See CHARITABLE TRUSTS
I L R 34 Mad 406

See CHAUKIDARI CHAKARAN LANDS
15 C W N 976

See CIVIL PROCEDURE CODE 1882
s 13 **I L R 33 Mad 459**
s 43 **I L R 34 All 172**
s 287 **I L R 35 All 257**

See CIVIL PROCEDURE CODE 1908 s 60 O XXI r 92
I L R 40 All. 680

O XLI r 5 (3) **I L R 41 Mad 327**

See COMPANIES ACT (VI OF 1882) ss 76 77 **I L R 36 All 416**

See COMPANY **I L R 42 Bom 215**

See CUSTOM **I L R 39 Calc 418**

See EASEMENT ACT s 13
I L R 45 Bom 80

See EVIDENCE ACT (I OF 1872) ss 115 116 **I L R 38 All 226**
I L R 40 Mad 561
1 Pat L J 16
I L R 41 Bom 480

See EXECUTION OF DECREE
3 Pat L J 454

See EXECUTION SALE
24 C W N 269

See FRAUD **I L R 36 Bom 185**

See HINDU LAW ADOPTION
I L R 37 Mad 529
I L R 40 All 593

See HINDU LAW JOINT FAMILY
I L R 43 All. 703
26 C W N 201

See HINDU LAW PARTITION
I L R 39 Mad. 587
L R 41 I A 247
I L R. 48 Calc 1059

See HINDU LAW REVERSIONERS
I L R 40 All 467

See JURISDICTION
I L R 34 Mad. 257

See LANDLORD AND TENANT
I L R 36 Mad 53
I L R 32 All 213
I L R. 46 Calc 1078

ESTOPPEL—*contd*

See LAND REGISTRATION I L R 38 Calc 512
See LEASE I L R 42 Bom 103
See LETTERS OF ADMINISTRATION 3 Pat L J 415
See LIMITATION ACT (IX OF 1908) s 19 I L R 40 Mad 701
See MAHOMEDAN LAW 24 C W N 321
See MAHOMEDAN LAW—DOWER I L R 33 All 291
See MINOR 15 C W N 239
See MORTGAGE 15 C W N 572
22 C W N 641
I L R 34 All 640
I L R 40 Calc 534
I L R 35 All 353
I L R 36 All 141
I L R 47 Calc 446
See MUNICIPAL ELECTION I L R 47 Calc 524
See NOTICE I L R 40 Calc 503
See OCCUPANCY HOLDING 24 C W N 818
See PRINCIPAL AND AGENT 14 C W N 381
See RES JUDICATA I L R 41 Calc 69
I L R 2 Lah 88
See SALE OF GOODS I L R 42 Bom 16
See SPECIFIC RELIEF ACT 1877 s 41 I L R 44 Bom 175
See SUB LEASE I L R 48 Calc 783
See TITLE I L R 44 Calc 771
See TRADE MARK I L R 40 Calc 814
I L R 42 Calc 262
See TRANSFER OF PROPERTY ACT s 107 I L R 36 Bom 500
See VENDOR AND SUB VENDOR I L R 38 Calc 127
See WAIVER I L R 44 Calc 10
See WAKF I L R 37 Bom 447
See WILL 3 Pat L J 199

———— doctrine of feeding the—

See EXPECTANCIES I L R 39 Mad. 554

———— non user of right to take water from a well—

See EASEMENT ACT 1882 s 13 AND 47 I L R 45 Bom 80

———— standing by while building operations are going on—

See ACQUIESCENCE I L R 2 Lah 258

1 DENIAL OF TITLE
2 ESTOPPEL BY CONDUCT
3 ESTOPPEL BY JUDGMENT

ESTOPPEL—*contd*

I DENIAL OF TITLE

———— *Saranjam—Inam—Mirasi (permanent tenancy)—Denial of Saranjamdar s title—Attornment to successive Saranjamdars* In an ejectment suit brought by an Inamdar against persons claiming to hold as mirasi or permanent tenants it was conceded that the inam rights in the land in suit appertained to a saranjam held on political tenure and that the present incumbent of the saranjam was the plaintiff The defendants resisted the plaintiff s claim to eject them on the ground that the inam rights were merely the right to receive the royal share of the revenue and that the proprietary rights in the soil were prior to the date of the grant vested in the grantee of the inam had descended to his heirs independently of the inam and furnished the leasehold or mirasi right *Held* that the defendant s contention involved the denial of the title of the reversionary rights in the lands in the defendants occupation of the successive saranjamdars approved by Government The defendants had however been continuosly paying rent for their holding to the successive saranjamdars including the plaintiff They were thus estopped by attornment from disputing the plaintiff s title *Vasudev Daji v Babaji Ranu* 8 *Bom H C R* (*A C*) 175 and *Doe dem Marlow v Wiggins* 4 *Q B* 367 referred to TRIMBAK RAMCHANDRA *v* SHEKH GULAM ZILANI (1909) I L R 34 Bom 329

———— *Evidence Act* (*I of 1872*) *s 115—Acquiescence—Both parties equally conversant with true state of facts—Vague allegation is—Real controversy to be ascertained by the Judge* Where parties make vague and loose allegation it is always essential to the correct determination of the suit that the real controversy should be ascertained by the Judge by questioning their legal advisers as to what is exactly their position in the matter Where both parties to a suit are equally conversant with the true state of fact it is absurd to refer to the doctrine of estoppel In the year 1871 Government granted to the defendants predecessor in title a certain plot of land situate at Dhandhuka The grant expressly stated that a strip of land belonging to Government was the southern boundary of the plot so granted This statement was repeated in the mortgage deed executed by the defendants predecessor in title to the defendants themselves in the year 1893 In the year 1895 the defendants purchased the said plot and encroached on the strip by extending their building on it Thereupon the Secretary of State for India in Council brought a suit against them to recover possession of the strip after removing the defendants encroachment The suit was brought in the year 1908 The defendants plea was that they were in possession and enjoyment for a long time and consequently there was acquiescence and estoppel on the part of the officers of Government and Dhandhuka Municipality and they wished to lead evidence to prove their plea *Held* that the defendants title deeds having brought to their knowledge the title of the Government the doctrines of estoppel and acquiescence were not applicable and the suit was governed by sixty year limitation the Government being a party to it RANCHODLAL VANDRAVAN *v* THE SECRETARY OF STATE FOR INDIA I L R 35 Bom 182

ESTOPPEL—*contd*

II ESTOPPEL BY CONDUCT—*contd*

——————— *Non transferable occupancy holding—Mortgage of the holding—Purchaser of the holding at private sale—Subsequent lease by landlord to purchaser—Evidence (Act I of 1872) s 115* A person having a raiyati interest in certain lands mortgaged the same to the plaintiff without the landlord's consent Subsequently various transfers of portions of the lands mortgaged were effected to different persons by the widow of the mortgagor Finally the widow sold a portion of the mortgaged lands with the consent of the landlord to one Radha Kanta Chakravarti who after his purchase took a fresh lease of the same from the landlord at an enhanced rent on payment of a premium A suit having been instituted by the mortgagee for recovery of the mortgage money the widow and all the subsequent transferees including the purchaser were made parties The purchaser pleaded that he was not a necessary party to the suit and that the mortgage was invalid on the ground that the raiyati right was not transferable The District Judge having decided against him on these points the purchaser appealed to the High Court *Held* (COXE J dissenting) that the purchaser claiming under a title partly at least created by the mortgagor was estopped from raising the plea of non transferability of the holding *Krishna Lal Shaha* v *Bhairab Chandra Rahut 9 C W N* explained *Ismatunnessa Khatun Saheba* v *Harendra Lal Biswas I L R 35 Calc 904 12 C W N 721 Doe* v *Stone 3 C B 176 Doe* v *Vickers 4 Ad & E 782 Hughes* v *Howard 25 Beav 575 Debendra Nath Sen* v *Mirza Abdul Samed Seraji 10 C L J 150* referred to RADHA KANTA CHAKRAVARTI *v* RAMANANDA SHAHA (1912)
I L R 39 Calc 513

——————— *Rent free tank—Sanad—No mention of rent in the sanad—Tenants making improvement by re excavating tanks effect of—Inference of landlord's intention to grant rent free right* In a suit brought by the landlord to recover possession of a tank with its banks and in the alternative to have the lands assessed with fair rent the defendant pleaded that the tank had been nishkar (rent free) from a long time by virtue of a *sanad* granted by the predecessor of the plaintiff The *sanad* was granted in the year 1820 to re excavate an unclaimed silted up tank by which the grantee was required to excavate the tank by employing earth cutters and the only restriction imposed was that the limits of the ancient tank were not to be exceeded There was no provision for the payment of any rent in the present or future and nothing was said as to the duration of the grant The ancestor of the defendant re excavated the tank at considerable expense and it has been in the exclusive possession of the family of the defendant from father to son and still supplies good drinking water *Held* that under the circumstances the plaintiff was estopped from asserting that the tank with its banks should come under a new liability of which there was no indication in the previous history of the tank and that therefore it could not be assessed with any rent *Held per* CHATTERJEE J that according to Hindu *shastra* digging new tanks and re excavation of old ones being supremely meritorious the ancestor of the plaintiff could never have meant that the grant made by the *sanad* was a mere licence and that the defendant was entitled to hold the tank with its banks without payment of rent as long as the tank served the purpose for which the grant was made The possession of a party basing his title on a grant and not on adverse possession as an alternative source of title cannot be used for any purpose other than for explaining the grant on which he relies BIRENDRA KISHORE MANIKYA *v* AKRAM ALI (1912)
I L R 39 Calc 439

——————— *Estoppel by conduct—Hindu Law—Adoption by Hindu widow under authority of her husband—Subsequent suit to set aside adoption as invalid—Denial of any valid authority to adopt—Adopted son having on faith of representations by widow married performed shradh of adoptive father and incurred heavy liabilities in maintaining his change of status and privileges* In this case which was an appeal from the decision of the High Court in *Dharam Kunwar* v *Balwant Singh I L R 30 All 549* their Lordships of the Judicial Committee while expressing their opinion that the question in the case might well be decided as one of fact on the appellant's own statements without recourse to the doctrine of estoppel did not differ from the view of the High Court as to the applicability of that doctrine The appellant they held had asserted her authority to adopt in the most solemn manner under her hand and seal and her conduct both before and after that assertion had been of a like unequivocal character She could not now be allowed to change her story without grave injustice ensuing to the respondent who had acted in reliance upon her deliberate and repeated representations The estoppel however their Lordships said must be taken as being purely personal and did not bind any one claiming by an independent title DHARAM KUNWAR *v* BALWANT SINGH (1912) **I L R 34 All 398**

——————— *Occupancy holding mortgaged to zamindar and sold in execution of a decree on the mortgage as a fixed rate holding—Ejectment of purchaser—Right of purchaser to recover possession—Possessory title* An occupancy holding was mortgaged to the zamindar as a fixed rate holding was sold as such in execution of a decree on the mortgage and purchased by a stranger who remained in possession thereof for some eleven years paying rent to the zamindar Subsequently the purchaser was dispossed by the judgment debtor *Held* on suit by the purchaser to recover possession that the defendant was estopped from setting up the plea that the holding was an occupancy holding and that the defendant having no title at all the plaintiff was entitled to regain possession on the strength of his possessory title ASGHAR HUSAIN *v* PAL AHIR (1912) **I L R 34 All 538**

——————— *Person not in fact misled if may urge* The doctrine of estoppel by conduct does not apply in a case in which the party claiming that the other side is bound by the estoppel had express notice of the fact which he says was not represented to him by the other side as the true fact SARAT CHANDRA MUKHOPADHYAY *v* RAJENDRA LAL MITRA (1913)
18 C W N 420

——————— *Unregistered deed of exchange of two plots each worth more than Rs 100*

ESTOPPEL—*contd*

II ESTOPPEL BY CONDUCT—*concld*

—*Conduct confirming the exchange whether an estoppel in a suit to recover possession—Transfer of Property Act IV of 1882 ss 51 54 and 118—Compensation* The plaintiff and the defendant exchanged adjacent plots of land each worth more than a hundred rupees by means of an unregistered deed on 4th March 1908 both believing that they had effected a valid transfer Possession was taken by each party and defendant began to erect a very costly building placing a wall thereof on the land he had acquired in exchange While the building was in progress the plaintiff demanded and obtained Rs 525 from the defendant on the ground that the plot he parted with was found to be more in extent than the defendant's After the completion of the building the plaintiff brought this suit in 1911 for recovery of his plot after removal of the defendant's building on it The defendant pleaded *inter alia* that he had acquired a valid title to the plot that the plaintiff was estopped by his conduct from recovering the plot and that if the plaintiff was to get a decree he must pay compensation as a condition of recovery *Held* on Letters Patent Appeal, by SADASIVA AYYAR and NAPIER JJ (ABDUR RAHIM J dissenting) —(i) that the plaintiff was not estopped and that he was entitled to recover his plot owing to the absence of a registered deed of exchange as required by ss 54 and 118 of the Transfer of Property Act and (ii) that the plaintiff must pay sufficient compensation before recovery under s 51 of the Transfer of Property Act *Kurri Veerareddi* v *Kurri Bapireddi* I L R 29 *Mad* 336 followed *Mahomed Musa* v *Aghore Kumar Ganguli* I L R 42 *Calc* 801 and *Venkayyamma Rao* v *Appa Rao* I L R 39 *Mad* 509 explained and distinguished *Per* ABDUR RAHIM J—Plaintiff was estopped by his conduct from recovering his lot in spite of the want of a registered deed of exchange *Per* SADASIVA AYYAR and NAPIER JJ The word transferee in s 51 of the Transfer of Property Act includes also a transferee under an invalid transfer and the words the person causing the eviction include a transferor under an invalid transfer RAMANATHAN v RANGANATHAN (1917)

I L R 40 Mad 1134

———— *Erection of building on another's land—acquiescence of owner's manager* A stranger who constructs a building on the land of another without the latter's consent is liable to be ejected In such a case the trespasser is not entitled to claim compensation for the building erected even though an agent of the owner of the land created or encouraged an expectation that the trespasser would be given an interest in the land if the agent's powers are expressly limited so as to exclude conveyance of land *Per* CHAPMAN J—In India the power to dispose of the landed property of a company does not usually lie in the hands of the local Manager *Per* Atkinson J—A person who deals with a known agent endowed with limited authority and powers is bound to ascertain the scope of the agent's authority and he neglects to do so at his peril The description of a person in a power of attorney as a general agent and manager cannot override the express limitation in the deed STOKING v THE TATA IRON AND STEEL COMPANY (1917) 2 Pat L J 600

ESTOPPEL—*contd*

III ESTOPPEL BY JUDGMENT

See CIVIL PROCEDURE CODE 1882 ss 13 44 (b) I L R 35 Bom 297

———— *Settlement—Suit by after born son to set aside settlement—Difference between estoppel and* res judicata Estoppel and *res judicata* are entirely different *Res judicata* precludes a man averring the same thing twice over in successive litigations while estoppel prevents him saying one thing at one time and the opposite at another CASSAMALLY JAIRAJBHAI v SIR CURRIMBHOY EBRAHIM (1911)

I L R 36 Bom 214

———— *Res judicata and estoppel distinguished Res judicata* ousts the jurisdiction of the Court while estoppel does no more than shut the mouth of a party Estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it at another time while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over BHAISHANKER NANABHAI v MORARJI KESHAVJI & Co (1911) I L R 36 Bom 283

———— *Equitable estoppel*—Res judicata—*Indemnity contract of—Breach—Decree against promisee is binding on promisor* The second defendant undertook to pay interest on certain debt of the plaintiff and in default agreed to indemnify the plaintiff against all losses caused thereby The second defendant having defaulted the creditor recovered judgment both for principal and interest on the debts in a suit to which the plaintiff and second defendant were parties the court finding that second defendant's plea of payment of interest was false In a suit by the plaintiff for recovery of damages against the second defendant on account of the latter's default in payment of the stipulated interest the second defendant again pleaded payment *Held* that whether the technical rule of *res judicata* was applicable or not the second defendant was equitably estopped by reason of the finding in the previous suit from raising the contention that he had really paid the interest due to the creditor Where there is a contract to indemnify a decree passed against the promisee cannot be impeached by the promisor and if both the promisee and the promisor were parties to the suit by the third party or if the promisor had notice of the suit the judgment would be conclusive against the promisor The contract on the part of the promisor is substantially broken when the Court finds in a suit honestly defended by the promise that there has been a violation of duty by the promisor which has entitled a third party to the damage for which the indemnity has been given *Parker* v *Lewis* L R 8 *Ch* A 1035 1058 *Mercantile Investment and General Trust Company* v *River Plate Trust Loan and Agency Company* [1894] 1 *Ch* 578 and *Krishnan Nambiar* v *Kannan* I L R 21 *Mad* 8 *referred* to NALLAPPA v VRIDHACHALA (1914)

I L R 37 Mad 270

———— *Judgment affirmed on Appeal—Second Appeal not decided on merits—Finally decided —British Baluchistan Regulation IX of 1896 s 10* The appellant in pursuance of a deed of dissolution of partnership executed a bond for payment of a sum of money to the [illegible] sued to set aside

EVIDENCE—*contd*

———— of value of the subject matter—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 110 I L R 40 Bom 477

———— onus of proof of necessity

See HINDU LAW—ENDOWMENT
I L R 40 Mad 402

———— recording of—

See SUMMARY TRIAL
I L R 48 Calc 288

———— regarding property transactions—

See SPECIFIC RELIEF ACT s 27
1 Pat L J 455

———— sufficiency of to prove necessity—

See HINDU LAW—ENDOWMENT
I L R 40 Mad 402

———— unregistered deed *re* property—

See SPECIFIC RELIEF ACT 1877 s 115

———— where witness not sworn—

See OATHS ACT (III OF 1873) ss 5 13
I L R 38 Mad 550

———— **Admissibility of evidence—Family settlement**—*Evidence of settlement consisting of a joint application by the parties for mutation in respect of the property in dispute* The brother and widow of a deceased Hindu settled a dispute between them as to the ownership of the property of the deceased by means of a joint application in the Revenue Court asking that the property should be recorded half in the name of each This was done and subsequently each sold the share of which he or she was recorded as owner There after the widow sued to recover the share which had gone to her husband s brother *Held* that it must be presumed from the application in the mutation proceedings the recording of names by the Revenue Court in accordance with that application and the subsequent sales on the strength of that record that the parties entered into a family arrangement and the application presented to the Revenue Court was *therefore not compulsorily* registrable and was admissible in evidence KORTA *v* PIARI LAL (1913)
I L R 35 All 502

———— **Expert in handwriting**—*Value to be attached to evidence of—Corroboration of such evidence* An accused should not ordinarily be convicted of forgery upon the uncorroborated testimony of a handwriting expert The value to be attached to the evidence of handwriting experts discussed *In re* VENKATA ROW (1913)
I L R 36 Mad 159

———— **Private knowledge of facts by Judge**—*How far may be relied on by him—Savaram lands—Meaning of Savaram—Madras Estates Land Act (I of 1908) s 185 construction of* Where the Judge used knowledge gained by him from his own experience as to scarcity of land for cultivation (although his knowledge was partly derived from facts relating generally to the lands in the zamindari of Nuzvid in which the lands in suit were situated) *Held* that the fact of which he had such knowledge was merely a fact of economical history and that he had not acted illegally in relying upon it *Per* SUNDARA AYYAR J—A Judge is not entitled to rely on specific facts not proved by the evidence in the case but known to him personally or otherwise but he may use his general knowledge and experience in determining the credibility of evidence adduced before him and applying it to the decision of the specific facts in dispute in the case *Per* SADASIVA AYYAR J—I think the only practical rule which can be laid down in these cases is that if a Judge knows of his own knowledge as an individual observer of a past *relevant* concrete private incident and that fact cannot be subjected to ocular proof at the time of trial (such as a person s colour resemblance of features appearance behaviour chemical experiments on the present condition of the object) and if the truth of such incidents is contested between the parties he should mention his private knowledge of such incidents to the parties and he should refuse to be the Judge in that case unless both the parties after he so mentions to them his said personal knowledge of that particular incident state that they have no objection to his continuing as Judge In the present case the learned Judge has not gone further than to use the general knowledge which he has acquired as a past revenue officer and as a revenue Court of experience in the course of the performance of his duties in zamindari tracts and I hold that he was entitled to use such knowledge in coming to conclusion on the facts after the consideration of the evidence let in in this case *Per* CURIAM The word *savaram* as applied to lands does not necessarily convey the idea of full proprietary right in the zamindar All that is clear is that *savaram* was compensation granted to a Zamindar or Revenue officer under the Mahomedan Government *Per* CURIAM Where *pattas* entered into in 1897 evidenced agreements to lease operating from 1st 1898 *Held* that s 185 of the (Madras) Estates Lands Act I of 1908 (does not preclude the Court from taking such *pattas* into consideration it being the date of the contract that is material in deciding whether the evidence is admissible *Per* SUNDARA AYYAR J The Act does not lay down any rule as to all the kinds of evidence that may be produced to prove that the land in question is private land and it cannot *be held that all evidence as to leases* subsequent to 1st July 1898 is shut out altogether *Per* SADASIVA AYYAR J—Evidence as to leases granted after 1st July 1898 is shut out by s 185 if the leases are sought to be used for the purpose of proving the character of the tenure of the land LAKSHMAYYA *v* VARADARAJA APPAROW (1913)
I L R 36 Mad 168

———— **Documentary evidence**—*Reversal by appellate Court of decision as to genuineness of documents—Evidence taken on commission so that first Court had not the usual advantage of seeing and hearing witness—Suit by head of family and owner of impartible raj to recover immoveable property reverting to raj on failure of objects for which it was given as maintenance* In this appeal from the decision of the High Court in *Paleshari Partab Narain Singh v Rudra Narain* I L R 26 All 528 their Lordships of the Judicial Committee agreed with the view of the High Court that the plaintiff (respondent) was entitled to succeed so far as his claim was based on the *sipurdnama* which if genuine was decisive of the case and without dissenting from their opinion on the point of law as to the competency of the Appellate Court under the circumstances to add a party after the period of limitation for the suit had expired affirm

EVIDENCE—*contd*

ed the finding as to the genuineness of the *pard nama* and *wasiatnama* and dismissed the appeal IMDAD AHMAD *v* RATESHRI PARTAP NARAIN SINGH (1910) I L R 32 All 241

—— —— **Usufructuary mortgage—Burden of proof**—*Suit for possession of mortgaged property brought within limitation—Presumption that consideration passed* Where the plaintiff who were usufructuary mortgagee were never given possession of the mortgaged property and did not attempt to recover possession until the period of limitation had almost expired it was *held* on plea raised by the defendants that no consideration had passed, that the burden of proving that consideration had passed was rightly shifted to the plaintiffs *Achal and Lal v Mahabir* I L R 8 All 641 followed *Mahabir Prasad v Bishan Dyal* All Weekly Notes (1904) 163 distinguished PIHARI *v* RAM CHANDRA (1911)

I L R 33 All. 483

—— —— **Prosecution of witness for perjury on deposition irregularly taken**—*Evidence irregularity in taking under s 360 Criminal Procedure Code (Act V of 1898)—Effect of irregularity* Where a deposition has been read to a witness over in Court and has been admitted by him to be correct in the presence of the Judge the fact that another witness was being examined at the time is no defence to a prosecution of the deponent for giving false evidence in the deposition so read over *Kamatchinathan Chetty v Emperor* I L R 28 Mad 308 commented on Though deposition so recorded might invalidate the conviction of the accused in the case in which the deposition was so recorded the deponent having admitted its correctness may be properly convicted of perjury thereon *Singari Eradi v Empress* Cr R C No 153 of 1894 (unreported) (*II Weir s Cr Rul* 435) distinguished BOGRA *v* EMPEROR

I L R 34 Mad 141

———— **Unstamped promissory note executed in Rampur in favour of the Nawab of Rampur**—*Suit on such note in British India—Lex loci contractus—Rampur Stamp Law ss 52 prov (c) and 53* Certain moneys having been advanced by the Nawab of Rampur a promissory note was accepted as security in favour of the Nawab of Rampur and bearing no stamp The Nawab being examined on commission stated — This debt is due to me personally and, ordinarily speaking a debt which is due to me is due to the State and a debt which is due to the State is due to me but the said amount I advanced from my own funds According to the Stamp Law of Rampur a document executed in favour of the State did not require to be stamped *Held* that the *lex loci contractus* had to be applied and that the note in question not being drawn in favour of the Nawab in his private capacity did not require to be stamped AMINA BEGAM *v* THE NAWAB OF RAMPUR (1911)

I L. R 33 All 571

———— **Proof of adoption**—*Presumption from non appearance of plaintiff in Court as witness—Practice for each litigant to cause his opponent to be cited as a witness—Non production of account books with entries made at ceremony of adoption—Unsatisfactory conduct of case* In this case in which the only issue was whether an alleged adoption had taken place or not the onus being on the plaintiff (respondent) to prove that he had been adopted the Judicial Committee held that he had not discharged the onus upon him and reversed the decision of the High Court mainly on the ground that due weight did not appear to have been given to the conduct of the plaintiff the improbability and inconsistency of the story told on his behalf his absence from the witness box and the non production of all books and documents Having regard to the well known and often proved habits of the Indian people with regard to the keeping of accounts recording their most minute transactions the non production of any books in which anything connected with this ceremony (of adoption) was entered covered the plaintiff s case with suspicion No effort was shown to have been made by either side to procure their production no search for them or loss of them was proved no explanation why they were not forthcoming The species of advocacy tolerated by the Courts of Law in the United Provinces of India in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client in order that he himself may have the opportunity of cross examining that client with the result that should the opponent refuse to be led into this trap the parties the principal witnesses are never examined at all condemned by the Judicial Committee as a vicious practice unworthy of a high toned or reputable system of advocacy as embarrassing and perplexing judicial investigation and it was to be feared too often enabling fraud falsehood or chicane to baffle justice *Quære* Whether the existence of such a system formed a ground for not drawing the ordinary presumption to the detriment of the plaintiff from his failure to go into the witness box and support his case *Semble* It does not LAL KUNWAR *v* CHIRANJI LAL (1909)

I L R 32 All 104

———— **Representative in interest**—*Evidence Act s 122* Where there is no representative in interest who can consent under s 122 of the Evidence Act to the disclosure of communications made by a deceased husband to his wife during marriage the wife should not be permitted even if willing to disclose such communications The widow of a deceased husband is not his representative in interest for the purpose of giving such consent NAWAB HOWLADAR *v* EMPEROR I L R 40 Calc 891

———— **Birth day books entries in**—*If admissible to prove age—Husband's evidence as to wife's age admissibility and value—Affidavit by husband before question litigated as to wife's age how far admissible* Where the evidence showed a practice to make entries of dates of births in books kept for the purpose of obtaining the opinion of astrologers as to good or ill fortune *Held* that under the Straits Settlements Ordinance No 3 of 1893 the provisions of which in this respect are identical with those of the Indian Evidence Act the birth day books were admissible to prove the dates of birth if the parol evidence concerning them were accepted A husband's evidence as to his wife's age which was obviously in the nature of hearsay being admissible for what it was worth, an affidavit sworn by him on a previous date which showed that he had sworn to the same date before the question arose was for that purpose admissible in evidence CHUAH HOOI GNOH NEOH *v* KHAW SIM LEE (1913) 19 C. W N 787

———— **Disbelief of greater part of the evidence of the prosecution witnesses**—*Contd*

EVIDENCE—*contd*

tion on the residue—Propriety of the conviction—Practice When the prosecution witnesses are found to be untruthful as to the greater part of their evidence it would be dangerous to convict the accused on the residue without corroboration HARI KRISHNA v EMPEROR (1914)

I L R 42 Calc 784

——— **Evidence taken by a Court without jurisdiction**—*Effect of consent to treat it as evidence of relevant* Consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant but consent or want of objection to the wrong manner in which relevant evidence should be brought on record of the suit disentitles parties from objecting to such evidence in a Court of Appeal *Miller v Madho Dass I L R 19 All 76* followed The fact that it was evidence taken previously by a Court which was held to have had no jurisdiction to try the case and take the evidence and that it was consented to be treated as evidence does not affect the validity of the consent *Quære* Whether in a case falling under s 33 of the Evidence Act evidence recorded by a Court can be regarded as not given in a judicial proceeding on the mere ground that the decree of the Court was subsequently set aside for defect of jurisdiction SRI RAJAH PRAKASARAYANIM GARU v VENKATA RAO (1912)

I L R 38 Mad. 160

——— **Mortgage**—*Recital of Receipt of consideration—Recital admissible as against representatives of original mortgagor* Held that the admission of the receipt of consideration contained in a mortgage deed is admissible in evidence against the representatives in interest of the original mortgagors *Brajeswari Peshakar v Budlanuddi I L R 6 Calc 268 Nawal Kunwar v Bulkhwar Singh 10 All L J 390* and *Abdul Majid v Mahbub Ali F A No 129 of 1911* followed *Manohar Singh v Sumitra Kuar I L R 17 All 4 8* not followed *Bisheshwar Dayal v Harbans Sahoy 6 C L J 659 Ghurphekn v Permeshwar Dayal 5 C L J 653* and *Rahim Jan Bibi v Iman Jan 14 C L J 173* doubted BIHARI LAL v MAKHDUM BAKSH (1913)

I L R 35 All 194

——— **Handwriting comparison of**—*Admissibility of intercepted letter written by the accused relating to the importation of contraband cocaine the subject of the charge—Admissibility of intercepted letters addressed to the accused in order to prove identity with the sender of a telegram relevant to the charge— Import into Bengal meaning of—Seizure of cocaine in the Custom House before clearance —Evidence Act (I of 1872) s 11—Bengal Excise Act (Ben V of 1909) ss 2 (12) 46 (a) and 61* A letter written by an accused when self disserving is *prima facie* evidence against him if it relates distinctly to a relevant point It is not necessary that it should be signed it is enough if it is traced to the writer and it is admissible though it may have been intercepted or surreptitiously detained and opened *Rex v Derrington 2 C & P 418* referred to An unsigned letter proved to have been written by the accused addressed to a firm in London which had shipped certain contraband cocaine which the accused was charged with importing into Bengal is admissible in evidence though intercepted under the order of the Magistrate at the Post Office during the course of transit A letter written by the exporter of certain contraband cocaine the subject of the charge against the accused containing a reference to a telegram signed in a different name but bearing the same business address as that of the accused is relevant under s 11 of the Evidence Act as showing that the accused was the sender of the telegram though the letter was intercepted at the Post Office under an order of the Magistrate before delivery *Queen v Cooper 1 Q B D 19* approved Although an excisable article may be actually within the geographical limits of Bengal it cannot be said to have been brought into Bengal within the meaning of s 2 (12) of the Bengal Excise Act if it is intercepted at the Custom House and the offence in such a case is not one of importing but of attempting to import under s 61 of the Act read with s 46(a) BOOTH v EMPEROR (1913)

I L R 41 Calc 545

——— **Date of Birth—Family Record**—*Admissibility—Illustration to Statute—Straits Settlements Ordinance III of 1893 and Indian Evidence Act (I of 1872) s 32 sub s (5) and Illustration (l)* In an action in the Straits Settlements to recover the amount due upon certain mortgages the defendant pleaded that he was an infant when he executed them As evidence in support of this plea there was tendered at the trial an entry recording the date of the defendant s birth made by the defendant s deceased father in a book in which he made similar entries with regard to his family *Held* that under the Straits Settlements Evidence Ordinance 1893 s 32 sub s (5) and having regard to illustration (l) to that section the entry was admissible in evidence Illustrations appended to sections of a Statute should be accepted if that can be done as being of relevance and value in construing the text they should be rejected as repugnant to the section only as the last resort of construction MAHOMED SYEDOL ARIFFIN v YEOH OOI GARK

L R 43 I A 256

——— **Secondary evidence**—*Certified copy of petition of compromise made in 1857—Record of proceedings destroyed in the Mutiny —Evidence to establish mortgage in suit for redemption of mortgage not made in writing—Stamp—Bengal Regulation X of 1829—Objection that certified copy is insufficiently stamped—Petition treated as document creating mortgage* In a suit for the redemption of a usufructuary mortgage alleged to have been created in 1857 the document on which the plaintiffs relied to establish the mortgage was a certified copy of a petition of compromise filed in Court on the 1st of April 1857 The record of the proceedings was admittedly destroyed in the Mutiny of that year The document which was admitted in evidence by the Subordinate Judge recited the terms on which the dispute was settled amongst them being the agreement relating to the mortgage and an endorsement on it after reciting that the pleaders for the parties filed the compromise in the presence of their respective client and verified and admitted all the conditions laid down therein ordered that the compromise be placed on the record and the case be put up to morrow for final disposal Then followed the date and the signature of the Zillah Judge in English The certified copy was on the 28th of April 1857 issued to the pleader acting for the predecessors of the plaintiffs It bore a stamp of one rupee The defence was that the contract was not enforceable as the document was not properly stamped The Subordinate Judge overruled the

EVIDENCE—*contd*

objection and decreed the suit The District Judge held that the copy was required by article 20 of Regulation X of 1829 to bear a stamp of the same value as the original compromise that the original bore a stamp of one rupee only but required a stamp of ten rupees and as it was insufficiently stamped its copy was not admissible in evidence He reversed the decision of the first Court and dismissed the suit The High Court on appeal restored the decision of the Subordinate Judge *Held* by the Judicial Committee (affirming that decision) that the mortgage was made verbally and was valid according to the law then in force and it was notified to the Court as part of the settlement The present suit was not based on any agreement contained in the petition but on a contract made outside and recited in it to enable the Court to make a decree in accordance with the settlement If the Judge did so the defendants objections fell to the ground and whether he did or not the suit based on the agreement made independently of and before the petition was filed in Court was clearly maintainable If however the petition was treated as the document creating the mortgage it might rightly be presumed that the officer before whom it was presented satisfied himself that it was properly stamped No inference could be drawn from the fact that the copy bore a one rupee stamp for that is the proper stamp for issuing a copy of the proceeding in the Zillah Court and as a copy of the petition and the order thereon it bore the proper Court fee stamp of one rupee The District Judge fell into an error in taking the stamp on the certified copy as an indication of the stamp on the petition itself AHMAD RAZA *v* ABID HUSAIN (1916)

I L R 38 All 494

———— Conversation between defendant and plaintiff's pleader—*When suit in contemplation if admissible in evidence—Admission made by one defendant evidence against all others—Evidence Act (I of 1872) ss 18 23* In a suit for rent there was a talk of settlement between the plaintiff's pleader and one of the defendants when the suit was about to be instituted. *Held* that the mere fact of the conversation taking place when the parties were contemplating a suit might be instituted is not in itself sufficient to prevent the conversation from being put in evidence *Wallace* v *Small (1830) Moo & M 446 Watts* v *Lawson (1830) Moo & M 447n Nicholson* v *Smith 3 Starkie 128 Harding* v *Jones (1835) F & G 135* and *Jorden* v *Money 5 H L C 185* relied on *Mohabeer Singh* v *Dhujjoo Singh 20 W R 172* discussed When several persons are jointly interested in the subject matter of a suit an admission by one of them is receivable in evidence not only against himself but also against the other defendants whether they be all jointly suing or sued provided that the admission relates to the subject matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered *Kowsulliah Sundari Dasi* v *Mukta Sundari Dasi I L R 11 Calc 588 Chalho Singh* v *Jharo Singh I L R 39 Calc 995* and *Ahmed Bibi* v *Abdul Kader Saheb I L R 25 Mad 26* referred to *Kali Kishore Chowdhury* v *Gopi Mohan Roy Chowdhury 2 C W N 166* distinguished MEAJAN MATBAR *v* ALIMUDDI MIA (1916) I L R 44 Calc 130

EVIDENCE—*contd*

———— Conveyance—Intention to Mortgage—*Third party owner—Notice—Evidence Act (I of 1872) s 92* As between the parties to an absolute conveyance s 92 of the Evidence Act (subject to its provisos) precludes the giving of oral evidence to prove that the transaction was intended to be a mortgage The section however applies only as between the parties Where therefore the grantee takes knowing that a third person is the owner of the property and the grantor is only a mortgagee and that the intention of all parties is merely to transfer the mortgage oral evidence is admissible to prove the real nature of the transaction *Semble* that a claim by the grantee to be owner under those circumstances is fraudulent and if s 92 applied oral evidence would be admissible under that proviso *Achutaramaraju* v *Subbaraju I L R 25 Mad 7 Maung Bin* v *Ma Hlaing 3 L B R 100* and *Dattoo valad Tatia ram* v *Chandra Tataram I L R 30 Bom 119* approved *Baksu Lakshman* v *Govinda Kanji I L R 4 Bom 591* and other decisions disapproved MAUNG KYIN *v* SHWE LA (1917)

L R 44 I A 236
I L R 38 Calc 892

———— Mortgage deed—*Form of proof of—Evidence Act (I of 1872) ss 68 to 71* In a suit on a mortgage bond the admission of execution by the sole mortgagor does not dispense with the necessity of complying with the provisions of s 68 of the Evidence Act in order to prove the execution of the document as against other parties in the suit who do not admit such execution Such a document must be proved as against them in accordance with the provisions of ss 68 69 and 71 of the Evidence Act *Jogendra Nath Mukhopadhya* v *Nitai Charan Bundopadhya 7 C W N 384* distinguished SATI *v* CHANDRA MITRA *v* JOGENDRA NATH MAHALANABIS (1916)

I L R 44 Calc 345

———— A party in possession of written evidence on a material issue is not justified in withholding it on the plea of onus of proof being on his opponent T S MURUGESA *v* MANIKAVASAKA (1917) 21 C W N 761

———— Relevancy of judgment—*Trial of accused for criminal breach of trust of certain amounts—Judgment in a civil case between the parties as to the amounts—Admissibility of the judgment into the criminal proceedings* The applicant was prosecuted for criminal breach of trust with reference to certain items There was a civil suit between the complainant and the applicant regarding items which included the items involved in the criminal case The civil suit was decided in applicant s favour He thereupon applied to admit the judgment in evidence in the criminal case and on the strength of it prayed for an order of discharge The Magistrate having refused to admit it in evidence the applicant applied to the High Court *Held* that the judgment of the Civil Court was admissible in evidence inasmuch as it would be relevant and important to know what the rights of the parties were as determined by the civil Court with respect to the items charged against the applicant MARKER *In re* (1914)

I L R 41 Bom 1

———— Unregistered deed—*Admissibility of deed for collateral purposes—Joint owners—Adverse possession* One of two brothers

EVIDENCE—*contd*

joint owner of certain immovable property executed a deed of relinquishment in favour of the other The deed was never registered but the brother in whose favour it was made remained in possession of the entire property *Held* that the deed of relinquishment was admissible in evidence to prove the nature of the occupant's possession and that there was no legal impossibility about one co owner claiming adverse possession as against the other JHAMPLU *v* KUTRAMANI (1917) **I L R 39 All 696**

——————— *Evidence Act (I of 1872) s 92—Evidence of acts and conduct of parties to deeds showing that they were mortgages when in form they were absolute transfers—Fraudulent dealing with property which the parties knew belonged to a third person not a party to deed* The language of s 92 of the Evidence Act 1872 with regard to a contract grant or disposition reduced to writing in terms applies and applies alone as between the parties to any such instrument or their representatives in interest Wherever accordingly evidence is tendered as to a transaction with a third party it is not governed by the section or by the rule of evidence which it contains and in such a case therefore the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions The principle of equity which are universal forbid a person to deal with property which he knows he holds on security and not in actual ownership In this case both the grantor and grantee in transactions by deed regarding certain land were shown by the evidence to have dealt with it with the knowledge that it belonged to a third person who was not a party to the deeds or a representative in interest of a party to them It was alleged that the deeds though in form absolute transfers of the property were intended to be only mortgages or transfers of mortgages *Held* that s 92 of the Evidence Act was no bar to the admission of evidence to show what was the true nature of the transactions it did not prevent fraudulent dealing with a third person's property Evidence as to that third party's rights is admissible and if admissible is most relevant The series of cases cited in the judgment of which *Balaji Lakshman* v *Govinda Kanji I L R 4 Bom 594* is an example in which it has been decided that notwithstanding the terms of s 92 evidence is admissible to show the acts and conduct of the parties to such deeds as inconsistent with the absolute transfer of the property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage ceased to have any binding authority after the decision by the Board in *Balkishen Das* v *Legge I L R 22 All 149 L R 27 I A 58* in which it was held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents and that the cases in the English Court of Chancery had no application to the law of India as laid down in the Acts of the Indian Legislature *Achutaramaraju* v *Subbaraju I L R 25 Mad 7 Maung Bin* v *Ma Hlaing 3 L B Rul 100* and *Dattoo walad Toloram* v *Ram Chandra Tolaram I L R 30 Bom 119* referred to as being cases in which the judgment of the Board in *Lalkishen Das* v *Legge I L R 22 All 149 L R 27 I A 58* had been rightly followed and applied MAUNG KYIN *v* MA SHWE LA (1917) **I L R 45 Calc 320**

EVIDENCE—*contd*

——————— **Probability**—*considerations of if and when may outweigh positive evidence when some found untrustworthy—Admission in deed to be taken as* prima facie *true* Where some of the verbal evidence was untrustworthy whilst the documents recorded a state of affairs which was often hard to reconcile with probabilities *Held* that unless the facts evidenced by documentary and oral testimony were so much at variance with known conditions as to be incapable of reasonable explanation it was to those facts and those facts alone that the Court must trust to reach a safe conclusion upon the matter in controversy A statement in a document should *prima facie* be accepted as true as against the executant unless it can be shown by independent evidence to be false IRSHAD ALI *v* KARIMAN (1917) **22 C W N 530**

——————— **Statement in wajib ul arz**—*Suit to recover parjot* Plaintiff sued as owner of the *abadi* of a village to recover a certain number of maunds of cotton seed from the defendants who were banias having shops in the said *abadi* and claim was based mainly upon an entry in a wajib ul arz framed some fifty years before suit to the effect that tenants living in the village did not pay *kiraya* (rent of a house) but *parjot* (ground rent) which for banias was one maund of cotton seed a year for each shop *Held* that the entry in the wajib ul arz was reliable evidence of the liability of the defendants to pay *parjot* to the zemindar in the manner described and that the use of the word indicated that the origin of the payment was an agreement between the inhabitants of the *abadi* and the zemindar rather than a custom MUHAMMAD FAIYAZ ALI KHAN *v* BIHARI (1917) **I L R 40 All 56**

——————— **Horoscope**—*Produced in proof of plaintiff's age—Document not entered in list as required by O VII r 14 of the Civil Procedure Code 1908—Refreshing memory of witness by document written by him at time of plaintiff's birth—Limitation Act 1908 s 7 Sch I Art 126* A question of whether or not a suit was barred by limitation under s 7 and art 126 of the Limitation Act 1908 depended on the age of the plaintiff One of the witnesses produced a horoscope which had not been entered in the list of documents as required by O VII r 14 of the Code of Civil Procedure 1908 and on an objection by the defendant was rejected by the Trial Judge as inadmissible in evidence *Held* that it was wrongly rejected the horoscope was not a document to be relied upon as a probative document in itself but it was a record made by the witness at the time to which he was entitled to refer for the purpose of refreshing his memory and it was therefore admissible BANWARI LAL *v* MAHESH (1918) **L R 45 I A 284**
I L R 41 All 63

——————— **Certified copies of chittas and map**—*Relating to partition under Reg IX of 1814 if admissible in evidence—Evidence Act (I of 1872) s 35* The plaintiffs suit for ejectment related to a tank claimed as appertaining to a certain estate which and three other revenue paying estates came in 18— under the operation of Reg IX of 1814 for partition of common lands The lower Appellate Court relied on certified copies of certain *chittas* and a map kept in the Collectorate The map was authenticated by a Deputy Collector but the *chittas* were

EVIDENCE—*contd*

not signed *Held* that *prima facie* the papers appeared to be record of the partition which was in fact made in a proceeding between the predecessors in interest of the parties If so the certified copies produced were good and admissible evidence quite apart from anything in s 35 of the Evidence Act KHETRA NATH MANDAL *v* MAHAMMAD ALLA RAKHA (1918) **23 C W N 48**

———— **Evidence of subsequent similar but unconnected transaction**—*Evidence Act (I of 18 -) ss 9 11 14 15 167—Improper reception of evidence at the trial—Power of the High Court on review to examine residue of the evidence and to decide the case finally thereon—Power to order a new trial—Proper mode of dealing with the evidence on review of the case in trials by Jury—Court not to substitute its own finding—Evidence improperly admitted of a character to influence the Jury—Letters Patent 1865 cl 26—Procedure—Right of prisoner s counsel to begin on reference under cl 25 Letters Patent—Advisability of separate trial when evidence clearly inadmissible on one of the charges though admissible as to the rest and likely to effect verdict on such charge* Where *P* introduced himself as a Raja s or Zamindar s son to a prostitute who passed into his keeping and he then introduced *G* as his *durwan* and both afterwards visited her house till the night of the 9th December 1914 when she was found next morning to have been murdered and robbed and the accused were tried on charges of murder conspiracy to rob theft and abetment of each other in the commission of the theft and murder —*Held* by the majority of the Full Bench (CHAUDHURI *J dissenting*) that evidence that *P* had similarly introduced himself as a wealthy Babu successively in 1915 and 1918 to three other prostitutes who each became his mistress that he then introduced *G* as his *durwan* that both visited the women and suddenly disappeared and that their disappearance was followed by discovery by the women in each case of the loss of their money or ornaments was not admissible under s 9 14 or 15 of the Evidence Act *Held* by the majority (CHAUDHURI *J dissenting*) that s 15 was not applicable as there was no question of the acts of murder and theft being accidental or intentional or done with a particular knowledge or intent but that they were plainly intentional *Per* MOOKERJEE *J* that s 14 was also not applicable as the evidence of the subsequent occurrences did not show the state of mind of the accused towards the murdered woman *Per* MOOKERJEE *J* The first *Explanation* and *Illus* (i) (j) and (o) further clearly excluded such evidence *Empress* v *Vyapoory Moodelair I L R 6 Calc 655 Badaruddin Mandal* v *Emperor 18 C L J 578 Emperor* v *Abdul Wahid Khan I L R 34 All 93 Emperor* v *Debendra Prasad I L R 36 Calc 573 Amrita Lal Hazra* v *Emperor I L R 42 Calc 957* relied on *Makin* v *Att Gen [1894] A C 57 Rex* v *Ball [1911] A C 47* [reversing *Rex* v *Ball 5 Cr App R 238*] *Rex* v *Smith 11 Cr App R 229 Rex* v *Bond [1906] 2 K B 389 Rex* v *Thompson [191] 2 K B 630 Thompson* v *Rex [1918] A C 221 Rex* v *Podley [1913] 3 K B 468 Rex* v *Ellis 5 Cr App R 41 Rex* v *Fisher [1910] 1 K B 149 Rex* v *Mason 111 L T 336 Rex* v *Baird 84 L J K B 1785* and *Perkins* v *Jeffer [1915] 2 K B 702* referred to *Held* by the majority (CHAUDHURI *J dissenting*) that s 9 did not apply for the purpose of proving identity as the murder and theft took place in December 1914 and the subsequent incidents in 1915 and 1918 *Per* CURIAM Evidence of the subsequent incidents was not admissible under s 11 *Per* MOOKERJEE *J* S 11 was not intended to have a meaning co extensive with its very wide terms as is possibly indicated by the fact that the *Illustrations* do not go beyond the cases familiar in the English Law of Evidence *Reg* v *Parbhudas Ambaram 11 Bom H C R 90 Queen Empress* v *Lajiram I L R 16 Bom 414* followed. *Per* CURIAM Under clauses 25 and 26 of the Letters Patent the High Court has to decide the case finally on review and cannot direct a new trial *Reg* v *Navroji Dadabhai 9 Bom H C R 358 Queen* v *Hurribole Chunder Ghose I L R 1 Calc 207 Imperatrix* v *Pitambar Jina I L R 2 Bom 61 Queen Empress* v *O Hara I L R 17 Calc 642 Emperor* v *Narayan Raghunath Patki I L R 32 Bom 111* and *Emperor* v *Fateh Chand Agarwalla I L R 44 Calc 477* followed The Court has power under cl 26 to examine the evidence and determine whether after the exclusion of the inadmissible evidence the residue is sufficient to justify the conviction *Per* MOOKERJEE AND CHAUDHURI *JJ* The Privy Council ruling in *Subrahmania Ayar* v *King Emperor I L R 25 Mad 61* has not overruled this view S 167 of the Evidence Act applies to civil and criminal cases and makes it incumbent on the Court to investigate whether independently of the evidence wrongly admitted there is sufficient evidence to support the verdict of the jury *Reg* v *Navroji Dadabhai 9 Bom H C R 358 Queen Empress* v *Hurribole Chunder Ghose I L R 1 Calc 207 Imperatrix* v *Pitambar Jina I L R 2 Bom 61 Queen Empress* v *O Hara I L R 17 Calc 642* and *Empress* v *McGuire 4 C W N 433* referred to But *held* by the majority (CHAUDHURI and WALMSLEY *JJ dissenting*) that the Court will not substitute its own finding for the verdict of the jury and that it must consider whether the evidence improperly admitted was of such a nature that it possibly may have considerably influenced the minds of the jury and whether it was reasonably certain that the jury *would* not *might* have acted on the unobjectionable evidence if the wrongly admitted evidence had not also been presented to them. Where the inadmissible evidence was of such character and the residue by no means conclusive the majority of the Court set aside the conviction. *Makin* v *Att Gen [1894] A C 57 Reg* v *Bertrand L R 1 P C 520 Rex* v *Barron 9 Cr App R 236 Rex* v *Campbell 8 Cr App R 75 Rex* v *Podley [1913] 3 K B 468* and *Rex* v *Norton [1910] 2 K B 496* referred to At the hearing of a reference under cl 25 of the Letters Patent the counsel for the prisoners begins and has a reply *Reg* v *Inhabitants of Gate Fulford 1 D & L 74 Per* SANDERSON *C J* and MUKHERJEE *J* Where on a trial for offences including murder and theft certain evidence objected to was admittedly irrelevant on the charge of murder and the jury would have been influenced thereby in their verdict on such charge the offence of murder should have been separately tried *Per* MOOKERJEE *J* The question of the admissibility of evidence must be determined with reference to the provisions of the Indian Evidence Act and not the Eng *Lekraj Kuar* v *Mahpal*

EVIDENCE—*concld*

Singh I L R Calc 744 Impress v Ashootosh Chukerbutty I L R 4 Calc 483 per JACKSON J *Queen Empress v Abdullah I L R 7 All 385 Muhammad Allahabad Khan v Muhammad Ismail Khan I L R 10 All 289 Collector of Gorakpur v Palakdhari Singh I L R 12 All 1* and *Imperatrix v Pitambar Jina I L R 2 Bom 61* ... F ... DAS (1920)
I L R 47 Calc 671

EVIDENCE ACT (I OF 1872)

——— s 2—*Scope of a t* Section 7 of the Statute of frauds never applied to India and even if it had it was wholly repealed by the Evidence Act SIR DINSHAW M PETIT AND OTHERS v SIR JAMSETJI JIJIBHOY AND OTHERS
I L R 33 Bom 509

——— ss 2 5 9—15 167—
S LETTERS PATENT ...
24 C W N 501

——— s 3—
See SANCTION FOR PROSECUTION
I L R 45 Calc 585

——— admission of evidence—
Admission of evidence for one purpose in a suit is evidence for all purposes (*Per* LORD MACNAGHTEN) BANK OF BOMBAY v NAND LAL THACKERSEY DAS
I L R 37 Bom 122

——— ss 3 10 45 101 135—
See PROBATE I L R 39 Calc 245

——— ss 3 74(2)—
See CONTEMPT OF COURT
I L R 45 Calc 169

——— ss 3 114 ill (g) 125—
See LIMITATION I L R 40 Calc 898

——— s 4—
See AGRA TENANCY ACT (II OF 1901)
s 201 (3) I L R 32 All 427
I L R 33 All 799

See LAND ACQUISITION
I L R 48 Calc. 916

——— ss 4 and 90—*Ancient document—Practice as to mode of proof—Whether document presumed to be genuine by the First Court can be rejected in appeal—Practice—Appeal from preliminary decree after passing of final decree* According to the practice prevailing in this Presidency when *prima facie* evidence of custody and of the date of a document purporting to be 30 years old is given the Court generally marks the document on the footing that there is sufficient evidence to justify its being marked as an exhibit at that stage It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption under s 90 of the Evidence Act should not be drawn with respect to the document The Court generally arrives at its conclusion on the matter after the evidence on both sides has been given An Appellate Court is entitled to reject a document presumed to be genuine by the Original Court under s 90 of the Evidence Act without calling for further proof *Shafiq un nisa v Shaban Ali Khan I L R 26 All 581* and *Srinath Patra v Kuloda Prasad Banerjee 2 C L J 592* referred to It is competent to a party to prefer an appeal against the preliminary decree in a redemption suit though before the appeal is presented the final decree has been passed *Lakshmi v Mani Devi 21 Mad L J 1063* followed *Janaki Nath Ray Chowdhury v Promotha Nath Ray Chowdhury 15 C W N 830* referred to RAMUNNY v VEERAPPUDAYAN
I L R 37 Mad 453 (1914)

——— ss 5 32 and 167—*Irrelevant evidence admitted without objection effect of* Mere omission to object to a document which is not in itself admissible as evidence does not constitute such document evidence so as to be available to either side at the trial It is the duty of the court apart from any objection by the parties or their pleaders to exclude all irrelevant evidence Where the lower court has based its decision partly on irrelevant evidence the High Court will not in second appeal decide whether the other evidence in the case is sufficient to support the findings arrived at and s 167 is not a bar to such a case being remanded MUSSAMMAT SUMITRA KUER v BABU KAIRED CHOWDRY
5 Pat L J 410

——— ss 9 11—*Omission of entry of payment in account book if relevant* The absence of an entry of payment in an account book is a relevant fact not under s 34 but under ss 9 and 11 of the Indian Evidence Act GANGARAM AGARWALA v LACHIRAM KISHEN DYAL (1914)
19 C W N 611

——— ss 9 11 14 15 167—
See EVIDENCE I L R 47 Calc 671

——— s 10—
See PROBATE I. L. R 39 Calc 295
See SECURITY FOR GOOD BEHAVIOUR
I L R 46 Calc 215

——— *Documents in possession of one conspirator if admissible to prove complicity of another—Independent proof of complicity if necessary* What has to be established under s 10 of the Evidence Act to make documents found in the possession of one of several persons accused of conspiracy admissible against the other accused is that there is reasonable ground to believe in the existence of a conspiracy among such persons It is not necessary for this purpose to establish by independent evidence that they were conspirators *Queen Caroline's Case 2 B & B 302 R v Jacobs 1 Cox C C 173 R v Duffield 5 Cox C C 404 431* referred to PULIN BEHARI DAS v KING EMPEROR (1911)
16 C W N 1105

——— ss 10 14, 15 54, 135 143 154—
See CHARGE I L R 42 Calc 957

——— ss 10 30—
See CONSPIRACY TO WAGE WAR
I L R 38 Calc 169

See HABEAS CORPUS
I L R 39 Calc 164

——— ss. 10 30 54—
See WITNESS I L. R 46 Calc 700

——— s 11—
See CUSTOM (RELIGIOUS INSTITUTION)
I L R 1 Lah 540

See EVIDENCE I L R 41 Calc 545

See SECURITY FOR GOOD BEHAVIOUR
I L R 37 Calc 91

EVIDENCE ACT (I OF 1872)—*contd*

———— s 11—*contd*

———— *Sc pe f—Stat ı nt b, wounded pers m o ı d ı, f rrer e ıf ıd ı ıtle —Trial by jury—Acqu tt l b, H gh Court o the ground of misdi ection* The accused was charged with having cau ed gri vous hurt to one of hi wives and killed another The woun led woma ı on the day of occurr nce on h r arrival in hospital made a s atement t ı a Magi trate to the ffect that it was the a cused who had attacked herself and her co-wife The statement was admitted and placed befor the jury *Held* that the mere fact that the woman made a statement had no bearing on th main facts in i sue and s 11 of the Evidence Act does not justify the admi sion of the conten s of th statement KING EMPEROR v ABDUL SHEIKH (1919) 23 C W N 933

———— ss 11 14 15—*Evidence—Admissibil ity of evid nce of si ilar but unconnect d trans actions in which th accused were concerned—Penal Code (Act XLV of 1860) s 420—Cheat ing* S l and W were charged with having cheated *B* and *P* and thereby obtained from them various sums of money The mode adopted by the accused was as follows S representing him elf to be a broker introduced *B* and *P* who wanted to borrow money to l and *W* as being the agents of a wealthy lady of the name of Abkari Begam and a story was told them that Abkari Begam had a large amount of a ready money which she was willing to lend on very favourable term Negotiations were commenced and ex tended over a considerable period in the course of which *B* and *P* were induced to part with vari ous small sums of money for preliminary expenses Ultimately the negotiations fell through and it was discovered that they had been fraudulent from beginning to end The accused s defence was broadly that while admitting that *B* and *P* had paid them the sums of money in questions the payments were made in circumstances totally different from tho e alleged by the prosecution They denied that they had ever said that there was such a person as Akbari Begam and *a fortiori* that they had ever repre ented themselves as her servants or agents *Held* that on the case for the prosecution evidence was admissible that the same three persons had on other occasions proposals made of much the same kind to other persons to whom they told a story similar in all es ential particulars down to the name of the proposed lender of the money *King Emperor* v *Abdul Wahid Khan I L R 34 All 93* and *Emperor* v *D bendra Prosad I L R 36 Calc 573* referred to EMPEROR v YAKUB ALI (1916) I L R 39 All 273

———— ss 11, 13 45—

See CUSTOM

I L R 1 Lah 540

———— ss 11 13 40—45—

See TENANCY ACT

24 C W N 378

———— ss 11 32—*Evid nce—Admis ibil ty—Statements of deceased per ns Held* that if the terms of a deposition ma le by a p rson since deceased do not fall within the provi ions of s 32 of the Indian Evidence Act the provisions of s 11 of the Act will not avail to make such deposition evid nce BELA RANI v MAHABIR SINGH (1912) I L R 34 All 341

EVIDENCE ACT (I OF 1872)—*contd*

———— s 13—

1 ———— *Evidence—Ad missibility of document affecting the right of a per on who is no party to it against such person* Th plaintiff sued for a five annas share in the *malıkı* ri ht in a certain land His case was that his mother s father owned a ten annas share half f which he gave to the plaintiff and the other half to the plaintiff s mother The contest ing defendant who was the brother of the plaintiff s grandfather contended that he and his brother owned the ten annas in equal shares and the effect of the gift to the plaintiff was to convey only two annas and a half although it purported to convey more The lower Appellate Court gave effect to this contention relying on two documents one executed by the plaintiff s mother acting through his father in favour of the contest ing defendant in which it was recited that the gift of ten annas by the plaintiff's grandfather was a mi take and that he was entitled to deal and intended to deal with five annas only and the other a *patta* executed by the plaintiff s mother and father in which they stated that a five annas share in the property belonged to the conte ting defendant *Held* that both the documents were inadmis ible in evidence against the plaintiff who was a stranger to them That the ruling as to the a lmissibility of the documents in *Dwarka Nath* v *Mukundalal 5 C L J 55* is *obiter* ABDUL ALI v SYED REJAN ALI (1913) 19 C W N 488

2 ———— *Suit for rent by co sharer landl rd—Decree for rent obtained by another co-sharer admissibility of to prove holding and rent* The plaintiff a co-sharer landlord sued the defendant for his share of rent in respect of a certain holding He produced a decree for rent previously obtained by another co sharer landlord against the defendant for his share of rent in respect of the same holding *Held* that whether the decree was by a predecessor of the plaintiff or by a stranger it was admissible under s 13 of the Evidence Act for the purpose of show ing that the defendant held the holding at the particular rent PYOMKE H CHAKRAVARTI v JAGADISWAR PAI (191) 22 C W N 304

3 ———— *Judgment not inter partes admissibility of for proving admission by d fen dant—Second appeal—Using docum nt admissible for one purpose as evidence for another* The plaintiff sued for recovery of his share in the land in suit The Subordinate Judge in appeal admitted a judgment in a previous suit brought by another person against the defendant and mainly relying on a certain pa sage therein as proving an admission by the defendant decided in favour of the plaintiff *Held* that the judgment was inadmissible in evidence for the purpose of proving the alleged admission and the error committed by the Subordinate Judge in using the judgment for a purpose for which it cannot be legitimately u ed vitiated his decree That the proper mode of proving any admission made by the defendant in the previous suit was by producing a copy of the defendant s deposition or by putting in the witness box some one who actually heard what the d f ndant said DEBENDRA NATH HALDER v BIBE SWAR HALDER (1914) 20 C W N 648

———— ss 13 42 43—*Judgment not inter partes—Admissibility in evidence—Recitals in*

EVIDENCE ACT (I OF 1872)—contd

———— ss 13 42 43—contd

judgment of admissibl It is well settled that although a judgment not *inter partes* may be used in evidence in certain circumstances as a fact in issue or as a relevant fact or possible as a transaction the recitals in the judgment cannot be used as evidence in a litigation between the parties KASHI NATH LAL v JAGAT KISHORE ACHARYA CHOWDHURY (1915) **20 C W N 643**

———— ss 14, 15—

1 ———— ———— *Relevancy of facts showing ill will and facts forming part of similar occurrences—Indian Penal Code (Act XLV of 1860) s 209—Making false claim in suit* The appellant was convicted under s 209 Indian Penal Code of having made false claims in three suits brought against certain persons Two other persons besides the appellant were similarly prosecuted and convicted for bringing other false suits against the same defendants *Held* that evidence relating to suits brought by the appellant other than those specified in the charges was properly admitted under ss 14 and 15 of the Evidence Act for the purpose of showing the ill will or enmity of the appellant toward the defendants in those suits as a body but the evidence relating to suits brought by other persons when no case of a conspiracy between them and the appellant was alleged or established was inadmissible LOKHUNATH LAL v KING EMPEROR (1918) **22 C W N 494**

2 ———— *Indian Penal Code s 415—Cheating—Evidence to show instances of cheating other than those charged inadmissible* A person employed as a clerk in charge of the renewal of licenses for hand carts received Rs 2 for each such renewal whereas he ought to have taken Rs 1 14 He was charged with cheating and evidence was produced showing that he had taken 2 annas in excess from persons other than those named in the charge *Held* that such evidence was inadmissible either under s 14 or under s 15 of the Evidence Act *Emperor v Debendra Prasad I L R 36 Calc 573* distinguished *Empress v M J Vinpoory Moodeliar I L R 6 Calc 655* referred to EMPEROR v ABDUL WAHID KHAN (1911)

I L R 34 All 93

———— ss 14 and 54—

See CRIMINAL PROCEDURE CODE ss 237 and 310 **5 Pat L J 706**

———— s 15—

See SEDITION **I L R 38 Calc 253**

———— ss 17 and 21—*Joint family—Partnership—Admission of partner Evidence—Evidence Act (I of 1872) ss 17 and 21* An arrangement was alleged to have been made with a Hindu joint family part of whose property consisted of a joint family business to take in as partner the person through whom the Plaintiff claimed to have a share in the family properties *Held* that no such arrangements had been proved That a statement in a will which suggests an inference as to a fact in issue cannot be proved by or on behalf of the person who made it or his representative in interest KALAM PATTABHIRAMA RAO v MANDARILLI NARAYANA MOORTHY (P C) **26 C W N 275**

EVIDENCE ACT (I OF 1872—contd

———— s 18—*Admission by natural guardian of minor of evidence against him in respect of interest not derived from guardian* In a suit by Hindu reversioners for recovery of immoveable property left by their maternal grandfather and sold by their maternal grandmother for alleged necessity the purchaser's representative adduced oral evidence to show that the widow had sold it for her husband's debts This evidence was found by the trial Judge to be unreliable but the learned Judge adverting to documentary evidence chiefly relied on an affidavit which was filed in another suit and was signed by the reversioners mothers and fathers and which contained a statement to the effect that certain other premises had been mortgaged by the widow (grandmother) for her husband's debt and that her daughters and sons in law had joined for protecting the reversioners (the present plaintiffs) interest and the Judge held that the affidavit was admissible regarding the parents as the guardians of the plaintiffs and as capable of making admissions against their interest on their behalf *Held* (on appeal) *per* JENKINS C J and WOODROFFE J and affirmed by the Judicial Committee of the Privy Council that there is nothing in the Indian Evidence Act to support the view of the learned Judge or make the affidavit relevant That the present plaintiffs had in no sense derived their interest in the subject matter of the suit from their parents nor could their parents be regarded as having been expressly or impliedly authorised by them to make the admission That when the suit was brought long after the alienation but within the period of limitation and the delay was explained as being due to the pendency of another suit and also to want of means *Held* that the delay did not operate to the prejudice of the plaintiffs' suit for declaration and possession MANORANJANI DEBI v HARIPADA MITTER (1914)

18 C W N 718

————ss 18 19—*Suit to declare property joint family property—Statement by an alleged co sharer in a previous deposition that property not joint if admissible against Plaintiff as admission—Community of interest proof of* Plaintiffs who were two out of five brothers sued to establish their right to a two fifths share in properties which were sold in execution of a money decree against another brother *U* and purchased by the Defendant on the allegation that the properties when sold were the joint family properties of the five brothers The Defendant whose case was that the brothers were not joint at the date of the sale and that the properties were exclusively owned by *U* put in a deposition given by another brother *K* in the suit in which the money decree against *U* was passed in the course of which *K* stated that the family was not joint and the properties belonged exclusively to *U* *Held* that the deposition of *K* in the previous suit was not admissible as admission against the Plaintiffs NAGENDRA NATH CHOWDHURY v LAWRENCE JUTE CO LD

25 C W N 89

———— ss 18 23—

See EVIDENCE **I L R 44 Calc 130**

———— *Conversation between one of several defendants and the plaintiff's pleader about compromise of suit if admissible in evidence—Admission of one defendant against other* The plaintiff sued the defendants for recovery of arrears of rent due on a lease

EVIDENCE ACT (I OF 1872)—contd

—— ss 18 23 —contd

executed in favour of their father. The substantial defence was a plea of payment which was overruled by the Court below. The material evidence in the case was that of the plaintiff's pleader with whom one of the defendants had two interviews, one about a month before the institution of the suit when a form of settlement was suggested namely diminution of interest and again on the day the suit was instituted when the pleader was asked to make a compromise. *Held* that as there was admittedly no express condition that the evidence of the interview should not be given and it could not be inferred from the circumstances that the parties had agreed that the evidence should not be given the evidence could not be excluded under s 23 of the Evidence Act. That the evidence of the plaintiff's pleader as to what had passed between him and the defendant who interviewed him for the settlement of the case was admissible and could be used even against the defendants other than the defendant who made the admission all of them being jointly liable to the plaintiff as the representatives in interest of their father. *Per* SANDERSON C J —That so far as the first interview was concerned the mere fact that it was contemplated between the parties that the suit was about to be instituted did not prevent the conversation as regards a settlement of the claim from being given in evidence. That the second conversation was a natural consequence of the first conversation and was not privileged. That the question whether the evidence of the interviews could be given against the defendants other than the defendants who made the admission depended upon s 18 of the Indian Evidence Act which enacted the principle that for making statements with reference to the joint concern or common subject of interest one partner or co contractor is considered to be the agent of the other. *Per* MOOKERJEE J —In the absence of any express or strongly implied restriction as to confidence an offer of compromise is clearly admissible and may be material as some evidence of liability although it may not be proper to enquire into the exact terms offered. That under s 18 of the Evidence Act an admission by one defendant may in certain circumstances be admissible in evidence as against another defendant. The principle is that when several persons are jointly interested in the subject matter of the suit an admission by any one of these persons is receivable not only against himself but also against the other defendants whether they be all jointly suing or sued provided that the admission relates to the subject matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. MEAJAN MATABOR *v* ALIMUDDIN MEAN (1916) 20 C W N 1217

—— ss 18 32(3)—*Draft record of rights entry in—admissibility of—Recital in conveyance executed by some defendants—admissibility of against defendants other than the executant —Reception of inadmissible evidence if vitiates judgment arrived at independently thereof—Omission to object to irrelevant evidence effect of—Court if will entertain objection first taken in appeal as to proper admission of document—Evidence Act ss 18 21 157 (3) 157* The plaintiff sued for recovery of possession of a tank on declaration of title alleging that it had been excavated by their ancestor long ago after whom it was known and it had been in their possession all along till dispossession by the defendant. The lower Appellate Court in decreeing the suit relied on (1) an entry in a draft record of rights (which was omitted in the record finally published) that the tank was known by the name of plaintiff's ancestor (2) a recital in a conveyance of sale of an adjoining piece of land executed by some of the defendants (who at the time of the conveyance had acquired no interest in the land in suit) in favour of a stranger to the effect that the land was bounded by the tank known after the ancestor of the plaintiffs. The conveyance was duly proved and admitted in evidence without objection. *Held* that the entry in the draft record of rights was not admissible in evidence but this did not vitiate the judgment of the lower Appellate Court which arrived at the conclusion on the merits independently of the evidence improperly admitted. That the recital in the conveyance though admissible against the makers of the conveyance was not admissible as admissions against the other defendants under s 18 of the Indian Evidence Act nor was it admissible under s 32 (3) of the Evidence Act the conditions mentioned in the introductory words of the section not having been fulfilled. That principle which regulates the reception in evidence of an admission by one defendant against another is that when several persons are jointly interested in the subject matter of the suit an admission of any one of these persons is receivable not only against himself but also against the other defendants whether they be all jointly suing or sued provided that the admission relates to the subject matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. The requirements of the identity in legal interest between the joint owners is of fundamental importance and the joint ownership must have existed at the time the statement was made. That if the plaintiff had cited the defendants who were the executants of the *kobala* as witnesses the recital could have been received in evidence to impeach their credit under s 155 (3) or to corroborate their testimony under s 157 of the Evidence Act and was not *per se* inadmissible. That an erroneous omission to object to evidence which is irrelevant and consequently inadmissible under any circumstances does not make it admissible but the Court will not entertain for the first time in appeal an objection that a document which *per se* is not inadmissible in evidence has been improperly admitted in evidence. On this principle the High Court declined to set aside the judgment of the lower Appellate Court. AMBER ALI *v* LUTFE ALI (1917) I L R 45 Calc 159
21 C W N 996

—— s 21—

See s 106 1 Pat. L J 188

See s 17 28 C W N 275

See POND CESS RETURN

I L R 39 Calc 1005

—— ss. 21 and

See CRIMINAL CODE s 164
2 Lah 325

EVIDENCE ACT (I OF 1872)—*contd*

—————— ss 21 25 29 47 67 73—

See JURY RIGHT OF TRIAL BY
I L R 37 Calc 467

—————— ss 21 and 81—*Evidence of publications of a newspaper by a particular person merely by production of the paper—Sufficiency of Criminal Procedure Code (Act V of 1898) s 255 256 271 272 428— Necessary meaning of —Mistake of Court as to primâ facie case—Retrial* *Per* SUNDARA AYYAR and PHILLIPS JJ —Merely exhibiting a copy of a private newspaper containing a libellous statement without any sort of proof such as the production of an authenticated copy of a declaration under s 7 of Act XXV of 1867 is no proof of publication of the libel by the person by whom the paper purports to have been published Evidence that a certain copy of the paper *appears* to be printed and published by *A* is no proof of publication by him If there be proof of publication of a newspaper of by *A* then s 81 Evidence Act presumes that what purpose to be a newspaper of a particular name is that paper and that every copy of its was issued by the publisher of that paper *Gathercole* v *Miall 15 M & W 319 Rex* v *Forsyth Russ & R 274* and *Watts* v *Fraser 7 Ad & E 223* considered A statement in a complaint that the accused published the libel is no evidence against the accused as it was not made in the presence of the accused The fact that the accused never denied publication by him of the libel does not relieve the prosecution of the necessity of proving affirmatively that the accused published the libel an essential fact necessary to establish the guilt of the accused Additional evidence under s 428 Criminal Procedure Code can be ordered to be taken only if the Appellate Court thinks it necessary *Quære* Whether if the admission by the accused of publication is contained in his written statement that would relieve the prosecution from the defect in letting in evidence of publication Difference between admissions in civil and criminal cases pointed out *Quære* Whether s 81 of the Evidence Act is not confined to public documents alone *Per* SUNDARA AYYAR J —Where the prosecution by its own negligence failed to produce evidence which it was its duty to do additional evidence cannot be considered *necessary* by the Appellate Court within the meaning of s 428 The language of that section seems to indicate cases where there being already evidence on the record the Court considered it to be unsatisfactory or where the evidence on record leaves the Court in such a state of doubt that it considers it necessary to enable it to decide the case to have further evidence In such a case the accused should be ordered to be acquitted and not retried allowing further evidence to be taken *Per* PHILLIPS J —Where on the Court itself taking a mistaken view that a *primâ facie* case of publication by the defendant had been made out (as was evident from its framing a charge) evidence to that effect was not let in by the complainant it is a case where the Appellate Court ought to consider that additional evidence is *necessary* within the meaning of s 428 Criminal Procedure Code and a retrial would be the proper order to be made under the circumstances if taking additional evidence would not meet the requirements of the case Necessity under s 428 Criminal Procedure Code is a matter to be determined on the particular facts of each

EVIDENCE ACT (I OF 1872)—*contd*

—————— s 21 and 81—*concld*

case *Per* BENSON J —Where the prosecution wanted to let in evidence necessary to prove the offence but the Magistrate intervened stating that it was unnecessary in the circumstances of the case and so refused to take that evidence the case is one in which retrial may properly be ordered or in which the Court may properly call for the additional evidence under s 428 Criminal Procedure Code JEREMIAH v VAS (1913)
I L R 36 Mad 457

—————— ss 21 157—*Criminal Procedure Code (Act V of 1898) ss 162 288—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of as to statements made by witnesses to him—Examination in chief—Practice and procedure* During the trial of an accused person, the Sessions Judge admitted into evidence and used against the accused the following statements (1) statements made by a witness to the Police implicating the accused (2) the same witness s statement to the Panch (3) his statement as an accused person made before a Magistrate and (4) statements made by the co accused to the Police The witness when he was examined before the Committing Magistrate gave a consistent story but he deposed to quite a different version when he was examined in the Sessions Court The learned Judge disbelieved the changed story and he used the witness s statements to the Police and his statements as an accused person and his statements to the Panch by way of corroboration of what the witness had stated to the Committing Magistrate The accused was convicted and sentenced On appeal —*Held* (i) that it was an error to admit statements Nos 1 and 2 for the purpose of corroborating statements No 3 for only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by s 157 of the Indian Evidence Act 1872 Previous statements might be used to corroborate or contradict statements made at the trial not to corroborate statements made prior to the trial (ii) That statements No 2 were altogether inadmissible as evidence of the accused s guilt for they could at most be regarded as admissions by the co accused which could possibly be used against himself but could not be proved and used against the accused The Investigating Police Officer ought not to be allowed to depose in examination in chief to what the witnesses stated to him It opens up an undesirably wide field for cross examination and leads to the attention of the Court being diverted and distracted from the true issues Moreover it is contrary to the plain intention of s 162 of the Code of Criminal Procedure which is that such statements should be used if at all on behalf of and not against the person under trial EMPEROR v AKBAR BADOO (1910)
I L R 34 Bom 599

—————— s 23—

See s 18 20 C W N 1217

See EVIDENCE I L R. 44 Calc. 130

See MALICIOUS PROSECUTION
4 Pat L J 676

EVIDENCE ACT (I OF 1872) contd

——— s. 24—

See CONFESSION I L R 37 Calc 735
23 C W N 886

See PRACTICE I L R 40 Bom 220

——— If in the circumstance of a case it appears to the Court that there is reason to believe that the confession was obtained by inducement the prosecution must shew that the confession was freely made ASHUTOSH DUTT v THE KING EMPEROR 26 C W N 54

——— *Confession—Inducement proceeding from a person in authority* The accused in making a confession before a Magistrate admitted that he had been told to tell the truth by the Sahib who told him to tell the truth and he would be released —*Held* that the confession so made was bad under s 24 of the Indian Evidence Act 1872 EMPEROR v DINANATH SUNDARJI I L R 45 Bom 1086

——— ss 24, 27 30—

See MISDIRECTION
I L R 45 Calc 557

——— ss 24, 123 124—*Privilege claimed by witness—Confession—Opium Act (I of 1878) s 9—Illicit possession of opium* The appellant was prosecuted by the Excise authorities and convicted of being in possession of opium without a licence It was stated that the appellant made a confession to the Superintendent of Excise At the trial the defence called the Inspector of the Customs Preventive Service and asked him to corroborate his statements from the posting register to show that the Preventive Officers were stationed at a particular place at the time of the appellant s arrest The defence also examined the Superintendent of the Preventive Service and asked him whether an Excise Inspector made an admission to him in the presence of the Excise Superintendent *Held* that the question of privilege could not arise in respect of the posting register the entry in question being merely a note of the times when particular Preventive Officers were ordered to be at their stations That the Customs Superintendent could not claim privilege as to the admission made to him by the Inspector although what took place between the two Superintendents might probably be privileged That in the absence of any inducement threat or promise the confession to the Superintendent of Excise was not shut out under s 24 of the Evidence Act RUKUMALI v EMPEROR (1917) 22 C W N 451

——— s 25—

See JURY I L R 37 Calc 467

——— *Statement of approver admissibility of* Statements of approvers to a Police Inspector are inadmissible against accused EMPEROR v MILAKANTA L R 35 Mad 247

——— ss 25 27—*Police deposing to admission of guilt by accused impropriety of* Where the Police Sub Inspector in his deposition before the Court stated that one of the accused admitted before him his guilt and that from the statement of that accused he (the Sub Inspector) could understand the exact nature of the offence committed by the accused *Held* that the Sub Inspector ought never to have been allowed to make such statement before the assessors whose minds must have been considerably prejudiced thereby FAIMULLAH v KING EMPEROR (1911) 16 C W N 238

——— s 25 30—

——— *Confessional statement to Excise Officers—Self exculpatory statements use of —Criminal Procedure Code (Act V of 1898) s 342—Opium Act (I of 1878) s 9 cls (c) (d)—Illicit possession of opium* The appellant with two other persons was prosecuted under the Opium Act The co accused made some statements to Excise Officers which the Magistrate used against the appellant *Held* that the statements could not be rejected under s 25 of the Evidence Act for it could not be said that the Excise Officers were Police Officers That in order to determine whether the statements were confessions the whole of the statements must be taken into consideration and the statements in question being self exculpatory were inadmissible against the appellant That the Magistrate should have examined the accused as provided in s 342 Criminal Procedure Code The High Court acquitted the accused on the ground that although the facts proved might give rise to suspicion against the appellant he was entitled to the benefit of the doubt AH FOONG CHINAMAN v KING EMPEROR (1918) 22 C W N 834

See EXCISE OFFICERS
I L R 45 Calc 411

——— ss 25 33—

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS
I L R 41 Calc 601

——— ss 25 114 Illustration (b) 133 and 157—*Accomplice corroboration of—Material particulars what are—Admissibility of previous statements of accomplice to Inspector of Police—S 157 authority legally competent to investigate the fact meaning of—Competency of officer of Criminal Investigation Department—Criminal Procedure Code (Act V of 1898) ss 16 151 155 157 and 551—Act XIV of 1908—Letters Patent cls 25 and 26* On a preliminary objection raised by the Crown with reference to the jurisdiction of the Court *Held* that the Letters Patent s 26 authorises the grant of a certificate by the Advocate General in a case tried by a Special Bench appointed under the Indian Criminal Law Amendment Act (XIV of 1908) The following five points of law were raised in the certificate of the Advocate General in this Letters Patent Appeal viz — (i) Does the evidence of an accomplice require corroboration in material particulars before it can be acted upon is it open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true and does not the Indian Evidence Act (I of 1872) s 133 read with s 114 illustration (b) merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances? (ii) Can the previous statements of an accomplice legally amount to corroboration of the evidence given by him at the trial? (iii) Is an Inspector of the Criminal Investigation Department an authority legally competent to investigate the fac within the m 157 Indian Evid n e

EVIDENCE ACT (I OF 1872)—*contd*

——— ss 114 Illust (b) 133 and 157—*contd*

Act (I of 1872)? (iv) Is a statement of a confessional nature made by a witness to a police officer a confession of an accused person within the purview of s 25 Indian Evidence Act? (v) While statements made by a person to a police officer in the course of an investigation and taken down in writing may not (by reason of s 162 Criminal Procedure Code) be proved by the production of the writing may such statements be proved by oral evidence? *On the first point Held* (by BENSON WALLIS and MILLER JJ) that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon and that it is open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true *On the second point Held* (By BENSON WALLIS and MILLER JJ) that the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial *On the third point Held* (by BENSON WALLIS and MILLER JJ) that an Inspector of the Criminal Investigation Department is an authority legally competent to investigate the fact within the meaning of s 157 Indian Evidence Act *On the fourth point Held* (by BENSON WALLIS and SUNDARA AYYAR JJ) that a statement of a confessional nature made by a witness to a police officer is a confession of an accused person within the purview of s 25 Indian Evidence Act *On the fifth point Held (per curiam totam)* that while statements made by a person to a police officer in the course of an investigation and taken down in writing may not (by reason of s 162 Criminal Procedure Code) be proved by the production of the writing they may be proved by oral evidence Before the High Court has decided any point of law raised in the Advocate General s certificate the accused cannot be heard on any point not included in the certificate MUTHUKUMARASWAMI PILLAI v KING EMPEROR (1912)

I L R 35 Mad 397

——— *Criminal Procedure Code Act V of 1898 ss 154 155 157 162 and 551—Approvers evidence corroboration of—Admissibility of previous statements of to Police Inspector—Value of such statements as corroboration— Legally competent to investigate meaning of—Competency of officer of Criminal Investigation Department* SIR ARNOLD WHITE C J and AYLING J —It is not the law either in England or India that the evidence of an accomplice must be corroborated in material particulars before it can be acted upon Where a Court is Judge of fact as well as of law the Court as a Judge of fact is not precluded from considering the question whether the unsupported evidence of an accomplice is true or not A Court may be competent in declaring to draw the presumption of fact referred in the illustration (*b*) to s 114 Indian Evidence Act *(I of 1872)* S 133 *Indian Evidence Act is the* substantive enactment declaring the law whereas s 114 only lays down certain propositions intended to assist the Courts in drawing inferences of fact Where the Court is acting in the capacity of both Judge and Jury it must direct itself and the proper direction would be —Consider the evidence of the approvers always bear in mind that it is tainted evidence scrutinize it with the utmost care accept it with the greatest caution consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible Then, if you believe it act on it even if there is not corroboration in the strict sense of the word If you do not believe it reject it *In re Meunier [1894] 2 Q B 415* approved *Reg v Ramasami Padayachi 1 L R 1 Mad 394* approved What are the material particulars referred to in the Indian Evidence Act (I of 1872) illustration (*b*) must depend upon the nature of the charge and the facts of the particular case Oral testimony of independent witnesses is not necessary SANKARAN NAIR J (*dissentiente*) —The Indian Evidence Act [ss *133* and *114 illustration (b)*] embodies the rules of English law that the presumption must first be drawn that the evidence of an accomplice is unreliable and exceptional circumstances must be proved to justify its acceptance The question is not whether a conviction based on the uncorroborated testimony of an accomplice is legal but whether there is a presumption that such testimony cannot be accepted without corroboration A person should not be convicted except under very special circumstances upon the uncorroborated testimony of an accomplice The special circumstances are that the grounds on which an accomplice s evidence has been held to be untrustworthy did not either exist in the case or did not exist in their full strength that there are countervailing considerations of greater weight which diminish or entirely get rid of the weight due to such presumptions In cases tried by a jury a jury has to be advised by the Judge of what I have above referred to The CHIEF JUSTICE and AYLING J —It cannot be laid down as a proposition of law that previous statements of an *accomplice cannot be regarded as* corroborative of evidence given by him at his trial *Reg v Malapabi Kupana 11 Bom H C R 196* dissented from SANKARAN NAIR J (*dissentiente*) —A previous statement by the accomplice himself or a statement by another accomplice is not the corroboration required under the rule as to material particulars The CHIEF JUSTICE and AYLING J —The words before any authority legally competent to investigate the fact in s 157 Indian Evidence Act are quite general and should not be restricted to police officers and to investigations in the technical *sense in which the word is* used in the Code of Criminal Procedure The words are competent to investigate not a *case* but the fact The words legally competent do not mean only competent under some express provision of law An Inspector of the Criminal Investigation Department has power to investigate in cases to which s 156 Criminal Procedure Code applies As such his local area is the Presidency of Madras SANKARAN NAIR J (*dissentiente*) —The police officers entitled to investigate an offence are the police officers referred to in the Code of Criminal *Procedure i e a station house* officer (ss 156 157) an officer in charge of a police station (ss 154 155 cl 1) and police officers superior in rank to an officer in charge of a police station (s 551) An Inspector of the Criminal Investigation Department is not such an officer and his evidence is not admissible under s 157 Indian Evidence Act he not being any authority legally competent to investigate the fact under s 157 Criminal Procedure Code The CHIEF JUSTICE and AYLING J —A statement of a confessional nature made to a police

EVIDENCE ACT (I OF 1872)—*contd*

——— **ss 114 Illust (b) 133 and 157**— *Id*

fh r l s a witn t n t s nd m of an accu sd p rson within th purview of s 25 Evid nc A t S lays down that s h s tat m nt cannot be used against th per n mak n it but on his trial SANKARAN NAIR *J (d t t)* —The state m nts of approver s th l lice In ject r being really confessions are inadmissible in evidence against the accu d under s 25 Indian Evid nce Act A confession is not the less a confession because it is made by a person in police custody I *taking* ... *Criminal Pr* ocedure Cod th written record of a statement mad t a police ... in the course of an investiga tion cannot be used as evid nce but the section does n t exclude oral evidence of the statement whether th statement has been tak n down in writing or not KING EMPEROR v NILAKANTA (1912) **I L R 35 Mad 247**

——— **s 26**—

1 ——— ——— *Mal* ... *Ex cise Officer aft* ... *the face* ... *made if a state* ... *police* ... *if admissible*—... Where in a case under s 9 of the Opium Act it appeared that two police servants accompanied the Excise Officer and assisted him in raiding a house and arresting the appellant and were in the hou e as part of the force in charge of the prisoners although they were not present in the room in which the appellant made certain statements to the Excise officer *Held* that the appellant was to be regarded as having been in police custody for the purpose of s 26 of the Evidence Act and the statements were inadmissible Protracted trial in the Presidency Magistrate s Court animadverted on IBRAHIM MUHAMMAD v KING EMPEROR (1917) **21 C W N 694**

2 ——— ——— *Confession*—*Custody of Police*—*Confession made to doctor in dispensary while police were waiting outside is bad* The accused, an undertrial prisoner was sent up by the Magistrate in whose lock up he was in the custody of two policemen to a hospital for treatment The policemen made him over to the doctor and waited in the verandah to take him back While with the doctor in his room the accused made a confession of his guilt At the trial the confession was allowed to be proved A question having arisen whether the confession was properly let in *Held* that the confession was excluded by s 26 of the Indian Evidence Act (I of 1872) because the accused who was in police custody up to his arrival at the hospital remained in that custody while the policemen were standing outside on the verandah *Queen Empress v Lakshmaya bin Bhima (1896) Ratanlal's Cr Cas 861* followed EMPEROR v MALLANGOWDA (1917) **I L R 42 Bom 1**

——— **s 27**—

See ... **16 C W N 238**

See MISDIRECTION

I L R 45 Calc 557

——— **ss. 27 25 21**—

——— *First information* ... *by accused admitting guilt*—*Portions of such information leading to discovery and containing narrative of events prior to occurrence if admissible*—*Discovery* ... *by police*—*Criminal Procedure Code (Act V of 1898)* s *164*—*Statement by accused* ... *other than confession not recorded by Magistrate*—... *of such Magistrate* ... *recorded statement if admissible* A first information of murder was lodged with the police by the accused himself and in he stated among other things that he had committed the offence Subsequently the accused was produced before a Deputy Magistrate before whom he made a statement which was not a confession and which was not recorded by the Magistrate *Held* that the first information was not admissible in its entirety but so much of it as contained a narrative of events prior to the occurrence and the portion which led to the discovery of material evidence were admissible in evidence Where portions of a statement are admitted the persons affected thereby may demand that the statement should be admitted and considered in its entirety yet the principle that portions of a statement or confession may be admitted and others excluded is recognised in the Evidence Act itself (*e g* s 27) and also in judicial decisions *Queen v Macdonald 10 B L R App 2 (1872)* *Queen v Meher Ali Mullick I L R 15 Calc 589 (1888)* *Emperor v Kanji Mall I L R 31 Calc 601 (1904)* and *Faminadra Chose v Emperor I L R 32 Calc 467* at p 470 (1903) referred to If and when certain facts are deposed to as discovered in consequence of information received from the accused when in custody of the police so much of the information as relates distinctly to the fact or facts thereby discovered will become admissible The discovery referred to in s 27 of the Evidence Act is discovery to or by police officers and facts already known to persons other than police officers may be said to be discovered in consequence of information received within the meaning of s 27 of the Evidence Act *Sure Ina Nath v Emperor 19 Cr L J 33* at p 93 (1918) and *Ado Sekh v Queen Empress I L R 11 Calc 635 (1885)* referred to Under s 164 Cr P C no distinction can be drawn between a statement made by an accused person and a confession made by him and the statement made by the accused should have been recorded by the Deputy Magistrate as provided in s 164 and the Deputy Magistrate s evidence regarding the unrecorded statement was inadmissible *Queen Empress v Hanumb* ... *C W N* 70 at p 715 (1898) *Emperor v Kiyani* *8 C W N 22 (1909)* and *Imirudin v Emperor I L R 45 Calc 557* at p 564 (1917) referred to To suggest that in capital cases stronger evidence or a higher degree of certainty is required than in other criminal cases is wrong THE SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS v LALIT MOHAN SINGH ROY **25 C W N 788**

——— **s 29**—

See JURY **I L R 37 Calc 467**

——— **s 30**—

See s 2 **22 C W N 934**

See CONFESSION **I L R 38 Calc 446**

See CONSPIRACY TO WAGE WAR

I L R 38 Calc 559

See CRIMINAL PROCEDURE CODE—

S 110 117 **I L R 41 All. 231**

Ss 256 342 **I L R 38 Mad. 302**

EVIDENCE ACT (I OF 1872)—*contd*

——— s 30—*contd*

See HABEAS CORPUS

I L R 39 Calc 164

See WITNESS I L R 46 Calc 700

——— *Confession of co accused not to be acted upon without corroboration—Misdirection to jury* The confession of a co accused is on an even lower footing than the evidence of an accomplice and a conviction based on such a confession alone is bad in law S 30 of the Evidence Act only provides that such a confession is to be an element in the consideration of all the facts of the case but it does not do away with the necessity for other evidence It is the duty of the Judge when there is no other evidence than the confession of a co accused to direct the jury accordingly and tell them to acquit the accused and his omission to do so is a misdirection which will vitiate a conviction GIDDIGADU *v* EMPEROR (1909) I L R 33 Mad 46

——— *Co accused—Plea of guilty—Removal of co accused from dock—Co accused's confession—Admissibility as against the other prisoner* Where one co accused pleads guilty and is removed from the dock and the other accused alone is tried *Held* that the confession of the former cannot be taken into consideration as against the latter under s 30 of the Indian Evidence Act for there has been no joint trial *Queen Empress* v *Pahuji I L R 19 Bom 195* followed EMPEROR *v* KERAMUT SIRDAR (1911)

I L R 38 Calc 405
15 C W N 49

——— *Co accused—Confession—Independent corroboration—Evidence—Practice* Eleven accused persons were tried for the offence of dacoity There was no direct evidence against any of them Seven of these confessed each one implicating himself and the rest They were convicted on their own confessions A question arose whether the remaining four accused who had not confessed could be convicted solely on the confessions of their co accused when they were not corroborated by any independent evidence HEATON J was of opinion that s 30 of the Evidence Act made the confessions which were already evidence in the case evidence against the person implicated as well as the other accused SHAH J *held* that s 30 permitted the confession of a co accused to be taken into consideration along with other evidence in the case but if there was no evidence in the case outside those statements no conviction based only upon the confessions of co accused was good in law Owing to this difference in opinion the case was referred to MACLEOD J *Held* that there was nothing in s 30 of the Indian Evidence Act 1872 which prevented the Court from convicting after taking the confession of a co accused into consideration but that the High Courts in India had laid down a rule of practice which had all the reverence of law that a conviction founded solely on the confession of a co accused could not be sustained *Held* further that the confession of one co accused could not be said to be corroborated by the confession of other co accused *Per* MACLEOD J —I do not think that "confession in s. 30 can be restricted to an unretracted confession as once a confession is

EVIDENCE ACT (I OF 1872)—*contd*

——— s 30—*concld*

proved it may be taken into consideration EMPEROR *v* GANGAPPA KARDEPPA (1913)

I L R 38 Bom 156

——— *Confession of co accused in dacoity case if admissible in subsequent bad livelihood case in which the maker of the confession was not an accused* In a case under s 110 Cr P C against the Petitioner the confession made by a person who was the co accused of Petitioner in a dacoity case but not in the present case was admitted in evidence *Held* that the confession was inadmissible MAHIZUDDIN KHAN *v* THE KING EMPEROR 25 C W N 239

——— *Evidence—Confession—Admissibility of—in evidence against coaccused—Joint trial* One out of several accused persons who were being tried jointly for an offence under s 193 of the Indian Penal Code pleaded guilty and made a statement implicating himself and other accused The Magistrate however did not convict him merely upon his plea of guilty but upon the evidence and upon the statement made by him The Magistrate also took the confession of this accused into consideration as against the others *Held* that the course taken by the Magistrate was not only admissible but that in the circumstances of the case the Magistrate would not have exercised a sound discretion in convicting the confessing accused at once on the strength of his own statement alone EMPEROR *v* DIP NARAIN (1915) I L R 37 All 247

——— ss 30 114 133—*Confession by co accused—Evidence against the accused—Amount of corroboration* The accused was charged with the murder of his brother in concert with two associates with whom he was jointly tried for the offence The principal evidence against the accused was the confessions of the two co accused Other facts established in the case were these The accused had a wife and children *but no* means to support them he had to work as a coolie in the Forest Department He was continually importuning the deceased who was rich but had no wife or children for assistance which was continually refused and although the two brother lived in the same building they did not associate About a fortnight after the disappearance of the deceased the accused made free with the grain which was collected in his brother's bin and on several occasions gave rice from it to his two associates Three months after the event the accused told a shop keeper that his brother had gone to Miraj for medical treatment After the crops had been got in he began to ask the tenants of his brother to pay their rents to him Shortly afterwards the accused when questioned by the Ranger of the forest replied that his brother had gone to Miraj and that a letter had come Later the accused received a letter through post purporting to come from his brother which directed the accused to collect the rents and pay the assessment The muster roll kept by the Forest Officer showed that the accused was absent from his work on the day of the offence and for some days after The trial Judge acquitted the accused On appeal by Government to the High Court of Bombay HEATON J was of opinion that there was in the case apart from the confession a body of evidence and circumstances

EVIDENCE ACT (I OF 1872)—*contd*

—— ss 30 114, 133—*concld.*

enough to support a conviction and that taking the confessions together with the circumstances the accused's guilt was made out SHAH J was of opinion that though the proved circumstances in the case were consistent with the guilt of the accused and though they might create a certain amount of suspicion against him they did not prove anything as to his participation in the crime Owing to this difference in opinion the case was heard by SCOTT C J *Held* by SCOTT C J (agreeing with HEATON J and differing from SHAH J) that there was on the facts established corroboration of the story of the confessing co accused so far as it affected the accused *Dictum of* GARTH C J *in Empress v Ashootosh Chukerbutty I L R 4 Calc 483* followed *Dictum of* MACLEOD J *in Emperor v Gangappa Kardeppa I L R 38 Bom 156 1 6* commented on EMPEROR v SABITKHAN (1919)

I L R 43 Bom 739

1 —— *Admission of evidence—Erroneous omission to object to the admission of evidence—Relevancy of evidence* Plaintiff sued to recover possession of a house The defendants contended that their deceased father had spent a certain amount of money for the completion of the house and for the purpose of proving this relied upon their father's will and a memo of expenses prepared by him In the lower Courts no objection was taken to the admission of the will and the memo as evidence In second appeal it was contended that the evidence was inadmissible *Held* upholding the contention that neither the will nor the memo was admissible in evidence under s 32 of the Evidence Act 1872 the erroneous omission before the lower Courts to object to the admission of evidence did not make that evidence relevant *Miller v Babu Madho Das (1896) L R 23 I A 106* relied on NARHARI HARI v AMBABAI (1919) I L R 44 Bom 192

—— s 32—

See s 6 — 5 Pat L J 410

See s 18 — I. L R 45 Calc 159

See EVIDENCE — L R 43 I A 258

See COTCHI MEMONS — I L R 41 Bom 181

See HINDU LAW—ADOPTION — I L R 36 Mad 69

See HINDU LAW (CUSTOM ADOPTION) — 5 Pat L J 164

See HINDU LAW (JOINT FAMILY) — 5 Pat L J 605; I. L. R 40 All 159

See HINDU LAW (MINOR) — I L R 38 Mad 166

See WILL — I L. R. 1 Calc 173

—— sub s 2—*Held* that entries in the diary of a deceased illiterate made by other people at his request were inadmissible under s 32 (2) but might be used s 157 or s 159 MUSSAMAT NAINA KOER v GOBARHAN SINGH

2 Pat L J 42

—— sub-s. 5—*Evidence of relationship—Statement made in a plaint filed by a member of the family since deceased—Second appeal—Finding of fact* In a suit to recover possession of property which had belonged in her life time to one Musammat Fiddo one of the material issues was whether the plaintiffs were or were not the sons of one Munir Khan paternal uncle of Musammat Fiddo In support of their statement that they were the sons of Munir Khan the plaintiffs tendered in evidence the plaint in a suit filed some years *ante litem motam* in which Musammat Fiddo as plaintiff had impleaded them as defendants describing them as the sons of Munir Khan. *Held* that this plaint was not only admissible evidence on the subject of the plaintiffs relationship to Munir Khan but was evidence to which considerable weight might be attached The High Court however in second appeal is not concerned with the quantum of evidence upon which a finding of fact come to by a Court of first appeal is based So long as there is legally admissible evidence to support the finding of the court below the High Court cannot interfere with it *Coghlan v Cumberland L R 1 Ch D 704* referred to MAULADAD KHAN v ABDUL SATTAR (1917) I L R 39 All 426

—— *Statement of relationship by deceased person admissibility of* The plaintiff brought a suit on two hand notes executed by the defendant The defence was that the defendant was a minor when he took the loans Besides adducing oral evidence as to the age of the defendant the plaintiff put in the record of a case under Act VIII of 1890 which contained a petition by the defendant's aunt since deceased for her appointment as guardian of the defendant This petition contained a statement by the aunt as to the date of the defendant's birth The lower Appellate Court held that this statement was admissible in evidence The High Court in appeal reversed the decision *Held* (on review of judgment) that the statement was admissible in evidence under s 32 cl (5) of the Evidence Act *Ram Chandra Dutt v Jogeswar Narain Deo I L R 20 Calc 758* followed RAM KISHORE SADKHAN v MANINDRA MOHAN RAY (1916)

19 C W N 648

—— sub s 6—*Evidence—Pedigree* A document ancient and genuine purporting to be a family pedigree was produced in evidence in a mutation case by one Jiraj The record was brought before the civil Court in a suit in which the plaintiff's relationship to one Hulas the last male owner of certain property was in question Jiraj stated that he had received the pedigree from his grandfather It was not proved who had prepared the pedigree *Held* that it was not necessary to show who had made the statements mentioned in the pedigree and that it was admissible in evidence under s 3 cl. (6) of the Evidence Act JAHANGIR v SHEORAJ SINGH (1915)

I L R 37 All 600

—— *Custom statements of deceased persons as to existence of if admissible when made after controversy arisen* Evidence oral or documentary as to statements of a deceased person as to the custom in a family is not admissible if it appears that such statements were made after a controversy as to the custom had arisen. EKRADESHWAR SINGH v JANESWARI BAHUASIN (1914) I. L. R. 42 Calc. 582; 19 C W N 1219

EVIDENCE ACT (I OF 1872)—*concld*

——— ss 40 41 42 and 44—*concld*

tor had bought him off under a mutual arrangement but after the order for probate had been made the executor failed to perform his part of the arrangement and had thus committed a fraud both on the Court and the applicant The application for revocation was disposed of by the Court on the ground that the applicant on his own showing was a party to a fraud upon the Court that he had not come with clean hands and was not therefore entitled to the relief sought Thereafter the executor having brought a suit in the Court of the Subordinate Judge to recover rent and possession against a tenant of the testator as defendant 1 and against the aforesaid nephew as defendant 2 defendant 1 pleaded that the deceased (testator) had asked him to pay rent to defendant 2 and defendant 2 contended as in the previous proceedings that the deceased had made no will, that the will produced was a fabrication and that probate had been obtained by fraud *Held* that defendant 2 was barred by the decision of the District Court in the revocation proceeding from raising the same question in the Court of the Subordinate Judge *Held* further that it was the District Court which was competent to decide the question of fraud and collusion vitiating the decree of that Court under which probate had been granted and that as the Subordinate Judge who tried the suit had no jurisdiction in probate matters the title of the plaintiff was conclusively proved on the production of probate and it was no valid defence for the defendants to allege that the will was a forgery and that probate had been obtained by fraud and deception. *Quære* Whether a debtor of the state could raise such a defence if sued by the executor in a Court having jurisdiction to revoke the probate? KISHORBHAI REVADAS *v* RANCHODJI DHULIA (1914) I L R 38 Bom 427

——— ss 40 to 45—

See LUNACY ACT (1858)
24 C W N 378

See CIVIL PROCEDURE CODE 1908 s 11
I L R 44 Mad 778

——— s 41—*Probate and Administration Act (V of 1881) s 83—Civil Procedure Code (Act V of 1908) s 11—Contentious proceeding for probate—Will not proved—Probate refused—Suit for recovery of property from defendants who held as executors—Judgment in the probate proceeding refusing probate not judgment in rem—Res judicata* In a contentious proceeding for probate the will produced by the applicants was held not proved and the probate was refused The applicants appealed to the High Court which dismissed the appeal The widow of the deceased thereupon brought a suit for the recovery of the property of the deceased from the defendants who held it as executors under the will and the first Court allowed the claim On appeal by the defendants two questions having arisen namely (i) whether the judgment refusing probate was as much within the scope and intention of s 41 of the Evidence Act (I of 1872) as a judgment granting probate and (ii) whether the judgment in the probate proceeding operated as *res judicata* *Held* by the Full Bench that s. 41 of the Evidence Act (I of 1872) was not applicable to the judgment of the Appellate Court refusing probate *Held* further that the judgment in the probate proceeding operated as *res judicata* between the parties under s 83 of the Probate and Administration Act (V of 1881) and s. 11 of the Civil Procedure Code (Act V of 1908) KALYANCHAND LALCHAND *v* SITABAI (1913) I L R 38 Bom 309

——— s 44—

See SANTAL PARGANAS SETTLEMENT REGULATION 1872 6 Pat L J 373

See CIVIL PROCEDURE ACT 1908 s 11
I L R 37 Bom. 563

——— *Right of a stranger to a decree affecting his rights to show in a subsequent suit that the decree was invalid on the ground of fraud—Maintainability of such subsequent suit without previous suit to have decree set aside* If by virtue of a previous High Court decree a person, who is no party to that decree is deprived of his rights with respect to certain property a suit by such a person with respect to the property is maintainable without his having first to bring another suit for getting the decree set aside on the ground of fraud under s 44 of the Evidence Act he can impeach it if it is sought to be used against him as evidence ASWINI KUMAR SAMADDAR *v* BONOMALY CHAKRAVARTI (1916)
21 C W N 594

——— *Grant by Probate Court if can be collaterally attacked in another proceeding as fraudulent Semble* —Having regard to the wide terms of s 44 of the Evidence Act it is not possible to say that it is not open to a Court other than the Court from which a grant has issued in cases of fraud or collusion to deal with the matter and decide whether the grant has been obtained by fraud or collusion. But the better course in such cases would be when it is open to the party alleging fraud to apply to the Court from which the grant issued to stay the suit to enable an application to be made to revoke the grant RAKSHAR MONDAL *v* SRIMATI TARANGINI DEBI 25 C W N 207

——— *Res judicata—Fixed rate tenancy—Partition—Power of joint tenants to partition—Suit to recover joint possession* A certain holding owned jointly by tenants at fixed rates was partitioned by an award One party sued on the award to recover exclusive possession of certain plots and obtained a decree for possession and mesne profits which was executed Subsequently the other party sued to regain joint possession of these plots and pleaded that the former decree was by a Court not competent to pass it and therefore not binding on them There was nothing to show whether the former suit was filed before or after the coming into force of the Agra Tenancy Act 1901 or whether the landlord had or had not assented to the partition *Held* that the plaintiffs had failed to show that the former decree was passed by a Court which had not jurisdiction and that the present suit was barred *Achhaj Lal v Janki Prasad I L R 29 All 66 explained* RAGHUNATH KALWAR *v* BALA DIN KALWAR (1910) I L R 33 All. 143

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 11
I L R 37 Bom 563

——— *Compromise decree—Suit to set aside decree on the ground that the same was caused by undue influence—Jurisdiction* A decree obtained by consent or on a

EVIDENCE ACT (I OF 1872)—*contd*

———— s 44—*concld*

compromise can be attached in a separate suit not only upon the ground of fraud but upon any ground which would be a sufficient reason for invalidating the agreement upon which the decree was based *The Huddersfield Banking Company Limited* v *Henry Lister and Son Limited L R 2 Ch 273* followed *Musammat Gulab Kuar* v *Badshah Bahadur 13 C W N 1197* and *Sarbesh Chand a Basu* v *Hari Dayal Singh 14 C W N 451* referred to SHAMI NATH CHAUDHRI v PAMJAS (1911) I L R 34 All 143

See FRAUD I L R 41 Calc 990

———— s 45—

See s 5 I L R 41 All 248

See CUSTOM I L R 1 Lah 540

See PROBATE I L R 39 Calc 295

See LUNACY ACT 24 C W N 378

See SEDITION I L R 39 Calc 606

———— s. 47—

See JURY I L R 37 Calc 467

———— s. 48—

See CUTCHI MEMONS I L R 41 Bom 181

———— s 52—

See SPECIFIC RELIEF ACT (I OF 1877) s 39 I L R 39 Bom 149

———— s 54—

See CHARGE I L R 42 Calc 957

See CRIMINAL PROCEDURE CODE ss 387 319 5 Pat L J 706

See WITNESS I L R 46 Calc 700

———— ss 54 165—

See PRACTICE I L R 39 Bom 376

———— ss 55 57 78 (2)

See LIBEL I L R 37 Calc 760

———— s 57—

See CHURCH I L R 36 Mad 418

———— s 58—

1 ———— *Fact admitted need not be proved—Defendant s admission of signature to a bond—Proof of the bond—Inference from facts which are not evidence—Inference not according to law—Error of law—Interference by High Court on second appeal* The plaintiff having sued on a mortgage the sons of the mortgagor some of whom were minors denied all knowledge of the mortgage One of the sons (defendants) who had attained majority when examined as a witness admitted that the signature to the mortgage deed was his father s At an adjourned date of hearing the plaintiff was absent on account of illness and his witnesses also were not present The Court declined to grant any further adjournment and dismissed the suit holding that the mortgage deed was not proved The Court also inferred from the mere fact that the plaintiff delayed bringing his suit until almost the last day allowed him by the law of limitation that he must have been receiving interest all that time at the rate stipulated for in the deed and on that calculation it reached the conclusion that the debt had been fully satisfied The plaintiff having appealed *Held* that as far as the defendant who had admitted the signature was concerned his admission would under s 58 of the Indian Evidence Act 1872 relieve the plaintiff of any further responsibility of proving the document *Held* further that the inference in question was one not drawn from any evidence and the drawing of it was an error of law which could be rectified in second appeal LAKHICHAND CHATRABHUJ v LALCHAND GANPAT (1918)

I L R 42 Bom 352

2 ———— *Jurisdiction—Court—Consent of the parties as to jurisdiction—Suit of value beyond the jurisdiction of the Court—Trial of suit—Jurisdiction cannot be questioned in appeal* The plaintiffs filed a suit for partition in the Court of the Subordinate Judge First Class valuing their claim at an amount which made the suit triable by that Court alone The Judge however made over the trial of the suit to the Joint Subordinate Judge In the latter Court neither party raised any objection on the ground of jurisdiction nor was any issue raised relating to it The trial proceeded on merits and a decree was passed in favour of plaintiffs The defendant appealed to the lower appellate Court where he for the first time raised the question of jurisdiction on the strength of the market value stated in the plaint The objection was overruled On appeal —*Held* that the market value stated in the plaint *prima facie* determined the jurisdiction *Held* further that as neither party raised any question as to want of jurisdiction in the first Court and as they by their conduct and silence treated the market value to be of the amount sufficient to give jurisdiction to the Court they dispensed with proof on the question by their tacit admissions and thus the principle of law laid down in s 58 of the Indian Evidence Act came into operation and prevented the result of the statement of the market value in the plaint As a rule parties cannot by consent give jurisdiction where none exists This rule applies only where the law confers no jurisdiction It does not prevent parties from waiving inquiry by the Court as to facts necessary for the determination of the question as to jurisdiction where that question depends on facts to be ascertained JOSE ANTONIO BARETTO v FRANCISCO ANTONIO RODRIGUES (1910)

I L R 35 Bom 24

———— ss 58 92 proviso 4—*Mortgage bond registered—Subsequent oral agreement by mortgagee to take less than due amount whether modifies bond—Admission by mortgagee in pleadings in suit—Proof of agreement whether necessary under Evidence Act and Civil Procedure Code* A subsequent oral agreement to take less than is due under a registered mortgage bond is an agreement modifying the terms of a written contract, and if it has to be proved, oral evidence is inadmissible under s 92 proviso 4 of the Indian Evidence Act If such agreement has been admitted in the pleadings, no question of admissibility of evidence oral or documentary arises, as proof of the same is dispensed with in consequence of the admission under s 58 of the Evidence Act and also under the provisions of the Civil Procedure Code *Chenbasappa* v *Lakshmanan* I L R 18 Bom 369 distinguish MATCHI NAGO CHETTY (1918) 42 Mad. 41

EVIDENCE ACT (I OF 1872)—*contd*

——— ss 65 66 90—*Secondary evidence of document—Original withheld by party who knew it would be required—Certified copy produced by plaintiff—Presumption as to ancient document applied in case of a certified copy* In a suit for redemption of a usufructuary mortgage the plaintiffs tendered in evidence a certified copy of the mortgage bond which was executed in the year 1876 There was no evidence that they had called upon the defendants mortgagees to produce the original document *Held* (i) that from the nature of the case the defendants must have known that they would be required to produce the original mortgage which presumably was in their possession, and therefore the certified copy was admissible and (ii) that the presumption allowed by s 90 of the Indian Evidence Act 1872 could be applied when a certified copy being admissible was produced in evidence in the same way as it could be applied to an original document *Ishri Prasad Singh* v *Lalli Jas Kunwar I L R 22 All 294* followed *Khetter Chunder Mookerjee* v *Khetter Paul Sreeterutno I L R 5 Calc 886* and *Ponnambalath Parapravan* v *Karoth Sankaran Nair 12 Indian Cases 453* referred to DWARKA SINGH v PAMANAND UPADHIA (1919) I L R 41 All 592

——— s 66—

See s 74 19 C W N 1068

——— ss. 67 and 73—

See JURY RIGHT OF TRIAL BY

I L R 37 Calc 467

——— s 68—

See ATTESTING WITNESS

I L R 48 Calc 61

See TRANSFER OF PROPERTY ACT 1882 s 59 I L R 44 Bom 405

1 ——— *Admissibility of document in evidence—Mortgage deed not proved but terms thereof incorporated in a subsequent instrument properly executed and proved* Where a document itself legally inadmissible in evidence was subsequently referred to and partly incorporated in a second document of similar import duly executed between the same parties and registered according to law it was *held* that the earlier document might be referred to for the purpose of explaining and amplifying the terms of the second, and of arriving at a correct conclusion as to the true nature of the transaction into which the parties had entered *Fishmongers Company* v *Dimsdale 18 L J C P 65 6 C B 899* and *Mitchell* v *Mathura Das I L R 8 All 6* referred to MOTI CHAND v LALTA PRASAD (1917)

I L R 40 All. 256

2 ——— *Attesting witness meaning of—Writer of a document whether can be regarded as an attesting witness* The writer of document who signed the same as a scribe can be regarded as an attesting witness, if he saw the signing of the document by the executant *Veerapudayan* v *Muthukaruppan Thevan 24 Mad L J 534 Ayyanasam Iyengar* v *Kyla am Pillai 26 I C 409* and *Ranu* v *Laxman Rao I L R 33 Bom 44* referred to *Badri Prasad* v *Abdul Karim I L R 35 All 254* and *Ram Bahadur Singh* v *Ajodhya Singh 0 C W N 699* dissented from PARAMASIVA UDAYAN v KRISHNA PADAYACHI (191) I L R 41 Mad. 535

EVIDENCE ACT (I OF 1872)—*contd*

——— s 68—*concld*

3 ——— The section is imperative so if an attesting witness can be called he must be even though he prove hostile TULA SINGH v GOPAL SINGH 1 Pat L J 369

4 ——— A person whose name is on a deed merely as a scribe is not a witness within the Transfer of Property Act 1882 s 59 although he may have actually seen the document signed LAMBULDER SINGH v ADJUDHAY SINGH 1 Pat L J 129

5 ——— *Mortgage—Evidence of execution—Attesting witness—Scribe* The scribe of a mortgage deed cannot be counted as an attesting witness merely because he has signed the deed even though the deed may in fact have been executed in his presence To be an attesting witness within the meaning of s 68 of the Indian Evidence Act 1872 the witness must have seen the document executed and have signed it as a witness *Ranu* v *Laxmanrao I L R 33 Bom 44 Burdett* v *Spilsbury 6 10 C & F 340* and *Shamu Patter* v *Abdul Kadir Ravuthan I L R 35 Mad 607* followed *Radha Kishen* v *Fateh Ali Khan I L R 20 All 532 Raj Narain Ghosh* v *Abdur Rahim 5 C W N 554* and *Muhammad Ali* v *Jafar Khan All Weekly Notes (1897) 146* discussed BADRI PRASAD v ABDUL KARIM (1913)

I L R 35 All 254

——— ss 68, 70—*Admission of execution by person claiming through executant* Admission of execution of an attested document by the executant or by a person representing his interests is sufficient proof of its execution against the person making such admission As against other parties the document must be proved in accordance with s 68 Evidence Act NIBARAN CHANDRA SEN v RAM CHANDRA SEN (1917) 22 C W N 444

——— ss 68, 69—

1 ——— *Evidence mortgage deed—Proof of mortgage deed after death of executant and marginal witnesses* *Held* that the executant of and all three marginal witnesses to a mortgage deed being dead a mortgage deed was sufficiently proved by evidence that the signature of the mortgagor was in his handwriting and that the signatures of two of the marginal witnesses were in their handwriting By such evidence a presumption of due execution was raised which it lay on the defendants to rebut *Wright* v *Sanderson L R 9 P D 149* referred to UTTAM SINGH v HUKAM SINGH (1916)

I L R 39 All 112

2 ——— *Evidence—Mortgage—Proof of mortgage-deed* A mortgage deed on the face of it appeared to be attested by a large number of witnesses In a suit upon the bond the mortgagee called one attesting witness who proved that he saw the mortgagor sign the mortgage and that he himself signed his name as an attesting witness The other witnesses were not called nor did the witness who was called say that any other attesting witness was present nor was he asked the question by either side *Held* that in the absence of any rebutting evidence the mortgage deed must be considered to be sufficiently proved *Uttam Singh* v *Hukam Singh I L R 39 All 112* referred to SHIB DAYAL v SHEO GHULAM (1916)

I L R 39 All. 211

EVIDENCE ACT (I OF 1872)—*contd*

—— —— ss. 68, 69—*contd*

3 —————— *Transfer of Property Act (IV of 1882) s 59—Attestation—Document proved to have been executed in the presence of one attesting witness who was examined* One of the attesting witnesses to a mortgage deed was dead The other attesting witness was called and proved that the mortgage deed was signed by the mortgagor in his presence and that he signed the deed as an attesting witness It was not expressly proved that there was another attesting witness present who saw the mortgagor sign but it was not proved to be contrary that there was not another attesting witness *Held* that the mortgage was sufficiently proved according to the requirements of ss 68 and 69 of the Indian Evidence Act RAM DEI v MUNNA LAL (1916) I L R 39 All 109

—————— ss 68 to 71—

See EVIDENCE I L R 44 Calc 345

—————— ss 69 and 70—

See MORTGAGE 4 Pat L J 511

—————— *Evidence—Mortgage—Proof of execution of mortgage—Mortgagors illiterate and both they and the attesting witnesses dead before suit brought* A mortgage deed was on the face of it executed in 1883 by three illiterate mortgagors who affixed their marks and was attested by more than two witnesses At the time of the institution of a suit for sale thereon all the executants and the attesting witnesses were dead and the evidence tendered in proof of the mortgage consisted of (i) the statement of a witness who professed to be acquainted with the handwriting of two of the attesting witnesses (ii) a deed of usufructuary mortgage executed by one of executants of the mortgage in suit and by the representative of the two other executants which referred to and recognized the genuineness of the mortgage in suit and (iii) a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit which recognized by genuineness of the usufructuary mortgage mentioned above *Held* that having regard to ss 69 and 70 of the Indian Evidence Act 1872 this evidence was not sufficient to prove the mortgage in suit GOBARDHAN DAS v HARI LAL (1913) I L R 35 All 364

—————— ss 68 154—Attesting witness is in the position of witness called by Court SURENDRA KRISHNA MONDAL v SM RANEE DASSI 24 C W N 860

—————— s 69—*Proof of document—Document required by law to be attested—Death of attesting witness—Hindu law—Joint Hindu family—Parties* On execution of a deed of mortgage the names of two out of the four attesting witnesses were written by the scribe who had signed the document himself *Held* that it being necessary to prove the deed of mortgage after the death of all the attesting witnesses and the scribe it was sufficient to prove the hand writing of the scribe *Radha Kishen v Fateh Ali Ram I L R 20 All 532* referred to Where all the adult members of a joint Hindu Family appear on the record as plaintiffs or defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit *Hori Lal v* Munman Kunwar I L R 34 All 549 and *Nathu Lal v Lala I L R 34 All 5 2* referred to KRISHNA JIVA TEWARI v BISHNATH KALWAR (1912) I L R 34 All 615

—————— ss 69 to 72—

See EVIDENCE I L R 44 Calc 345

—————— s 70—

1 —————— *Registration Act (XVI of 1908) s 60 (2)—Admission—Endorsement of registering officer not evidence of admission of execution of document* The admission referred to in s 70 of the Indian Evidence Act is an admission in the course of proceedings in which the attested document is produced for example made in the pleadings or by a party himself in his examination The certificate of execution endorsed by the registering officer upon a document registered by him cannot be used as an admission of execution within the meaning of this section RAJ MANGAL MISIR v MATHURA DUBAIN (1915) I L R 38 All. 1

2 —————— *Suit on a mortgage bond—Admission of mortgagee if sufficient to make mortgage admissible against other parties not admitting execution without proof by attesting witnesses—S 70 effect of* Per WOODROFFE and D CHATTERJEE JJ (Newbould J dissenting) In a suit on a mortgage bond the admission of execution by the sole mortgagor does not under s 70 of the Evidence Act dispense with the necessity of complying with the provisions of s 68 of the *Evidence Act in order to prove the execution of* the document as against other parties in the suit who do not admit such execution The document must be proved as against them in accordance with the provisions of ss 68 69 and 70 of *the Act The effect of s 70 is that the proof* by calling attesting witnesses is dispensed with when the party executant admits execution only as against him *Jogendra Nath Mukhopadhya v Nitai Churn Bundopadhya 7 C W N 384* commented on SATISH CHANDRA MITRA v JOGENDRA NATH MOHALANABIS (1916) I L R 44 Calc 345 20 C W N 1044

3 —————— A person who signs as a witness merely on admission of execution by the executant is not an attesting witness MUSSAMMAT HIRA BIBI v RAMDHAN LAL 6 Pat L J 468

—————— s 73—*Handwriting proof of—Document when admissible against accused* A document to be admissible against an accused person should be proved (i) to be either a document in the handwriting of an accused person by comparison with an admitted or proved specimen of his hand writing in the light of the testimony of expert witnesses or (ii) to be in the possession of an accused person or (iii) to be admissible as falling within the scope of s 10 Evidence Act *Barindra Kumar Ghose v Emperor 14 C W N 1114 I L R 3 Calc 46* followed PULIN BEHARI DAS v KING EMPEROR (1911) 16 C W N 1105

—————— s 74—

See CONTEMPT OF [illegible] 45 Calc.

Criminal Procedure Code [illegible]

EVIDENCE ACT (I OF 1872)—*contd*

———— s 74—*concld*

necessary for admission of such document in evidence A notice under s 107 Criminal Procedure Code is a public document within the meaning of s 74 of the Evidence Act but it cannot come in without proof that the parties mentioned in it are the parties concerned in the question at issue about which it is produced as evidence AMJAD *v* LACHHI KANTA JHA (1914) 18 C W N 644

———— ss 74 66—*Order of Probate Court granting letters of administration with copy of will annexed if public document—Certified copy if admissible—Admission as secondary evidence though no steps taken to call for production of original* The certified copy of an order of the Probate Court to the effect that letters of administration be granted to the person named with a copy of the will annexed of the deceased testator is admissible the latter being a public document within the meaning of s 74 of the Indian Evidence Act Where it appeared that the original letters were in the *possession of* parties interested in opposing the plaintiff s claim but the plaintiff did not take steps to call upon them to produce them *Held* that there being no question of the genuineness of the document these steps should have been *waived by the Court* and the document admitted in evidence under s 66 of the Evidence Act HARIRAM DAS *v* HEM NATH SARMA (1915) 19 C W N 1068

———— ss 74 and 114—

See REGISTER OF DEATHS I L R 46 Calc 152

———— s 78 (2)—

See LIBEL I L R 37 Calc 760

———— ss 80 91—

See DEPOSITION I L R 45 Calc 825

———— ss 80 and 144—

See CONFESSION 2 Pat L J 80

———— ss 80 167—

See DEPOSITION I L R 46 Calc 895

———— s 81—

See s 21 I L R 36 *Mad* 457

———— s 82—

See HINDU LAW (MINOR) I L R 38 Mad 166

———— s 83—

See s 3 19 C W N 1038

———— *Evidence Act (I of 1872) ss 3 83—Map of khas mehal land prepared under direction of Government—Admissibility in boundary disputes—Witness non attendance of—Process to compel attendance refused without good ground—Second appeal* In a dispute relating to the boundary of a holding between the plaintiff and the Municipal Corporation of Calcutta *Held* that a map prepared in 1872 under the direction of the Government acting not *in its sovereign* capacity but as the landlord of this and neighbouring holdings was admissible in evidence *if* not under s 83 under s 13 of the Evidence Act UPENDRA NATH GHOSH *v* THE CHAIRMAN OF THE CALCUTTA CORPORATION (1911) 16 C W N 116

EVIDENCE ACT (I OF 1872)—*contd*

———— s 88—

See CRIMINAL PROCEDURE CODE, 1908 ss 196 AND 428 I L R 42 Mad 885

———— s 90—

See s 32 3 Pat L J 306

See s 4 I L R 37 Mad. 455

See s 65 I L R 41 All. 592

See BOMBAY LAND REVENUE CODE, 1879 ss 3 74 I. L R 45 Bom. 878

———— S 90 of the Indian Evidence Act does not prove the authority of the person who has made the grant the genuineness whereof is presumed by the Court under the provisions of that section KASHI NATH PAL *v* JAGAT KISHORE ACHARYA CHOWDHURY (1915) 20 C W N 643

———— *Secondary evidence of document which may be given—Document failure of witness to produce—Process fee for warrant failure to deposit if default excluding secondary evidence of document—Recital of boundaries in documents if admissible as between persons not parties thereto—Document over thirty years old opportunity if must be given to prove execution where presumption does not apply—Road cess return admissibility of—Omission in a document if evidence* Where the plaintiff issued summons upon a witness to produce a lease which was a title deed of the witness and which he was under no agreement with the plaintiff to produce and on the failure of the witness to attend the plaintiff to obtain an order for the issue of warrant against the witness but failed to put in the process fee *Held* that the failure of the plaintiff to get the warrant issue did not amount to default on his part and that in the circumstances of the case he was entitled to use a certified copy of the document as evidence A recital as to the boundary of a land in a lease is admissible in evidence against a person who was no party to that document *Ningava* v *Bharmappa I L R 23 Bom 63 Abdul Aziz Mollah* v *Ebrahim Molla I L R 31 Calc 965 Burha Mandar* v *Megnath 2 C L J 4n* followed *Abdulla* v *Kunja Behari 14 C L J 467 Brajesuari* v *Bhudanuddi I L R 6 Calc 268 Monohur Singh* v *Sumitra Loer I L R 17 All 428* referred to Under s 90 of the Evidence Act the Court is not bound to presume the genuineness of a document over thirty years old It must first satisfy itself that the elements necessary to bring the document within the rule in that section exists and then exercise its discretion as to whether in the circumstances the presumption of genuineness should be applied to it If the Court is not satisfied that the presumption should apply it should call upon the party to produce evidence of its execution Where therefore the Court below rejected such a document without calling upon the party to produce evidence of execution *Held* that the Court had not acted properly The absence of the names of the predecessors of the plaintiff from the list of tenants in a road cess return not *filed by* either party to the suit was admissible in evidence against the plaintiff IMRIT CHAMAR *v* SIRDHARI PANDAY (1911) 17 C W N 108

———— s 91—

See CONTRACT FOR SALE I L R 45 Calc 481

EVIDENCE ACT (I OF 1872)—contd

—— s 91—contd

See CRIMINAL PROCEDURE CODE—

s. 103 I L R 34 Mad. 349

s 239 I L R 42 Mad. 561

See DEFINITIONS

I L R 45 Calc. 825

See DYING DECLARATION

I L R 36 Calc 659

See LEASE I L R 46 Calc 1079

See LIMITATION ACT 1877 SCH II ARTS 132 134 I L R 35 Bom 438

See PARTITION 15 C W N 375

See TRANSFER OF PROPERTY ACT s 107

I L R 38 Bom 500

See VARTHAMANAM OF LETTER

I L R 38 Mad 660

—— perjury but statement not read out—
See PENAL CODE s 193

I L R 1 Lah 361

—— oral evidence of an agreement—
See REGISTRATION

I L R 1 Lah 436

1 —— *Search list does not exclude oral evidence of matters stated therein—Confession not recorded in compliance with orders of Government—Such confession admissible if voluntary* S 91 of the Evidence Act has no application when the writing is not evidence of the matter reduced to writing A search list is not evidence of the matter stated therein and it does not therefore exclude oral evidence of such matter G O No 2883 Judicial paragraph 5 (dated 17th December 1887) directs that no Magistrate may record any confession or statement under s 167 Criminal Procedure Code until he has first recorded in writing his reasons for believing that the accused is going to make such statement voluntarily *Held* that non compliance with an order of Government as to the formalities to be observed in recording confessions does not render a confession inadmissible in evidence The Court has to determine whether such confession was voluntary or not PUBLIC PROSECUTOR *v* SARABU CHENNAYYA (1899)

I L R 33 Mad 413

2 —— *Oral evidence admissible to prove what took place at time of search* Where a search has been conducted under the Criminal Procedure Code the search list is not the only evidence admissible as to the matters dealt with therein S 91 of the Evidence Act does not exclude oral evidence of what took place at the time of search *Abdul Kadir v Queen Empress 2 Weir Cr R 515* dissented from *Public Prosecutor v Sarabu Chennayya I L R 33 Mad 413* followed ELAMATHAN *v* EMPEROR (1910)

I L R 33 Mad 416

3 —— *Hindu Law—Partition—Partition evidenced by a writing not registered—Oral evidence admissible to prove the fact of partition* The fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved for want of registration CHHOTALAL ADITRAM *v* BAI MAHAKORE (1917) I L R 41 Bom 438

4 —— *Suit on promissory note—Note inadmissible in evidence—Plaintiff entitled to fall back on original cause of action* If a creditor has a cause of action for the recovery of money for which his debtor has executed a promissory note separate from and independent of the note he can recover upon such cause in case the note for any reason cannot be put in evidence Nor is the creditor necessarily debarred from suing on the original cause of action by the fact that it arose out of the same transaction in the course of which the promissory note was executed *Pursotam Narain v Taley Singh I L R 26 All 178* overruled *Sheikh Akbar v Sheikh Khan I L R 8 Calc 256* *Krishnaji v Rajmal I L R 24 Bom 360* *Vithal Appa v Bhimaji I L R 28 Bom 432* *Banarsi Prasad v Fazal Ahmad I L R 28 All 298* and *Sri Nath Das v Angad Singh 7 All L J 159* referred to RAM SARUP *v* JASODHA KUNWAR (1911) I L R 34 All 158

5 —— *Evidence admissibility of—Confession made to enquiring magistrate but not recorded by him in writing—Criminal Procedure Code ss 364 and 533* A confession of an accused person made to a Magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of s 91 of the Indian Evidence Act 1872 and that no evidence can be given of the terms of such a confession except the record (if any) under s 364 of the Code of Criminal Procedure s 533 of the Criminal Procedure Code has no application to a case where no record whatever has been made of such a confession EMPEROR *v* GULABU (1913)

I L R 35 All 260

6 —— *Evidence—Confession—Admission of guilt during departmental inquiry—Oral evidence as to statement admissible* The complainant in a petty criminal case before a bench of Honorary Magistrates in the course of negotiations concerning a compromise made a statement to the effect that he had paid a certain sum of money by way of an illegal gratification to the peshkar of the Court The peshkar was at once called up and examined by way of departmental inquiry and not on oath and he admitted having received money from the complainant The Honorary Magistrates reported the circumstances to the District Magistrate who directed the prosecution of the peshkar *Held* that the statement made by the peshkar to the Magistrates was not a statement which was required by law to be in writing and could be proved by the evidence of either of the Magistrates who had heard it EMPEROR *v* HAIDAR RAZA (1914)

I L R 36 All 222

7 —— *Hundi—Renewal of hundis given as security for debt—Hundis sued on inadmissible for want of proper stamp—Right of creditor to fall back on previous hundis* The defendants borrowed money from the plaintiffs and in return therefor drew four hundis in their favour As these hundis became due the interest on the loan was paid and the hundis were renewed, the old hundis being on each occasion handed over to the defendants Ultimately the plaintiffs sued on a set of renewed hundis but it was found that these particular hundis were insufficiently stamped and could not be admitted in evidence *Held* that the plaintiffs were entitled to fall back upon the last preceding set of hundis and as these were in the possession of the defendants to give secondary evidence of their contents JAGAT PRASAD *v* INDIA MAL (1911) I L R 33 All 259

EVIDENCE ACT (I OF 1872)—*contd*

———— s 91—*concld*

8 ———————— *suit for recovery of money advanced on a hundi which was signed shortly after the money was actually paid—Hundi insufficiently stamped and inadmissible in evidence—whether plaintiff has a cause of action independent of the hundi* The defendant C S applied to the Amritsar National Insurance and Banking Company for a loan and in his application stated the security as personal security on a *hundi* payable after 3 months The Directors of the Company sanctioned the loan and the money was paid to C S less a certain amount deducted as interest in advance for 3 months and C S thumb marked the Banker s voucher The same day C S executed a *hundi* promising to repay the money to the Company after ninety days The Company subsequently assigned their claim to the National Banking Company Amritsar and the latter at first sued on the *hundi* but finding that it was insufficiently stamped put in an amended plaint in which they claimed simply to recover the money advanced with interest *Held* that the loan having been granted on the security of a *hundi* (the execution of the *hundi* being for certain reasons postponed till a short time after the money had actually been paid to the defendant) the plaintiff had no cause of action independent of the *hundi* and as the *hundi* was inadmissible in evidence and as s 91 of the Evidence Act forbids secondary evidence the plaintiff s suit must fail *Sheo Das* v *Kanhaya Lal (61 P R 1888)* *Bakhshi Ram Labhaya* v *Kala Ram (42 P R 1895)* and *Ganga Ram* v *Amir Chand (66 P R 1906)* and *C A 2863 of 1916* unpublished followed *Raj Nath Das* v *Salig Ram (16 Indian Cases 33)* not followed CHANDA SINGH v AMRITSAR BANKING CO I L R 2 Lah. 330

———— ss 91 92—*Contract—Contract signed by a party personally—Oral evidence to show that the party signing contracted as agent—Admissibility of—Indian Contract Act (IX of 1872) ss 231 33 effect of* In a suit on a contract signed by the defendant personally the defendant attempted to lead oral evidence to show that he was contracting as agent and that the name of his principal was disclosed at the time of the contract On plaintiff objecting to this evidence being admitted *Held* that such evidence was not admissible for the purpose of exonerating a contracting party from liability for that would be substituting a different agreement from that evidenced by the writing *Higgins* v *Senior (1841) 58 R R 884* followed *Venkata subbiah Chetty* v *Govindarajulu Naidu (1907) 31 Mad 45 and Salasul Janki Das* v *Sir Kishan Pershad (1918) 46 Calc 663* referred to EBRAHIMBHOY PABANEY MILLS CO LTD v HASSAN MAMOOJI (1921) I L R 45 Bom. 1242

———— s 92—

See s 58 I L R 42 Mad 41

See CONTRACT ACT

ss 1 and 118 I L R 41 Bom 518

63 15 C W N 408

See DOCTRINE OF SATISFACTION I L R 37 Bom 211

See DEKKHAN AGRICULTURISTS RELIEF ACT (XVII OF 1879) ss 2(2) 10A I L R 3 Bom 18

EVIDENCE ACT (I OF 1872)—*contd*

———— s 92—*contd*

See EVIDENCE I L R 45 Calc 320
I L R 38 Calc. 892

See EVIDENCE ADMISSIBILITY OF L R 44 I A 236
I L R 45 Calc 320
I L R 38 Calc 892

See KHUD KASHT JOTES I L R 48 Calc 959

See LANDLORD AND TENANT I L R 46 Calc 1079

See LEASE I L R 46 Calc 1079

See TRANSFER OF PROPERTY ACT (IV OF 1882) ss 54 118 I L R 37 Mad. 423

See RAYATI HOLDING I L R 42 Calc. 546

See ORAL AGREEMENT

See RECEIPT I L R 47 Calc 129

See RENT I L R 41 Calc 347

See RES JUDICATA I L R 1 Lah. 83

———— Price specified in the sale deed—*Recital as to amount of price essential term of contract of sale—Oral agreement as to higher price in discharge of a mortgage—Evidence inadmissible* The amount of the price agreed to be paid is an essential term of a contract of sale and consequently no evidence of an oral agreement at variance with the provisions of a registered sale deed as to the amount of the price fixed for the sale is admissible under 92 of the Indian Evidence Act *Cowasji Ruttonji Limboowalla* v *Burjorji Rustomji Limboowalla I L R 12 Bom 335* followed *Vasudeva* v *Narasamma I L R 5 Mad 6* *Kumara* v *Srinivasa I L R 11 Mad 213* *Hukmchand* v *Hiralal I L R 3 Bom 159* and *Gopal Singh* v *Laloo Lall 10 C L J 27* explained. *Ram Baksh* v *Durjan I L R 9 All 392* *Indarjit* v *Lal Chand I L R 18 All 168* *Balkishen Das* v *Legge I L R 22 All 149* *Sitamba Goundan* v *Palani Goundan (1913) Mad W N 650* and *Prolat Chandra Gangopadhya* v *Chiraq Ali I L R 33 Calc 607* referred to ADITYAM IYER v RAMA KRISHNA IYER (1913) I L R 38 Mad 514

———— Sale deed or Mortgage—*Written agreement—Contemporaneous oral agreement to treat it as mortgage—Absence of fraud misrepresentation etc —Oral agreement cannot be pleaded* Where parties enter into a sale deed with a contemporaneous oral agreement to treat it as a mortgage it is not open to either of them to plead the oral agreement in absence of fraud misrepresentation or failure of consideration or the like reason rendering the sale void SANGIRA MALAPPA v RAMAPPA (1909) I L R 34 Bom 59

———— Sale-deed or Gift—*Admissibility of evidence to show that a document purporting to be a sale deed is in reality a deed of gift* In the appeal their Lordships were of opinion that the decree of the High Court in *Faiz un nissa* v *Hanif un nissa I L R 29 All 617* could not be supported and remitted the case to the High Court to be dealt with on the evidence HANIF UN NISSA v FAIZ UN NISSA (1911) I L R 33 All 34

EVIDENCE ACT (I OF 1872)—*contd*

—— s 92—*contd*

—— prov I—*Sale deed—Contemporaneous agreement—Admissibility—Fraud* A desired to ... aside an ostensible sale deed by proving that a representation agreement or promise was made to him at the time of execution that the deed would not be enforced as a sale deed *Held* that no evidence of such a representation agreement or promise could be admitted for this purpose *Dattoo v Ramchandra I L R 30 Bom 119* and *Kashavrao v Raya I L R 8 Bom L R 98* followed DAGDU VALAD SADU v NANA VALAD SATU (1910) I L R 35 Bom 93

—— *Sale deed or Mortgage—Dekkhan agriculturists Relief Act (XVII of 1879) s 10A—Redemption suit—Sale in reality a mortgage—Evidence of oral agreement varying the written document* The plaintiff brought a redemption suit under the provisions of the Dekkhan Agriculturists Relief Act (XVII of 1879) alleging that the deed which he had executed to the defendant though on its face a deed of sale was in reality only a deed of mortgage the defendant having promised at the time of the execution of the deed that he would allow redemption on payment of the money advanced The defendant replied that the transaction was sale The First Class Subordinate Judge of the Dharwar District to which s 10A of the Dekkhan Agriculturists Relief Act (XVII of 1879) was not extended found on the evidence that the deed passed by the plaintiff was not proved to be really a mortgage and dismissed the suit The plaintiff appealed urging that the proper issue in the case was as to whether the sale deed was not obtained or induced by the defendant by means of fraud or misrepresentation within the meaning of prov I of s 92 of the Evidence Act (I of 1872) and prayed for a remand *Held* confirming the decree that the plaintiff sought to make a new case in appeal in so far as he endeavoured to base his case not upon a separate oral agreement but upon some fraud which would invite the application of prov I of s 92 of the Evidence Act (I of 1872) *Held* further that in the districts to which s 10A of the Dekkhan *Agriculturists Relief Act (XVII of 1879) was not* extended it was not open to the Court to enter upon a defence which consisted of an allegation of an oral agreement varying the written contract *Dagdu v Nana I L R 35 Bom 93* and *Sangappa Malappa v Ramappa I L R 34 Bom 59* followed *Balkishen Das v W F Legge I L R 22 All 149* referred to SOMANA BASAPPA v GADIGEYA KORNAYA (1910) I L R 35 Bom 231

—— Fraud—*Evidence admissibility of—Evidence of acts and conduct of parties to deeds showing that they were treated as being otherwise than they purport to be—Evidence showing actual conveyances to be only mortgages—Fraud with regard to property of third person not party to deed* S 92 of the Evidence Act (I of 1872) is applicable to an instrument as between the parties to such instrument or their representatives in interest but it does not prevent proof of a fraudulent dealing with a third person s property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance The respondents claimed to recover possession of certain parcels of land under deeds which purported to be absolute conveyances but which the appellants contended were meant to be and had always in fact been treated by all the parties concerned as mortgages only and they tendered evidence of the acts and conduct of the parties to that effect This evidence was excluded by both Courts below under s 92 of the Evidence Act Their Lordships of the Judicial Committee on appeal were however of opinion that on the evidence the case for the appellants disclosed a charge of fraud against the respondents antecedent to the deeds inasmuch as they or the persons under whom they claimed took absolute conveyances of property from the appellants with notice that such property belonged in fact to a third person the alleged mortgagor whose evidence would be material and necessary in the matter of the alleged fraudulent dealing Their Lordships therefore without expressing any opinion on the construction or application of s 92 of the Evidence Act in relation to the deeds came to the conclusion that the rejected evidence should be heard subject to any objections which the respondents might be advised to take as the Court would then be in a position to deal hereafter (if necessary) with the admissibility of the evidence in relation not only to the deeds but also in relation to the questions that might arise in connection with the alleged knowledge or conduct of the parties antecedent to the execution of those deeds and upon which their validity might possibly depend MAUNG KYIN v MA SHWE LA (1911) I L R 38 Calc 892

—— Consideration—*Sale of land consideration for not as stated in the deed—Oral promise failure to perform* Assuming that it may be shown by oral evidence that the real consideration for a deed of sale was not the consideration stated in the deed itself but a promise to maintain the plaintiff in the absence of coercion undue influence fraud or misrepresentation of any kind at the time when the deed of sale was registered and possession taken thereunder the deed will not be set aside The special equitable doctrine whereby the American Courts have relieved in cases where an aged person has conveyed all his property in consideration of an oral promise to be supported for the remainder of his life by the grantee not applied SUBBAYYAR v MONIEM SUBRAMANIA AYYAR (1913) I L R 36 Mad. 8

—— prov 1—*Evidence—Proof of failure of consideration—Promissory note given partly on account of a gambling debt* The defendant who had been gambling with the plaintiffs and had lost gave the plaintiffs two promissory notes partly for his gambling losses and partly on other accounts but it could not be ascertained what proportion of the total sum secured was represented by the gambling debts *Held* on suit to recover on these notes that it was open to the defendants to prove that the consideration was in part at least money lost in gambling and that the Court below was justified on its finding that the part of the consideration represented by gambling debts could not be separated from the rest in dismissing the whole suit *Jugarnauth Sew Bux v Ram Dyal I L R 9 Cal 791* distinguished. BALGOBIND v BHAGGU MAL (1913) I L R 35 All. 558

—— Fraud—*Written document—Oral evidence to vary its terms—Plea of fraud—Section applies only to parties or their representatives* In 189[illegible] certain property ... [illegible] to S by its owners, ... and his cousin.

EVIDENCE ACT (I OF 1872)—*contd*

——— s 92—*contd*

show that the intention of the parties was that the kabuliyat from the very first was not intended to be acted upon or that there had been a waiver of the strict terms of the lease *Benimadhub Gorain* v *Jalmoti Dasi 6 C W N 242* followed MANINDRA CHANDRA NANDI v DURGA SUNDARI DASSYA (1915) **20 C W N 680**

——— **Mortgage with possession**—*De facto substitution of the other property for part of that included in the mortgage deed—Suit for redemption—Evidence* The plaintiff mortgaged to the defendants three specific items of property for a sum of Rs 99 The mortgage was registered and it was a possessory mortgage but the defendants never in fact got possession of more than one of the items mentioned in the deed They did however get possession as mortgagees of another piece of property not mentioned in the deed apparently by virtue of a subsequent oral agreement with the plaintiff and they held this piece of property in mortgagee possession for a number of years *Held* on suit by the plaintiff for redemption that the plaintiff was entitled to lead evidence to prove two facts (i) that the possession of the defendants over the plot not mentioned in the mortgage deed was that of mortgagees and had never been adverse to himself and (ii) that the right of mortgagee possession was terminated by the payment of Rs 99 which had been duly tendered by him BAID RAM v TIKA RAM (1917) **I L R 39 All 300**

——— **Prov 5**—Dowl kabuliyat *construction of—Exclusion of evidence of customary incidents—Evidence Act (I of 1872) s 92 Prov 5—Non agricultural tenancies created before the Transfer of Property Act not heritable or Transferable—Death of tenant after Act IV of 1882 came into force—Heirs if may transfer tenancy—Tenancies if terminable without notice—Bengal Tenancy Act (VIII of 1885) s 106 if bars civil suit to correct entry* The mere fact that a document is called a *doul kabuliyat* does not decide its nature The document should be looked at as a whole and any evidence designed to show customary incidents of tenure as attaching to the *jotes* must be rejected if and so far as it conflicts with what is contained in the *doul* themselves Evidence of a custom of transferability is thus excluded by an express statement in the *douls* that there is no right of sale Gift or transfer without the landlord s consent Where the only right secured in the *douls* to the tenants was an option to take a renewal at the rate of rent prevalent in the perganah *Held* that the tenancies created by the *douls* were neither heritable nor transferable and no evidence of custom was admissible on these heads When the term of the *doul kabuliyats* expired the tenants holding over became yearly tenants on the terms of the *doul kabuliyats* so far as applicable to a yearly tenancy and when on the death of the last survivor of them their heirs were recognised as tenant they became yearly tenants upon the term of the *dowl kabuliyat* so far as applicable to a yearly tenancy The Transfer of Property Act having come into operation before the tenancy came into the possession of the tenants heirs they had a yearly tenancy in the land which was capable of transfer and notice was necessary to terminate the tenancy the tenancies not being agricultural within the meaning of s 117 of the Transfer of Property Act and Chap V of the Act consequently applying to them S 106 of the Bengal Tenancy Act does not provide the only method of obtaining the correction of the entry in a finally published record of rights and a civil suit instituted with that object is maintainable *Jogendra Nath Roy* v *Krishna Pramada Dassi I L R 35 Calc 1013 (1908)* not followed MAHOMED AFFIJUDDIN MEA v PRODYOT KUMAR TAGORE **25 C W N 13**

——— **Prov 6**—*Deed of settlement construction of—Subsequent conduct of parties to the instrument whether admissible in evidence—Execution proceedings—Res judicata—Notice of particular questions necessity for—Application for execution—Order at one stage of the application if res judicata at another stage* Where by a Deed of Settlement almost the whole of the settlor s immoveable property was transferred to trustees together with buildings and appurtenances thereto and the question was raised as to whether certain specific properties were included in the deed *Held* that the ambiguity in the deed being latent in construing the deed the subsequent conduct of the parties thereto can be legitimately looked into under s 92 proviso 6 of the Evidence Act for the purpose of ascertaining to what persons or things the expressions used therein were intended to apply *Tulshi Pershad Singh* v *Ramnarain Singh I L R 12 Calc 117 Venkataramanna* v *Venkatapathi 28 Mad L J 510 Forbes* v *Watt 2 Sc & D App 214* and *Van Diemen s Land Company* v *Table Cape Marine Board [1906] A C 92* referred to *Vissanji Sons & Co* v *Shapurji Burjorji I L R 36 Bom 387 395* explained A decree holder applied for execution of his decree by attachment and sale of certain properties in the possession of the respondents the sons of the deceased judgment debtor Notice went to the respondents to show cause why they should not be brought on the record as the legal representatives of the deceased judgment debtor for purposes of execution they did not appear and an order was made *ex parte* *Held* that they were not estopped by this order from moving to set aside the attachment on the ground that the properties did not belong to the judgment debtor Observations as to the application of the principle of *res judicata* to orders in execution SUBRAMANIA AYYAR v PAJA RAJESWARA DORAI (1916) **I L R 40 Mad 1016**

——— *Sale deed—Old document—Intention of parties—Extrinsic evidence admissibility of—Such evidence can only be allowed if the terms of the document require explanation* In 1865 a possessory mortgage deed was passed in favour of the father of defendant No 1 In 1867 the mortgagor sold by a document purporting to be a sale deed the equity of redemption to the plaintiff s assignor The plaintiff having sued for redemption of the mortgage of 1865 an issue was raised whether the transaction of 1867 was a mortgage or sale Both the lower Courts were of opinion that on the wording of the document itself viewed in the light of certain surrounding circumstances as to the value of the property inadequacy of consideration &c under proviso (6) of s 92 of the Evidence Act 1872 the parties intended that the transaction was a mortgage On appeal to the High Court *Held* that the docu

EVIDENCE ACT (I OF 1872)—contd

———— s. 92—contd

ment of 1867 was termed a sale deed and on the face of it it was anything except a sale deed and the Courts should not have taken into consideration extrinsic evidence in construing the document On general principles it would be extremely undesirable after the document has existed more than fifty years to allow evidence to be led to show that the document is not what appears on the face of it Where the document itself is a perfectly plain straightforward document no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. There may be cases where such extrinsic evidence is required and it will therefore be admitted But it can only be in cases where the terms of the documents themselves require explanation, that extrinsic evidence can be led within the restrictions laid down by Proviso (6) of s. 92 Evidence Act 1872 *Datoo v. Ramchand a (1906) 30 B m 119* relied on. *Jha do S ch v Wahid ud din (1916) 38 All 570 Ma ng Kyin v Ma Shwe La (1917) 45 Cal 320 Balkishen Das v W F Legge (1899) 22 All 149* referred to GANPATRAO APPAJI v BAPU bin TUKARAM (1919)

I. L. R. 44 Bom. 710

———— s. 93—

See s 92 I. L. R. 40 Mad. 1016

———— Hand note—*Evidence Act (I of 1872) ss 93 94 95 96—Stipulation to pay interest—Interest whether monthly or annual extrinsic evidence to prove* A hand note contained a stipulation to pay interest at 2¼ per cent but did not mention whether that interest was to be calculated annually or monthly or otherwise *Held* that evidence was properly admitted to show that the words meant that interest should be calculated monthly *Mahomed Sumsooddeen v Moon he Abdool Huq (1864) W I 379* followed MONMOTHA NATH CHAUDHURY v NOBIN CHANDRA SANYAL (1910) 14 C W N 1100

———— *Agreement to sell land—Statement of area in the schedule whether an assurance or description—Presumption—Conditional—Extrinsic evidence admissibility of to explain facts—Evidence Act (I of 1872)* s3 Negotiation for the sale of certain plots of land by the plaintiffs to the Defendant having for a considerable time proceeded on the basis of area per square yard Plaintiffs at a certain stage repudiated the suggestion of sale by area Defendants at the same time insisting that the sale must be by area After long discussion a conclusion was reached and an agreement executed A memorandum at the top of the plan attached to the original draft agreement prepared by the Defendant giving the specific areas of the plots together with the aggregate area was struck out but this aggregate area was retained in the schedule In a suit for specific performance of the agreement the Plaintiffs denied that they had agreed to guarantee any area whilst the Defendant affirmed that they did *Held* that extrinsic evidence to explain the facts was admissible in order to reconcile the statement in the body of the agreement on which the Plaintiffs rested their case with the recital in the schedule on which the Defendant relied as amounting to an assurance in respect of the area which was intended to be conveyed to him That though the presumption is that in fixing the price regard

EVIDENCE ACT (I OF 1872)—contd

———— s. 93—contd

was had to the quantity which both parties believed to be the subject matter of the sale it was not so in the present case *Hill v Buckley (1811)* ... applied to *Hill* on the ... that the allegation of the Plaintiffs that the statement of area in the schedule was a description not by way of an assurance and ... that the statement of the area in the schedule was not by way of an assurance and amounted to no more than a misdescription. HIRJIBHAI SULEMANJI v TRIBHOWANDAS MANOHARDAS ...

25 C. W. N. 285

———— Imputation—ambiguity—If an imputation is ambiguous as to meaning evidence is admissible to explain it KUPPUSWAMI v DURAISWAMI I. L. R. 33 Mad 67

———— s. 94—*Mortgage—Construction of document—Misdescription of property mortgaged—Evidence admissible to show to which property the mortgage was intended to apply* On the 27th of March, 1871 one H B mortgaged 9¼ biswas of the villages Anula, Hasan Mahdud and Laniyala On the 6th of February 1873 the mortgagor executed a second mortgage of the villages comprised in the mortgage of the 27th of March, 1871 but by mistake the name of the third village was entered in the schedule of property mortgaged as Halla Nala instead of Laniyala *Held* that s. 94 of the Indian Evidence Act, 1872 did not debar the mortgagee from giving evidence to show that the village of Laniyala was intended to be charged by the mortgage of the 6th of February 1873 the language of the later mortgage could not be regarded as clear and unambiguous MAHABIR PRASAD v MASITULLAH (1916) I. L. R. 38 All. 103

———— s. 95—

See CONTRACT ACT s 63
I. L. R. 34 Mad. 156

———— ss. 95 and 96—

See s 93 14 C W N 1100

———— ss. 95 to 97—

See s 92 I. L. R. 40 Mad. 1016

———— s. 101—

See LUNATIC I. L. R. 39 Calc

———— s. 102—

See RENT SUIT
I. L. R. 43 Calc 654

———— s. 103—*Goods consigned by rail—Risk note—Liability of Railway Company for goods consigned on a risk note—Burden of proof* The plaintiff consigned certain bales of piece goods by the defendants Railway under a risk note By the terms of the risk note in consideration of a special reduced rate being charged the consignor agreed to hold the Railway Administration harmless for any loss except for loss of a complete consignment due to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants provided that wilful neglect was not to be held to include robbery from a running train or any other unforeseen event The goods were properly carried in a closed waggon but one of the bales was lost in transit The plaintiff having sued the defendant Railway Company

EVIDENCE ACT (I OF 1872)—*contd*

——— s 103—*contd*

the value of the missing bale the Subordinate Judge decreed the plaintiff's claim holding that the defendant Company failed to prove the theft from the running train though he found that there was no evidence to prove that there was any theft from the train. The defendant company having applied to the High Court under its revisional jurisdiction *Held* reversing the decree and dismissing the suit that the burden lay on the plaintiff under s 103 of the Indian Evidence Act to give proof of the fact that there was wilful neglect or theft by railway servants and he not having done so no question was reached of robbery from a running train *East Indian Railway Company* v *Nathmal Behari Lal I L R 39 All 418* approved B B & C I RAILWAY COMPANY *v* RANCHHODLAL CHHOTALAL & Co (1919)

I L R 43 Bom 769

But *See* RAILWAY COMPANY

I L R 45 Bom 1201

——— s 105—

See PENAL CODE s 76

I L R 32 All 451

——— *Penal Code (Act XLV of 1860) s 97—Right of private defence—Pleadings—Alternative and apparently inconsistent pleas* The right of an accused person to defend himself upon a criminal charge can only be limited by the provisions of the statute law There is nothing in the law to prevent a man on his trial on a charge of culpable homicide from setting up an alternative defence on some such lines as these ' *First* I was not present at the occurrence referred to by the prosecution witnesses and they are giving false evidence against me *secondly* even if I fail to persuade the Court of this fact I can show from the statements of the prosecution witnesses themselves that if I had caused the death of any person in the manner and under the precise circumstances deposed to by their evidence I should have been acting in the lawful exercise of a right of private defence *Queen Empress* v *Prag Dat I L R 20 All 459 Queen-Empress* v *Timmal I L R 21 All 122* and *Emperor* v *Gullu All Weekly Notes 1904 p 113* referred to EMPEROR *v* YUSUF HUSAIN (1918) **I L R 40 All 284**

——— s 106—

See MUNICIPALITY

I L R 41 Calc 168

See RAILWAY COMPANY

I L R 47 Calc 6

——— *Onus of Proof—Individual and Corporation* In order to apply the section the knowledge must be in the nature of something peculiar and there is no difference in this respect between an individual and corporation LACHHMINARAIN MARWARI *v* PANCHI MUNICIPALITY

1 Pat L J 168

——— ss 106 and 114 ill (g)—

See MADRAS REGULATION (XXV OF 1802) s 4

I L R 38 Mad 620

——— ss 107 108—*Adverse possession tacking—Nature of presumption—* There is no presumption in law that a person was alive for seven years from the time when he was last heard of Ss 107 and 108 of the Evidence Act deal with the procedure to be followed when a question is raised before a Court as to whether a person is alive or dead but do not lay down any presumption as to how long a man was alive or at what time he died *Narki* v *Lal Sahu I L R 37 Calc 103* and *Muhammad Sharif* v *Bande Ali I L R 34 All 36* followed Assuming that the Court could make a presumption that a person was alive for seven years after he was last heard of it depends on the circumstances of each case whether the Court would draw such a presumption or not A person in possession without title cannot tack his possession to that of another if he did not enter on possession as the heir of that other VEERAMMA *v* CHENNA REDDI (1914) **I L R 37 Mad 440**

——— s 108—

See DEATH PRESUMPTION OF

I L R 37 Calc 103

See LIMITATION ACT (IX OF 1908) SCH I ARTS 140 141

I L R 40 Bom 239

See MORTGAGE **I L R 40 Calc 342**

——— *Missing—Presumption as to death but not as to date of death—Muhammadean law* The presumption of Muhammadan law that when a person has disappeared and has not been heard of for a certain number of years he is dead and further that as regards property coming to him by inheritance he must be deemed to have died at the date of his disappearance is a rule of evidence only and as such must be taken to have been superseded by the provisions of the Indian Evidence Act 1872 which do not raise any presumption as to the date of the death of a person who has disappeared and has not been heard of for a certain number of years by those who would naturally hear of him *Mazhar Ali* v *Budh Singh I L R 7 All 297* followed MAIRAJ FATIMA *v* ABDUL WAHID **I L R 43 All 673**

——— *Evidence—Presumption of death—Burden of proof* *Held* that the presumption which it is permissible to make under s 108 of the Indian Evidence Act 1872 does not go further than the mere fact of death If the period which has elapsed since the time that the person whose death is in question was last heard of is more than seven years there is no presumption that such person died during the first period of seven years and not at any subsequent period *Dharup Nath* v *Gobind Saran I L R 8 All 614* discussed *In re Phene's Trusts L R 5 Ch A 139 Narayan Bhagvant* v *Shriniwas 8 Bom L R 226, Fani Bhushan Banerji* v *Surjya Kanta Roy Chowdhry I L R 35 Calc 25* and *Srinath* v *Probodh Chunder Das 11 C L J 580* referred to MUHAMMAD SHARIF *v* BANDE ALI (1911)

I L R 34 All 36

——— s 110—

See CIVIL PROCEDURE CODE 1908 O XLI R 23 **2 Pat L J 61**

——— *Unoccupied village site—Presumption of title vesting in Government—Party in possession to prove better title—Onus of proof—Adverse possession—Land Revenue Code (Bom Act V of 1879) s 37* The land in dispute was a Gaothan or unoccupied village site The plaintiff alleged that the land came to him at a partition of joint family property and he was in possession.

EVIDENCE ACT (I OF 1872)—*contd*

——— s 110—*contd*

of it for twenty years In 191 the Collector held that the site belonged to Government and ordered the plaintiff to pa s a lease The plaintiff thereupon sued for a decl ration that the site was of his ownership and that the order passed by the Collector might be cancelled It was contended that as the pl intiff was shown to have been in po e sion for a period of twenty years the onus of proving that the plaintiff was not the owner was thrown on the Government under s 110 of the Evidence Act 18 2 *Held* that under old customary law and s 37 of the Bombay Land Revenue Code the presumption aro e that the title to the village site vested in the Government and in order to oust the Government the plaintiff had to prove either that he had got a title better than the title of the Secretary of State or that he had obtained a title by adver e possession of sixty years *Hanmantrav v 71 Se retary of State for India (1900) 25 Bom 28* di cussed *The Secretary of Stat for India v Chellikani Rama Rao (1916) 39 Mad 617* referred to VASTA v SECRETARY OF STATE FOR INDIA

I L R 45 Bom 789

——— s. 114—

See s 25 I. L. R. 35 Mad. 247 and 397

See s 30 I L R 43 Bom 739

See s 106 1 Pat L. J 168

See CONFESSION 2 Pat L J 80

See LIMITATION I L R 40 Calc 898

See LIMITATION ACT 1908 SCH I ARTS 142 AND 144 2 Pat L J 504

See MADRAS REGULATIONS (XXV OF 1802) s 4 I. L. R 38 Mad. 620

See PRINCIPAL AND AGENT I L R 43 Calc 527

See REGISTER OF DEATHS I L R. 46 Calc 152

See REGISTRATION ACT (III OF 1877) ss 32 60 75 I. L. R 34 All. 253

See RENT DECREE I L R 43 Calc 170

See WARRANT ATTACHMENT 3 Pat L. J 636

——— *Burden of proof—Su t on mortgage bond—Production b plaintiff of copy of bond on the ground of loss of the original—Defendant admission of execution and production of original with payment of debt endorsed by agent of mortgagee—Rebuttal of defendants evidence by plaintiff with false story* In a suit for money due on a mortgage bond the plaintiff produced only a copy of the document alleging in his plaint that it had been lost The defendant admitted its execution but alleged that the debt had been discharged and in support of his allegation he produced the original document containing the endorsement of the mortgagee through her agent of payment of the debt The Subord nate Judge relying on s 114 of the Evidence Act put the *onus* on the plaintiff who to account for the posses ion of the bond by the defendant set up a case supported by witne ses which both Courts below held to be false The Subordinate Judge dismi sed the suit The Judges of the Judicial Commissioner s court disbelieved the evidence on both sides set aside the presumption under s 114 of the Ev dence Act and endeavoured to make out a case for the plaintiff based on a theory of their own *Held* (reversing that d ci sion) that the first Court was right in holding that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of proving that the debt was still out standing and that the Appellate Court should not have di regarded the presumption under s 114 in favour of a po sibility bas d on surmise Sus picion though a ground for scrutiny could not be made the foundation of a decision MUHAMMAD MEHDI HASAN KHAN v MANDIR DAS (1912)

I L R 34 All 511
17 C W N 49

——— *Presumption aris ing under— Transfer of Property Act (IV of 1882) s 106—Notice to quit—Service by post* A notice to quit was given by registered post but the letter containing the notice was returned by the post office the addressee having refu ed to accept it *Held* that under s 114 of the Evidence Act the Court was entitled to presume that the letter con taining the notice r ached the defendant and the fact that the letter was returned by the post office as not accepted by the addressee did not destroy the presumption GIRISH CHANDRA GHOSH v KISHORE MOHAN DAS (1918) 23 C W N 319

——— ss 114, 133—

See ACCOMPLICE I L R 38 Calc 96

——— s 115—

See ADVERSE POSSESSION I L R 40 Calc 173

See BENAMI I L R 46 Calc 566

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 258 I L R 34 Bom 575

See EASEMENT ACT 1882 s 1? AND 47 I. L R 45 Bom 80

See ESTOPPEL I L R 36 Mad. 564
I L R 39 Calc 513

See LANDLORD AND TENANT (INTEREST) I L R 46 Calc 1079

See [illegible] I L R 1 Lah. 389

See TRANSFER OF PROPERTY ACT 1882 s 123 I. L R 45 Bom 164

——— Adjustment out ide the Court—*Civil Procedure Code (Act XIV of 1882) s 258—Adjustment or payment of decree—Decree holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872) s 115* A decree was a ljusted outside th Court o notice was given to the Court of the adjustment and its sanction was not taken under s 2 8 of the Civil Procedure Code of 188. The decre holder re ceived payment under the adjustment and after some tim applied to execute the decree irre p ctive of the adjustment The judgment debtor pleaded the adjustment as a bar to execution The d cree holder contended that the adjustment not hav n been certified to the Court it could n t recogni e is as valid but was bound to execute the decree The Subordinate Judge overruled the contention holding that as the decree holder had aft adjustment received for several y ar mone h

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EVIDENCE ACT (I OF 1872)—contd

——— s 115 —contd

estopped by conduct under s 115 of the Indian Evidence Act 1872 *Held* that the view of the Subordinate Judge gave the go by to the plain language of the last paragraph of s 258 of the Civil Procedure Code 1882 There is no room left by the law for the operation of the law of estoppel in the matter of execution The last paragraph of s 258 enacts a special law for a special purpose whereas s 115 of the Indian Evidence Act 1872 relates to the general law of estoppel and the principal is that a special law overrides for its purposes the general law *Per* CHANDAVARKAR J —Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice and decree holders who enter freely into adjustments outside the Court and do not certify them as required by law but fraudulently apply for execution ignoring the adjustment should be dealt with under the criminal law *Per* HEATON J —The purpose of s 258 of the Civil Procedure Code 1882 is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree TRIMBAK RAJKRISHNA v HARI LAXMAN (1910) I L R 34 Bom 575

——— *Estoppel—Acquiescence—Both parties equally conversant with true state of facts—Vague allegations—Real controversy to be ascertained by the Judge* Where parties make vague and loose allegations it is essential to the correct determination of the suit that the real controversy should be ascertained by the Judge by questioning their legal advisers as to what is exactly their position in the matter Where both parties to a suit are equally conversant with the true state of facts it is absurd to refer to the doctrine of estoppel In the year 1871 Government granted to the defendants predecessor in title a certain plot of land situate at Dhandhuka The grant expressly stated that a strip of land belonging to Government was the southern boundary of the plot so granted This statement was repeated in the mortgage deed executed by the defendants predecessor in title to the defendants themselves in the year 1893 In the year 1895 the defendants purchased the said plot and encroached on the strip by extending their building on it Thereupon the Secretary of State for India in Council brought a suit against them to recover possession of the strip after removing the defendants encroachment The suit was brought in the year 1908 The defendants plea was that they were in possession and enjoyment for a long time and consequently there was acquiescence and estoppel on the part of the officers of Government and Dhandhuka Municipality and that they wished to lead evidence to prove their plea *Held* that the defendants title deeds having brought to their knowledge the title of the Government the doctrines of estoppel and acquiescence were not applicable and the suit was governed by sixty years limitation, the Government being a party to it PANCHODLAL VANDRAVANDAS v THE SECRETARY OF STATE FOR INDIA (1910) I L R 35 Bom 182

——— *Estoppel—Minor if may be estopped from repudiating contract induced by representation that he was sui juris—Misrepresentation not fraudulent—Contract Act (IX of 1872) s 10* The law of estoppel must be read subject to other laws such as a Indian Contract Act and a minor cannot be made liable upon a contract by means of an estoppel under s 115 of the Indian Evidence Act *Dhurmadas v Brohmo Dutt I L R 25 Calc 616 s c 2 C W N 330* followed *Surendra Nath Roy v Krishna Sakhi Dasi 15 C W N 239* where there was fraudulent misrepresentation distinguished GOLAM ABDIN SARKAR v HEM CHANDRA MAJUMDAR (1915) 20 C W N 418

——— *Estoppel—Minor included in person —Minor passing himself off as a major is bound by his contract—Sale of house* The plaintiff purchased a house from defendant No 2 who was not clearly a minor in appearance and who represented to the plaintiff and caused her to believe that he was a major In a suit by the plaintiff to recover possession of the house defendant No 2 pleaded his minority *Held* negativing the plea that defendant No 2 being a person within the contemplation of s 115 of the Indian Evidence Act 1872 and having by direct declaration intentionally caused the plaintiff to believe that he was a major was precluded absolutely from denying the truth of that assertion *Ganesh Lala v Bapu I L R 21 Bom 198* followed DADASAHEB DASPATHRAO v BAI NAHANI (1917) I L R 41 Bom 480

——— *Estoppel—Owner causing person without legal title to have her name registered as proprietor in Revenue Register—Conveyance sued on challenged as invalid on account of vendor s minority—Failure to prove minority—Onus—Co defendants res judicata as between* Property belonging to B s estate then under management under the provisions of the Chota Nagpur Encumbered Estates Act having been put up to sale by the manager was bought by K who either was a *benamidar* for B or whose title was extinguished by reason of his not taking a conveyance of it B then caused K's son to execute a conveyance of the property to B s natural daughter R and later on actively assisted her in a proceeding for mutation of names in the Revenue Register for which R applied Her name was registered and she thus became bound for all the State liabilities which attach to registered holders of immoveable property On B s death, his widow C sued for a declaration that the property was hers making P and J B s son and heir defendants That suit was dismissed the Court holding as between P and J that the property was P s The plaintiff claiming under a conveyance executed in his favour by R sued for recovery of the property from J who *inter alia* pleaded that P was an infant at the date of the conveyance which in consequence was invalid *Held* that the onus to prove minority being on defendant defect in his proof could not be cured by a mere criticism of the plaintiff's evidence and the defendant having failed to bring reliable evidence to prove his assertion the conveyance must stand That the decision in C's suit as between R and B who were co defendants was not *res judicata* in the present suit That B was estopped from questioning P s title to the property JAGANNATH PRASHAD SINGH v SYED ABDULLAH (1918) I L R 45 Calc 909 22 C W N 891

——— ss 115 116—

See ADMINISTRATOR PENDENTE LITE. I L R 41 Calc 771

See WAKF I L R 37 Bom 447

EVIDENCE ACT (I OF 1872)—contd

———— ss 115 116 117—*I s if maj d ry l nr s t lle aft r esj ry (f t m—I on g vn by le ard retunel afte xp j of t n—Estoppel rul s of—E id n e Act f ccha t to stoppel* A lessee o lon a retains th po ession he obtained from the lessor cannot even after his term has expired set up in the lessor's suit for ejectment the defence that the lessor had no title at the time the lease was granted This rule has not been affected by s 116 of the Indian Evidence Act S 115 to 117 of the Evidence Act are not exhaustive as to the rules of estoppel in force in British India BHAGAVANTA BEWAH *v* HIMMAT BADLAKAR (1916) **20 C W N 1335**

———— *Estoppel*—There can be no estoppel if the party to whom the represent ation was made did not believe it to be true for in such a case the resulting conduct is in no sense the effect of the preceding declaration S 115 does not apply to such a case Under Hindu Law a bequest of income without disposing of the corpus is probably void as offending the Rule against Perpetuities Under the same law gifts to women except a widow convey an absolute estate in the absence of words of limitation JAGARNATH PRASAD *v* JAIKISHUN PRASAD **1 Pat L J 16**

———— s 116—

See BENAMI TRANSACTION
I L R 37 All 557

See LANDLORD AND TENANT
I L R 36 Mad 53

———— *Landlord and tenant—Denial of landlord's title—Estoppel* When once a person is the tenant of another person he cannot be allowed to deny that the person whose tenant he was was the owner when the tenancy was created He can no doubt admit that his land lord was the owner at the commencement of the tenancy and allege and prove by evidence that the landlord's estate has subsequently come to an end but he cannot deny that at the com mencement of the tenancy the person with whom he entered into the contract was the owner of the property and this disability is not removed by the determination of the tenancy *Pita Kunwar v Dhiraj Ranjit Singh I L R 37 All 557* followed GANPAT PAI *v* MULTAN (1916)
I L R 38 All 226

———— *Estoppel—Landlord and tenant—Tenant not let into possession by the landlord—Whether estopped from denying the landlord's title to the property* Held by the Full Bench (SESHA GIRI AYYAR and PHILLIPS JJ ABDUR RAHIM Offg C J dissenting) that a tenant who has executed a lease but has not been let into pos ses sion by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud misrepresentation or coercion *Per* ABDUR RAHIM Offg *C J*—A tenant who was let into possession is estopped from denying a land lord's title A tenant who was not let into pos ses sion by the person seeking to eject him is not estopped from denying the plaintiff's title he may show that the title is in some third person or in himself But the execution of a lease or payment of rent by the defendant is *prima facie* proof of the plaintiff's title which the Court dealing with the evidence will ordinarily treat as conclusive in his favour unless the fact is sufficiently explained In most cases of this nature the presumption in favour of the plaintiff can only be displaced by the de fendant showing that the attornment was made by him in ignorance of the plaintiff's title or was in duced by fraud misrepresentation or coercion VENKATA CHETTY *v* AIYANNA GOUNDAN (1916)
I L R 40 Mad 561

———— s 117—

See ss 115 116 **20 C W N 1335**

See TRADE MARK
I L R 42 Calc 262
I L R 49 Calc 814

———— s 118—

See APPEAL **I L R 41 Calc 406**

See OATH ACT (X OF 1873) ss 5 6 13
I L R 38 All. 49
6 Pat L J 148

———— ss 118 132—

See WITNESS **I L R 45 Calc 720**

———— s 122—

See EVIDENCE **I L R 40 Calc 891**

———— *Evidence Act (I of 1872) s 122— Representative in interest —Dis closure by wife of communications made by deceased husband during marriage* Where there is no re presentative in interest who can consent under s 122 of the Evidence Act to the disclosure of communications made by a deceased husband to his wife during marriage the wife should not be permitted even if willing to disclose such commu nications The widow of a deceased husband is not his representative in interest for the pur pose of giving such consent NAWAB HOWLADAR *v* EMPEROR (1913) **I L R 40 Calc 891**

———— ss 123 124 125—*Privilege—Depart mental enquiry into conduct of Police officers state ments made by witnesses at—Trial of Police Officers on charge of taking illegal gratification—Court's duty to send for the statements and allow accused to cross examine thereon* Statements made by witnesses in the course of departmental enquiry into the conduct of Police Officer who were subsequently put upon their trial on charges of taking illegal gratification are not privileged under ss 123 124 or 125 of the Evidence Act and the accused are entitled to cross examine the witnesses under s 153 of the Evidence Act on the statements made by them at the departmental enquiry *Empress v Ramadhan Maharun 2 Bom L R 399* HARBANS SAHAI *v* EMPEROR (1912) **16 C W N 431**

———— ss 123 124, 163—

See EASEMENTS ACT (V OF 1882) s 15
I L R 39 Mad. 304

———— s 125—

See LIMITATION **I L R 40 Calc 898**

———— s 126—*Professional confidence stat ment made by client to pleader in—Disclosure with out client's consent—Impropriety—Inadmissibility in evidence* Plaintiff sought to prove that defendant who had recovered a decree for possession of pro perty against certain third parties was plaintiff's *benamdar* and for that purpose examined defen dant's pleader in that suit who deposed that defendant had informed him that he was plaintiff's

EVIDENCE ACT (I OF 1872)—*contd*

———— s 126—*contd*

benamdar *Held* that the statement of the pleader having been made without his client s consent was inadmissible in evidence under s 126 Evidence Act The pleader acted improperly in disclosing without his client s consent communications made to him in confidence as pleader BAKAULLA MOLLAH v DEBIRUDDI MOLLAH (1912)
16 C W N 742

———— *Privilege of witness—Vakil and client—Information gained by vakil in case of former employment though not by direct oral or written communication* S 126 of the Indian Evidence Act 1872 applies as much to what a witness has learned by observation as *e g* by watching a manufacturing process being carried on as to what is communicated to him by word of mouth or writing In the course of his employment to defend certain manufacturers of a substance called *banslochan* against a charge of creating a nuisance in the process of manufacture the process in question was shown to the vakil engaged by the manufacturers *Held* that such vakil could not afterwards being subpoenaed as a witness for the applicant in an application for revocation of patent against the same manufacturers be compelled to disclose what he had learned of the process in the course of his former employment GOPI LAL v LAKHPAT RAI (1918)
I L R 41 All 125

———— s 132—

See FALSE EVIDENCE
I L R 37 Calc 878

See THUMB IMPRESSION
I L R 39 Calc 348

See WITNESS
I L R 45 Calc 720

1 ———— *Penal Code (Act XLV of 1860) s 499—Witness—How far a statement made by a witness in giving evidence is privileged* A person who whilst giving evidence as a witness in Court has made a statement which *primâ facie* amounts to defamation under s 499 of the Indian Penal Code may plead one or other of the exceptions to that section or he may claim the protection of the proviso to s 132 of the Indian Evidence Act 1872 but in the latter case he must show that he was *compelled* to make the statement alleged to be defamatory in the sense that he had asked to be excused from answering the question which led up to it and the Court had obliged him to answering it *Queen* v *Gopal Dass I L R 3 Mad 271 Queen Empress* v *Moss I L R 16 All 88* and *Emperor* v *Ganga Prasad I L R 29 All 685* referred to KALLU v SITAL (1918) I L R 40 All 271

———— *Defamation—Prosecution of witness in respect of statement made in answer to a question put by the court* *Held* that a witness in a civil suit cannot be prosecuted for defamation in respect of an answer made by him to a question asked by the court *Queen Empress* v *Moss I L R 16 All 88* and *Kallu* v *Sital I L R 40 All 271* referred to EMPEROR v GANGA SAHAI I L R 42 All 257

2 ———— *Witness—Defamation—Statement made on oath by a witness in a criminal case in answer to a question—Witness compelled to answer even if he has not objected* Although a voluntary statement made by a witness may stand on a different footing an answer given by a witness in a criminal case on oath to a question put to him either by the court or by counsel on either side especially when the question is on a point which is relevant to the case is within the protection afforded by s 132 of the Indian Evidence Act 1872 whether or not the witness has objected to the question asked him *Queen* v *Gopal Das I L R 3 Mad 271 Queen Empress* v *Moss I L R 16 All 88 Kallu* v *Sital I L R 40 All 271* and *Ganga Sahai* v *Emperor I L R 42 All 257* not followed EMPEROR v CHATUR SINGH I L R 43 All 92

———— s 133—

See s 25 I L R 35 Mad 247 and 397

See ACCOMPLICE I L R 38 Calc 96

———— s 135—

See CHARGE I L R 43 Calc 957

———— *Per Curiam—While Counsel has discretion, the Court has also power under s 135 of the Evidence Act to direct the order in which witnesses cited by a party shall be examined* *In the goods of* GOPESSUR DUTT (1911)
16 C W N 205

———— s 137—

See CRIMINAL PROCEDURE CODE s 4
6 Pat L J 644

———— ss 143 154—

See CHARGE I L R 42 Calc 957

See CROSS EXAMINATION
I L R 42 Calc 957

———— ss 144—

See CONFESSION 2 Pat L J 80

———— s 145—

See HINDU LAW—ADOPTION
I L R 39 Bom 441

See HINDU LAW—MINOR
I L R 38 Mad 166

———— ss 145 33—*Depositions of witnesses in a criminal trial use of in supporting or contradicting them in a subsequent civil suit—Irregularity in procedure* In the absence of proof of circumstances specified in s 33 of the Evidence Act the importing in bulk in a civil suit of depositions of witnesses recorded in a criminal trial was a serious irregularity The depositions could not in such circumstances be used even to support the evidence the witnesses gave in the civil suit Where they were used to contradict the witnesses but without giving them opportunity to tender their explanation or to clear up the particular points of ambiguity or dispute *Held* that the procedure was contrary to general principles and to the specific provisions of s 145 of the Evidence Act *Valubai* v *Govind Kashinath I L R 24 Bom 218 221* approved BAL GANGADHAR TILAK v SHRINIWAS PANDIT (1915) 19 C W N 729

———— s. 153 154—

See WRIT I L R 47 Calc 1043

EVIDENCE ACT (I OF 1872)—*contd*

——— s 154—

See 143 I L R 42 Calc 957

——— ss 155 and 157 —

See Police Diaries 2 Pat L J 568

——— s 157 —

See 4 I L R 34 Bom 599

I L R 35 Mad 247 and 397

See Criminal Procedure Code (Act V of 1898) s 162

I L R 39 Bom 58

See ss 39 & 17 1 9

2 Pat L J 42

——— s 159—

——— *Held that under the* provisions of ss 159 and 160 of the Evidence Act an officer while giving his evidence was entitled to refresh his memory *from the entries in the* register written by his clerk and which he himself signed daily ABDUL SALIM v KING EMPEROR

26 C W N 660

——— s 163—

See Easement Act (V of 1882) s 1

I L R 39 Mad 304

——— s 165—

See s 132 I L R 42 All 257

See Practice I L R 39 Bom 326

——— *Suit under Registration Act (XVI of 1908) s 77—Suit to enforce registration of a will—Evidence taken before Sub Registrar filed in Court by the consent of parties—Evidence not found to be relevant under s 33 of the Act or otherwise—Judgment and decree based on such evidence whether valid* A suit instituted under s 77 of the Registration Act to enforce registration of a will was decided by the Court on evidence taken before the Sub Registrar and filed as evidence in the suit by consent of the parties who did not want to adduce any further evidence in the Court The Court did not find that the evidence was relevant under s 33 or any other section of the Evidence Act but admitted the same solely on the ground of the consent of the parties On objection being taken in appeal to the validity of the judgment *Held* that the judgment was invalid under s 165 of the Evidence Act as it was not based on facts declared to be relevant by the Act and duly proved that the consent of parties could not take the place of a declaration of the Evidence Act and that consequently the judgment and the decree should be set aside *Sri Raja Prakasarayanim Garu v Venkata Rao I L R 38 Mad 160* dissented from PONNUSWAMI PILLAY v SINGARAM PILLAY (1918)

I L R 41 Mad 731

——— s 167—

See Deposition

I L R 46 Calc 895

See Evidence Act ss 5 3 167

5 Pat L J 411

——— *Trial by Jury—Misdirection improper admission of evidence whether amounts to—Counter information—Criminal Procedure Code (Act V of 1898) s 423—Powers of the High Court in a jury trial* Where in his charge to the jury the Sessions Judge referred to a certain counter information lodged by one of the accused as if it contained an admission by all the accused of their presence at the scene of occurrence *Held* that the counter information was wrongly admitted as evidence against the accused other than the accused who lodged it That the observation of the Sessions Judge on the counter information amounted to a misdirection only in so far as a wrong admission of evidence implies a misdirection and that notwithstanding such a misdirection the High Court can deal with the case in accordance with the provisions of s 167 Indian Evidence Act But on the general principle enunciated in the case of *Sakhi Sheikh v Emperor 4 C W N 576* the case of the accused against whom the counter information was wrongly admitted was sent back to be retried by the Sessions Judge and a Jury SHEIKH HAZIR v EMPEROR (1910)

14 C W N 493

——— *Application in second appeal after finding of fact arrived at in part on inadmissible evidence* Where in a suit on a bond plaintiff sought to save the bar of limitation by proving payment of interest by the defendant at Faridpur on a date on which the defendant averred he was at Pegu and which plea the latter sought to establish by producing a certificate which he swore he had received *from the hands of the manager of* the Pegu Club and the District Judge found first that the plaintiff s evidence in support of his case was *discrepant* and *not satisfactory* and went on to hold that there was sufficient proof of the certificate — and in this view dismissed the suit *Held that* the certificate being inadmissible in evidence and it being impossible for the High Court to say how far the lower Appellate Court was influenced in its decision by it there ought to be a retrial GOMEZ v IDOO MIAN (1911)

19 C W N 1148

EVIDENCE FOR THE DEFENCE

See Practice I L R 40 Calc 378

EVIDENCE OF ASSOCIATION

——— *admissibility of*—

See Security for good behaviour

I L R 37 Calc 91

EVIDENCE OF BAD CHARACTER

See Libel I L R 37 Calc 760

EVIDENCE OF IDENTITY

See Conspiracy I L R 41 Calc 754

EVIDENCE OF JURORS

See Jury trial by

I L R 40 Calc 693

EVIDENCE OF REPUTATION

See Burmese Law—Marriage

I L R 39 Calc 492

See Criminal Procedure Code, s 110

25 C W N 334

EVIDENCE ON OATH

See Judicial Proceeding

I L R 37 Calc 52

EVIDENCF ON COMMISSION

See WILL I L R 47 Calc 1043

EVIDENTIARY VALUE

See CONFESSION I L R 40 Calc 873

EXAMINATION

See INSOLVENCY I L R 44 Calc 374

EXAMINATION OF WITNESS

See INSOLVENCY I L R 38 Calc 542

———— de novo—

See MAGISTRATE TRANSFER OF
I L R 37 Calc 812

EXAMINATION ON COMMISSION

1 ———————— *Purdanashin lady —Exemption—Code of Civil Procedure (Act V of 1908) ss 132 133—Costs* S 132 of the Code of Civil Procedure covers the case of a woman who although she may have abandoned the protection of the *purda* should not be compelled to give evid ence in Court having regard to the class and com munity to which she belongs SOLOMON v JYOTSNA GHOSAL (1917) I L R 45 Calc 492

2 ———————— *Purdanashin lady —Practice—Right of purdanashin lady to be examined on commission—Civil Procedure Code (Act V of 1908) s 132 cl (1)* The petitioner a *purdanashin* lady applied under s 132 cl (*1*) of the Civil Pro cedure Code to be examined on commission The oppo ite party objected on the ground that she had on a former occasion appeared before a Criminal Court to institute a complaint *Held* that she was entitled to be examined on commission and ought not to be compelled to appear in public *Chamat kar Mohiney Dabee v Mohesh Chunder Bose I L R 26 Calc 651 n Mohesh Chunder Addy v Manick Lall Addy I L R 26 Calc 650* followed *In re Hurro Soondrey Choudhrain I L R 4 Calc 20 In re Din Tarni Debi I L R 15 Calc 775 Abhayesuari Debi v Kishori Mohan Banerjee I L R 42 Calc 19 18 C W N 1020 Hem Coomaree Dassee v Queen Empress I L R 24 Calc 551 In re Faridunnissa I L R 5 All 92 In re Basant Bibi I L R 12 All 69* discussed BALAKESHWARI DEBI v JNANANANDA BANERJEE (1917) I L R 45 Calc 697

———————— *Purdanashin lady— Civil Procedure Code (Act V of 1908) ss 132 133 O XXVI r 1—Right of choice as to place of examina tion* The defendant contended that his witness who is a *Purdanashin* lady is entitled to be examined on commission at a place of her own choice or where she happened to be at the time of the issue of the commission *Held* that she had no such right KHITIPATI ROY v DHARANI MOHAN MOO KERJEE (1920) I L R 48 Calc 448

EXCAVATION OF TANK

See PROHIBITORY ORDER
I L R 38 Calc 876

EXCEPTED RISKS

See COMMON CARRIER LIABILITIES OF
I L R 38 Calc 28

EXCESS PROFITS DUTY

———————— *Clubs— B [illegible] —Charities—Exc Profits Duty Act (X of 191)*

EXCESS PROFITS DUTY—*contd*

s 2 The income of a Turf Club consisted of moneys paid by the public as (*i*) entrance fees to the stand paddock and enclosure (*ii*) entrance fee paid by owners of race horses (*iii*) book makers license fees and (*iv*) percentage on the totalisators besides moneys paid by its ordinary members *—Held* that the club carried on business within the meaning of s 2 of the Excess Profits Duty Act (X of 1919) in respect of the above heads and was liable to pay such duty *Carlisle and Silloth Golf Club v Smith [1913] 3 K B 75* relied on CALCUTTA TURF CLUB v SECRETARY OF STATE FOR INDIA (1921)
I L R 48 Calc 844

EXCESS PROFITS DUTY ACT (X OF 1919)

———— s 2—

See EXCESS PROFITS DUTY
I L R 48 Calc 844

———————— It is not necessary that the duty should be assessed within the year for which the duty is payable CHIEF COMMISSIONER FOR INCOME TAX v RAMANATHAN CHETTIAR
I L R 44 Mad 768

———— ss. 4 5 (b) 6 (1) (b)—*Indian Income Tax Act (VII of 1918) s 2 (1)—Capital employed in the business meaning of—money invested in shares in public companies and Government securities—moneys lent and advanced* Moneys invested in the shares of public companies and in Government securities having been treated by the firm as part of the capital of the firm were capital employed in the business of the firm and consequently as such must be included in the capital computation both for the accounting period and the standard years under the Excess Profits Duty Act 1919 Moneys lent to business concerns and individuals were also capital employed in the business and as such to be similarly computed MESSRS MARTIN & Co v THE SECRETARY OF STATE FOR INDIA IN COUNCIL 25 C W N 875

———— ss 3 15 Sch. I— *Offices or employ ments meaning of— Excepted business —Agents of a mill company remunerated by commission— Indian Income Tax Act (VII of 1918) s 51— Reference on application of assessee—Finance (No 2) Act 1915 (5 and 6 Geo 5 89) c 9— Specific Relief Act (I of 1877) s 45—High Court s power of Interference* The petitioners who acted as agents of a mill company and were remunerated by a commission claimed to be exempted from the excess profits duty under clause 2 of Schedule I of the Excess Profits Duty Act 1919 The Collector and the Chief Revenue Authority in appeal decided that the petitioners were not exempt from such duty inasmuch as they constituted a separate firm whose business was different from that of the mill company and was not an office or employment which would be exempted under the Act The petitioners requested the Chief Revenue Authority to refer the question of exemption to the High Court under s 51 of the Income Tax Act 1918 but the latter declined to do so and the petitioners applied to the High Court under s 45 of the Specific Relief Act *—Held* that the proviso to Schedule I must be read as governing generally the three kinds of businesses enumerated under headings (1) ( ) and (3) of the Schedule or in other words as including the businesses mentioned therein within the terms of s 3 of

EXCESS PROFITS DUTY ACT (X OF 1919)—contd

———— ss 3, 15 Sch I—contd

the Act *Held* further on the facts that the petitioners were not to be considered as carrying on a business excepted under the above Schedule *Held* also that it was not incumbent on the Chief Revenue Authority to make a reference to the High Court whenever an application for a reference was made to him and that in the present case he exercised a proper discretion in coming to the conclusion that a reference was unnecessary IN THE MATTER OF DORAISWAMI IYER & CO

I L R 45 Bom 1064

———— s 6(1) (a) and (b) and Schedule II cl 1 Proviso—*Cash and investments—Accumulated profits not to be considered as capital unless employed in business—Employed in the business meaning of—Income Tax Act (VII of 1918) s 51—High Court s power of interference—Specific Relief Act (I of 1877) s 45* Under the proviso to clause (1) to Schedule II of the Excess Profits Duty Act 1919 accumulated profits of a company cannot be treated as capital unless they are employed in the business Whether or not they are employed in the business is a question of fact which the Chief Revenue Authority is entitled to decide on the materials before it the words employed in the business in the proviso *primâ facie* bear their natural meaning of *actually* employed in the business and cannot be construed as if the words were employed or *intended to be employed* in the business *Per* MACLEOD C J—It would be open to the Court to consider the grounds on which the Chief Revenue Authority (acting under s 51 of the Indian Income Tax Act 1918) was satisfied that a reference was unnecessary For instance if a question arose with regard to the interpretation of a section which was so complex so intricate that it was clearly advisable that the question should be finally determined by a judicial authority rather than by the Chief Revenue Authority I doubt whether that Authority would be justified in saying that it was satisfied that a reference was unnecessary IN THE MATTER OF THE EXCESS PROFITS DUTY ACT (1920)

I L R 45 Bom 881

EXCHANGE

See ENCUMBRANCE

I L R 46 Calc 891

See TRANSFER OF PROPERTY ACT (IV OF 1882) ss 118 119 120 54 AND 55 CL 6 (b) I L R 38 Mad 519

ss 54 118 I L R 40 All 187

———— rate of—

See FOREIGN CURRENCY

I L R 48 Calc 886

EXCISABLE ARTICLE

See BENGAL EXCISE ACT

See BOMBAY ABKARI ACT

See MADRAS ABKARI ACT

See UNITED PROVINCES EXCISE ACT (IV OF 1910) s 60

I L R 35 All 575

———— *Bonâ fide medicinal preparation containing alcohol—Unlicensed manufacture and sale of such—Excise Act (Beng V of 1909) ss 2 (7) (14) and 46 (a) as amended by Beng*

EXCISABLE ARTICLE—contd

Act VII of 1914 A medicinal preparation containing alcohol (ranging from 68 3 / to 87 / proof) is an excisable article within the meaning of the Bengal Excise Act (V of 1909) s 2 (7) (14) as amended by Beng Act VII of 1914 *Ganesh Chunder Sikdar v Queen Empress I L R 24 Calc 157 Mati Lal Chandra v Emperor I L R 39 Cal 1053 Satish Chandra Roy v King Emperor 17 C W N 939* declared obsolete GANESH CHANDRA SIKDAR v EMPEROR (1917)

I L R 45 Calc 82

———— *Spirituous and fermented liquors —Drugs containing spirituous liquo —Manufacture sale or possession—Transport import or export—Bengal Excise Act (V of 1909) ss 46 56 55 and 57—Board Notifications—Licens —Misconduct of servant or agent* The meaning of the Legislature in amending the Bengal Excise Act (VII of 1878) was to prevent chemists and vendors of drugs selling intoxicating liquors or otherwise dealing with them and not to penalise the use of beneficent drugs To be an excisable article liquor must be intoxicating liquor The term spirituous liquor is not intended to include a medicinal preparation merely because it is a liquid substance containing alcohol in its composition S 55 of the Bengal Excise Act (V of 1909) refers to manufacture sale or possession of excisable articles. It does not apply to import transport or export S 56 make the holder of a license permit or pass liable for the misconduct of his servant or agent in matters of import transport or export *Ganesh Chunder Sikdar v Queen Empress I L R 24 Calc 157* approved MATI LAL CHANDRA v EMPEROR (1912)

I L R 39 Calc 1053

EXCISE

———— *Denatured spirit meaning of—Dilution of denatured spirit with water rendering it fit for human consumption— Excisable article and liquor whether diluted denatured spirit is— Manufacture meaning of—Mere dilution of denatured spirit not a process —Bengal Excise Act (Beng V of 1909) ss 2 (6) (7) (11) (15) 46 48 74 81 84—Application of the Criminal Procedure Code to trials for excise offences—Misjoinder of charges—Criminal Procedure Code (Act V of 1898) s 233* The words effectually and permanently rendered unfit in s 2 (6) read with s 48 of the Bengal Excise Act appear to contemplate such a process of denaturing as will defy any chemical treatment which while not substantially increasing the bulk of the liquid renders the spirit fit for human consumption Where the liquid was so manipulated as to lose its characteristics of a denatured spirit and the accused had succeeded in the attempt to render the spirit fit for human consumption the conviction under s 48 was *held* bad in the above meaning *Semble* If the words imply only a process which would be permanently effective in the absence of some chemical treatment or process of filtration the conviction under s 48 was still bad for want of evidence that the spirit was in fact ever so denatured by the accused The words unfit for human consumption may be taken to mean liable to be injurious to health The term manufacture in s 2 (11) of the Act does not include the act of mere dilution of denatured spirit with water but a continuous and regular action or a succession of actions taken or carried on in a definite manner and

EXCISE—*contd*

accomplishment of some result *Quære* Whether denatured spirit diluted with water is an exciseable article or liquor within s 2 (7) and (14) of the Act S 75 and 81 of the Act apply to proceedings before a Collector and s 84 shows that the Criminal Procedure Code is applicable to trials before a Magistrate under the Act subject to specified restrictions An appeal therefore lies under s 410 of the Code from a conviction and sentence by a Presidency Magistrate passed under the Act The acts of manufacturing the exciseable article brought into Court bottling and possessing the same and of selling from time to time various other and similar articles not before the Court and of attempting to render denatured spirit fit for human consumption do not constitute the same transaction and a trial in respect of all such acts is bad for misjoinder under s 233 of the Code S 233 applies to trials of summons cases *King Emperor* v *San Dun 3 L B R 52* approved UPENDRA NATH BISWAS v EMPEROR (1913)

I L R 41 Calc 694

EXCISE ACT (X OF 1871)

See ACT OF STATE

I L R 39 Calc 615

EXCISE ACT (E B AND ASSAM I OF 1910)

——— ss 36 53 72—*Medicated article containing Bhang Kameshwar Modal Manufacture and sale by medical practitioner for medicinal purposes protected—S 72 effect and scope of—Notification by Local Government—Rules by Board of Revenue* The petitioner who was a Kabiraj was charged under s 53 of the Eastern Bengal and Assam Excise Act with the manufacture and sale of an exciseable article namely a mixture called Kameshwar Modak which contained *bhang* and which admittedly was a medical article prepared by the petitioner for medical purposes *Held* that in regard to the manufacture and sale of the article in question the petitioner was protected by s 72 of the Act the language of which is wide enough to take any case to which it applies without restriction out of the Act SATISH CHANDRA ROY v THE KING EMPEROR (1913)

17 C W N 939

EXCISE LICENCE

See UNITED PROVINCES EXCISE ACT (IV OF 1910) s 64 (c)

I L R 40 All 563

EXCISE OFFICERS

See PENAL CODE s 332

I L R 37 All 353

——— *Excise officers whether police officers—Retracted confessions admissibility of—Confession whether exculpatory statements amount to—Evidence Act (I of 1872) ss 25 30—Duty of Presidency Magistrate to examine the accused when written statement filed—Duty of such Magistrate to make a full and proper record of material facts—Criminal Procedure Code (Act V of 1898) ss 342 362—Benefit of the doubt when facts are consistent with innocence* Excise officers are not police officers within s 25 of the Evidence Act A confession made out of Court but retracted

EXCISE OFFICERS—*contd*

during the trial is nevertheless admissible under s 30 of the Evidence Act The word makes in s 30 only means that a confession may be taken into consideration against the co accused as well as against the maker To determine whether a statement is a confession it is essential to consider the nature of the offence charged or likely to be charged and to read the statement as a whole A statement consistent with an attempt on the part of the maker to exculpate himself from the charge made or likely to be made against him is not a confession and is inadmissible under s 30 of the Evidence Act against the co-accused The putting in of a written statement by the accused does not absolve the Court from the duty of carrying out the provisions of s 342 of the Criminal Procedure Code It is the duty of a Presidency Magistrate under s 362 of the Code to make a full and proper record of all the material facts, whether appearing in the examination in chief or cross examination especially when the witness is the only independent prosecution witness (all the other witnesses being excise officers engaged in the arrest) and there is an appeal so as to enable the Appellate Court to deal with the case Where the Magistrate recorded only a few sentences of the cross examination which took place on two days the High Court looked into and compared the notes of the evidence made at the trial by a local pleader with the Magistrates record of the same to satisfy itself as to the incompleteness of the record Although the facts may give rise to grave suspicion on a charge under s 9 (c) (d) of the Opium Act yet if the view that the accused was not in possession of the opium and took no part in its transport but had only to pay the fare is consistent with the evidence after elimination of the inadmissible parts of it the accused ought to have the benefit of the doubt AH FOONG v EMPEROR (1918)

I L R 46 Calc 411

EXCLUSION OF FEMALES

See HINDU LAW—INHERITANCE

I L R 42 Calc 1179
I L R 45 Calc. 17

EXCLUSIVE POSSESSION

——— claim of—

See DISPUTE CONCERNING LAND

I L R 38 Calc 889

EXCOMMUNICATION

——— from caste—

See TORT I L R 39 Mad 433

EXCULPATORY STATEMENTS

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS

I L R 41 Calc 601

EXECUTANT

——— personal liability of—

See NEGOTIABLE INSTRUMENTS ACT (XVI OF 1881) s 28

I L R 38 Mad 482

EXCISE—contd

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17 C W N 939

EXCISE LICENCE

See UNITED PROVINCES EXCISE ACT (IV OF 1910) s 64 (c)
I. L. R 40 All 563

EXCISE OFFICERS

See PENAL CODE s 73
I L R 37 All 353

———————— *Excise officers whether police officers—Retracted confessions admissibility of—Confession whether exculpatory statements amount to—Evidence Act (I of 1872) ss 25 30—Duty of Presidency Magistrate to examine the accused when written statement filed—Duty of such Magistrate to make a full and proper record of material facts—Criminal Procedure Code (Act V of 1898) ss 342 362—Benefit of the doubt when facts are consistent with innocence* Excise officers are not police officers within s 25 of the Evidence Act A confession made out of Court but retracted

EXCISE OFFICERS—contd

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I L R 41 Calc. 601

EXECUTANT

———— personal liability of—

See NEGOTIABLE INSTRUMENTS ACT (XVI OF 1881) s 28.
I L R 38 Mad. 482

EXECUTING COURT

——— competency of to enquire in o title of transferee—

See Civil Procedure Code (Act V of 1908) O XXI r - (3)
I L R 40 Mad 295

——— jurisdiction of—

See Execution of Decree
I L R 37 Calc 5,4

EXECUTION

See Civil Procedure Code 185—

s -S -93 I L R 36 Bom 329

s 524A 2 2 285
I L R 36 Bom 519

3 5A I L R 36 Bom 510

See Civil Procedure Code 1908—

4 I L R 45 Bom 241 and 812

s 48 I L R 36 Bom 368

s 60 (c) I L R 41 Bom 475

S 115 O XXI r 89
I L R 4" Bom 735
I L R 45 Bom 945

S 144 I L R 41 Bom 625

Ss - (11) 3
I L R 42 Bom 504

S 11 4, I L R 42 Bom 246

O XXI Rr 73 83

I L R 41 Mad 616

O XXXIV r 14
I L R 43 Bom 631

Sch III s 7 (1) (b) ss 69 70
I L R 37 Bom 32

See Contract Act (IX of 1872) s 70
I L R 42 Bom 556

See Criminal Procedure Code s 145
14 C W N 78

See Decree I L R 43 Bom 412
I L R 36 Bom 42
I L R 40 Bom 504
I L R 44 Bom 22"

See Decree execution of

See Dekkhan Agricultural Relief Act (XVII of 18 9) s 48
I L R 42 Bom 367

See Execution of Decree

See Execution of Document

See Execution Stay of

See Execution sale

See Foreign Decree
I L R 40 Bom 551

See Idol I L R 36 Bom 135

See Injunction I L R 46 Calc 103

See Limitation Act (XV of 1877)—

Arts 1 8 179 I L R 36 Mad 553

Art 1,9 cl. (4)
I L R 34 Bom 68

See Limitation Act (IX of 1908) Sch I—

Arts 181 18-
I L R 4 [illegible] 309

EXECUTION—contd

Art 182 cls (5) and (6)
I L R 42 Bom 420

See Mortgage I L R 37 Calc 897
I L R 41 Mad. 513

See Transfer of Property Act s 85
I L R 34 Bom 354

See Will I L R 47 Calc 1043

——— application for—

See Civil Procedure Code 1 08 s 144
I L R 45 Bom 1137

See Evidence Act (I of 1872) s 92 pro 6 and ss 93 and 95 to 97
I L R 40 Mad 1016

——— application for defective—

See Limitation Act (IX of 1908) Sch I Art 182 cl (5)
I L R 40 Mad 949

——— attachment by petitioner before judgment — sale — Opponent withdrawing the proceed of sale in execution of his decree—

See Civil Procedure Code (Act V of 1908) s 11
I L R 45 Bom 360

——— claimant to Property sold in possession paying into Court—

See Civil Procedure Code 1908 O XXI r 89 I L R 45 Bom 1094

——— claim to property—Burden of proof—

See Attachment
I L R 45 Bom 1020

——— death of judgment debtor—effect of—
I L R 45 Bom 1186

——— decree for partition of property in possession of judgment debtor—

See Adverse possession
I L R 45 Bom 943

——— decree holder attaching mortgage decree of his judgment debtor—

See Civil Procedure Code 1908 O XXI r 53 I L R 45 Bom 343

——— execution proceedings in Court of a Native State—

See Limitation Act (IX of 1908) Art 18? Expl. II
I L R 45 Bom 453

——— executing Court—Inherent powers of—

See Civil Procedure Code 1908 s 115
I L R 45 Bom 946

——— for sale of mortgaged property—

See Civil Procedure Code (Act V of 1908) ss 47 73 104
I L R 39 Mad 5 0

——— of ex parte decree—

See Civil Procedure Code (Act V of 1908) ss. 47 144 1,1
I L R 43 Bom [illegible]

——— of d cree pas d under old [illegible]

See Civil Procedure Code 1908 s 4[illegible]
I L R 45 [illegible]

EXECUTION—*contd*

——— — **of Order in Council**—

See CIVIL PROCEDURE CODE, 1908 O XLV r 15　　1 Pat L J 385

— **purchaser in rights of**

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 17　　I L R 40 Mad 77

— — **stay of**

See SEARCH WARRANT　　I L R 47 Calc 164

See EXECUTION STAY OF　　I L R 38 Mad 700

See CIVIL PROCEDURE CODE 1908 O XLI r 5　　I L R 2 Lah 61

— — **transmission of decrees to Courts of Native States**—

See EXECUTION　　I L R 40 Mad 1069

——— **in statement award decree**—

See CIVIL PROCEDURE CODE 1882 s 47　　I L R 45 Bom 812

— — — **transfer to and sale by Collector**—

See BOM CIVIL COURTS (1869)　　I L R 45 Bom 1132

——— **whether court can restore an application for dismissed for default**—

See CIVIL PROCEDURE CODE　　I L R 2 Lah 63

——— **Decree for rent**—*Suit for redemption—Taking of accounts under the Dekkhan Agriculturists Relief Act (XVII of 1879)—Result of account showing that mortgagee over paid himself from rents and profits—Mortgagees right to execute decree for rent* In virtue of a decree for four years rent passed at a time when the provisions of the Dekkhan Agriculturists Relief Act did not apply the plaintiff (mortgagee) became entitled to recover a certain sum from the defendant (mortgagor) After the introduction of the Dekkhan Agriculturists Relief Act the latter sued the former for redemption of the mortgage of the land in respect of which the rent aforesaid on had been passed on taking accounts in the way directed by the Act it was found that the plaintiff as mortgagee had overpaid himself from the rents and profits of the land The plaintiff thereafter applied to execute his decree for rent Both the lower Courts dismissed the application on the ground that the plaintiff had already recovered more than was due to him as mortgagee from the rents and profits of the land On appeal *Held* that the rent decree must be executed as it stood having regard to the fact that the provisions of the Dekkhan Agriculturists Relief Act did not apply when it was passed and that the accounts which were taken for the purposes of the subsequent decree were taken for a special purpose—that is for enabling the defendant to redeem on favourable terms and did not entitle him to recover anything from the plaintiff by way of set off MUGAPPA v MAHAMAD SAHEB (1906)　　I L R 31 Bom 260

— — **Limitation—Step in aid**—*Accompanying the serving peon and identifying the judgment debtor for levy in aid of execution—Limitation Act (IX of 1908) Art 182 cl (5) and (6)—Court decree ... without notice to judgment debtor—... in time—Decision of binding judgment ...* One of the decree holders accompanying the serving peon and identifying the judgment debtor upon whom notice of the application for execution had been taken out for service does not by itself constitute a step taken by the decree holder in aid of execution within cls (5) and (6) of Art 182 of the Limitation Act Where an application for execution which was reported by the office of the executing Court to be time barred was without notice to the judgment debtor held by the Court to be within time and received and later on dismissed for default *Held* that the decision that the application was not time barred was not binding on the judgment debtor An *ex parte* decree is a good decree but if it is made in the absence of and without notice to the other party it does not bind him and does not prevent him from showing what the true facts of the case were JUGOL KISHORE v CHINTAMONEY (1914)　　18 C W N 1283

——— ——— *Prayer herein for attachment—Attachment ordered—Failure to pay batta—Presumed oral application at the hearing of the petition to issue warrant of attachment—Whether such application is step in aid of execution—Part payment entered in the petition—Civil Procedure Code (Act V of 1908) O XXI r 2 cl 3 without certificate of payment proved—Limitation Act (IX of 1908) s 20 saving of limitation* Where an assignee of a decree filed a petition for execution on the 13th July 1911 and an order of attachment was made on the day of hearing the 12th August 1911 and the petition was subsequently dismissed on the 26th August 1911 on his failure to pay batta within the time allowed and a fresh application was filed on the 10th August 1914 *Held* that though in the above circumstances the Court might presume that the decree holder made an oral application of the day of hearing to proceed with the execution such application was not a step in aid of execution and that the second application filed more than three years after the date of the first was barred by limitation *Held* also that the part payment of a decree amount entered in an execution petition presented within three years from the date of such alleged payment amounts if the fact of payment is proved to a certificate of payment under O XXI r 2 of the Code of Civil Procedure and will operate to save limitation under s 20 of the Limitation Act *Rajam Iyer v Ananthanarayana Aiyar 29 Mad L J 163* and *Lalla Narain v Jelamani Das 20 C L J 131* referred to MASILAMANI MUDALIAR v SETHUSWAMI AYYAR (1917)　　I L R 41 Mad 251

——————— *Application to transmit a decree of a British Court to a Travancore Court whether an execution application or a step in aid of execution—Issue of notice on such application whether affords a fresh starting point under Art 182 cl (6)—Limitation Act (IX of 1908) Art 182 cl 5—Power of British Courts to send their decrees for execution to Courts of Travancore State—Civil Procedure Code (Act V of 1908)—Effect of* *Held* by the Full Bench (i) that in the absence of any provision to that effect in the Civil Procedure Code Courts in British India have no power to send their decrees for execution to the Court in Travancore but may and should send to the Courts the documents they require to enable them to execute these decrees under the powers conferred upon them by the legislative authority in Travancore (ii) that the execution contemplated by the Civil Procedure Code and Art 182 of the Limitation Act being execution by

EXECUTION *contd*

British Courts in India on application made to such Court an application to a British Court in India to send a decree of such Court for execution to a Court of Travancore is neither an execution application nor a step in aid of execution within Art 182 cl (5) and (iii) that the issue of a notice to the judgment debtor on any such application to show cause why the decree should not be transmitted to a Travancore Court does not give a fresh starting point under Art 182 (6) as no such notice is required by the Civil Procedure Code to be issued as a preliminary for execution by the Travancore Court PIERCE LESLIE & Co LTD COCHIN v PERUMAL (1917) **I L R 40 Mad 1069**

———— **Civil Procedure Code**— *Act V of 1908 s 141 O II r 2 Non applicability of to execution applications—consolidating statute construction of* The dismissal of a suit on the ground that no suit would lie to recover mesne profits subsequent to the date of a previous decree which awarded subsequent mesne profits is no bar to a claim thereto in execution of that decree The fact that a decree holder made a previous application for execution to recover mesne profits only for three years subsequent to the plaint and not for a further period also is not a bar under O II r 2 Civil Procedure Code or s 141 Civil Procedure Code as now enacted to another execution application for recovery of mesne profits for the further period *Thakur Prasad v Fakir ullah I L R 17 All 106 s c 22 I A 44* followed *Safdar Ali v Kishen Lal 12 C L J 6* not followed There is nothing in the Code of Civil Procedure to prevent a decree holder from presenting successive applications for realising different portions of his decree When the words of a consolidating statute are clear their effect cannot be cut down by a comparison with the language of earlier statutes S 141 Civil Procedure Code is intended to apply to proceedings in Civil Courts such as probate etc BALASUBRAHMANYA CHETTI v SWARNAMMAL (1913) **I L R 38 Mad 199**

———— **Transfer to Collector**—*Mortgage by judgment debtor—Invalidity—Civil Procedure Code (Act XIV of 1882) s 325 A* When the execution of a decree ordering the sale of immovable property has been transferred to the Collector under s 320 of the Code of Civil Procedure 1882 the effect of s 325 A is that a mortgage of the property or any part of it made by the judgment debtor while the Collector can exercise the powers given to him by ss 322 to 325 is absolutely void and not merely void as against the Collector and those claiming under him *Magniram Sitharam v Bakuba I L R 6 Bom 510* disapproved *Salu Bai v Bapu Khan 13 Nagpur L R 130* approved GAURISHANKAR BALMUKUND v CHINNUMAYA (1918) **L R 45 I A 219**

———— **Civil Procedure Code (Act V of 1908) s 49 and O XXI r 2**—*Satisfaction of decree not certified—Second execution of decree by assignee of decree holder—Suit by judgment debtor for damages against decree holder and assignee maintainability of* Even a decree which has once been satisfied can be executed so long as the satisfaction is not reported to and certified by the Court A judgment debtor who is obliged to satisfy such a decree a second time at the instance of an assignee of the decree holder has a cause of action for damages only as against the decree holder but none against the assignee even though the assignee got the assignment with knowledge of satisfaction

EXECUTION—*contd*

Virarajhava Reddi v Subbakka I L R 5 Mad 397 referred to *Manmohan Karmokar v Dwarka Nath Karmokar 17 C L J 312* and *Goono Monee Dossee v Pran Kishore Doss 13 W R 69* distinguished KRISHNA AIYAR v SAVUTHUTHU PILLAI (1918) **I L R 42 Mad 338**

———— **Attachment and sale of lands**—*Transfer of territorial jurisdiction of Court—Order of Court which did not pass the decree but to which execution was transferred—Attachment and sale of lands by Court after deprivation of territorial jurisdiction validity of —Estoppel against judgment debtor how far binding upon auction purchaser* A Court to which execution of a decree is transferred has no jurisdiction to order either the attachment or sale of immoveables in execution if at the time of the order such Court had no territorial jurisdiction over the immoveables Though a judgment debtor who does not object to a confirmation of a sale by such Court may be estopped from raising the question that the sale was a nullity such estoppel does not operate against the subsequent purchaser of the same property in a sale held by Court having jurisdiction in execution of another decree against the same judgment debtor *Mahomed Muzuffer Hossein v Kishori Mohun Roy (1895) I L R 22 Calc 909* explained *Prayag Roy v Sidhu Prasad Tewari (1908) I L R 35 Calc 817* and *Parsidh Narain Singh v Janaki Singh (1907) 7 C L J 614* dissented from VEERAPPA CHETTY v RAMASAMI CHETTY (1920) **I L R 43 Mad 135**

———— **Pre decree arrangement that decree should be inexecutable in part** *whether recognisable in execution proceedings* An arrangement made prior to decree in a suit that the decree that might be passed should be inexecutable in part is one that cannot be enforced in execution hence a sale held in execution of such a decree in spite of the arrangement is good *Chidambaram Chettiyar v Krishna Vathiyar (1917) I L R 40 Mad 233 (F B)* ARUMUGAM PILLAI v KRISHNASWAMI NAYUDU (1920) **I L R 43 Mad 725**

———— *Civil Procedure Code (V of 1908) O XXI rr 15 16 and O XXII r 10 (1)—Transfer of part of decree—Right of transferee to execute or to join in execution—Prohibition of execution by transferee void under s 28—Contract Act (IX of 1872)—Appeal against orders purporting to be passed under O XXII r 10 Civil Procedure Code* S 146 Civil Procedure Code recognizes the validity of a transfer of a part of a decree and execution thereof by the transferee O XXI r 16 is no bar to the application of the section Such transferee is like a joint decreeholder and can under O XXI r 15 protect his rights either by executing the decree himself or by joining or intervening in the execution by his transferor An agreement by the transferee of part of a decree that the transferor shall conduct execution proceedings and may compromise the same as he thinks fit only constitutes the transferor the agent of the transferee and the agency is revokable An agreement between them that the transferee shall not in any way enforce his rights under the transfer *e g* execute or intervene in execution is void under s 28 of the Contract Act An order purporting to be passed under O XXII r 10 by a Court of first instance is appealable though facts

EXECUTION—*contd*

order should not have been passed under the rule MUTHIAH CHETTIAR v COVINDDOSS KRISHNADOSS (1921) **I L R 44 Mad 919**

————**Stayed by High Court upon Appeal to England**—*furnishing security within a fixed date to the satisfaction of the Subordinate Judge in default execution to be proceeded with—Security furnished but Commissioner s investigation of security not completed within that date—Subordinate Judge whether has jurisdiction to give time to Commissioner and stay sale any further—Specification of time for tendering security* The High Court ordered that execution of a decree be stayed pending the disposal of appeal therefrom to His Majesty in Council upon the Appellant to England giving security to the satisfaction of the Subordinate Judge for a certain sum by the 20th September 1919 and that in default of the said security being given by the 20th September the application for stay of execution was to stand dismissed and the sale to be proceeded with In pursuance of the said order security was offered on the 16th September and the matter was referred to Commissioners for investigation of its sufficiency The Subordinate Judge on 20th September upon an application by the Appellants to England gave the Commissioners time up to the 10th November for submitting their report after the completion of the enquiry and on the 22nd September postponed the sale till the 1st December The Respondents to England moved the High Court against the orders of the Subordinate Judge dated the 20th and the 22nd September as having been made without jurisdiction *Held* that in the special circumstances of the case the High Court should refuse to interfere under s 115 of the Civil Procedure Code That the Commissioners having later on found the security to be sufficient and objections having been or being about to be made by the Respondents to the Commissioners report the Respondents would not be prejudiced if on the hearing of the observations it turned out that the security was sufficient on the other hand if the security was held to be insufficient execution should not be stayed and the sale should take place It will be advisable in the future for the Court to specify definitely the time within which the security which it is desired to offer must be tendered and to give such further directions as may be necessary to ensure the intention of the Court being carried out KEDAR NATH SANYAL v MATILAL DAS **24 C W N 265**

EXECUTION APPLICATION

See CIVIL PROCEDURE CODE (ACT V OF 1908)—

ss 38 39 41 AND 50 O XXI RR 16 26 I L R 37 Mad 23

ss 144 AND 11 EXP IV AND 47 O II R 2 I L R 40 Mad 780

See EXECUTION I L R 38 Mad 199

See LIMITATION ACT (IX OF 1908) ART 182 I L R 39 Mad 923

———— by one only of the decree holders—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 231 I L R 36 Mad 357

EXECUTION OF DECREE

See AGRA TENANCY ACT (II OF 1901) s 20 CL (2) I L R 37 All 278
I L R 43 All 547

See APPEAL I L R 38 Calc 717

See ARMY ACT (44 AND 45 VICT C 58) ss 145 190 I L R 43 Bom. 368

See ASSIGNEE I L R 38 Mad 36

See ATTACHMENT I L R 42 All 39

See BENGAL TENANCY ACT 1885 ss 69 AND 70 2 Pat L J 24

See CIVIL COURT ACT s 32 I L R 38 Bom 662

See CIVIL PROCEDURE CODE 1882 I L R 37 All 542

s 230 I L R 34 All 397 636
I L R 32 All 136

s 234 I L R 32 All 404

s 23 I L R 33 All 517

ss 235 320 I L R 34 Bom 142

s 244 I L R 32 All 321

ss 244 283 I L R 32 All 129

s 258 I L R 34 Bom 575

ss 268 278 283 I L R 38 Bom 631

ss 268 274 I L R. 35 Bom 288

ss 276 295 320 325A I L R 35 Bom 516

ss 278 279 280 281 I L R 34 All 365

ss 282 287 I L. R 35 Bom 275

s 287 (c) I L R 35 All 257

s 308 I L R 32 All 380

s 315 I L R 35 All. 419
I L R 40 All 411

s 316 I L R 33 All 63

s 317 I L R 35 Bom 342

s 341 AND 349 I L R 33 All 279

ss 373 AND 375 I L. R 36 All 172

See CIVIL PROCEDURE CODE 1908
s 66 to 74—
s 104 O XXI I L R 40 All 122

O XXI
Sch III

O XXIII R 3 I L R 38 Mad 959

O XXIV RR 1 2 AND 3 I L R 40 All 195

R 14 I L R 35 Bom 248

O XXXIV

R 8 I L R 35 All 116

R 14 I L R 38 All 327
I L R 35 All 518
I L R 39 All 36
I L R 41 All 399
I L R 42 All 566

EXECUTION OF DECREE—*contd*

O XXXVIII—
r 5 I L R 38 Bom 105
O XXXIX r 1 I L R 33 All 79
O XLV r 15 I L R 37 All 567
rr 15 and 16
I L R 38 Mad 833

See Civil Rule of Practice—
r 161 I L R 39 Mad 485

See Contract Act 1872 s 65
I L R 42 All 7

See Court of Wards Act (III of 1899)—
ss 16 19 and 49
I L R 33 All 791

See Debt I L R 39 Calc 862

See Deccan Agriculturists Relief Act (XVII of 1879) s 2
I L R 40 Bom 194

See Decree I L R 39 Bom 80
I L R 40 Bom 118

See Decree against a Major as Minor
I L R 39 Mad 1031

See Execution

See Execution sale

See Exproprietary Holding
I L R 41 All 346

See Garnishee 4 Pat L J 141

See Ghatwali Tenure
I L R 39 Calc 1010

See Gujrat Talukdars Act (Bom Act VI of 1888) s 29E
I L R 43 Bom 44

See High Court Bombay Civil Circular 96 cl (*l*)
I L R 37 Bom 631

See Hindu Law—Joint Family
I L R 35 All 380
I L R 37 All 214
I L R 43 Bom 17
I L R 42 All 58

See Hindu Law Coparcener
I L R 40 Bom 329

See Jurisdiction
I L R 41 Calc 915

See Land and Tenant
I L R 41 Calc 926

See Limitation I L R 33 All 264
I L R 46 Calc 22
I L R 47 Calc 813

See Limitation Act (XV of 1877)—
s 3 Sch II Arts 13 and 14
I L R 33 All 93
4 Sch II Art 179
I L R 36 All 284
Sch II Art 178
I L R 34 All 430

Art 179 14 C W N 465
I L R 34 Bom 189
I L R 37 Bom 42 317
I L R 39 Bom 20
I L R 32 All 257
Art 180 I L R 33 All 154

See Limitation Act (IX of 1908)—
s 7 I L R 41 All 435
s 15 I L R 38 Bom 153
s 20 Sch I Art 182
4 Pat L J 355
Sch I Art 2
I L R 41 All 219
Arts 29 36 120
I L R 39 All 322
Art 128 I L R 35 All 389
Art 138 and 144
I L R 35 All 432
Arts 165 181
I L R 38 All 339
Art 179 I L R 36 Bom 638
Art 181 I L R 42 All 564
Art 182

See Malabar Compensation for Tenants Act (Mad 1 of 1900) ss 5 and 5
I L R 38 Mad 954

See Mesne Profits
I L R 39 Calc 220

See Mortgage
I L R 37 Calc 796
15 C W N 80 743
I L R 38 Bom. 24
I L R 39 All 67

See Occupancy Holding
2 Pat L J 530

See Pension Act 1871 ss 6 8 11
I L R 34 Bom 151

See Political Agent at Sikkim court of I L R 38 Calc 859

See Practice I L R 43 Calc 285

See Pre emption
I L R 34 All 596
I L R 36 All 398

See Prohibitory Order
I L R 39 Calc 104

See Provincial Insolvency Act (III of 1907) ss 16 and 31
I L R 34 All 106

See Provincial Small Cause Court Act (VII of 1887) 25
I L R 38 All. 690

See Res Judicata
I L R 37 All. 589
I L R 39 All. 379

See Revivor I L R 43 Calc 903

See Sale 2 Pat L J 157

See Sale in Execution of Decree

See Succession I L R 37 All. 545

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attachment of immoveable property in execution of a decree an inventory of the property to be attached with a reasonably accurate description of the same as required by O XXI r 13, of the Civil Procedure Code is not an application in accordance with law within the meaning of Art 182 of the first schedule to the Indian Limitation Act of 1908 *Hira Lal* v *Dulari Kuar, All Weekly Notes (1903) 3 Mangal Sen* v *Baldeo Prasad All Weekly Notes (1892) 70* followed ABDUL RAFI KHAN v MAULA BAKSH (1915)
I L R 37 All 527

17 ———————— *Plea of adjust ment—Previous adjudication* Upon an application being made for the execution of a decree a compromise was entered into between the decree holder and the respondents by which the latter were exempted from liability for costs The assignee of the decree holder applied for execution against the respondents The respondents objected and their objections were upheld by the High Court Notwithstanding this the decree was again put into execution against the respondents who again objected but allowed their objection to be dismissed for default *Held* that the dismissal of the objection for default must be taken to be adjudication that the decree had not been adjusted and that the later decision neutralised the earlier one and the respondents were consequently liable for the balance of the decretal amount DAMBAR SINGH v MUNAWAR ALI KHAN (1915) I L R 37 All 531

18 ———— Death of Judgment debtor —*Insolvency—Civil Procedure Code (Act V of 1908) s 55 (4)—Surety discharge of* A judgment debtor having under s 55 (4) of the Code of Civil Procedure found a surety that he would apply to be declared an insolvent within a specified time and would appear when called upon, died before the expiration of such time *Held* that the surety was discharged by the death of the judgment debtor and it was not open to the decree holder to proceed against him *Kishan Najar* v *Ittinan Najar I L R 24 Mad 637* followed NABIN CHANDRA HAZARI v MIRTUNJOY BARICK (1913)
I L R 41 Calc 50

19 ———— Sale in execution—*Grove or garden with house being ancestral property and forming part of a mahal—Sale by Civil Court amin—Jurisdiction—General rules (Civil) of 1911 Chapter IV rules 5 and 8* *Held* that a grove or garden part of which was occupied by a house and which was a part of a mahal and assessed to revenue and had been owned continously by the family of the proprietors for over fifty years was ancestral land within the meaning of r 5 of Chap IV of the General Rules for the Civil Courts and could not be sold by the Court amin in execution of a Civil Court decree but only through the Collector after the decree had been transferred to him for execution FATMATUL KUBRA v ACHCHI BEGAM (1913) I L R 36 All 33

20 ———— Limitation—*Limitation Act (IX of 1908) Sch I Art 182—Application in accordance with law—Judgment debtor missing* A decree for sale on a mortgage executed by *A* was passed against *A* (who was reported to be missing at the time) and against *B C D* and *E* who were in possession of the mortgaged property and were heirs presumptive of *A* jointly *Held* that in the absence of any evidence that *A* was dead an application for execution of this decree against *A* alone was an application in accordance with law within the meaning of Art 182 of the First Schedule of the Limitation Act 1908 MUHAMMED HUSAIN v JAYAT HUSAIN (1914)
I L R 33 All 482

21 ———— Sale in execution—*Failure of judgment debtor s title—suit for refund of purchase money—Procedure* Where an auction purchaser seeks to have refunded the price paid by him for property sold in execution of a decree on the ground that at the time of sale the judgment debtor had no saleable interest therein it is competent to him to proceed by way of a regular suit and he is not confined to the special remedy provided by the Code of Civil Procedure *Munna Singh* v *Girdhar Singh I L R 6 All 57* followed but doubted *Kishun Lal* v *Muhammad Safdar Ali Khan I L R 13 All 383 Sidheswari Prasad Narain Singh* v *Gosain Maja and I L R 35 All 439 11 All L J 606* and *Dorab Ali* v *Abdul A* [illegible] *L R 5 I A 126* referred to MUHAMMAD NAJIB ULLAH v JAI NARAIN (1914)
I L R 36 All 529

22 ———— Priority between mortgage decree and money decree applicant was the holder for the time being of the Paikpara Estate In 1902 *M* who was then Receiver of that estate lent a sum of money to the uncle of the 2nd respondent The mortgage deed provided that it would be lawful for the mortgagee at any time after the commencement of a suit on the mortgage to apply for and obtain the appointment of a Receiver of the mortgaged property In a suit on the mortgage *M* applied to the Subordinate Judge (First Court) for the appointment of a Receiver of the mortgaged property This application was disallowed by that Court but on appeal the High Court granted the application and appointed the first respondent Receiver of the mortgaged property— to collect the rents and profits thereof until final disposal of the suit either by payment of the mortgage debt or by confirmation of any sale which might take place In accordance with this order dated the 5th July 1908 the Receiver took possession of the mortgaged property and collected the rents and profits thereof From time to time he made payments to the 2nd respondent but discontinued these payments in June 1912 when the mortgaged property was sold in execution of the decree On the application of the judgment debtor this sale was set aside on the 31st May 1916 In the meantime a considerable sum of money accumulated in the hands of the Receiver The 3rd respondent obtained a money decree in the Court of the Subordinate Judge (Second Court) for Rs 22 070 which was declared to be recoverable out of the estate of the original mortgagor The High Court without deciding whether the mortgagee or the holder of the money decree was entitled to proceed against the rents of the property in the hands of the Receiver granted formal permission to the 3rd respondent to execute her decree by attaching the money in the hands of the Receiver The 3rd respondent thereupon applied for attachment of the Rs 28 000 in the hands of the Receiver She then applied to the Subordinate Judge (Second Court) for an order upon the Receiver to pay the sum of Rs 28 000 to her and an order for payment was issued *Held* that the Subordinate Judge (Second Court)

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not being the court in whose custody the money was, had no jurisdiction to order the payment of the money in the hands of the Receiver *Held further* that the money in the hands of the Receiver was in the custody of a Court but *quaere* whether the Receiver appointed by the High Court should be treated as a Receiver appointed by that Court and not by the Subordinate Judge RANI DEBENDRA BALA DASI *v* BABU CHANDRA SEKHAR PRASAD SINGH **1 Pat L J 449**

23 ———— **Dispute between decree holder and judgment debtor as to amount** *of property actually attached—duty of executing Court to enquire into the allegations* Where a judgment debtor filed a petition before the Court *executing a decree against him alleging that the* decree holders, in collusion with the Court peon had made away with the bulk of the property which had been attached and that only a small part of the whole had been put up for sale and the executing Court declined to enquire into these allegations but referred the judgment debtor to a regular suit *Held* that the matter was one which should have been enquired into by the Court executing the decree under s 47 of the Code of Civil Procedure GAJADHAR PRASAD SINGH *v* BABU RAJUN DASS **1 Pat L J 558**

24 ———— **Decree for rent**—*Right of landlord to choose manner of execution* It is not competent to a Court to direct in what manner the landlord shall execute a decree for rent and he cannot be compelled to proceed first against the holding and then against the person of the judgment debtor MAHARAJAH KESHO PRASAD SINHA BAHADUR *v* LAJI RAI **1 Pat L J 138**

25 ———— **Limitation**—*Date of which runs* The period of limitation for an application to execute a decree runs for the date judgment is pronounced and not for when the decree is actually signed SURJA DEO NARAYAN SINGH *v* MUSAHROO RAUT **1 Pat L J 359**

26 ———— **Limitation**—*Decree holder—Payment of money by judgment debtor by way of interest—Notification of the payment to Court—Certification of the payment—Civil Procedure Code (Act V of 1908) O XXI r 2—Limitation Act (XV of 1877) ss 19 20* A decree holder who has received a certain sum of money by way of payment of interest might either apply to certify payment before execution or might do so on his application for execution of the decree On the 17th February 1906 the plaintiff obtained a decree and on the 18th May 1911 he applied for execution At the time of the application he notified to the Court that he had received a certain sum on the 19th June 1908 from the judgment debtor towards interest and alleged that the execution was not barred by limitation —*Held* that the notification to the Court of the receipt of the sum paid by the judgment debtor was all that the decree holder had to do in order to certify payment and O XXI r 2 of the Code of Civil Procedure did not stand in the way EUSUFFZEMAN SARKAR *v* SANCHIA LAL NAHATA (1915) **I L R 43 Calc 207**

27 ———— **Sale of zamindari**—*rights—Whether buildings pass with the zamindari or not* The doctrine that the sale by auction of a zamindari share includes also buildings situated within the zamindari is only applicable in the absence of evidence indicating an intention to exclude such buildings from the sale *Abu Hasan* v *Ram an Ali I L R 4 All 381* distinguished SAKHAWAT ALI SHAH *v* MUHAMMAD ABDUL KARIM KHAN (1915) **I L R 38 All 59**

28 ———— **Assignment**—*Ex parte order passed subsequent to assignment—Power of court on application of assignee to reconsider such order* Pending an application for execution of a decree the decree holder sold the decree The purchaser applied for execution but whilst his application was pending the former application of the original decree holder came on for hearing and it was decided *ex parte* that the decree was barred by limitation *Held* that this decision was no bar to the consideration of the application for execution filed by the assignee of the decree nor was the Court hearing this application bound by the former *ex parte* finding BALMAKUND *v* ASHFAQ HUSAIN (1912) **I L R 34 All 518**

29 ———— **Decree for money against judgment debtor personally**—*Judgment debtor in possession as shebait—Civil Procedure Code (XIV of 1882) ss 244 278* If *A* in execution of a decree for money against *B* personally attaches and proceeds to sell properties of which *B* alleges that he is in possession not in his own right but as *shebait* of a deity to whom the properties have been dedicated the question does not fall within the scope of s 244 of the Civil Procedure Code but within the scope of s 278 read with s 280 of the Code *Kuriyali* v *Mayan I L R 7 Mad 255* not followed *Punchanun Bundopadhya* v *Rabia Bibi I L R 17 Calc 711* distinguished KARTICK CHANDRA GHOSE *v* ASHUTOSH DHARA (1911) **I L R 39 Calc 298**

30 ———— **Decree passed in favour of several persons**—*One of whom was a minor and not properly represented* *Held* that the mere fact that at the time when the final decree in a suit was passed one of the decree holders was a minor whose guardian *ad litem* had died and had not been replaced was not sufficient to invalidate the decree GOBARDHAN SAHAI *v* MAHABIR SINGH (1912) **I L R 34 All 321**

31 ———— **Limitation**—*Application after passing of Civil Procedure Code 1908 for execution of decree passed under Act XIV of 1882—S 19 Limitation Act* Decree *nisi* was passed for the sale of mortgaged property on the 11th August 1896 and was made absolute on the 6th February 1898 An application for execution of the decree was made on the 16th February 1904 It was dismissed by the first Court but was allowed on appeal, on the 28th June 1906 Another application made on the 4th September 1907 was also dismissed by the first Court but allowed on appeal, on the 29th June 1910 A further application was made on the 28th July 1911 and was struck off on the 29th June 1912 after the decree-holder had recovered a part of the decretal amount Another application made on the 6th September 1912 was struck off for want of prosecution on the 5th December 1912 The present application was made on the 18th July 1913 and contained a prayer that the application should be treated as a continuation of the application of the 28th July 1911 It asked for relief different from the relief claimed in 1911 and was directed against property which was not touched by the former

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application *Held* that the application was governed by s 48 of the Code and was time barred and present application was not in continuation of that 28th July 1911 MAHANTH KRISHNA DAYAL *v* MUSSASAMAT SAKINA BIBI

1 Pat L J 214

32. ———— Limitation Decree temporarily satisfied—*effect on limitation* An *ex parte* decree was obtained against two persons the appellant and one *S* The decree was executed against *S* by the sale of whose moveables the whole decree was satisfied On a suit by *S* the decree as against him was set aside and the money realised from him was ordered to be refunded The decree holder then applied for execution against the Appellant *Held* that the order directing re fund by the decree holder to *S* in effect reopened the execution proceedings and the application for execution against the appellant must be treated as a continuation of the original application for execution which was brought within time KERAMAT ALI *v* NAGENDRA KISHORE RAY (1916)

21 C W N 571

33 ———— Decree conditional on money being paid into Court *within thirty days of the decree becoming final —Interpretation of condition* Where a decree was passed in favour of a plaintiff conditional on his depositing a sum of money into Court within thirty days of the decree becoming final it was *held* that this did not signify merely the bare period of limitation for an appeal but included also the time neces sary for obtaining the requisite copies BHAGELU SALU *v* RAM AUTAR SHAKUL (1916)

I L R 39 All 193

34 ———— Execution of decree by instalments—*Limitation—Petition of compromise —Decree— Application in accordance with law —Civil Procedure Code (Act V of 1908) O XXI r 17—Limitation Act (IX of 1908) Art 82 cls (5) and (7)—Instalment decree—Default* Where in a suit against five persons for recovery of monies due on a handnote separate compromise petitions for instalment decrees were filed on the 1st July 1911 in which there was a provision that default being made in the payment of one *kist* the whole amount would become due and subse quently on the 10th July 1911 one instalment decree was passed against all the five defendants in which separate amounts were decreed against each defendant to be paid as per instalments provided therein but in which the condition as to the whole amount being due in default of the payment of one *kist* was not stated and an appli cation for execution of the whole decree having been made on the 10th July 1914 against all the five defendants it was dismissed on the 20th February 1915 on the ground that the prayer for execution was not in accordance with the terms of the decree and subsequently the pre sent application for execution of the decree for the *kist* from January 1911 to September 1915 was made on the 10th November 1915 against defendant No 2 alone and it was dismissed by the lower Court on the ground that the decree was barred by limitation *Held* that in order to properly understand what the decree was the Court was entitled to look at and consider the terms of the compromise and was not bound to take the decree by itself that the application for execution dated the 10th July 1914 having been

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rejected under O XXI r 17 sub r (*1*) as not being an application in accordance with law did not save limitation that the whole decree became due on the default of the payment of one *kist* and the decree holder had no option to recover the decretal amount in accordance with the *kists* and his present application for execution of the decree dated the 10th November 1915 was barred by limitation JAYANUDDIN KHAN *v* JAMIRUD DIN SARKAR (1917)

21 C W N 835

35 ———— Objection to execution of decree —*Dismissed for default—Fresh objection if lies before order of dismissal is set aside—Civil Pro cedure Code (Act V of 1908) r 9 O IX applica bility of—Inherent power of Court to review order of dismissal* Where an objection to the execu tion of a decree is dismissed for default the order of dismissal is binding until it is set aside and the judgment debtor cannot ignore it and file a fresh objection R 9 O IX does not apply to such a case but the Court has inherent power on a proper application being made to review the order and to enquire whether the objector had or had not a reasonable case for not appearing on the date appointed for the hearing of his petition BHARAT CHANDRA NATH *v* IASIN SARKAR (1917)

21 C W N 769

36 ———— Practice—*Rival decree holders— Assets in the hands of Registrar—Attachment of fund with Accountant General—Anticipatory attachment— Priority—Rateable distribution—Civil Procedure Code (Act V of 1908) s 73 O XXI r 52* A ques tion of rateable distribution under s 73 of the Code of Civil Procedure of 1908 arises amongst cre ditors where the application for execution has been made before the receipt of assets O XXI r 52 does not allow of an anticipatory attachment of money expected to reach the hands of a public officer and is restricted only to money actually in his hands Where a fund in Court has been attached by several creditors of the judgment debtor none of the attaching creditors is entitled to preferential treatment by reason of the priority of his attachment as the attachments create no charge or lien upon the fund so long as the fund is in the custody of the Court is bound to apply the rules of justice equity and good conscience in the determination of the relative rights of the creditors who wish to proceed against the fund in *custodia legis* for the satisfaction of their dues In such circumstances the fund is sufficient to meet in full the claims of the creditors should be rateably distributed amongst them THAKUR DAS MOTILAL *v* JOSEPH ISKENDER (1917)

I L R 44 Calc 1072

37 ———— Limitation—*Decree giving mesne profits to be ascertained in the execution depart ment—Terminus a quo* The decree in a suit for redemption of a usufructuary mortgage pro vided that certain mesne profits were payable to the mortgagor the mortgage having been more than satisfied by the profits of the property The amount of mesne profits was to be ascertained in the execution of department *Held* that as regards execution of the decree in respect of such mesne profits time did not begin to run against the mortgagor until the profits had in fact been ascertained *Muhammad Umarjan Khan* v *Zinat Begam I L R 25 All 335* followed NARSINGH DAS *v* DEBI PRASAD (1918)

I L R 40 All 211

EXECUTION OF DECREE—*contd*

38 ———— Mortgage bond—*Money decree—Civil Procedure Code (Act V of 1908) O XXXIV rr 14 15—Declaration of lien over properties—Such properties cannot be sold in execution—Decree holder s remedy* Where a decree is a decree against the judgment debtor personally with a declaration in the decree that the decree holders are entitled to a lien over the properties—a mortgage decree having been expressly refused by the decreeing Court—the decree is merely a money decree with a declaration of lien over the properties Rr 14 and 15 of O XXXIV stand in the way of properties being sold in execution of such a decree The decree holder s only course is to institute a suit for sale in enforcement of the mortgage *Mungul Pershad Dichit v Grija Kant Lahiri I L R S Calc 51* distinguished GOBINDA CHANDRA PAL *v* KAILAS CHANDRA PAL (1917) I L R 45 Calc 530

39 ———— Transfer —*Civil Procedure Code (Act XIV of 1882) ss 232 248—Application for transmission of decree whether application for execution—Order under s 284 without notice whether without jurisdiction* An order for execution made under s 248 of the Civil Procedure Code of 1882 (O XXI r 22 of the Civil Procedure Code of 1908 without notice is without jurisdiction and is a nullity Notice given to the representative of the judgment debtor of the application for transmission of the decree cannot be treated as notice given upon a previous application for execution within the meaning of s 248 of the Code of 1882 *K* obtained a decree on 19th June 1896 against *D* in the High Court On 18th May 1907 an application was made by the son of *K* (*K* dying in the meantime) for transmission of the decree to the District Court of Murshidabad for the purpose of having the decree executed On 23rd August 1907 order for transmission was made by the High Court in the presence of the judgment debtor The decree was not transmitted On 4th September 1907 an application was made by the son of *K* for the attachment and sale of certain premises in Calcutta without notice to the representatives of *D* (*D* having died in the meantime) On 17th September 1907 an attachment was made of the property in Calcutta and on 29th July 1908 an order for sale was made Both the orders were made without notice On the 29th August 1916 the respondent who is the assignee of the decree made an application for leave that he might be allowed to proceed with the sale of the attached property in terms of the order of the 29th August 1908 *Held* that inasmuch as the application for attachment dated 4th September 1907 was made without notice the attachment of the 17th September 1907 and the order for sale of the 29th of July 1908 were made without jurisdiction and consequently no legal proceedings can be taken on the basis thereof *Held* further that the order for transmission dated 23rd August 1907 was not an order passed on a previous application for execution MAHARAJ BAHADUR SINGH *v* INDAR CHAND BOTHRA (1917) 22 C W N 390

40 ———— Composite decree—*Consisting of separate decrees—Execution of one of such decrees if saves the others from bar of limitation—Limitation Act (IX of 1908) Art 18 expl 1* The defendants held three separate tenancies under the plaintiffs who instituted one suit against him for arrears of rent in respect of the three tenancies At the instance of the plaintiffs a decree was made specifying the sum due in respect of each of the tenancies with an order for the realisation of the sums in arrear from the respective tenancies Within three years the plaintiffs applied for execution of the decree only in respect of the sum decreed with regard to the third tenancy There after more than three years from the date of the decree they applied for execution in respect of the entire amount of the three tenancies *Held* that the position was precisely the same as if the plaintiffs had brought three distinct suits for rent against the defendants one in respect of each tenancy and by taking out execution in respect of one decree they were not protected from the bar of limitation in respect of the other decrees and the second application for execution was barred by limitation with regard to the sums claimed for the first and second tenancies but in respect of the sum due from the third tenancy the application was in time as made within three years from the date of the first application That there might be nominally one decree passed in a a suit which is essentially of a composite character and contains a number of separate decrees in respect of which the law of limitation will be separately enforced This principle which underlies the decision of the Full Bench in *Wise* v *Raj Narain Chakrabarty 19 W R 30* met with legislative approval and is embodied in explanation (1) to Art 182 of the Limitation Act 1908 which is in terms identical with explanation (1) to Art 179 of the Act of 1877 DHIRENDRA NATH SARKAR *v* NISCHINTAPUR COMPANY (1916) 22 C W N 192

41 ———— Provident fund——*Jurisdiction—Small Cause Court—Civil Procedure Code (Act V of 1908) s 115* By the provisions in the Provident Fund Act (IX of 1897) money in such fund is protected from attachment by creditors even after the death of the subscriber Any error in law which amounts to a usurpation of authority in the act done by the Court comes within the scope of s 115 of the Code of Civil Procedure (Act V of 1908) *Veerchand* v *B B & C I Ry Co I L R 29 Bom 259 Seth Manna Lal* v *Gainsford I L R 35 Calc 641 Badami Kuar* v *Dinu Rai I L R 8 All 111 Dhon Singh* v *Basant Singh I L R 8 All 519 Sew Bux* v *Shib Chunder I L R 13 Calc 225 Sheoraj Nardan* v *Gopal Suran I L R 18 Calc 290 Shew Prosad* v *Ram Chunder I L R 41 Calc 323 Balakrishna* v *Vasudeva I L R 40 Mad 793* referred to HINDLEY *v* JOYNARAIN MARWARI (1918) I L R 46 Calc 962

42 ———— Bengal Tenancy—ACT (*VIII of 1885*) *s 66 sub s (2)—Date of the decree, meaning of—Whether decree of the Appellat Court or the Court of first instance* S 66 provides for ejectment of a tenant not being a permanent tenure holder (and certain other classes of tenants) for arrears of rent and sub s *(2)* of the section provides that in a suit for ejectment for an arrear of rent a decree passed in favour of the plaintiff shall specify the amount of the arrear and of the interest (if any) due thereon and the decree shall not be executed if that amount and the costs of the suit are paid into Court within 15 days from the *date of the decree* or when the Court is closed on the 15th day on the day when the Court reopens. So long as an appeal is not disposed of the decree in sub s (2) of

EXECUTION OF DECREE—*contd.*

[illegible]

I. L. R. [illegible] Cal. [illegible]

40. ——— [illegible]

[illegible]

I. L. R. 41 All. [illegible]

41. ——— [illegible] [illegible] When a decree [illegible] An application for execution [illegible] credit for any payments [illegible] made by him [illegible] the decree must be executed as it stands. [illegible] Kanhaiya Lal Singh v. Dukhan Kanwar Singh? (1)

I. L. R. 41 All. 517

41. ——— Compromise decree—Rights of parties—It is open to the execution Court to consider what are the rights of the parties equitable or otherwise are which flow from the contract embodied in a compromise decree. [illegible] Nath Banerjee v. Secretary of State for India.

5 C. W. N. 545

42. ——— Proclamation—Amendment, what is. An application by the decree-holder to have the form of the sale proclamation corrected and a date fixed for the settlement of the terms of the proclamation under rule 66 of O. XXI, with a prayer that notice should issue for a specified date is a step-in-aid of execution for the purpose of limitation even if it is not in writing. Sukhdeo v. Sahdeo Prasad Singh.

2 Pat. L. J. 5

47. ——— *Decree* [illegible] *not invested with* [illegible] *jurisdiction* [illegible] A decree was passed by the 1st Munsif of Gaya who was invested with jurisdiction up to the sum of Rs. 2000 on February 2[illegible], 1911. An application for execution of the decree was made on June [illegible], 1913, to his successor who was not invested with jurisdiction

[illegible] A second application for execution was made [illegible] the court on [illegible] application was made to the proper court and [illegible] barred by [illegible] Ishwar Prasad Singh v. Fazal Husain?

2 Pat. L. J. 212

48. ——— Decree against one of two defendants—[illegible]

[illegible] In a suit against A and B a decree was passed against A and B [illegible] On appeal a decree was passed against [illegible] Bahadur? [illegible] v. Dukharan Das?

2 Pat. L. J. 172

49. ——— Death of party [illegible] *after decree* [illegible] in a suit which was dismissed by the court of first instance and during the pendency of an appeal which resulted in a reversal of the decree of the original court. Plaintiff applied to the lower court for execution of the decree [illegible] his heir and [illegible] The [illegible] objected on the ground that her husband had died before the passing of the decree, that no heir was substituted before the decree was made, and that therefore execution could not proceed against her. The executing court held that the objector should have applied to the appellate court for an amendment of the decree and dismissed the objection. *Held*, that the executing court should have decided the objection under s. 47 of the Code of Civil Procedure, 1908. Mussammat [illegible] Kuar v. [illegible] Prasad.

2 Pat. L. J. 192

50. ——— Surety—*Stay of execution upon* [illegible] *furnish* [illegible] *security of property given by surety*. A judgment-creditor who has exhausted his remedies against the judgment-debtor is entitled to take out execution against the property pledged by a surety as security for the judgment-debtor upon the latter obtaining a stay of execution. [illegible] is not a decree except for the purposes of appeal. Ganga Deo Narain Singh v. Jogi Lal Sahu?

2 Pat. L. J. 257

51. ——— Appeal from Decree for possession of land—*Security Bond*—*Liability of surety*

EXECUTION OF DECREE—*contd*

d ration of—No one being named in bond—Application for enforcement of bond—Civil Procedure Code (1882) s 545 and 546—Civil Procedure Code (1908) s 47 144 The widow of the taluqdar of Mahewa brought a suit in a Subordinate Judge's Court on the 6th of August 1902 obtained a decree for possession of it and on her applying for execution of the decree the Subordinate Judge made on the 21st of August 1902 an order under s 545 of the Code of Civil Procedure (1882) giving her possession on her providing security to restore the mesne profits to the extent of one lakh of rupees in case his decree should be reversed by the Court of the Judicial Commissioner to which the defendant had appealed The security was in the form of a hypothecation bond executed by the predecessors in title of the present appellants secured on certain villages of their estate The bond recited the order and stated it was given so that any order that might be passed by the Appellate Court be made binding on the sureties for the above sum No obligee was named in the bond The defendant failed in his appeal to the Judicial Commissioner but on his father's death an appeal to the Privy Council by his son the present respondent was successful the decree of the Judicial Commissioner was reversed, and the respondent was declared entitled to the taluqa of Mahewa and the widow's suit was dismissed except as to some of the villages to which she was found entitled The Subordinate Judge was directed to ascertain the amount of mesne profits due to the respondent On an application under ss 47 and 144 of the Code of Civil Procedure of 1908 to which the appellants were made parties *Held* that on the true construction of the hypothecation bond it was an instrument of charge and not a bond imposing any personal liability on the appellants *Held also that the appellants became sureties for the restitution of the mesne profits according to the ultimate decision of the Courts and their liability did not cease on the 26th of March 1903 when the Court of the Judicial Commissioner dismissed the appeal from the Subordinate Judge *Held,* further that the Court had jurisdiction over the sureties in the present proceedings and to make an order as to their liability RAJ RAGHUBAR SINGH *v* JAI INDRA BAHADUR SINGH

I L R 42 All 158

52 ——————Failure of custodian—*Appointed by court to restore property to judgment debtor when so ordered—Remedy of judgment debtor* Where a person placed in charge of property of a judgment debtor by order of the court fails to restore the same to the judgment debtor when directed to do so the judgment debtor's remedy is not to invoke by application executive or disciplinary action on the part of the court but to sue the receiver for the restoration of the property or damages KALLU KHAN *v* ABDULLAH KHAN

I L R. 42 All 394

53 —————— Limitation—*Application for execution in continuation of previous application—identical property concerned* A decree was passed on the 28th June 1905 and an application for execution made in August 1906 was dismissed in February 1907 A second application was made in July 1909 and the judgment debtor's property was sold on December 4th, 1909 The sale was set aside on February 12th 1910 On December 10th 1912 a third application was made asking the court to sell the identical property sold on December 4th 1909 *Held* that under the circumstances the third application for execution should be regarded as having been made in continuation of the second application MUSAMMAT KANIZ ZOHRA *v* BOONDI SAHU

2 Pat L J 115

54 ——————Jurisdiction—*Civil Procedure Code (Act V of 1908) s 150—Decree by Subordinate Judge for nearly Rs 2 000—Application for execution of decree before Munsif invested with power up to Rs 2 000—Maintainability* In a mortgage suit for over Rs 1 000 after a preliminary decree was obtained in the Court of the 2nd Munsif who was empowered to try suits up to Rs 2 000 the Munsif was transferred and the final decree in the case was passed by the Subordinate Judge Application for the execution of the decree was then made before a successor of the Munsif similarly empowered —*Held* that under the provisions of s 150 of the Civil Procedure Code the Munsif had jurisdiction to entertain the application AMINUDDIN MULLICK *v* ATAR MANI DASI (1920)

I L R 47 Calc 1100

55 ——————Practice— *Rateable distribution—Money paid to Sheriff in execution of a decree—High Court (Original Side) Rules Chap XVII r 24—Civil Procedure Code (Act V of 1908) 73 O XXI r 55* On an application by a judgment creditor for execution of a decree money was paid by the judgment debtor to the Sheriff who paid it into Court Two other creditors who had previously applied for execution had part of their claim and the costs of execution respectively unpaid and asked for rateable distribution of the assets —*Held* that the money so lying in Court was assets available for rateable distribution *Held* further that the right to rateable distribution is limited to the amount due under the decree and does not apply to costs of a previous application for execution *Sorabji Coovverji* v *Kala Raghunath I L R 36 Bom 156* dissented from *Harai Saha* v *Fazlur Rahaman I L R 40 Calc 619* referred to NOOR MAHOMED DAWOOD *v* BILASIRAM THAKURSIDASS (1919)

I L R 47 Calc 515

56 ——————Warrant of arrests—*Outside the territorial limits of court's jurisdiction* The fact that the judgment debtor does not reside within the territorial jurisdiction of the Court is not a sufficient reason for refusing to issue a warrant for his arrest although such a warrant can be executed *only within the court's territorial jurisdiction,* but a time must be fixed for its return KRISHNA PRASAD *v* BIDYA NANDA

3 Pat L J 95

57 ——————Limitation—*revival of former application for execution—Code of Civil Procedure (Act V of 1908) s 48—Limitation Act (IX of 1908) Sch I article 181* S 48 of the Code of Civil Procedure 1908 has no application to the case of a revival of an antecedent application for execution which has been in suspense by reason some bar or which has been stayed pending the determination of subsequent litigation. The period of limitation in such a case is that provided by Art 181 of the Limitation Act 1908 namely three years from the date of the removal of the bar SAKINA BIBI *v* GANESH PRASAD BHAGAT

3 Pat L. J 103

58 ——————Security of cost pendings appeal—*subsequent application for execution of original*

EX-TERRITORIAL JURISDICTION OF BRITISH COURT—*contd*

Indian soldiers enjoy His Majesty s protection in Shameen Canton and the Court exercises juris diction over them and that consular protection extends to trying persons and protecting them if they are improperly arrested *Held* that s 4 (*1*) of the Foreign Juri diction Act 1890 did not make this evidence inadmissible to prove that by u age, sufferance or other lawful means His Majesty has juri diction at Canton That the accused being during his service in the Indian Army subject to military law was entitled to His Maje ty s protection and was a British protected person within Art III When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service loyalty and allegiance as on the duties of British enlisted subject it extends to them the same protection in a foreign country where all are serving together in the armed forces of His Majesty Protection enjoyed by virtue of the Foreign Jurisdiction Act 1890 or other wise as mentioned in Art III includes that derived from other Statutes Imperial or Indian applicable to the person in question *Quære* Whether the Court could take judicial notice of the political change in China in considering the que tion of jurisdiction *Quære* Whether it may not be reasonably inferred from the practice (which is a matter of public knowledge) of enli ting native Afghans in the Indian Army whereby they are *de facto* brought under the authority of His Majesty that the Ameer does in fact con ent to such enlistment with its consequences so as to bring uch enlisted Afghans within the terms of cl (*4*) Art V *i e* foreigners with respect to whom any State King Chief or Government whose subjects they are con ents to the exerci e of power or authority by His Majesty The officer commanding the detachment who spoke to the accu ed shortly after the occurrence deposed to having a ked the accu ed why he had done such a sensele s act—not thereby meaning to convey a threat or inducement—and to the accused having replied that he was being abu ed by the deceased three or four days and that without a doubt he had killed him The Judicial Com mittee found that the words of the officer though formally a que tion, were really an exclamation of dismay *Held* that the prosecution having by the evidence of th s officer proved to the satis faction of the trial Judge that the statement of the accused was voluntary in the en e that it had not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority its admi sion in evidence was not in breach of the long establi h ed rule of Engli h criminal law which makes statements obtained from the accused by pressure of authority and fear of consequences inadmi sible in evidence and which casts on the prosecution the onus of proving that the statement relied on was voluntary On the question whether the state ment should not have been excluded from evidence on the ground of its having been made by a per on in custody in an wer to a question put by a per on having authority over him and having cu tody of him through his subordinates *Held* on a review of Er li h authoritie that the Engli h law on the point was still unsettled some Judges being of opinion that such a statement is admi ble in evid nce without exception whilst others treat its exclusion from evidence as a matter for the Judge s discretion depending largely on his view of the impropriety of the questioner s conduct and the general circumstances of the case That the trial Judge in admitting this evidence decided in accordance with what at any rate was a prob able opinion of the present law if it was not actually the better opinion, and his so doing was not a violation of the principles of natural justice calling for His Majesty s interference That even if the evidence was admissible in the exercise of the trial Judge s discretion, that discre tion in the present case was not shown to have been exercised improperly With reference to Act XXXV (*2*) of the China and Corea Order in Council which provides that subject to the provi ions of that Order criminal juri diction under the Order shall, as far as circumstances admit be exerci ed on the principle of and in conformity with Engli h law for the time being *Held* that in the absence of any provision in the Order on the point modifying or excluding the principles and practice of English law the question of the admis ibility of the statement of the accused might justly be treated as if English criminal law and practice applied to the criminal jurisdic tion of the Supreme Court at Hong Kong subject however to the following reservations —(i) That such law and practice are not to be con sidered as in all respects and particulars binding on that Court (ii) that regard mu t be had to the necessary distinction that must be drawn between the criminal procedure of a European country who e jurisprudence has a defined h tory extend ing over many centuries and that applicable to a Briti h po session in the Far East where a mixed and fluctuating population is subject to the administration of law by European Judges whose duty it is to have regard alike to the principle of Briti h justice and to the necessities of local order (iii) that the words so far as circumstances admit may well (*a*) refer to absence of facilities at Hong Kong for formal proof of Statutes pa ed and administrative orders made in various parts of His Majesty s dominions, and (*b*) be intended to cover some necessary departures from the formalities only as di tinguished from the essentials of Engli h justice when as in the present ca e a force detailed for the protection of European residents beyond His Majesty s dominions in the midst of a popula tion often turbulent and at the particular time disturbed was it elf disturbed by such a crime as the murder of a Subadar by a native private in the ranks That in view of the position which the Privy Council held in regard to criminal proceed ings, the Judicial Committee d d not in this case d cide what the rule of Engli h law should be with regard to the admi sibility in evidence of state ments made by an accused person in answer to a question put by a person in authority in whose custody he is that should be left to a Court which exerci es the revising functions of a general Court of criminal appeal *Clifford* v *The King Emperor L R 40 I A* 241 referred to The Privy Council cannot in a criminal matter allow an appeal on grounds that would not have sufficed for granting leave to appeal Mi direction as such or irregularity as such will not suffice There must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law or which in general tends to divert the due and orderly

EX-TERRITORIAL JURISDICTION OF BRITISH COURT—concld

administration of law into a new course which may be drawn into an evil precedent in future *Ex parte Macrea* [1893] *A C 346 R v Bertrand 16 L J N S 75* followed *Piel v The Queen 10 A C at p 675 In re Dillet 12 A C 459* referred to The jurisdiction of the Privy Council in appeals in criminal matters involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of if substantiated, in their proper relation to the whole matter *Held* upon a review of the evidence that the preponderance of unquestioned over the questioned evidence (the accused's statement to the commanding officer) was so great that it was impossible at any rate highly improbable that the jury was substantially influenced by that evidence Therefore the fact that the Judge left the objectionable evidence for the consideration of the jury without any warning to disregard it did not justify the conclusion that there was any miscarriage of justice substantial grave or otherwise *Sembl* Where it is highly improbable that evidence improperly admitted can have had any influence on the verdict of the jury the Appellate Court will be justified in refusing to interfere *Makin v A G for New South Wales* [1894] *A C 57* considered IBRAHIM v THE KING (1914) **18 C W N 705**

EXTRADITION

——————— *High Court jurisdiction of—Extradition Proceedings jurisdiction of High Court in—Code of Criminal Procedure (Act V of 1898) s 491—Indian Extradition Act (XV of 1903) s 3 sub s (3) (4) (6) (7) and (8) and s 4 sub s (1) —Habeas Corpus* If the provisions of the Legislature have not been carried out the High Court can interfere notwithstanding that the warrant has been given in extradition proceedings *Rudolf Stallmann v Emperor I L R 38 Calc 547* distinguished S 3 sub s (6) of the Indian Extradition Act 1903 is not a substitute for and does no interfere with proceedings taken under s 491 of the Code of Criminal Procedure 1898 the provisions of which are as much binding as those of the Extradition Act The Government of India may issue its order to any Magistrate and such Magistrate may issue a warrant provided he is one who has jurisdiction to enquire into the crime of the nature of that for which extradition is sought Therefore an enquiry into the case of a fugitive criminal under arrest in Calcutta can be made by the Magistrate of Alipore if duly authorised An order issued under s 3 sub s (1) of the Indian Extradition Act 1903 by the Government of *Bengal* upon a requisition made to the Government of *India* is invalid, and cannot be ratified by a subsequent order of the Government of *India* Where however the latter order directs the Magistrate in pursuance of the former order and of the statutory provisions in that behalf to enquire into the said case the Government gives valid effect to its intention and the Magistrate has jurisdiction to enquire Under s 528 of the Code of Criminal Procedure 1898 the District Magistrate can transfer to his own file from that of the Deputy Magistrate an application by the fugitive criminal for return of his property The Magistrate making the enquiry under s 3 of the Indian Extradition Act 1903 can initiate fresh proceedings notwithstanding proceedings taken under a previous order When the Magistrate sends up his report to the Government of India under s 3 sub s (6) of the Indian Extradition Act 1903 he becomes *functus officio* and renders himself incapable therefore of recording evidence that may be subsequently produced The Legislature intended that the fugitive criminal should be given an opportunity of defence If such opportunity is not given it goes to the jurisdiction of the Magistrate The enquiry therefore is not according to law and the issue of the warrant is itself invalid *Per* MOOKERJEE J—The burden lies very heavily upon those who assert that a right of so much importance to the criminal as *Habeas Corpus* given by the Common Law has been taken away by implication S 491 of the Code of Criminal Procedure 1898 is applicable to cases under the Indian Extradition Act *Rudolf Stallmann v Emperor I L R 38 Calc 547* distinguished The jurisdiction of the High Court has not been taken away merely because the Government of India has already issued a warrant for surrender under s 3 sub s (8) of the Indian Extradition Act 1903 Depositions which have not been taken in the presence of the accused may be admitted by the Magistrate *In re Counhaye L R 8 Q B 410* Where there is no evidence before the Magistrate the Court will interfere *R v Maurer 10 Q B D 513* approved of The Court will not consider questions regarding evidence unless the objection is such that if effect were given to it there would be no evidence left upon which the order for extradition could be supported Under s 4 sub s (1) the Magistrate may issue a warrant when the person to be arrested is within his jurisdiction S 4 merely provides a preliminary procedure Under it an arrest may be effected before the receipt of the requisition mentioned in s 3 otherwise the criminal might escape The two sections do not overlap Under s 3 sub s (1) of the Indian Extradition Act 1903 the only Government competent to issue the order for enquiry is the Government to whom the foreign state has made a requisition This function must be performed strictly and cannot be delegated Where the provisions of the Statute have not been followed the report of the Magistrate cannot afford a foundation for the order of the Government of India under s 3 of the Indian Extradition Act 1903 *In the matter of* RUDOLF STALLMANN (1911) **I L R 39 Calc 164** **15 C W N 1053**

——————— *Extradition Act (XV of 1903) ss 3 3 (1) 3 (4) 3 (8) 3 (10) 4 (1) 4 ( )—Jurisdiction of High Court—Transfer—Criminal Procedure Code (Act V of 1898) s 526—Habeas Corpus—Bail* Although the warrant of arrest under which the accused was arrested in extradition proceedings referred to the offence of escaping from lawful custody inasmuch warrant was issued on a petition charging theft which is an extraditable offence —*Held* that the extradition proceedings were taken in respect of an extraditable offence In the circumstances of the case the accused who had been in custody for a period exceeding two months had not been committed to prison under s 3 (4) of the Extradition Act and consequently s. 3 [illegible] inappli-

EXTRADITION—*contd*

cable to entitle him to be discharged by the High Court Apart from considerations as to the jurisdiction of the High Court the application for transfer for a writ of *Habeas Corpus* and for bail refused on the merits *Rudolf Stallmann* v *Emperor I L R 38 Calc 547* referred to *Per* WOODROFFE J *Semble* that in much as it has been held that the High Court has no general superintendence over such extradition proceedings it would have no jurisdiction to grant bail A C TOPS v EMPEROR (1918)

I L R 46 Calc 31

———— **Effect of illegal arrest on trial of accused**—*Criminal Procedure Code (Act V of 1898) s 188* Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code it will not avail him to say that he was brought there illegally from a foreign country The principle upon which English cases to this effect are based underlies also s 188 of the Criminal Procedure Code (Act V of 1898) EMPEROR v VINAYAK DAMODAR SAVARKAR (1910)

I L R 35 Bom 225

———— **Jurisdiction of High Court to revise proceedings of Magistrates under the Extradition Act**—*High Courts Act 1861 (24 and 25 Vict c 104) s 15—Extradition Act (XV of 1903) ss 3 and 4* The High Court has no jurisdiction under s 15 of the Charter Act to revise the proceedings of a Magistrate acting under ss 3 and 4 of the Extradition Act *In re Mohunt Deva Dass I L R 38 Calc 550 (note)* referred to STALLMANN RUDOLF v EMPEROR (1911)

I L R 38 Calc 547
15 C W N 736

———— *Proceedings before the Magistrate without jurisdiction—Power of High Court to interfere with order directing delivery of fugitive offender—Extradition Act (XV of 1903) ss 10 15* S 15 of the Extradition Act ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Chap III Where however the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law but is in fact without jurisdiction such order is revisable by the Court at the instance of the party whose liberty is affected by it *Emperor* v *Huseinally Nazaliy 7 Bom L R 463 In the matter of Ahadyer Punj Rec 45* followed *Attorney General for Hong Kong* v *Kwok a Sing L R 5 P C 179* referred to The High Court set aside the order of the Magistrate directing the delivery of a fugitive offender to the Nepal authorities where he had issued the warrant, at least in the case of one accused on mere information without any evidence where he had failed to report the issue of the warrant to the Political Agent in Nepal had made an inquiry into the case without a warrant issued by the Political Agent and had ordered the surrender on a procedure not known to the Extradition Act GULLI SAHU v EMPEROR (1913) **I L R 41 Calc 400**

———— *Requisition by Administrator of French Chandernagore for surrender of a British Indian subject for theft committed there—Foreign State meaning of—French Chandernagore not a Foreign State—Extradition Treaty with France of 14th August 1876 Art 16—Extradition Treaty with same of 7th March 1815 Art 9—Procedure on requisition for surrender—Extradition Act (XV of 1903) s 2 (c) Chapter II ss 7 8 8A 9 and 18* By Art 16 of the Extradition Treaty with France of 1876 the East Indian Possessions of the two countries are excluded therefrom and are not a Foreign State within s 2 (c) and Chap II of the Indian Extradition Act (XV of 1903) and the provision of the chapter are not therefore applicable to such Possessions Ss 7 8 and 8A of the Act do not apply to the French Possessions in India Art 9 of the Extradition Treaty with France of 7th March 1815 contemplates the summary surrender of a fugitive criminal and read with s 18 of the Act excludes the operation of s 9 of the latter A British Indian subject may on requisition by the Administrator of French Chandnagore be surrendered for theft committed therein without any preliminary enquiry under s 9 of the Act by a Magistrate in British India The subject has no right at Common Law to have such preliminary enquiry made before his surrender when there is a treaty excluding such enquiry and is followed by a statute recognising the treaty RAHAMAT ALI v EMPEROR (1919)

I L R 47 Calc 37

———— *Foreign State — Chandernagore—Treaties between Great Britain and France 7th March 1815 Art IX and 14th August 1876 Art XVI—Orders in Council 10th May 1878 and 7th March 1904—Extradition Act 1870 (33 and 34 Vic c 52) ss 2 18 25—Indian Extradition Act (XV of 1903) s 2 (c) Chap II and s 18* Chandernagore is a Foreign State as defined by s 2 (c) of the Indian Extradition Act and the provisions of Chapter II thereof must be followed before a fugitive offender can be surrendered to the French authorities The concluding portion of Art XVI of the Extradition Treaty with France of 1876 does not exclude its East Indian Possessions but is a saving clause intended to preserve intact the special arrangement established by Art IX of the Treaty of 1815 The Order in Council of 10th May 1878 applied the English Extradition Acts 1870 1873 to the case of France and therefore by reason of s 25 of the Extradition Act 1870 to the East Indian Possessions of France as part thereof The words *shall be delivered* in Art IX aforesaid do not provide for any procedure within the meaning of s 18 of the Indian Extradition Act *Rahamat Ali* v *Emperor I L R 47 Calc 37* not followed A Judge exercising the Original (Criminal) Jurisdiction of the Court in one matter is not bound by a decision of an Appellate Bench in another matter *Abhai Charan Ghose* v *Dasmani Dasi 6 B L R 623* followed CELESTE CULLINGTON *In re* (1920)

I L R 48 Calc 328

EXTRADITION ACT (XV OF 1903)

See EXTRADITION

See HABEAS CORPUS
I L R 46 Calc 52

———— s 2—

See EXTRADITION
I L R 39 Calc 146 547
I L R 47 Calc 37

———— s 2(c) Chap II and s 18—

See EXTRADITION
I L R 48 Calc 328

EXTRADITION ACT (XV OF 1903)—*contd*

——— ss 3, 4—

See EXTRADITION
I L R 38 Calc 547
I L R 39 Calc 164
I L R 46 Calc 31

See HABEAS CORPUS
I L R 39 Calc 164
I L R 46 Calc 52

——— ss 7 15—

See EXTRADITION WARRANT
I L R 42 Calc 793

——— ss 7 10 15—

See EXTRADITION
I L R 41 Calc 400

——— ss 7 8 and 8A—*Extradition Treaty with the Hyderabad State— Cheating not mentioned in the treaty though mentioned in the Act—Extradition for cheating by British Government—Warrant from the Political Agent—Bail not allowed in the warrant—British Magistrate has no power to grant bail—Criminal Procedure Code (Act V of 1898) s 496* The offence of cheating is an extradition offence so far as British India is concerned under the Indian Extradition Act (XV of 1903) notwithstanding its omission from Art 4 of the Extradition Treaty between the British Indian Government and the Hyderabad State The Magistrate in British India to whom a warrant has been addressed under s 7 of the Indian Extradition Act 1903 has no power to admit an arrested person to bail apart from the provisions of s 8 and 8A of the Act MURLIDHAR BHAGWANDAS *In re* (1918) I L R 43 Bom 310

——— ss. 7 8 9 and 18—

See EXTRADITION
I L R 47 Calc 13

——— ss 7 and 15—

See REVISION
I L R 42 Calc 793

EXTRADITION ACT (XXI OF 1879)

——— s 14—*Extradition Act (XXI of 1879) s 14 enquiry under—High Court s power to transfer enquiry to another Magistrate or to control the procedure therein* The High Court had no power to order the transfer of an enquiry under s 14 of the Extradition Act XXI of 1879 from the Court of the Magistrate specially authorised to hold the enquiry because the competency of the Magistrate to hold the enquiry depended on the authorization of the Executive Government The law also did not empower the High Court to request the Government to appoint another Magistrate to enable it to transfer the enquiry to that Magistrate if appointed The High Court refused to direct by what procedure the Magistrate should be guided in the further conduct of the enquiry as it did not possess any power to control or interfere in the conduct of an enquiry held under s 14 of the Act MOHUNT DEVA DASS *In re* (1898) 15 C W N 736

EXTRADITION ACT (33 AND 34 VICT C 52)

——— how far applicable to India—

See CRIMINAL PROCEDURE CODE 1898 s 491 15 C W N 1053

EXTRADITION TREATY

——— with the Hyderabad State—

See EXTRADITION ACT (XV OF 1903) ss 7 8 AND 8A
I L R 43 Bom 310

EXTRADITION WARRANT

——— by Resident in Nepal—

See REVISION I L R 42 Calc 793

EXTRAORDINARY ORIGINAL CIVIL JURISDICTION

See PRACTICE I L R 37 Calc 803

EXTRINSIC EVIDENCE

——— admissibility of—

See HINDU LAW—ADOPTION
I L R 38 Mad 1105

EX TRUSTEE

——— suit by an for reimbursement—

See LIMITATION ACT (XV OF 1877) SCH II ART 10 I L R 38 Mad. 260

EYE WITNESSES

See PUBLIC PROSECUTOR
I L R 42 Calc 422

F

FABRICATING FALSE DOCUMENT

——— *Kabala containing a false recital of marriage—Intent to use same in a judicial proceedings—Fraudulently executing a document— Fraudulently meaning of—Deprivation of property—Deception and injury to different persons—Penal Code (Act XLV of 1860) ss 193 and 493* When an accused person had unsuccessfully sought to obtain a woman in marriage and thereafter made and registered a *kobala* in her favour falsely reciting that he had married her and purporting to convey to her a plot of land in lieu of her dower —*Held* that he acted in furtherance of his desire to secure her person that as this could under the circumstances be done only by judicial proceeding his intention was to use the document with its false statements in a judicial proceeding and thereby to mislead the Court and that he was therefore guilty of an offence under s 193 of the Penal Code *Held* also that he had a further intention to cause injury to her and her husband and to support his own false claim to that status and that he was guilty also under s 493 of the same Code The word fraudulently in s 493 does not connote deprivation of property It is not essential under the section that the person deceived or to be deceived should be the same as the person injured or intended to be injured LEGAL REMEMBRANCER v ARI LAL MANDAL (1921) I. L. R. 48 Calc. 911

——— *Kabuliat containing false recitals and purporting to be accepted by the landlords—Admissibility in evidence of kabuliat—Kabuliat whether a document purporting to transfer or subject to any charge property or interest therein —Penal Code (Act XLV of 1860) ss 192 193 423—Evidence Act (I of 1872) s 13* Although a kabuliat when accepted, operates as a lease

EXTRADITION—*contd*

cable to entitle him to be discharged by the High Court Apart from considerations as to the jurisdiction of the High Court the application for transfer, for a writ of *Habeas Corpus* and for bail refused on the merits *Rudolf Stallmann v Emperor I L R 38 Calc 547,* referred to *Per* WOODROFFE *J Semble* that inasmuch as it has been held that the High Court has no general superintendence over such extradition proceedings it would have no jurisdiction to grant bail A C TOPS *v* EMPEROR (1918)

I L R 46 Calc 31

——— **Effect of illegal arrest on trial of accused**—*Criminal Procedure Code (Ac V of 1898) s 188* Where a man is in the countr and is charged before a Magistrate with an offen under the Penal Code it will not avail him to s that he was brought there illegally from a fore country The principle upon which English c to this effect are based underlies also s 188 of Criminal Procedure Code (Act V of 1 EMPEROR *v* VINAYAK DAMODAR SAVARKAR (

I L R 35 Bom

——— **Jurisdiction of High to revise proceedings of Magistrates un Extradition Act**—*High Courts Act 18 and 25 Vict c 104) s 15—Extradi (XV of 1903) ss 3 and 4* The High Cou jurisdiction under s 15 of the Charte revise the proceedings of a Magistr under ss 3 and 4 of the Extradition *Mohunt Deva Dass I L R 38 Calc* referred to STALLMANN RUDOLF (1911) **I L R C**

15 C

——— *Proceed Magistrate without jurisdiction—I Court to interfere with order dire fugitive offender—Extradition Act ss 10 15* S 15 of the Extraditi jurisdiction of the High Court t propriety of a warrant issued Where however the order of sought to be justified under an to be derived from the law I urisdiction such order is r at the instance of the party by it *Emperor v Hu L R 463 In the matt r of* followed *Attorney Ge Kwok a Sing L R 5 P* High Court set aside t directing the delivery Nepal authorities w at least in the ca ation without a to report the Agent in Nepal ... into the case witho ... Political Agent ... render on a procedure ... Extradition Act GULLI SAHU ... **I L R 41 Calc 400**

——— *Requisition by Admi ... French Chand rnagore for surrender of a ... subject for theft committed there— Foreign State meaning of—French Chandernagore not a Foreign State —Extradition Treaty with France of 14th August 1876 Art 10—Extradition Treaty with same of 7th March 1815 Art 9—Procedure on requisition for surrender —Extradition Act (XV of 1903) s 2 (c) Chapter*

EX ... ON ACT ... XTRADIT ... ABEAS C ... TRADIT ... I ... (c) C ... PART I

EXTRADITION ACT (XV OF 1903)—*contd*

——— ss 3, 4—

See EXTRADITION

I L R 38 Calc 547

I L R 39 Calc 164

I L R 46 Calc 31

See HABEAS CORPUS

I L R 39 Calc 164

I L R 46 Calc 52

——— ss 7 15—

See EXTRADITION WARRANT

I L R 42 Calc 793

——— ss 7 10 15—

See EXTRADITION

I L R 41 Calc 400

——— ss 7 8 and 8A—*Extradition Treaty with the Hyderabad State— Cheating not mentioned in the treaty though mentioned in the Act—Extradition for cheating by British Government—Warrant from the Political Agent—Bail not allowed in the warrant—British Magistrate has no power to grant bail—Criminal Procedure Code (Act V of 1898) s 496* The offence of cheating is an extradition offence so far as British India is concerned under the Indian Extradition Act (XV of 1903) notwithstanding its omission from Art 4 of the Extradition Treaty between the British Indian Government and the Hyderabad State The Magistrate in British India to whom a warrant has been addressed under s 7 of the Indian Extradition Act 1903 has no power to admit an arrested person to bail apart from the provisions of s 8 and 8A of the Act MURLIDHAR BHAGWANDAS *In re* (1918) I L R 43 Bom 310

——— ss 7 8 9 and 18—

See EXTRADITION

I L R 47 Calc 13

——— ss 7 and 15—

See REVISION

I L R 42 Calc 793

EXTRADITION ACT (XXI OF 1879)

——— s 14—*Extradition Act (XXI of 1879) s 14 enquiry under—High Court s power to transfer enquiry ... Magistrate ... to control the pro...* High Court had no power to ... enquiry under s 14 of the ... from the Court of ... credit the Trial Judge had ... story told by the appellant ... witnesses of whose respectability ... promissory ... alleged were ... to be signed by ... *Held* by the Judicial Committee ... of form ... an opinion ... exceptional ... the High Court that the evidence adduced by the appellant ... established the ... evidence differing from ... which it was incumbent on the respondents to ... by personal denials ... they did however ... to put against it the denial of the signature ... the receipts by their son and evidence not ... satisfactory on a collateral matter ... the ... [illegible]

EXTRADITION TREATY

——— with the Hyderabad State—

See EXTRADITION ACT (XV OF 1903) ss 7 8 AND 8A

I L R 43 Bom 310

EXTRADITION WARRANT

——— by Resident in Nepal—

See REVISION I L R 42 Calc 793

EXTRAORDINARY ORIGINAL CIVIL JURISDICTION

See PRACTICE I L R 37 Calc 853

EXTRINSIC EVIDENCE

——— admissibility of—

See HINDU LAW—ADOPTION

I L R 38 Mad 1105

EX TRUSTEE

——— suit by an for reimbursement—

See LIMITATION ACT (XV OF 1877) SCH II ART 1?0 I L R 38 Mad 260

EYE WITNESSES

See PUBLIC PROSECUTOR

I L R 42 Calc 422

F

FABRICATING FALSE DOCUMENT

——— *Kabala containing a false recital of marriage—Intent to use same in a judicial proceedings—Fraudulently executing a document— Fraudulently meaning of—Deprivation of property—Deception and injury to different persons—Penal Code (Act XLV of 1860) ss 193 and 423* When an accused person had unsuccessfully sought to obtain a woman in marriage and thereafter made and registered a *kobala* in her favour falsely reciting that he had married her and purporting to convey to her a plot of land in lieu of her dower —*Held* that he acted in furtherance of his desire to secure her person that as this could under the circumstances be done only by judicial proceedings his intention was to use the document with its false statements in a judicial proceeding and thereby to mislead the Court and that he was therefore guilty of an offence under s 193 of the Penal Code *Held* also that he had a further intention to cause injury to her and her husband and to support his ... of ... claim to that status and that he was ... of the Penal ... under s 4?3 of the same Code ... Magistrate to try ... dently ... in s 4 3 does not ... about previous d ... property It is not ... etion—Prejudice—Criminal ... V of 1898) s 19? 200 to 203 ... that the person ... tion impugning the police report and ... the same ... that the accused be placed on trial is a complaint under the Criminal Procedure Code When such a petition is presented to a Sub-divisional Magistrate he should, therefore either examine the complainant himself record reasons for distrusting its truth, hold an inquiry personally and then pass a formal order of dismissal or he should make it over to another Magistrate for disposal The latter may then, after inquiry make a proper order dismissing the complaint and pass an order under s 4 6 of the Code The

... FALSE ... n ... ego ... p n ... tha ... BOSE ... c 878

FABRICATING FALSE DOCUMENT—*contd*

for some purposes it is not a document which purports to transfer or subject to any charge any *property or any interest therein within the meaning of s* 423 of the Penal Code *Raimani Dassi* v *Mathura Mohan Dey I L R 39 Calc 1016* referred to *Quære* Whether ss 192 193 of the Code apply only where the fabricated evidence is legally admissible in the proceedings mentioned therein *Empress* v *Gauri Shankar I L R 6 All 42 Emperor* v *Chandra Kumar Missir 2 C L J 46 and Barada Kanta Sarkar* v *Emperor 16 Cr L J 620* referred to Where kabuliat containing false recitals as to the true co owners of certain disputed land and as to the possession of the executants purported to have been accepted by all the alleged owners including the complainant and his brothers —*Held* that the statements in the document would be admissible in evidence against the latter and that the kabuliat might also be admissible under s 13 of the Evidence Act As the questions of law arising in the case were not free from doubt it was not one in which the Court would interfere with an order of acquittal on revision. MAHAMMAD KAZEM ALI v JORABDI NASKAR (1919)

I L R 46 Calc 986

FACT

———— **finding of—**

See SECOND APPEAL **I L R 38 Calc 278**

See SPECIAL APPEAL **I L R 46 Calc 189**

———— **question of—**

See WILL **I L R 38 Calc 355**

See APPEAL **I L R 43 Calc 833**

———— *Fact determination of question of—Credibility of witnesses—Trial Judge opinion of value of—Strong case established by plaintiff's evidence—Necessity of rebuttal by personal testimony of defendants—Failure of defendants to depose—Material witness not cited by plaintiff because witness expected to be summoned by defendants—Costs—Successful appellant ordered to pay costs of unsuccessful—Set off against costs decreed* The appellant sued to recover jewellery of the value of Rs 29 000 which she alleged she had deposited with the respondents who were husband and wife for safe custody and produced receipts purporting to be signed on their behalf by their son which the respondents alleged were forgeries The respondents denied the deposit [illegible] alleged that the only jewels they had [illegible] to the [illegible] from the appellant had been deposit[illegible] the warrant [illegible] by way of security for two loan[illegible] on mere inform[illegible] and Rs 1 000 and they prod[illegible] where he had failed [illegible] for the amounts purpo[illegible] warrants to the Political [illegible] appellant which th[illegible] made an inquiry into the [illegible] geries T[illegible] a warrant issued by the Political [illegible] and had ordered the surrender on a procedure not known to the Extradition Act GULLI SAHU v EMPEROR (1913) **I L R 41 Calc 400**

———— *Requisition by Administrator of French Chandernagore for surrender of a British Indian subject for theft committed there— Foreign State meaning of—French Chandernagore not a Foreign State —Extradition Treaty with France of 14th August 18[illegible]6 Art 16—Extradition Treaty with same of 7th March 1815 Art 9—Procedure on requisition for surrender —Extradition Act (XV of 1903) s 2 (c) Chapter*

FACT—*contd*

execution of the promissory notes by the appellant The judgment of the High Court was reversed and that of the Trial Judge restored. A material witness by whose hands the appellant alleged the jewellery had been sent to the respondents for deposit and who was a relative of the respondents and had been a servant of the appellant but had previously to the suit left her service was summoned by the respondents whose conduct showed that they were going to make her their witness *Held* that it was not unnatural that the appellant should as she did leave it to the respondents to call her DURGA KUNWAR v MATHURA KUNWAR (1911) **15 C W N 717**

FACTORY

See BOMBAY CITY MUNICIPAL ACT s 390 **I L R 34 Bom 344**

FACTORIES ACT (XII OF 1911)

———— **Whether Magistrate can try a case when he has ordered enquiry—**

See CRIMINAL PROCEDURE CODE s 536 **I L R 1 Lah 35**

———— **ss 29 (1) and 41 (a)**—*Manager of a textile factory—Employment of labour after prohibited hours—Liability of the manager to be punished separately for each workman so employed* The accused who was the manager of a textile mill employed 18 workmen to work at his mill after 7 P M in violation of the provisions of s 29 (1) of the Indian Factories Act 1911 Eighteen prosecutions were started against the accused and the accused was convicted and sentenced separately in each case On appeal the Sessions Judge was of opinion that the employment of labour was a single offence under s 41 (a) read with s 29 (1) of the Indian Factories Act 1911 he therefore confirmed the conviction and sentence passed on the accused only in one case and acquitted him in the remaining cases The Government of Bombay having appealed again[illegible] the orders of acquittal *Held* setting [illegible] the orders of acquittal, that the [illegible] Indian Posse[illegible] to be co[illegible] part thereof The word [illegible] in each of [illegible] in Art IV [illegible] Indian procedu[illegible] was Extradi[illegible] of the person *I L R 4*[illegible] contrary to the ing the [illegible] Court in [illegible] **I L R 41 Bom 8**[illegible] an A[illegible] *Char*[illegible] follo[illegible] [illegible] **I L R 5 Bom 2**[illegible]

EX[illegible]

[illegible] **C W N** [illegible]

[illegible] **I L R** [illegible] **All 2**[illegible]

———— [illegible] **I L R** [illegible] **Calc** [illegible]

———— [illegible]

See [illegible] CO[illegible] **I L R** [illegible] **Calc** [illegible]

[illegible] **I L R** [illegible] **Calc** [illegible]

[illegible] **I L R** [illegible] **Calc** [illegible]

FAIR TRIAL.

See SECURITY FOR GOOD BEHAVIOUR
I L. R 41 Calc. 606

FALLOW LANDS

See MADRAS ESTATES LAND ACT 1908 ss 4 27 73 143
I L R 40 Mad. 640

FALSE CHARGES AND COMPLAINTS

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 195
I. L. R 38 Mad. 1044
s 2 0 I. L. R 37 Bom 376
ss 250 AND 423 I. L. R 38 Mad. 1091

See JURISDICTION OF CRIMINAL COURT
I L R 40 Calc 360

See PENAL CODE (ACT XLV OF 1860) s 211 I. L. R 39 All 715

FALSE DEFENCE.

——— in suit against vakil—

See PROFESSIONAL MISCONDUCT
I L. R 40 Mad 69

FALSE DOCUMENT

See FABRICATING FALSE DOCUMENT

See FORGERY I L R 38 Calc 75
14 C W N 1076

FALSE EVIDENCE

See FALSE STATEMENT
I L. R 38 Calc 368

See JUDICIAL PROCEEDING
I L R 37 Calc 52

See PENAL CODE (ACT XLV OF 1860) s 192 I L R 40 All 30

See THUMB IMPRESSION
I L R 39 Calc 348

——— Deposition und r compulsion—*Privileg —Incriminating stat ments in cross examin ation mad by a party to a suit after objection taken not by deponent personally but by h s pleader— Ad miss bility of the statem nts on subsequent trial for giving false evidence— Compelled to answer — Evidence Act (I of 1872) s 132 proviso* An incriminating statement in a deposition made by a party to the suit in cross examination in answer to questions relevant only as affecting his credit and objected to not by the deponent himself but by his pleader is not admissible against him on his subsequent trial for giving false evidence he being in fact compelled to answer within the meaning of s 132 of the Evidence Act Such objection may be taken by counsel or pleader representing the party *Thomas* v *Newton 1 Moo and M 48n* and *Rex* v *Adey 1 Moo and Rob 94* distinguished *Queen* v *Gopal Doss I L R 3 Mad 271* explained and distinguished *Per* TEUNON J When such an objection has been taken and overruled, if any objection or privilege personal to the witness remains it is still op n to him to assert that objection or claim tha privilege EMPEROR v PRAMATHA NATH BOSE (1910) I L R 37 Calc 878

FALSE IMPRISONMENT

——— *Preventing intending passenger of ferry boat to return from wharf through turnstile without payment—Reasonable condition* The plaintiff with a view to take the defendant Company s ferry boat paid the usual charge of a penny on entering the defendant Company s wharf then changed his mind and wanted to return through a turnstile provided by the Company for exit but having refused to pay the penny which he was asked to do to be allowed to go through the turnstile was by force prevented from going through it There being no complaint of any excessive violence having been used *Held* that there was no false imprisonment as the defendant Company was entitled to impose a reasonable condition before allowing the plaintiff to pass through their turnstile from a place to which he had gone of his own free will and which he had contracted to leave by a different exit The payment of one penny was a quite fair condition and if the plaintiff did not choose to comply with it the defendant was not bound to let him through *Held* further that the question whether the attention of the plaintiff had been sufficiently drawn to the Company s notices saying that the fare must be paid was immaterial for the decision of the case ARCHIBALD NUGENT ROBERTSON v THE BALMAIN NEW FERRY COMPANY LIMITED (1909) 14 C W N 410

FALSE INFORMATION—

See PENAL CODE 1860 s 182 I L R 1 Lah 410

See JURISDICTION OF CRIMINAL COURT
I L R 37 Calc 250

See SANCTION FOR PROSECUTION
I L R 43 Calc 1152
I L R 44 Calc 650

——— *Criminal Procedure Code s 195—False information to Police prosecution for—Opportunity to the informant to prove his case* A person who lays information to the Police is entitled to have his case judicially determined before he is called upon to answer the charge of giving false information under s 182 of the Indian Penal Code ISSER v KING EMPEROR (1910)
14 C W N 765

——— *Information to the police reported false—Subsequent petition to the Magistrate impugning the report and praying for trial—Complaint—Proper procedure—Reference of complaint to another Magistrate for inquiry and report legality of—Power of latter to hold inquiry and direct prosecution of informant for offences under ss 182 and 211 of the Penal Code —Jurisdiction of referring Magistrate to try such charges on the police report without previous disposal of the complaint—Discretion—Prejudice—Criminal Procedure Code (Act V of 1898) ss 190 200 to 203 476 537* A petition impugning the police report and praying that the accused be placed on trial is a complaint under the Criminal Procedure Code When such a petition is presented to a Sub divisional Magistrate he should therefore either examine the complainant himself record reasons for distrusting its truth, hold an inquiry personally and then pass a formal order of dismissal or he should make it over to another Magistrate for disposal. The latter may then, after inquiry make a proper order dismissing the complaint and pass an order under s 476 of the Code. The

FISHERY—*concld*

changing rivers of England be profitably applied to such differing conditions. In the case of alluvion as applied to rights of jalkar and the argument that the right to follow the river ought to be limited to cases where the river encroachments were gradual and should not be extended to an irruption as sudden and rapid as was the formation of the new channel in the respondents lands, the Indian law doubtless guided by local physical conditions has adopted in Regulation XI of 1825 ss. 1 and 4 a rule varying somewhat from the rule established in England and the analogy of the English law can hardly be called in aid when Indian legislation has thus an established and different rule on the same subject As to the Indian rule working injustice in that a land owner not only loses the use of his land when the river overflows it but also the right to fish over his own acres in order that another may unmeritoriously fish in his place which cannot occur under the English rule, there is no such proof that one rule is better than the other as would even approach the conclusion that the rule established in India should be set aside. SRINATH ROY *v* DINABANDHU SEN (1914)
L. R 41 I. A. 221
I L R. 42 Calc. 489

———— *Right of owner of fishery in river to follow it when it changes its course* The solution of the question whether the owner of a fishery in a river is entitled to follow it when it changes its course depends mainly on whether or not the invading river has lost its identity It is impossible to prescribe any hard and fast rule for the purpose of ascertaining the conditions in which the river may be said to have lost its identity The decision of the Privy Council in *Srinath Roy v Dinabandhu Sen, I L R 42 Cal 489 s c 19 C W N 1217* is confined to cases where the river made for itself a new channel where none existed SARADA PRASAD RAY CHAUDHURY *v* MUHAMAD YUSUF (1916)
21 C. W N 1007

FISHING LEASE.

———— *for 9 years void for want of registration—Removal of fish under authority of lease if wrongful—License—Co-sharer—Transfer of Property Act (IV of 1882) s. 107* Where in a suit by one co-owner against another for damages for wrongful removal of fish from a tank the defendant's plea was that he had been put in possession of the tank with the right of fishery therein for a period of nine years under an arrangement with his co-sharers and he proved that he had removed the fish under such authorisation *Held* that the arrangement proved was a sufficient answer to the suit irrespective of any rights the defendant might have as a co-sharer even if as a lease it was void under the provisions of the Transfer of Property Act. BEHARY LAL NANDY *v* KEDAR NATH NEBU (1915) 19 C. W N 872

FITNESS OF SURETY

See SURETY I. L. R. 41 Calc. 764
I. L. R. 42 Calc. 706
I. L. R. 43 Calc. 1024
I L. R. 44 Calc. 737

FIXED DEPOSIT

See CHARGE I. L. R. 36 All. 507

FIXED RATE HOLDING

See AGRA TENANCY ACT (II OF 1901) s. 79 I. L. R. 39 All. 455

See ESTOPPEL I. L. R 34 All. 538

See MORTGAGE I L. R. 39 All. 539

FIXED RATE TENANCY

See AGRA TENANCY ACT (II OF 1901) s. 9 I. L. R. 34 All 255

See LANDLORD AND TENANT
I. L. R. 34 All. 694

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 91 I L. R. 33 All. 111

FIXED RENT

See KABULIAT CONSTRUCTION OF
I L. R 37 Calc. 625

FIXTURE.

See ADMINISTRATION
I L. R. 45 Calc. 653

See CALCUTTA MUNICIPAL ACT s. 341
15 C. W N 730

———— doctrine of—

See LANDLORD AND TENANT
I. L. R. 37 Calc. 815

———— English Law of—

See LAND REVENUE CODE (BOM ACT V OF 1879) s 83. I. L. R. 38 Bom. 716

———— notice to remove—

See CALCUTTA MUNICIPAL ACT (BENGAL III OF 1899) ss. 341 (1) etc.
I. L. R. 37 Calc. 384

———— removal of—

See COMPENSATION
I L. R 44 Calc. 87

———— *Crop grown on another person's land title of an owner of land—Suit by owner to recover value of crop cut and taken away—Fixtures English law of if applies in this country* When after purchasing a holding at an execution sale and taking delivery of possession thereof through Court the plaintiff suffered the tenant to grow crop on the land *Held* that the plaintiff could not sue for recovery of the value of the crop cut and taken by another The crop did not become the plaintiff's as soon as it was grown merely because the plaintiff had acquired ownership of the land. *Mofi Sheikh v Panik Lal I L. R. 37 Calc. 815* distinguished. *Lep Singh v Nimar Khan I L. R. 21 Calc. 44* referred to PRIYA NATH PAL *v* KAMINI DASI (1912)
16 C. W N 1101

———— *Projections—Tin sheets attached to a shop by hinges and supported on movable props—Necessity of notice of removal—Limitation of period of prosecution in cases of obstructions to or projections over a public street—Calcutta Municipal Act (Beng III of 1899) ss. 341 and 601 Bye-law (7) paragraph 3 made under s 559 (18).* Sheet of tin attached to a shop by hinges and supported by movable props so as to form a verandah over the street and which hang vertically when the props are taken away are not so attached as to become a part of the shop, and are not therefore fixtures within s. 341 of the Calcutta Municipal Act (Beng III of 1899) requiring notice of removal

FIXTURE—*contd*

thereunder The period of limitation under s 631 of the Act in the case of unauthorized obstructions to or projections over the public street run from the date when they are first made and not from the last date on which they were in existence Where certain tin sheets alleged to amount to such obstruction or projection were put up more than three months before the filing of the complaint the prosecution was *held* to have become barred NARAYAN KISSEN SEN *v* CORPORATION OF CALCUTTA (1920) I. L. R. 48 Calc 602

FOOTINGS.

———— *Trespass—Survey Map evidentiary value of—Mandatory Injunction—Specific Relief Act (I of 1877) Chap X—Presumption* The existence of footings to a wall, in the circumstances of the case raised the presumption that the land covering such footings belonged to the owner of the wall to which they appertained Where a wall was constructed by the defendant on the land covering plaintiff's footings and after its completion a suit was brought by the plaintiff for trespass the plaintiff not having been guilty of delay or acquiescence *Held* that the proper remedy was by way of mandatory injunction ordering the demolition of the defendant s wall ABDUL HOSSAIN *v* RAM CHARAN LAW (1911) I. L. R 38 Calc 687

FORCE.

———— use of—

See BAILIFF I. L. R. 42 Calc 313

FORCIBLE EJECTMENT

See RAILWAY PASSENGER I L R 44 Calc 279

FORCE MAJEURE

See CONTRACT ACT (IX OF 1872) s 56 I. L. R 40 Bom 301

FORECLOSURE

See APPEAL I L R 41 Calc 418

See MORTGAGE I L R 37 Calc 796; I L R 39 Calc 828

See MORTGAGE BY CONDITIONAL SALE I L R 36 All 327

See MORTGAGE—FORECLOSURE

See REGULATION NO XVII OF 1806 s 8 I L R 40 All 387

———— right to decree for—

See TITLE I L R 37 Calc 239

———— suit for—

See CIVIL PROCEDURE CODE 1908 s 11 I L R 36 Bom 548

See COURT FEES ACT (VII OF 1870) s 7 (ix) SCH I ART (1) I. L. R 36 All 40

See LIMITATION ACT (IX OF 1908) s 20 I L R 35 All 378

See MORTGAGE I. L. R 43 Calc. 22

FOREIGN BILLS

See BILLS OF EXCHANGE I L R. 46 Calc 584

FOREIGN COURT

See FOREIGN DECREE

See FOREIGN—JUDGMENT

See MEMONS I L R 43 Bom 647

———— jurisdiction of—

See FOREIGN JUDGMENT I L R 37 Mad 163

———— Injunction on ground of suit pending in—

See INJUNCTION 24 C W N 735

1 ———— *Appearance by the defendant—Protest against jurisdiction—Defence on the merits—To get refund from the creditor s son to whom the suit debt was repaid and to avoid arrest—Voluntary submission to jurisdiction* The defendant who was sued in a foreign Court *viz* a Court in the Cochin State appeared and defended the suit against him on the merits but protested against the jurisdiction of the Court His reasons for appearing and defending the suit were (i) that the creditor s son to whom he had repaid the suit debt refused to refund the money unless he defended the suit brought by the father and (ii) that if a decree were passed against him he might be arrested when he went to Cochin on business or to see his relations *Held* that the defendant must be deemed to have submitted to the jurisdiction of the foreign Court voluntarily notwithstanding his protest against its jurisdiction *Parry & Co* v *Appasami Pillai I L R 2 Mad 407* overruled RAMA *v* KRISHNA (1915) I L. R 39 Mad. 733

2 ———— *Suit in on cause of action tried and determined between the parties in a British Indian Court—Latter Court if may issue perpetual injunction to restrain proceeding in Foreign Court—Res judicata—Civil Procedure Code (Act V of 1908) ss 11 13—Specific Relief Act (I of 1877) s 56 (B)* A A a Mahomedan died leaving estates situate partly within British India and partly within the ceded district of the Feudatory State of Rampur and leaving him surviving a widow a daughter and her children The daughter and her children alleging that A A was a Shia and that therefore the daughter excluded the residuary heirs from inheritance instituted a suit against the latter in a British Indian Court (*viz* the Court of the Subordinate Judge at Bareilly) where their claim was opposed by the residuaries and finally obtained an *ex parte* decree upholding their claim the defendants having failed to obtain an adjournment which they said was necessary to enable them to call witnesses This decree was affirmed by the High Court at Allahabad. Meanwhile the residuaries instituted against the daughter and her children a suit in a Court of the Rampur State for possession of a moiety of the estate of A A situate in the ceded district of Rampur State claiming as they had done in their defence in the other suit that A A was a Sunni The daughter and her children thereupon instituted another suit in the Court of the Subordinate Judge at Bareilly praying for a declaration that the previous decree of the Court was binding between the parties and operated as *res judicata* and that the defendants (the residuaries) be restrained by a perpetual injunction from continuing their suit in the Court of the Rampur State The Subordinate Judge as well as the High Court at Allahabad on appeal having held that they had no jurisdiction to grant

FOREIGN COURT—contd

the injunction and dismissed the suit the Privy Council on the appeal of the plaintiff's affirmed that decision and dismissed their appeal *Maqbul Fatima v Amir Hasan Khan I L R 37 All 1* affirmed MAQBUL FATIMA v AMIR HASAN KHAN (1916) **20 C W N 1213**

FOREIGN CURRENCY

——— *Damages—Rate of exchange—Date of conversion* In a suit for damages caused to the plaintiff by reason of negligence on the part of the second defendant as a common carrier it was contended on behalf of the second defendant that the loss caused to the plaintiff being in the first instance measurable in sterling judgment must be based upon the rate of exchange prevailing on the date of judgment. *Held* that this contention must be overruled *Di Fernando v Simon Smits & Co Ld [1920] 2 K B 704 [1920] 3 K B 409 Barry and Others v Van Den Hurk [1920] 2 K B 709* and *Lebeaupin v Crispin [1920] 2 K B 714* followed DEKHARI TEA CO LTD, v ASSAM BENGAL RAILWAY CO LTD (1921) **I. L. R 48 Calc. 886**

FOREIGN DECREE

See DECREE **I L R 39 Bom 34**
I L R. 40 Bom 504

See FOREIGN COURT

See FOREIGN JUDGMENT
I L R 36 Mad 414

1 ——— *Execution by British Court—The British Court can inquire if the decree was passed with jurisdiction—Ex parte decree—Absent defendant not submitting to jurisdiction—Decree a nullity—Civil Procedure Code (Act V of 1908) s 44 Order XXI rule 7—Act XIV of 1882 s 229 B* It is open to a British Court executing a foreign decree to enquire whether the foreign Court had jurisdiction to pass the decree A decree pronounced by a Court of a foreign state in a personal action *in absentem* the absent party not having submitted himself to its authority is a nullity JIVAPPA TIMMAPPA v JEEBOI MURGEAPPA (1916)
I. L R 40 Bom 551

2 ——— *Execution of foreign decree in British India—Competency of British Indian Courts to question the jurisdiction —Appearance to save property from seizure—Denial of jurisdiction and claim—Jurisdiction submission to whether voluntary* It is competent to the executing Court to refuse execution of a foreign decree sought to be executed in British India under s 44 of the Code of Civil Procedure on the ground that such decree was passed without jurisdiction Submission is not voluntary if the appearance is made only to save property which is in the hands of a foreign tribunal. *Voinet v Barrett 55 L J (Q B D) 39 Guiard v De Clermont and Donner 30 T L R 511* and *Boissiere & Co v Brockner & Co 6 T L R 85* followed *Parry & Co v Appasami Pillai I L R 2 Mad 407* doubted *Per* WALLIS OFFG *C J*—Whether submission was for the purpose of saving property or voluntary is a question of fact in each case *Per* SESHAGIRI AYYAR *J*—The change in the language between s. 229 of the Civil Procedure Code (Act XIV of 1882) and O XXI r 7 of the Code of 1908 does not warrant the conclusion that in regard to decrees obtained within British India the executing Court has no jurisdiction to question the jurisdiction of the Court which passed the decree The words As if they have been passed by the Courts in British India relate only to the mode of execution and have not the effect of giving foreign judgments all the incidents of a judgment of a British Court VEERARAGHAVA AYYAR v MUGA SAIT (1914) **I L R 39 Mad 24**

FOREIGN DOMICILE

See DIVORCE **I L R 40 Calc 215**

FOREIGN JUDGMENT

See CIVIL PROCEDURE CODE 1908 s 13 ss 11 13 **I L R 37 All 1**

See FOREIGN COURT —

——— *Defence struck out No decision on the merits—No cause of action* Where in a suit in a foreign Court defence was struck out and judgment entered for plaintiff *Held* that the judgment is not one decided on the merits and thus not being conclusive could not of itself constitute a cause of action to the suit VISWANADHA REDDI v KEYMER (1914)
I L. R 39 Mad 95

——— *Foreign Judgment suit on—Jurisdiction of Foreign Court—submission to by defendants when defendant carrying on business in foreign territory through agent—No residence thereby—Service of notice of suit on agent insufficient as against principals outside jurisdiction—Service on principals out of jurisdiction* Submission to the jurisdiction of a foreign forum is largely a question of fact in each case or a mixed question of law and fact Where defendants submitted to the jurisdiction of foreign Courts by giving a power of attorney as abovementioned to an agent and a decision is passed against them after service of summons of the suit on them while they were out of jurisdiction by order of Court the defendants are *primâ facie,* bound by the judgment and where no other defence is raised but that of non submission and non service of notice both of which were found against a decree against the defendants in accordance with the foreign judgment must necessarily follow Persons who carry on business in a foreign country through an agent submit to the jurisdiction of the Courts of that country by giving that agent a power of attorney containing very wide powers including right to institute or defend any suits that might be brought against them touching any matters connected with their business or otherwise A power of attorney of this character which presumably is brought to the notice of persons dealing with the firm is evidence that the principals adopted the Court of the place wherein the business is carried on as the forum before which their claims were to be brought *Bank of Australasia v Harding 19 L J C P 345* and *In re Hainault Forest Act 9 C B Rep 648 at p 661* and *Bank of Australasia v Nias 20 L J Q B 284* followed *Obiter* A decree obtained in a foreign country against a firm after serving the agent of the firm with notice of the suit while the principals of the firm who were defendants in the case were out of its juris

FOREST ACT (VII OF 1878)—*contd*

members of the party who had not shot any thing could properly be convicted of hunting in a reserved forest within the meaning of s 25 (i) of the Indian Forest Act 1878 EMPEROR v BARKAT ALI (1917) I L R 40 All 38

———— s 25 cl (i) r 3 (a)—*Shooting in a reserved forest without license—Tracking and shooting a tiger to preserve one's property* The accused finding that his cattle were killed by a tiger tracked and shot the animal in a reserved forest without a license *Held* that the accused was guilty of a technical offence under r 3 (a) framed under the provisions of s 25 cl (i) of the Indian Forest Act 1878 EMPEROR v AMIRSAHEB BALAMIYA (1918) I L R 42 Bom 406

———— s 75—An occupier held entitled to cut certain sandalwood trees not proved to be in existance and reserved at the time of settlement EMPEROR v YELLAPPA RAMANGOUDA I L R 45 Bom 110

FORFEITURE

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXII R 10 I L R 39 Bom 568

See LANDLORD AND TENANT I L R 35 Bom 239; I L R 39 Calc 903; I L R 40 Calc 870

See LEASE I L R 42 Bom 734; I L R 45 Bom 300

See LESSOR AND LESSEE I L R 38 Mad 445

See PARDON I L R 42 Calc 756 & 856

See PARTITION I L R 37 Calc 918

See PASTURE LANDS 14 C W N 372

See PRINTING PRESS FORFEITURE OF I L R 38 Calc 202

See RIGHT OF SUIT I L R 40 Bom 200

See TRANSFER OF PROPERTY ACT 1882 ss 6 CL (b) 109 111 CL. (g) I L R 43 Bom 28

s 111 I L R 35 All 145

———— of cash and ornaments found on the person of the gamblers—

See BOMBAY PREVENTION OF GAMBLING ACT (BOM ACT IV OF 1887) s 8 I L R 47 Bom 686

———— of adoption—

See BURMESE LAW I L R 45 Calc 1

———— bond—

See CRIMINAL PROCEDURE CODE s 514 I L R 2 Lah. 204

———— of deposit of earnest money—

See CONTRACT BREACH OF I L R 38 Mad. 801

———— of land—

See LAND REVENUE CODE (BOM ACT V OF 1879 AS AMENDED BY BOM ACT VI OF 1901) s. 56 I L R 37 Bom. 692

FORFEITURE—*contd*

———— of lease—

See LANDLORD AND TENANT I L R 44 Mad 629

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 111, CL. (g) I L R 42 Bom 195

———— of occupancy—

See LAND REVENUE CODE BOMBAY ss 56 214 I L R 36 Bom 91

———— of pardon—

See PARDON I L R 37 Calc 845

———— of property—

See PENAL CODE (ACT XLV OF 1860) s 62 I L R 36 All 395

———— of servient estate—

See MADRAS IRRIGATION CESS L R 46 I A 302

———— relief against—

See LANDLORD AND TENANT I L R 39 Mad. 834 & 1049

———— suit to set aside collector's order of Limitation—

See LIMITATION ACT (IX OF 1908) SCH I ART 14 I L R 44 Bom 451

1 ———— Forfeiture by Government of Deshgat Inam lands—*Effect of forfeiture on prior mortgage—Payment of assessment to Government by mortgagee in possession—Suit to redeem by mortgagor—Mortgagee cannot deny mortgagor's title* The plaintiff's ancestors mortgaged their Deshgat Inam lands to the defendant's ancestor with possession in 1855 The lands were in 1856 forfeited by Government but the mortgagee was continued in possession and paid assessment in respect of the lands to Government In 1901 the plaintiffs sued to redeem the mortgage The defendant contended that the order of forfeiture deprived the plaintiffs of all right to the lands and that the title thereafter became vested in the defendant *Held* that the order of forfeiture had merely the effect of converting the lands from a service tenure into lands liable to pay assessment to Government and that it did not deprive the plaintiff of all right and title to the lands and extinguished the relation of mortgagor and mortgagee which existed between the parties *Vishnoo Trimbuck v Tatia 1 Bom H C R 22* and *Gangabai v Kalapa Dari Mulrya (1885) 9 Bom 419* followed. *Held* also that the defendant who came into possession of the lands as mortgagee of the plaintiffs could not turn round after the order of forfeiture and take the benefit of it and challenge the validity of the mortgage in virtue of which his title to the land as mortgagee had begun GURBASAPPA v RANGO VENKATESH (1912) I L R 36 Bom. 539

2 ———— Insolvency—*Security for production of insolvent debtor—Failure of insolvency application—Forfeiture of security money —Civil Procedure Code (Act V of 1908) s 145* The decree holder is entitled to the money that has been deposited by the surety as security for the

FORFEITURE—*contd*

benefit of the decree holder whose rights were interfered with to enable the judgment debtor to make an application in insolvency with a view to his protection from arrest on the money being forfeited by the Court for failure to produce the debtor when required The Court has no power to declare a forfeiture in favour of the Govern ment BASANTI LAL v CHHEDO SINGH (1912)

I L R 39 Calc 1048

3 ——— Under Press Act—*Scope of s 4 — Stating the grounds of its opinion —Mandatory nature of direction in s 12—Notification—Grounds —Onus of proof—Limited Jurisdiction of High Court —Executive and Judicial functions contrasted—Intention—Penal Code (Act XLV of 1860) s 153A* On an application under the Indian Press Act 1910 to set aside the order of forfeiture of a pamphlet made by the Local Government *Held* that the onus was cast on the petitioner to establish that it was impossible for the pamphlet to come within the terms of s 4 of the Act and that the functions of the High Court were limited under ss 17 and 19 to considering whether the petitioner had discharged that onus the High Court had no jurisdiction to pronounce on the wisdom or unwisdom of the order of forfeiture The direction in s 12 of the Act (stating the grounds of its opinion was mandatory and it was not a compliance with the direction merely to cite the words of the section invoked without setting out facts on which the opinion was based but the High Court was debarred by s 22 from questioning the legality of the forfeiture on that ground In an enquiry under this Act the question of the intention of the writer or publisher is not directly material. *Per* STEPHEN J —The omission of the Local Government to comply with the mandatory direction contained in s 12 did not oust the jurisdiction of the High Court to revise the order of forfeiture on its merits *In re Maho* MAHOMED ALI (1913)

I L R 41 Calc 466

4 ——— *Order made by Local Government of Delhi—Jurisdiction—Delhi Laws Act (XIII of 1912* Where an order was made under s 4 (*1*) of the Indian Press Act 1910 by the Local Government of Delhi directing the forfeiture wherever found of all copies of a news paper published on a certain date in Delhi on an application to set aside the order made by a person who had in his possession in Calcutta a particular copy *Held* that this High Court had no jurisdiction to entertain the application *In re* ABUL KALAM AZAD (1915)

I L R 42 Calc. 730

5 ——— *Security—News paper articles—Sedition and seditious libel—Competency of the High Court to set aside order of forfeiture—Burden of proof—Presumption—Evidence—Policy of the newspaper—Intention material ty of—Hatred contempt and disaffection words likely or having a tendency to produce—Indian Press Act (I of 1910) ss 4 17 19 to 22* The Press Act was framed to enable the Government and the Court to deal with the meaning of documents and not with the intentions of their authors and publishers It is essentially a preventive measure a measure with a view to prevent crime that is crime imperilling the existence of the State the safety of its officers public order and the like An offence under this Act is not sedition as such but the printing or publishing of matter of the nature and tendency mentioned in s 4 attracts to itself the penalty of forfeiture It would be against all recognised canons of interpretation to import into the Press Act the provisions of the law of sedition as enacted in the Indian Penal Code or as administered in England The power to declare the security forfeited under the Press Act can be exercised only with regard to a press in respect of which security has been deposited under either of the two sub sections of section 3 S 22 makes the declaration of the forfeiture conclusive evidence of the *factum* of forfeiture The legality of forfeiture can be questioned only by the method mentioned in s 17 and to the extent provided thereby Although the order may have been made by the Local Government on the ground that the words signs or visible representations were of the nature described in one or other of the six clauses of s 4 (*1*) the High Court under s 19 (*1*) is competent to set aside the order of forfeiture on one ground and one ground alone namely that the words contained in the newspaper in respect of which the order in question was made were not of the nature described in any of the clauses of s 4 (*1*) The Court does not approach the case with the presumption that the order is erroneous the burden lie upon the petitioner to establish the validity of his contention If he fails to satisfy the Court that the words signs or visible representations are not of the nature described in s 4 (*1*) the application to set aside the forfeiture must be dismissed *Prolab Chunder Mukerji* v *Emperor 11 C L R 25 Rohimuddi* v *The Queen Empress I L R 20 Calc 353* and *Milan Khan* v *Sagar Bepari I L R 23 Calc 347* referred to In the absence of any words of direct exclusion of evidence it is fair to assume that if an article is ambiguous or doubtful and therefore the Crown requires to supplement it by evidence of other articles from the same newspaper the person against whom the order of forfeiture is passed should have the right to give evidence in rebuttal. The object of s 20 of the Press Act was to widen for a specified purpose, the rule of evidence embodied in s 14 of the Evidence Act S 20 may be utilised by the person affected by the order of forfeiture precisely in the same way as by the Crown *Amar Singh* v *Emperor 16 Cr L J R 555* and *Ghulam Qadir Khan* v *Emperor 15 Cr L J R 493* referred to S 20 only applies where if the article stood alone there may be doubt or ambiguity as to the character nature or tendency of the words used and not when the meaning of the article is apparent on its face *Annie Besant* v *Emperor I L R 39 Mad 1085* and *Annie Besant* v *The Advocate General Madras 23 C W N 956 35 T L R 500* Question of Intention and Evidence discussed *In re* AMRITA BAZAR PATRIKA PRESS LIMITED (1919) I L R 47 Calc 190

FORGERY

See CRIMINAL PROCEEDINGS STAY OF

I L R 38 Calc 106

See CRIMINAL PROCEDURE CODE s 195

I L R 34 All 654

I L R 42 All 130

See EVIDENCE.

I L R 36 Mad 159

See LIMITATION ACT (IX OF 1908)

I ARTS. 92, 93 I L R 40 Bom.

FORGERY—*contd*

See PENAL CODE ss 34 109 467
I L R 36 Bom 524
ss 463 467 I L R 37 Bom 666
s 465 471 I L R 43 All 225

See SANCTION FOR PROSECUTION
14 C W N 479

See USING FORGED DOCUMENT
I L R 39 Calc 463

———— copy of—

See FORGERY I L R 43 Calc 783

———— antecedent—

See SANCTION FOR PROSECUTION
I L R 44 Calc 1002

———— **False document, ingredients of**—*Material part of document if altered— Dishonestly and fraudulently* Where the accused after the execution and registration of a document, which was not required by law to be attested added his name to the document as an attesting witness *Held, per* HARINGTON and MOOKERJEE *JJ* (TEUNON *J* dissenting) that the accused was not guilty of an offence under s. 471 That the accused by the insertion of his name as an attesting witness cannot be held to have done the act either dishonestly or fraudulently within the meaning of these words as defined in ss 24 and 25 of the Indian Penal Code The word fraudulently defined The interpolation of the name of a person as an attesting witness to a document not required by law to be attested subsequent to its execution and registration is not an alteration of the document in a material part SURENDRA NATH GHOSE *v* EMPEROR (1910)
14 C W N 1076
I L R 38 Calc 75

———— **Certified copy**—*filing of whether user of forged document if original be forged —Evidence of intention—Penal Code (Act XLV of 1860) ss 466 471* A series of similar transactions which are not the offence charged can only be used as evidence of the intention of the person who forged the document and not as evidence of forgery It is extremely doubtful whether the mere filing of a copy is the user of a forged document A certified copy thereof is certainly not a forged document But it is otherwise where the offender used the copy knowing or having reason to believe that the entries in the original documents were forgeries and intending to use them for fraudulent purposes *Queen* v *Nujum Ali 6 W R Cr 41* and *Emperor* v *Mulai Singh I L R 28 All 402* distinguished KRISHNA GOVINDA PAL *v* EMPEROR (1916)
I L R 43 Calc 783

———— **Signing certificate of purchase of arms and ammunitions in false name and giving wrong addresses**—*Person legally entitled to possess the same—Act fraudulent if not dishonest —Penal Code (Act XLV of 1860) ss 23 24 463 to 465* A person lawfully entitled to possess arms and ammunitions signing the prescribed certificate of purchase of the same in the name of another with an address not his own and thereby deceiving the gunsmith and the Government and defeating the object of the certificate, commits forgery his act having been done fraudulently if not dishonestly *Reg v Toshack I Den C C R 492 Empress v Dhunum Kazee I L R 9 Calc 53* and *Queen*

FORGERY—*contd*

———— antecedent—*contd*

Empress v *Abbas Ali I L R 25 Calc 512 followed* CAUSLEY *v* EMPEROR (1915)
I L R 43 Cacl 421

———— **Copy of forged document**—*whether constitutes a forgery—Penal Code (Act XLV of 1860) ss 417 420 and 511* The making of a copy of a forged document does not constitute forgery unless the maker of the copy was authorised to make it *Essan Chander Dutt* v *Baboo Prannath Chaudhry Marsh rep 270* distinguished. *Emperor* v *Ali Hussan I L R 28 All 358* referred to LACHMAN LAL *v* THE KING EMPEROR 4 Pat L J 16

FORM OF DECREE

See CHARITABLE TRUSTS
I L R 34 Mad 406

FORM OF ORDER

See DISSOLUTION I L R 47 Calc 620

FORM OF WARRANT

See SEARCH WARRANT
I L R 45 Calc 905

FORMALITIES

See DEPOSITION I L R 45 Calc 825

FORMÂ PAUPERIS

See PAUPER SUIT

———— appeal in—

See LIMITATION ACT (XV OF 1877) ss. 5 AND 7 I L R 34 Bom 589

FORMER COURT

See TRANSFER OF PROPERTY (VALIDATING) ACT NO XXVI OF 1917 s. 3 PROVISO 3 I L R 42 All 430

FORMER RECEIVER

———— suit against—

See RECEIVER I L R 41 Calc 92

FORUM

See ADOPTION I L R 37 Calc 860

FORWARD CONTRACT

See CONTRACT ACT (IX OF 1872) s 47
I L R 40 Bom 517

FOUNDER

———— descendant of—

See WAKF I L R 43 Calc 467

———— intention of—

See MAHOMEDAN LAW ENDOWMENT
I L R 43 Calc. 1085

FRAME OF SUIT

See CHAWKIDARI CHAKRAN LANDS
I L R 37 Calc 57

See MORTGAGE I L R 38 Calc 342

FRAUD

See ACCOUNTS I L. R 42 All. 230

See ASSIGNEE
I. L. R 38 Mad. 36

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 2,8 I. L. R 34 Bom. 575

See CIVIL PROCEDURE CODE (ACT V OF 1908) s. 47 O XXI r. 2
I. L. R 43 Bom. 240

See COMPANY I L. R 36 Bom 564

See DECREE 4 Pat L. J 187

See DIVORCE. I. L. R. 48 Calc. 283

See EVIDENCE ACT (I OF 1872) s 92
I. L. R. 35 Bom 93
I. L. R 38 Calc 892

See EXECUTION OF DECREE
I L. R. 38 Calc. 622

See FORGERY I L. R 43 Calc. 421

See HINDU LAW—ADOPTION
I L R. 39 Bom 441

See HINDU LAW—WIDOW
I. L. R. 41 Bom 93

See IMMOVEABLE PROPERTY
I. L. R. 34 Mad. 143

See LIMITATION ACT (IX OF 1908) SCH I ART 95 I L. R 37 Bom 158

See MINOR I L R 37 Mad 535

See MORTGAGE I. L. R 38 Bom. 10

See MORTGAGE BY MINOR
I. L R 38 Mad. 1071

See MISTAKE I. L. R 43 Calc 217

See PLEADINGS
I. L R 37 Calc 856

See POSSESSION BY FRAUD
I. L R 46 Calc 331

See PRESIDENCY SMALL CAUSE COURT s 94 14 C W N 695

See RAILWAY PASSENGER
I. L R. 44 Calc 279

See RIGHT OF SUIT
I. L R 37 Calc 197

Se SALE I. L R 48 Calc 119

See SPECIFIC PERFORMANCE
I L R 38 Calc 805

See SUIT TO SET ASIDE DECREE
I L R 32 All 145
I. L R 38 All. 7

See UNITED PROVINCES LAND REVENUE ACT (III OF 1901) s 233 (k)
I. L. R 41 All 182

———— by guardian—

See MINOR I L R. 38 All 452

———— of creditors—

See CIVIL PROCEDURE CODE (ACT V OF 1908) ss 47 AND 50
I. L. R 38 Mad. 1076

———— plea of—

See EVIDENCE ACT (I OF 1872) s 92
I. L. R. 42 Bom. 512

FRAUD—*contd*

———— suit to set aside decree on the ground of—

See CIVIL PROCEDURE CODE (1908) s 20 (c) I L R 36 All 564

See COMPROMISE DECREE
I L R 1 Lah 344

———— upon creditor—

See MORTGAGE I L R 38 Bom 10

———— whether vitiates order of settlement Officer—

See SANTAL PARGANAS SETTLEMENT REGULATION 6 Pat L J 373

———— Fraudulent decree—*Presidency Small Cause Courts Act (XV of 1882) s 94—Suit to set aside decree—Jurisdiction to set aside decree of Presidency Small Cause Court how determined—Civil Procedure Code (Act V of 1908) if applies—Onus of proof* A suit lies in one Court to set aside a decree of another Court on the ground that the decree was obtained by fraud as the fraud gives rise to a fresh cause of action ABDUL HUQ CHOWDHRY *v* ABDUL HAFEZ (1910) 14 C W N 695

———— *Suit to set aside a decree on the ground of fraud—Personal service not effected—Conduct of plaintiff* The mere fact that the personal service of a summons has not been effected on a defendant will not render the proceedings against him absolutely abortive But where the non service is due to the fraudulent conduct of the plaintiff in the suit and others acting with him and a decree is thereby obtained such decree may be set aside as fraudulent *Mahomed Gulab* v *Mahomed Sulaiman I L R 21 Calc 619* followed TIKA RAM *v* DAULAT RAM (1909)
I L R 32 All 145

———— Fraud and collusion of predecessors in title—*Parties by descent precluded from setting up fraud* The property in dispute belonged originally to Mahomedsahib who in 1829 gave it to his wife Sabinibibi as dower Sabinibibi sold it in 1863 to Sardarkhan one of the two brothers of her daughter in law Fatmabibi Sardarkhan died in 1873 and in 1875 his brother Mahomedkhan *gave it in gift to Shabusaheb one of the sons of* Fatmabibi Subsequently on Shabusaheb s death his creditor sued his son and obtained a decree against him In execution the property was sold and was purchased at auction by one Ramchandra who having transferred his right to the plaintiff her agent brought the present suit against Shabusaheb s sister and his two brothers to recover possession *Held* that the plaintiff was entitled to succeed If all the said transactions were genuine legal and valid the defendants had no case at all, and if they were as alleged by the defendants fraudulent and collusive, the defendants were precluded, as parties by descent to the alleged fraud, from setting up their own iniquity to avoid the legal consequences of those transactions *Doe dem Roberts* v *Roberts* 2 B & A 367 followed SAYAD NAHANNU *v* SABINBIBI (1911) I L R 37 Bom 217

———— Ex parte decree procured by fraud—*Jurisdiction of another Court to set aside the ex parte decree—Investigation how far limited* The defendant obtained an *ex parte* decree at Akyab upon a promissory note against the plaintiff who subsequently applied under s 108 of the Code of

FRAUD—*contd*

Civil Procedure to set aside the said decree The *ex parte* decree who set aside and the suit was revived but at the hearing the plaintiff could not appear and an *ex parte* decree was again passed The plaintiff then brought a suit in the Court to which the *ex parte* decree was transferred for execution for a declaration that the said decree was not binding on him it being based upon no cause of action and being fraudulent inasmuch as he did not execute any promissory note in favour of the defendant or receive any money from him On an objection by the defendant *that the Court had no jurisdiction to enter* into the merits of the suit in the Akyab Court and in any case the only matter that could be investigated was whether the plaintiff had by the action of the defendant been prevented from placing his case properly before the said Court —*Held* that the jurisdiction of the Court in trying a suit of this kind was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree LAKSHMI CHARAN SAHA *v* NUR ALI (1911)

I L R 38 Calc 936

———— Fraudulent transfer of possession—*Reversioner getting into possession from an alienee of the widow—Mortgage by alienee—Suit for foreclosure—Reversioner setting up the plea that widow s alienation beyond her life time was void—Estoppel between mortgagor and mortgagee—Estoppel binds reversioner—Practice* In 1878 *G s* widow sold certain property belonging to *G* to *G A* who mortgaged it to *D* in 1892 The widow died in 1897 *After G A s death in 1901 H (defendant No 3)* who was a reversioner of *G* slipped on it possession of the property by fraudulently inducing *G A s* sons (defendants Nos 1 and 2) to favour his claim In 1908 the plaintiff who claimed through *D* sued to recover his money by sale of the mortgaged property It was contended by *H* that it was not competent to *G s* widow to alienate the property beyond her life time and that her alienation was not binding on him *Held* that *H* having obtained possession of the property by colluding with defendants Nos 1 and 2 his fraud was sufficient in law to deprive him of the right to be heard in defence to the suit that he was entitled to the property as reversionary heir of *G* *Held* further that defendants Nos 1 and 2 having been in possession of the property as mortgagors of the plaintiff were estopped from denying his right to foreclose the mortgage and that that estoppel applied also to *H* who stepped into possession through a fraud common to *H* as well as defendants Nos 1 and 2 The true owner of property is entitled to retain possession even though he has obtained it from a trespasser by force or other unlawful means This principle applies only when the true owner gets into possession without bringing himself within the law of estoppel As between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage A mortgagor cannot derogate from his grant so as to defeat his mortgagor s title, nor can the mortgagee deny the title of his mortgagor to mortgage the property HILLAYA SUBBAYA *v* NARAYANAPPA TIMMAYA (1911) I L R 36 Bom 185

FRAUD—*contd*

———— Decree—*When can be set aside for fraud—Res judicata —Evidence Act (I of 1872) s 44* It is beyond question that the jurisdiction to impugn a previous decree for fraud exists But it is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation The fraud used in obtaining a decree being the principal point in issue it is necessary to establish it by proof before the propriety of the prior decree can be investigated One who seeks to impugn a decree passed after contest takes on himself a heavy burden and it is not satisfied by merely inducing the Court to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit was erroneous Nor can a prior judgment be upset *on a mere general allegation of fraud or collusion* it must be shown how, when where and in what way the fraud was committed The fraud must be actual positive fraud —a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance *Shedden* v *Patrick et Al 1 Macq 535 Ochsenbein* v *Papelier L R 8 Ch App 695* and *The Duchess of Kingston s Case 2 Sm L C 11th Ed 731* followed The character of fraud vitiating a decree would vary with the circumstances of each class of decree NANDA KUMAR HOWLADAR *v* RAM JIBAN HOWLADAR (1914)

I L R 41 Calc 990

———— *Decree based on perjured evidence—Suit to set aside—Onus of proof —Res judicata* *Held* that a suit to set aside a decree on the ground that the decree had been obtained by perjured and false evidence *is not* maintainable *Held* further that where a decree was impeached on the ground of fraud the fraud alleged must be actual positive fraud a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of the decree by that contrivance *Nand Kumar Howladar* v *Ram Jiban Howladar I L R 41 Calc 990 Munshi Mosuful Huq* v *Surendra Nath Ray 16 C W N 1002* followed *Chinnayya* v *Ramanna I L R 38 Mad 203 Baler* v *Wadsworth 67 L J Q B D 301 Vadala* v *Lawes L R 25 Q B D 310 Abouloff* v *Openheimer & Co L R 10 Q B D 295* referred to *Venkatappa Naik* v *Subba Naik I L R 29 Mad 179* dissented from JANKI KUAR *v* LACHMI NARAIN (1915)

I L R 37 All 535

———— Fictitious rent-sale—*Collusive sale arranged between putnidar and tenure holder to get rid of und r tenure—Abuse of process—Duty of tenure holder to protect under tenure holders from paramount claims—Transaction a private sale* Where a tenure holder having offered to sell his interest to the *putnidar* the latter agreed to pay the price asked only if the tenure was rid of the interest of subordinate tenure holders and it was arranged that the tenure holder would make default in paying rent and that the *putnidar* would sue him for arrears of rent and put up the tenure for sale in execution of the decree and that a person who had no intention of buying the property would be made to bid up to a figure approaching the price settled which thereupon

FRAUD—*contd*

would be offered by the *patnidar* and the sale was effected as arranged *Held* that the transaction should be viewed as a private sale which in fact it was, the form only of a Court sale having been gone through and abused with the object of defrauding the under tenure holders A suit by the purchaser *patnidar* to annul an under tenure and to recover possession must therefore fail. UMA CHARAN MANDAL *v* MIDNAPORE ZEMINDARY Co (1914) 19 C W N 270

——— Fraudulent agreement—*Collusive decree obtained on such agreement—Fraud unsuccessful—Suit impugning agreement and decree—Defendant prevented from defending suit on the plaintiff's assurance that decree will not be executed against him—Suit to declare decree incapable of execution if lies* The principle that a party to a fraudulent transaction is entitled to relief in a Court of Equity as against the fraudulent confederate so long as the fraud contemplated has not been carried into effect is not inapplicable merely because the party suffers a decree to be passed against him in a fictitious and collusive suit which is only a part of the fraudulent scheme *Abdul Prodhan* v *Manmotha Nath 18 C W N 1331 s c 18 C L J 616* and *Param Singh* v *Lalji Mal I L R 1 All 403* followed Where one of two defendants was prevented from making a proper defence to the suit by the fraudulent assurance of the plaintiff that the decree obtained would not be executed against him *Held* that the defendant was not estopped by the decree from suing for a declaration that the decree was incapable of execution. *Chenvirappa* v *Puttappa I L R 11 Bom 708* followed. RAJAB ALI CHOUDHURY *v* HADAYET ALI CHOUDHURY (1915) 19 C W N 1151

——— General allegations of fraud in pleading if should be noticed Under the Contract Law of India as well as by ordinary principles coercion undue influence fraud and misrepresentation (though they may overlap or may be combined) are all separate and separable categories in law General allegations however strong are insufficient even to amount to an averment of fraud of which any Court ought to take notice The law of India is in no way different from this, and the Judicial Committee regret that the rule is not more strictly observed *Gunga Narain Gupta* v *Tiluckram Choudhury L R 15 I A 119* referred to BAL GANGADHAR TILAK *v* SHRINIWAS PANDIT (1915) 19 C W N 729

——— Suits to set aside a judgment for fraud—Discretionary relief—*What acts constitute fraud—Obtaining decree by deliberate perjury whether liable to be set aside as fraudulent* A judgment in a previous suit cannot be set aside by a new suit based on an allegation that the decree holder obtained it by practising a fraud on the Court in the absence of the judgment debtor *viz* by suppressing certain material evidence in the case for it was the duty of judgment debtor to have got produced all his evidence in the previous suit Suppression of material evidence is not fraud within the meaning of the rule enunciated in *The Duchess of Kingston's Case 2 Sm L C 11th Edn 731* at p 738 which is to the following effect —In order that fraud may be a ground for vacating a judgment it must be a fraud that is extrinsic or collateral to everything that has been adjudicated upon but not one that has been or must be deemed to have been dealt with by the Court The power of the Court to set aside a judgment on the ground of fraud is a discretionary one which will be exercised in favour of the petitioner only if he had been free from fraud or any turpitude or laches sloth or lack of diligence in protecting his own interests *Quære* Whether a judgment can be set aside for fraud on the ground that the successful party was guilty of deliberate perjury or suborning perjury English and Indian case law on the subject discussed Examples of fraud which will vitiate a judgment given CHINNAYYA *v* RAMANNA (1913) I L R 38 Mad 203

——— Different from that alleged in plaint—*If can be relied on—Duty of plaintiff to state facts constituting alleged fraud—Document bearing genuine signature—Burden on signatory to prove falsity of recitals* When a plaintiff impeaches a transaction on the ground of fraud the facts which constitute the alleged fraud must be distinctly specifically and accurately stated. That a charge of fraud must be substantially proved or laid and when one kind of fraud is charged another kind of fraud cannot upon failure of proof be substituted for it That the rule that the Court will grant only such relief as the plaintiff is entitled to upon the case made by his pleadings is strictly enforced when the plaintiff relies on fraud That when a party seeks to avoid the Statute of Limitation on the ground of fraud the statement of claim should set forth specifically the particular acts which constitute the fraud as well as the time when it was discovered in order to enable the defendant to meet the fraud and the alleged time of its discovery so that the Court may see whether by the exercise of ordinary diligence the discovery might not have been made before BANSIRAM *v* PANCHAMI DASI (1914) 20 C W N 638

——— Ex parte decree and sale thereunder—*Suit to set aside decree and sale on the ground that processes in suit and execution suppressed in collusion with officers of Court —Suit if maintainable—Case of fraud pleading and proof in* Where the plaintiff in a suit to set aside an *ex parte* rent decree and sale held thereunder alleged that the defendants had in collusion with the officers of the Court caused a suppression of the processes in the suit as also in the execution proceedings *Held* that if this allegation had been established the plaintiff would have been entitled to succeed The mere circumstance that a defendant had failed to have an *ex parte* decree set aside under s 108 C P C (of 1882) or to have a sale set aside on the ground of material irregularity does not debar him from seeking relief in a suit properly framed for the purpose on the ground that the suit itself was a fraudulent suit and that the proceedings therein were vitiated by fraud But to enable the plaintiff to succeed in a suit so framed he must specifically allege the circumstances of fraud and he must prove the fraud as laid in the plaint Fraud how to be pleaded and in what manner established discussed NAGENDRA NATH BOSE *v* PARBATI CHARAN (1914) 20 C W N 819

——— *to set aside ex parte decree on ground ... application to set aside ... if lies when ... suit by the*

[illegible]

FRAUDULENT DECREE—*contd*

ground of fraud, it must be shown that the fraud was practised in relation to proceedings in Court and that the decree must be shown to have been procured by practising fraud upon the Court. MANINDRO NATH MITRA *v.* HARI MONDAL 24 C. W. N 133

FRAUDULENT EXECUTION

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXI r. 2.
I. L. R. 40 Bom 333

FRAUDULENT PREFERENCE.

See COMPANIES ACT 1913 s. 231
I. L. R. 2 Lah. 102

See PROVINCIAL INSOLVENCY ACT 1920 s. 54 I. L. R. 43 All. 427

——— *State of mind of maker—Intention—Receiver—Onus—Provincial Insolvency Act (III of 1907) s 3* The question whether there has been a fraudulent preference depends not upon the mere fact that there had been a preference but also on the state of mind of the person who made it It must be shown not only that he has preferred a creditor but that he has fraudulently done so It depends upon what was in his mind. *For this purpose* it is not true that the debtor must be taken to have intended the natural consequences of his acts. One must find out what he really did intend *Dicta* of LORD HALSBURY in *Sharp v Jackson (1899) A C 419* followed. It is not necessary to threaten criminal proceedings to constitute pressure. The threat of civil suits is enough If it is established that the transaction was the result of real pressure brought to bear by a creditor on his debtor it cannot be deemed as a spontaneous act The onus is on the Receiver to show that it was an outcome of a fraudulent preference NRIPENDRA NATH SAHU *v* ASHUTOSH GHOSH (1915) I. L. R 43 Calc 640

FRAUDULENT REPRESENTATION

See CONTRACT ACT (IX OF 1872) ss 20 65 *I. L. R 40 Bom 638*

See PARTITION SUIT
I L. R 44 Calc 28

See RES JUDICATA
I L. R 45 Calc 442

FRAUDULENT SUPPRESSION

See SUBROGATION I L R 43 Calc 69

FRAUDULENT TRANSFER

See ATTACHMENT I L R 44 Calc 662

See FRAUDULENT CONVEYANCE

See PROVINCIAL INSOLVENCY ACT (III OF 1907) s 36 2 Pat L J 101

s 43 I. L. R 44 Bom 673

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 53 I L R 43 Bom 707
I L. R 39 Bom 507

FREEDOM OF RELIGIOUS ACT (XXI OF 1850)

See CASTE DISABILITIES REMOVAL

See HINDU LAW—CONVERSION
15 C W N 545

FREIGHT

——— paid in advance—

See BILL OF LADING
I L. R 44 Mad 145

See CONTRACT ACT (IX OF 1872) ss 56 65 I L. R. 40 Bom 529

FRENCH SUBJECT

——— will of—

See PROBATE AND ADMINISTRATION ACT s 5 24 C W N 713

FRESH PROCEEDINGS

See JURISDICTION OF CRIMINAL COURT
I. L. R 40 Calc 71

See NOLLE PROSEQUI
16 C W N 983

FRESH RULE.

See CRIMINAL REVISIONAL JURISDICTION.
I L. R 38 Calc 933

FRESH SUIT

——— liberty to institute—

See JURISDICTION
I. L. R. 48 Calc. 138

FRIVOLOUS OR VEXATIOUS ACCUSATION

See CRIMINAL PROCEDURE CODE s 250
I L. R 40 All 79

FRIVOLOUS OR VEXATIOUS COMPLAINT

See CRIMINAL PROCEDURE CODE ss 107 250 I L R 36 All 382

FUGITIVE OFFENDER

See EXTRADITION I L R 41 Calc 400

See HABEAS CORPUS
I L R 39 Calc 164

FULL BENCH

See PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882) ss 37, 38
I L. R 34 Bom 316

s 38 I L R 42 Bom 80

See REFERENCE TO FULL BENCH

——— question referable to a—

See LIMITATION ACT (IX OF 1908) SCH I ART 131 I L R 40 Mad 1040

——— *Judicial opinion reversal of by Full Bench—Effect* The effect of the Full Bench decision in *Bhupati Nath Smrithi tirtha v Ram Lal Moitra 11 C W N 18* was not to make a new law but to declare the law as it stood and has always stood SARADINDU MUKERJEE *v* CHARU CHANDRA DUTTA (1910)
23 C W N 872

——— *When a reference should be made to Full bench* Advantage of referring matters upon which a difference of opinion has arisen in the High Court to a Full Bench adverted to BUDDHA SIN *v* LALTU SINGH (1915)
20 C W N, 1

GAS COMPANY—*contd*

tract *Dixon v Bell 5 M & S 198 Thomas v Winchester 6 N Y 409* and *Parry v Smith 4 C P D 325* referred to *Held* further that initial negligence having been found against the Gas Company they were liable unless they proved that the proximate cause of the accident was the conscious act of another volition DOMINION NATURAL GAS CO LD *v* JAMES H COLLINS (1909) 14 C W N 158

GAYAWAL

——— *Whether gaddi of Gaya wal is an office or business and inheritible—Improper use of gaddidar s name—Injunction* Whether the occupant of the *gaddi* of the *Gayawal* has an hereditary office or not he has a business and that business is property capable of being inherited on his death Where a person has been using the name of the occupant of the *gaddi* of a *Gayawal* with the express object of benefiting himself at the latter s expense the court will restrain by injunction repetition of such improper using of the plaintiff's name LACHMAN LAL PATHAK *v* BALDEO LAL SHATHWARI (1917) 2 Pat L J 705

GENERAL ACCOUNT

See PARTNERSHIP I L R 34 Mad. 112

GENERAL CLAUSES ACT (I OF 1868)

——— s 2 (1)—

See PLEADER I L R 44 Calc 230

——— s 3—

See HABEAS CORPUS I. L. R. 44 Calc 459

GENERAL CLAUSES ACT (X OF 1897)

——— application of—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXXIII R 1 I L R 41 Mad. 624

——— s 3 (25)—

See LIMITATION ACT 1908 SCH I ART 120 ETC 3 Pat L J 522

See PUNJAB PRE EMPTION ACT I L R 1 Lah 567

——— *Provincial Small Cause Courts Act (IX of 1887) Sch II, Art 13—Court of Small Causes—Jurisdiction—Ferry— Immovable property —Suit to recover tolls alleged to be due to plaintiff as lessee of a ferry Held* that the right to a ferry is a benefit which arises out of land and comes within the definition of immovable property under s 3 (25) of the General Clauses Act, 1897 and a suit by a lessee of a ferry to levy a toll alleged to be recoverable by him as such lessee falls under Art 13 of the second Schedule to the Provincial Small Cause Courts Act and is therefore not cognizable by that Court *Gokal Chand v Lal Chand Punj Rec 1897 Case No 43* [illegible] *and Dewa Singh v Narain Das Punj Rec* [illegible] No 59 p 03 approved. ABDUL [illegible] KHAN *v* BABU LAL (1913) I. L. R 35 All. 156

[illegible] ——— Benefits arising out of [illegible] able property GULAM MOHEDIN [illegible] I. L. R 36 Calc 665

GENERAL CLAUSES ACT (X OF 1897)—*contd*

——— s 3 (25)—*contd*

See PROFITS A PRENDRE. 2 Pat L J 323

——— a company is a person ' and can therefore sue through its Liquidator in forma pauperis

See CIVIL PROCEDURE CODE (1908 O XXXIII) I L R 41 Mad 624

——— s 3 cl (52)—

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 59 I. L R 41 Bom 384

——— s 6—

See EX PARTE DECREE I L R 39 Calc. 506

See EXECUTION OF DECREE I L R 40 Calc. 704 1 Pat L J 214

See HUSBAND AND WIFE I L R 37 Bom. 393

See TRANSFER OF PROPERTY ACT ss 88 89 I L R 34 All. 72

——— s 6 (c) and (e)—

See CIVIL PROCEDURE CODE (ACT V OF 1908) O XXI R 93 I L R 40 Mad. 1009

——— *Limitation Act (IX of 1908) s 6 Sch I Art 166—Sale of minor judgment debtor s property before 1909—Minor s right to apply to set aside sale on attaining majority* The right which accrued to a minor judgment debtor under Act XV of 1877 to apply to set aside a sale which took place before the Limitation Act of 1908 came into force upon attaining majority is not taken away by the coming into operation of that Act, that being a privilege which has been preserved by s 6 cl (c) of the General Clauses Act FAZL KARIM *v* ANNADA MOHAN RAY (1911) 15 C W N 845

——— ss 6 7—

See HABEAS CORPUS I L R 44 Calc 459

——— ss 9 and 10—

See PROVINCIAL INSOLVENCY ACT ss 45 AND 46 I. L. R 42 Mad 13

——— s 10—

See LIMITATION ACT (IX OF 1908)—
s 4 I. L R 41 All. 4[illegible]
s. 31 I. L R 34 All 3[illegible]5
I. L R 36 Bom. 268

See MADRAS ESTATES LAND ACT I. L R 42 Mad. 310

——— *Civil Procedure Code (Act V of 1908) O XXI r 1—Decree—Payment of money ordered in a decree—Payment ordered on a fixed date—Delay in making payment into Court owing to closing of Court—Payment on the opening day—Practice.* A decree provided as follows The plaintiff should pay by the 10th day of April 1909 to the defendant Rs 100 If the moneys are not paid by the plaintiff as agreed upon the property in dispute will remain with the defendants by right of ownership and the plaintiff will have

GENERAL CLAUSES ACT (X OF 1897)—*contd*.

——— s. [illegible]

[illegible] I. L. R. 35 Bom. 35

——— s. 1.

See ARBITRATION ACT, s. 9. I. L. R. 4[illegible] Bom. 202

See PLEADER. I. L. R. 44 Calc. 290

——— s. 1[illegible] cl. (1)—

See DEFENCE OF INDIA ACT (IV OF 1915), s. 2. I. L. R. 42 Mad. 69

——— s. 26.

See CRIMINAL PROCEDURE CODE, s. [illegible] 3 Pat. L. J. 433

——— *One act constituting two offences under different laws—conviction for both offences—Penalty.* The accused was charged under s. 353 of the Penal Code and under s. 101 of the Railway Act with the offences of resisting the police and endangering the lives of by standers by one specific act. *Held* that the conviction under s. 101 of the Railway Act could not stand. It is only when one act constitutes two offences under the same law that separate sentences can be inflicted for each offence. PAHAMATULLA *v.* KING EMPEROR (1916) 1 Pat. L. J. 373

——— s. 2[illegible]—

See PRACTICE. I. L. R. 35 Bom. 213

GENERAL CLAUSES ACT (BENGAL)

See BENGAL ACT I OF 1899.

——— s. 8, cl. (e)—

See EXECUTION OF DECREE. I. L. R. 40 Calc. 623

GENERAL CLAUSES ACT (BOMBAY)

See BOMBAY ACT I OF 1904.

——— s. 3—

See MAMLATDARS COURTS ACT, BOMBAY (BOM. ACT II OF 1906), s. 23. I. L. R. 39 Bom. 552

GENERAL CLAUSES ACT (UNITED PROVINCES)

See UNITED PROVINCES ACT I OF 1904.

——— s. 6—

See AGRA TENANCY ACT (II OF 1901), s. 20. I. L. R. 32 All. 628

——— s. 23—*Act (Local) No. I of 1900 (United Provinces Municipalities Act), s. 187—Municipality—Powers of Government to frame rules*

GENERAL CLAUSES ACT (UNITED PROVINCES)—*contd*.

——— s. 23—*contd*.

[illegible] Certain draft rules [illegible] were published in [illegible]. These draft rules were then [illegible] the Government in connection with [illegible] and objections as had been presented, and finally a set of rules was published in the [illegible] been made under s. 187 of the [illegible] Municipalities Act, 1900. *Held* that such rules were none the less valid [illegible] in some details they differed from the draft rules previously published. The rules so [illegible] provided that a municipal election might be questioned by means of a petition presented to a competent Court. *Held* that the expression "competent Court" so used meant a Civil Court of competent jurisdiction with reference to the valuation given by the petitioner in his petition. GUR CHARAN DAS *v.* HAR SARUP (1917) I. L. R. 34 All. 391

——— s. 24—*Effect of General Clauses Act as to orders framed under the former Municipalities Act of 1900—Municipal Account Code, r. 40—Octroi duty.* A consignment of cloth addressed to one *M* reached one of the octroi barriers of Bareilly on the 10th of February 1917. The Officer in charge demanded a larger sum than *M* considered properly leviable. The matter was referred to the Octroi Superintendent who, as he had the right to do, assessed the duty at Re. 1-0-9. Under r. 40 of the Municipal Account Code framed under Act No. I of 1900, a person in the position of *M* could appeal against the decision within sixty days, but he could only exercise the right by first paying under protest the duty demanded. *M*, however, appealed against the decision without making the payment. On the expiry of sixty days a prosecution was instituted against *M* under Act No. II of 1916 and he was fined. He applied in revision to the High Court. *Held* that the conviction was legal; the jurisdiction of the Court was saved by s. 24 of the Local General Clauses Act, and the fact that the prosecution had been instituted under the Municipal Account Code framed under the repealed Municipalities Act (I of 1900) did not affect the question. *Held* also that the mandatory direction in r. 40 of the Municipal Account Code lays down by inference a period of 53 days on the expiry of which without payment as required the offence is complete and a prosecution may be started. EMPEROR *v.* MANIK CHAND (1917) I. L. R. 40 All. 105

GENERAL COMMITTEE

——— sanction by—

See DEMOLITION OF BUILDING. I. L. R. 37 Calc. 585

GENERAL REPEALING ACT (XII OF 1873)

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 11. I. L. R. 40 Bom. 86

GHARJAMAI.

See HINDU LAW—MAINTENANCE. 15 C. W. N. 205

GHAT

See HINDU LAW. I. L. R. 43 All. 581

GHATWALI TENURE

See ADVERSE POSSESSION
I L R 40 Calc 173

See BEMIADI PATTA 6 Pat L J 687

See LIMITATION ACT SCH I ART 144
2 Pat L J 506

——————— *Attachment—Receiver appointment of—Execution of decree* On an application for execution of a decree although an order directing attachment of a ghatwali estate may be erroneous an order appointing a Receiver to receive the rents and profits of such estate is sanctioned by authority *Udoy Kumari Ghatwalin* v *Hari Ram Shaha I L R 28 Calc 483* referred to KESOBATI v MOHAN CHANDRA MANDAL (1912)
I L R 39 Calc 1010

——————— *Suit for possession—Court fee—Court Fees Act (VII of 1870) s 7 cl v sub cls (a) (c) (d)* Where a suit had been brought for recovery of possession of the Ghatwali lands of Rohini and Court fees had been paid under sub cl (a) of cl v of s 7 of the Court Fees Act on ten times the revenue alleged to be payable and the Court below held that sub cl (c) was applicable and the value of the subject matter should be deemed to be fifteen times the net profits *Held* that the Ghatwali lands formed part of the estate of the zemindar of Birbhum and the contention that sub cl (c) was applicable could not be supported *Kustura Kumari* v *Monohor Deo (1864) W R 39 Raja Lilanand* v *The Government of Bengal 6 Moo I A 101 Moonranjan* v *Raja Lilanund 3 W R 84 Raja Leelanund* v *Monoranjan 5 W R 101 Lilanand Singh* v *Munorunjan 13 B L R 124 Lilanund* v *Munranjan I L R 3 Calc 251* referred to *Held* also that sub cl (d) was applicable as the land in suit formed part of an estate paying revenue to Government but did not constitute a definite share of such estate nor was it separately assessed with revenue Consequently the value of the subject matter must be deemed to be the market value of the land CHANDRA NARAYAN SINGH v ASUTOSH DE (1914)
I L R 41 Calc 812

——————— *Suit for resumption of land by proprietor—Jaigir two kinds of—Not necessarily conditional and inalienable—Tenure created by document evidence necessary to prove incidents of—Fact of descent of land from father to son for a long time inference to be drawn from—Facts necessary to be proved even if grant originally mad subject to performance of service—Limitation—Fact of service being incapable of being enforced effect of on service tenure* The plaintiff brought a suit for the possession of two mouzahs within his zemindari against the defendants who were in possession having acquired them by a series of purchases from the persons who previously held them under the plaintiff The plaintiff s case was that the mouzahs in question were a *jaigir* conditional on the performance of *Ghatwali* services and as such were inalienable and the original holders having alienated them the plaintiff was entitled to resume possession *Held* on the evidence that the plaintiff had failed to prove that the land was held on a service tenure whether *Ghatwali* or otherwise That a *jaigir* is not necessarily conditional it may be unconditional and the mere fact that a tenure is described as a *jaigir* by no means conclusive and its incidents must be determined from other circumstances

GHATWALI TENURE—*contd*

That where the tenure in question was created by a document *the terms on which the land is held* its alienability and its liability to forfeiture must depend on the terms of the particular grant and not on the terms of grants that may have been made to others BHAGWAT BAKSH RAY v SHEO PROSAD SAHU (1913) 18 C W N 297

——————— *Liability to sale for arrears of rent* The contention that no *ghatwali* tenure is liable to be sold in execution of a decree is not a sound contention Kharagpur *ghatwali* lands are liable to be sold in execution of a decree for rent Where a *ghatwal* is liable to render service to the Deputy Commissioner of the Santal Parganas and derives his appointment from the Deputy Commissioner his land can be sold only with the consent of the Deputy Commissioner When a *ghatwal* is appointed by a local Raja and is not shown to be liable to render service to anybody but such Raja his *ghatwali* lands may be sold by the Raja The only *ghatwals* over whom the Deputy Commissioner of the Santal Parganas has jurisdiction are those who are subject to the provisions of the Bengal *Ghatwali* Lands Regulation (XXIX of 1814) The Deputy Commissioner has power to put up for sale for arrears of revenue the lands of *ghatwals* subject to Regulation XXIX of 1814 LAKSHMI NARAIN MAHTO v SATYA NARAIN CHAKERVERTY (1916) I Pat L J 197

——————— Where the right to nominate the *ghatwal* rests with the Government a *ghatwali* tenure is not saleable in execution of a decree for arrears of rent MIDNAPUR ZAMINDARI CO LTD v AJAMBAR SINGH MURA (1916)
1 Pat L J 601

——————— *Ghatwali land tenants of—Acquisition of right of occupancy—Bengal Tenancy Act (VIII of 1885) s 181—Act X of 1859 s 6* and *Act VIII (B C) of 1869 s 6* Tenants in occupation of *ghatwali* land could acquire occupancy right therein under s 6 of Act X of 1859 and s 6 of Act VIII (B C) of 1869 and such right acquired between 1859 and 1885 has not been taken away by s 181 of the Bengal Tenancy Act SITIKANTA ROY v BIPRA DAS CHARAN (1918)
22 C W N 763

——————— *Mode of succession—Incidents of tenure—Rights of male members of family other than the acutal Ghatwals* The result of the decisions of the Privy Council as to the nature of the Ghatwali tenure is that it is ordinarily hereditary the estate descending to such male member of the family as the zemindar approves as competent and that it is the right of of the family so long as they have male members competent to perform the duties to have one or more of them appointed Ghatwals The incidents of the Ghatwali tenure in this case are not such as to give the family any rights over the property while it is in the hands of the Ghatwal on which point their Lordships are in full agreement with the Courts in India If the scheme of the pottah was to preserve family rights there would still be no reason for holding that they extended so as to give any beneficiary interest in the mouzahs to the male members of the family other than the actual grantees *Nilmani Singh* v *Bikranath Singh I L R 9 Calc 187 L R 9 I A 104* and *Kali Pershad Singh* v *Anand Roy I L R 15 Calc 471*

GHATWALI TENURE—*contd*

L. R. 15 I A 18 referred to DURGA PRASAD SINGH *v* TRIBENI SINGH (1918)
I. L. R. 46 Calc. 362
L. R. 45 I. A. 251

GHEE.

See ADULTERATION
I L R 39 Calc. 682

——————— *Adulteration—Chemical tests for determination of the purity of ghee—Corporation standard—Value of the same—Necessity of testing the value of such standard by evidence in each case—Calcutta Municipal Act (Beng III of 1899) s 495A (1)—Amendment Act (Beng I of 1917) s 2.* There is no standard of purity of ghee fixed by the Indian Legislature and the Courts of Law have, therefore to decide the question of adulteration upon such evidence as is available in each case As there is no statutory presumption every case must depend on its own evidence The High Court was strongly of opinion that a statutory standard should be laid down as raising a presumption of adulteration and that such cases should not be made to depend on evidence forthcoming in each case to test the value of the Corporation standard. The Court should determine whether the Corporation standard ought to be acted upon or not but the Court ought not to fix a standard of its own. On the evidence the Court did not accept the *P W* figure arrived at by the Corporation as by itself raising a presumption of adulteration on account of the limited number of its expert s experiments and the fact that sufficient allowance had not been made for climatic conditions, nature of food period of lactation breed stabling and local conditions nor for the temperature of manufacture but considered the Corporation *B R* and *Saponification* figures to be fair Where the two samples of *ghee* in respect of which the accused was convicted gave the following figures K. W 26 6 and 24 5 *B R* 44 and 45 and *Saponification* 222 and 220 and showed colour under Wellman s test the Court held that the *ghee* was adulterated. GRANDE VENKATTA RATNAM *v* CORPORATION OF CALCUTTA (1920)
I. L R 47 Calc. 633
22 C W N 745

GHEE ADULTERATION ACT (Ben I of 1919)

——————— *(I) B C of 1917) s 2 (2)—Calcutta Municipal Act (III B C of 1899) s 495A sub s (1)—Sale of adulterated ghee—Standard raising presumption as to adulterated nature of ghee* The Ghee Adulteration Act does not lay down a standard raising a presumption that ghee not satisfying the standard is not genuine and in the absence of such statutory presumption every case must depend upon its own evidence Where it was found that the ghee sold by the accused contained a percentage of foreign fat *Held* that it was adulterated with the meaning of sub cl 2 of s 2 GRANDE VENKATTA RATNAM *v* CORPORATION OF CALCUTTA
24 C W N 388

GIFT

See CIVIL PROCEDURE CODE 1882 ss 13 44 (*b*) I L R 35 Bom 297

See CONSTRUCTION OF DOCUMENT
I L R 33 All 665

GIFT—*contd*

See CONTRACT ACT s 19
I L R 36 Bom 37

See HINDU LAW—ALIENATION
I L R 45 Bom 105

See HINDU LAW—ENDOWMENT
I L R 33 All 253

See HINDU LAW—GIFT

See HINDU LAW—JOINT FAMILY
I L R 45 Calc 733
I. L R 42 Bom. 69

See HINDU LAW—WIDOW
I L R 34 Bom 165
I L R 32 All 176
I L R 37 Calc 1
I L R 39 All 520

See JOINT TENANCY
I L R 34 Mad 80

See LIMITATION L R 46 I A 285

See LIS PENDENS I L R 41 All 534

See MAHOMEDAN LAW—GIFT

See MALABAR LAW
I L R 38 Mad 79

See NAIKINS I L R 37 Bom 116

See REGISTRATION I L R 35 All 3

See TRANSFER OF PROPERTY ACT (IV OF 1882)—

ss 123 129 I L R 38 All 212

ss 55 123 I L R 34 Bom 287

See TRUSTS ACT s 5
I L R 36 Bom 396

See WILL I L R 43 Bom 88
I L R 45 Bom 711

——————— absolute to son—

See HINDU LAW—WILL
I L R 40 Calc 274

——————— actionable claims—

See TRANSFER OF PROPERTY ACT 1882 ss 3 8 I L R 44 Mad. 196

——————— after unauthorised occupation—

See TRANSFER OF PROPERTY ACT 1882 s 123 I L R 45 Bom. 164

——————— alteration of deed of—

See TRANSFER OF PROPERTY ACT IV OF 1882 s 123 I L R 44 Bom 231

——————— by adoptee—

See HINDU LAW—ADOPTION
I L R 35 Bom 169

——————— by husband to wife—

See MALABAR LAW
I L R 38 Mad 79

——————— by karta—

See HINDU LAW—JOINT FAMILY PROPERTY I L R 40 All. 159

——————— by Hindu widow—

See HINDU LAW—GIFT
I L R 37 Calc 1
I L R 45 Bom 105

GIFT—*contd*

———— by Mahomedan widow—

See WASTE I L R 44 Bom 727

———— by widow and next reversioner—

See HINDU LAW I L R 44 Bom 488

———— Mortgage on half gifted land—Effect of—

See MAHOMEDAN LAW—GIFT I L R 45 Bom 1296

———— for religious purpose—

See HINDU LAW—GIFT I L R 42 Bom 136

———— of land, by co parcener—

See HINDU LAW—PARTITION I L R 39 Mad 587

———— of land to a stranger—

See CUSTOM (SUCCESSION) I L R 2 Lah 284

———— revocation of—

See MAHOMEDAN LAW—TRUST I L R 34 Bom 604

See ADOPTION I L R 35 Bom 169

———— substantially to charity—

See MAHOMEDAN LAW—WAKF L R 44 I A 21

———— to a class —

See HINDU LAW—WILL I L R 38 Calc 188
I L R 41 Calc 1007

———— to Brahmins—

See HINDU LAW—GIFT I L R 44 Bom 304

———— to daughter—

See CUSTOM I L R 39 Calc 418

See HINDU LAW—REVERSIONER I L R 44 Bom 255

———— to future wife—

See HINDU LAW—WILL I L R 39 Calc 87

———— to wife for life with directions to appoint—

See WILL I L R 45 Bom 711

———— to illegitimate son—

See HINDU LAW—GIFT I L R 39 Mad 1029

———— to unborn person validity of—

See HINDU LAW—GIFT I L R 40 Mad 818

———— to wife and children or children alone—

See MALABAR LAW I L R 39 Mad 317

———— validity of—

See OCCUPANCY HOLDING I L R 45 Calc 434

See RES JUDICATA I L R 48 Calc. 499

GIFT—*contd*

———— with obligation—

See CONTRACT ACT (IX OF 1872) s 69 I L R 42 Bom 93

———— Gift burdened with an obligation—*Alienation by donee—Restrictions on alienation* When it is doubtful whether a deed embodies a complete dedication to a religious trust or merely creates a gift of that property subject to an obligation to perform certain services the question should be decided by reference to the deed itself In the former case the property would be inalienable and in the latter alienable subject to the obligation and notwithstanding restrictions as to selling or mortgaging the said property DASSA RAMCHANDRA *v* NARSINHA

I L R 35 Bom 156

———— Purdanashin illiterate donor—*Fiduciary relationship—Cancellation—Independent and competent advice—Duty of solicitor—Power of revocation—Transfer of Property Act (IV of 1882) s 126—Costs* Where an old illiterate *purdanashin* woman executes an improvident deed of gift in favour of a person standing towards her in a fiduciary capacity the *onus* lies on the donee to establish not only that the donor understood the transaction but that she was in a position to exercise a free and unfettered judgment that the intention to give was her own voluntary act and that she had independent and competent advice *Huguenin* v *Baseley 14 Ves 273 Hall* v *Hall L R 8 Ch App 430* followed *Kanai Lall Jowhary* v *Kamini Debi 1 B L R 31* (note) *Lyon* v *Home L R 6 Eq 655* referred to It is the duty of a solicitor who acts as the sole solicitor in such a transaction to try and protect the lady against herself and to make all proper enquiries A solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances and if he is not so satisfied it is his duty to advise his client not to go on with the transaction and to refuse to act further if the client persists *Powell* v *Powell [1900] 1 Ch 243 Wright* v *Carter* [1903] *1 Ch 27* followed *Coomber* v *Coomber* [1911] *1 Ch 273* distinguished In considering the validity of a deed of gift the absence of a power of revocation is of importance though not sufficient by itself to show that the gift is invalid *Hall* v *Hall L R 8 Ch App 430* referred to KAMINI DASSEE *v* KRISHNA CHANDRA MUKERJEE (1912)

I L R 39 Calc 933

———— Death of donor before registration of deed—*Registration by donee without consent of donor's legal representatives—Transfer of Property Act (IV of 1882) s 123—Registration Act (III of 1877) effect of* A deed of gift registered by the donee after the death of the donor without the consent of the legal representatives of the donor is valid There is nothing in s 123 of the Transfer of Property Act which requires the donor to have the deed registered all that is required is that he should have executed the deed Once such an instrument is duly executed the Registration Act allows it to be registered even though the donor may not agree to its registration and upon registration the gift takes effect from the date of execution *Ramamirtha*

GIFT—*contd*

Ayyan v. Gopala Ayyan, I. L. R. 19 Mad. 433; D... S... v. D... [illegible] I. L. R. 25 Mad. I. J. 3 ... [illegible] ... Mallik... (1917) ... 13 Mad. L. J. ... ; referred to. VENKATI RAMA REDDI v. PILLATI RAMA REDDI (1916)

I. L. R. 40 Mad. 204

——— gift—Zamindar gift [illegible] ... Construction of deed of ... all his properties to his ... for maintenance ... [illegible] ... land ... Construction of decree ... [illegible] ... Symbolical possession ... effect of ... proceedings to ... Where a zamindar conveyed by gift all his properties to his only son stipulating for a maintenance allowance of Rs. 400 a month to be paid to him by his son for his life and retaining the rights of land in his occupancy as zirat land in his possession and zirat land ... it held that the expression ... the donor for his personal use and maintenance without passing any part thereof ... termination of his interest the land ... that on the ... to form part of the general zamindari property of ... family so that his son had in it a vested zamindari interest in reversion during the donor's life time. That the plaintiff who got possession of the zamindari property at a mortgage sale obtained possession of the reversionary interest in the zirat land subject to the life interest of the donor. That the fact that the Court ... [illegible] ... description of the properties ordered to be sold the words ... [illegible] ... to bring it into conformity with the ... [illegible] ... described in the mortgage bond did not lead to the exclusion of the zirat land from the sale inasmuch as the true construction of the decree depended on what the Court actually ordered and not on what it refused to order. That symbolical possession given to the plaintiff was sufficient to dispossess the defendants in the mortgage suit and were donor's interest in execution were made defendants in the mortgage suit and were thus parties in the proceeding in which delivery of possession was ordered and given. RADHA KRISHNA CHANDERJI v. RAM BAHADUR (1917) 22 C. W. N. 330

GIFT OVER

See HINDU LAW—WILL.

I. L. R. 42 Calc. 561

See WILL. I. L. R. 40 Calc. 192

I. L. R. 46 Calc. 485

GODOWNS

See LAND ACQUISITION.

I. L. R. 43 Calc. 665

GOLDEN TEMPLE (DARBAR SAHIB) AMRITSAR—

——— Succession to office and property of granthi—

See CUSTOM (RELIGIOUS INSTITUTIONS).

I. L. R. 1 Lah. 511 and 540

GOOD FAITH

See WRONGFUL CONFINEMENT.

I. L. R. 47 Calc. 818

——— presumption of—

See DEFAMATION. I. L. R. 41 Calc. 514

GOODS

See CONFISCATION.

I. L. R. 42 Calc. 334

See LOSS OF GOODS.

I. L. R. 46 Calc. 56

——— non delivery of—

See SPECIFIC MOVABLE PROPERTY.

I. L. R. 39 Mad. 1

——— property in at the time of capture—

See CONFISCATION.

I. L. R. 42 Calc. 334

——— ultimate destination of—

See SALE OF GOODS ACT (56 AND 57 VIC. C. 71), SS. 45 AND 47.

I. L. R. 34 Bom. 640

GOOD WILL.

See TRADE MARK. I. L. R. 38 Calc. 110

I. L. R. 42 Calc. 262

——— sale of—

See CONTRACT (56)

I. L. R. 48 Calc. 1030

GORS

——— right of—

See HINDU TEMPLE.

I. L. R. 44 Bom. 150

GOSAVIS

See DEKKHAN AGRICULTURISTS RELIEF ACT, S. 2. I. L. R. 36 Bom. 543

GOTRAJA SAPINDA

See HINDU LAW—SUCCESSION.

I. L. R. 37 Calc. 214

GOVERNMENT

See ADVERSE POSSESSION.

14 C. W. N. 317

See BHAGDARI VILLAGE.

I. L. R. 37 Bom. 87

See CANTONMENT TENURE.

I. L. R. 36 Bom. 1

See GRANT.

See CROWN. I. L. R. 36 Bom. 438

See SECRETARY OF STATE.

See LAND ACQUISITION ACT (I OF 1894), SS. 3 (b), 11 AND 31 (1) AND (2).

I. L. R. 37 Bom. 76

——— attachment for non payment of Jama—

See BOMBAY LAND REVENUE CODE (BOM. ACT V OF 1879), SS. 144, 160.

I. L. R. 43 Bom. 6

——— acquisition by—

See LAND ACQUISITION ACT (I OF 1894), S. 18. I. L. R. 35 Bom. 146

——— acts of—

See ACT OF STATE.

I. L. R. 39 Calc. 615

——— assignment of jodi by—

See INAMDAR. I. L. R. 40 Mad. 93

——— Digwar appointed by—

See LAND... [illegible] ...D TENANT.

I. L. R. 39 Calc. 696

GOVERNMENT—*contd*

——— forfeiture by—

See FORFEITURE I L R 36 Bom 539

——— jodi payable to—

See INAMDAR I L R 40 Mad 93

——— liability of—

See PENSIONS ACT (XXIII OF 1871) ss 4 5 6 I L R 37 All 338

——— loss to—

See ACTIO PERSONALIS MORITUR CUM PERSONA I L R 35 Bom 12

——— order of—

See HABEAS CORPUS I L R 39 Calc 164

——— right of to assess Revenue—

See ASSESSMENT I L R 43 Calc 973

——— right of to streets drains etc —

See MUNICIPAL COUNCIL I L R 38 Mad 6

——— share of—

See LAND ACQUISITION—COMPENSATION I L R 40 Calc 64

——— suit against—

See ABKARI ACT (BOM ACT V OF 1878) ss 32 67 I L R 37 Bom 101

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) s 424 I L R 35 Bom 42

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 80 I L R 40 Bom 392

——— ultra vires order of—

See LIMITATION ACT (IX OF 1908) SCH I ART 14 I L R 39 Bom 494

GOVERNMENT CIRCULAR

——— effect of—

See CRIMINAL REVISIONAL JURISDICTION I L R 40 Calc 41

GOVERNMENT DEPARTMENT

——— *Government department discretion vested in by Statute if arbitrary and uncontrolled—Colourable exercise amounting to refusal—Court s power to interfere* The plaintiff an employee in the Public Service of the State of New South Wales on his retirement in 1905 became entitled under s 4 of the Public Superannuation Act of 1903 to a gratuity not exceeding one month s pay for each year of service from the date of his permanent employment the gratuity to be calculated on the average of his salary during the whole term of his employment and to be payable in the case of retirement after the commencement of the Public Service Act of 1902 only in respect of service prior to such commencement. The Public Service Board awarded him a gratuity based on the average of his salary reckoning his service however up to a certain date in 1895 Plaintiff having asked his service to be reckoned up to the date of the commencement of the Public Service Act in 1902 he was first informed that in respect of that claim no further sum could be paid but subsequently the Board allowed him one penny for each year of service subsequent to

GOVERNMENT DEPARTMENT—*contd*

the said date in 1895 No fault was thereby admittedly intended to be found with the manner in which the plaintiff had discharged his duties when in service *Held* that the discretion which the Government purported to exercise (through the Public Service Board) was not an arbitrary uncontrolled discretion but a discretion to be exercised reasonably fairly and justly An illusory award such as this—an award intended to be unreal and unsubstantial—though made under guise of exercising discretion is at best a colourable performance and tantamount to a refusal by the Board to exercise the discretion entrusted to them by Parliament WILLIAMS v GIDDY (1911) 15 C W N 669

"GOVERNMENT ESTABLISHED BY LAW IN BRITISH INDIA"

See PRESS ACT 1910 s 4 I L R 42 All 233

GOVERNMENT IRRIGATION SOURCE

See MADRAS IRRIGATION CESS ACT s 2 I L R 34 Mad 366

GOVERNMENT LAND

See LAND ACQUISITION ACT (I OF 1894) I L R 34 Bom 618

See MADRAS ESTATES LAND ACT (I OF 1908) ss 6 SUB S (6) 8 I L R 39 Mad 944

GOVERNMENT NOTIFICATION

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 59 I L R 36 Bom 617

GOVERNMENT OFFICER

——— suit against—

See BOMBAY COURT OF WARDS ACT (BOM ACT I OF 1905) s 3 (c) I L R 37 Bom 313

GOVERNMENT OF INDIA ACT 1833 (3 and 4 William IV c 85)

——— ss 39 45 46 and 51—

See DEFENCE OF INDIA ACT 3 Pat L J 537

GOVERNMENT OF INDIA ACT 1858 (21 & 22 VICT c 106)

——— s 39 42 55—

See EXECUTION OF DECREE I L R 38 Calc 754

——— s. 64—

See LEAVE TO APPEAL TO PRIVY COUNCIL I L R 42 Calc 35

——— ss 65 to 67—

See JURISDICTION OF CIVIL COURT I L R 40 Calc 391

GOVERNMENT OF INDIA ACT 1859 (22 and 23 Vict c 41)

——— s 1

See EXECUTION OF DECREE I L R 38 Calc 754

GOVERNMENT OF INDIA ACT 1865—(28 & 29 Vict. c. 17)

——— s. 4—*Notification by Governor General in Council declaring the boundaries of the Ballia and Shahabad Districts—Notification by Local Government transferring villages from one district to the other district effect of* The Governor General in Council having by a Notification under the Government of India Act 1865 s. 4 declared the deep-stream of the River Ganges to be the boundary between the district of Ballia in the United Provinces and the district of Shahabad in Bihar the deep stream is the boundary between the two Provinces and determines the jurisdiction of Civil Courts situate therein. Notifications by the Local Government issued for general information that in consequence of a change in the course of the deep-stream certain villages have been transferred from one Province to the other do not affect the matter MAHARAJA KESHO PRASAD SINGH v NIRMAL KUMAR
5 Pat L. J 451

GOVERNMENT OF INDIA ACT 1915 (5 and 6 Geo V c 61)

——— ss 65 and 72 and Amendment Act 1916 (6 and 7 Geo V) s 2—

See GOVERNOR GENERAL IN COUNCIL
I. L. R. 1 Lah. 326

——— s 72—

See DEFENCE OF INDIA ACT 1915 ss 1 TO 11 3 Pat L J 537

——— ss. 106 107—

See DEFENCE OF INDIA ACT 1915 ss 1 TO 11 3 Pat L. J 537

See INCOME TAX ACT 1910 s 51
I. L. R. 44 Mad. 718

See PRESS ACT (I OF 1910) s 3 (1) PROVISO I L. R 39 Mad. 1164

——— s. 107—

See HIGH COURT JURISDICTION OF
I. L. R. 48 Calc. 522

——— s 107 ss 71 and 217—

See CHOTA NAGPUR TENANCY ACT 1908 s 71 3 Pat L J 143

See CONTEMPT OF COURT
I L. R. 42 All. 26

See CIVIL PROCEDURE CODE 1908 O XXI R 60 2 Pat L J 130

See CRIMINAL PROCEDURE CODE 1898 s 195 4 Pat L J 609

s 14 24 C W N 96

I L R 40 All 364
I L R 41 All 302
I L. R 39 All 612

See DISMISSAL FOR DEFAULT
4 Pat L J 277

See HIGH COURT JURISDICTION OF
I L R 48 Calc 522

See LAND ACQUISITION ACT (I OF 1894) ss 3 AND 18 I L R 42 Mad 231

See LEGAL PRACTITIONERS ACT 1879 s 14 1 Pat L J 576

See LETTERS PATENT

See PROVINCIAL SMALL CAUSE COURT ACT 1887 s 25 1 Pat L J 465

GOVERNMENT OF INDIA ACT 1915 (5 and 6 Geo V c 61)—*contd*

——— s 107 ss 71 and 217 —*contd*

See RECEIVER 4 Pat L J 20

See REVISION I L. R 47 Calc 438

See RETRIAL 3 Pat L J 632

See WITHDRAWAL OF SUIT
2 Pat L J 682

——— On a difference of opinion between two Judges exercising revisional powers the decision of the Senior Judge prevails. MONRAH BISWAS v MIRZAN SARDAR
24 C W N 97

——— *Superintendence High Court's powers of—Code of Criminal Procedure (Act V of 1898) s 145* In exercise of its power of superintendence the High Court will interfere with an order under s 145 of the Code of Criminal Procedure 1898 where the Magistrate has acted without jurisdiction or has exceeded his jurisdiction It will not interfere merely because there has been an irregularity in the proceedings or an erroneous decision on a question of fact or law but it can and will interfere when there has been a material irregularity which amounts to a refusal to exercise or an usurpation of jurisdiction or which has prejudiced a party to the proceedings It is not always incumbent upon the Magistrate to give effect to a recent decision or proceeding of a Civil or Criminal Court No hard and fast rule can be laid down on this matter PARMESHWAR SINGH v KAILASHPATI 1 Pat L. J 336

GOVERNMENT OFFICIALS IN BOMBAY

See RESUMPTION
I L. R 39 Bom 279

GOVERNMENT ORDERS

See MADRAS IRRIGATION CESS ACT (VII OF 1865) s 1 I L R 38 Mad 997

See SECRETARY OF STATE FOR INDIA
I L R 39 Mad 781

GOVERNMENT PROCLAMATIONS

See SALE OF GOODS
I L R 40 Bom 11

GOVERNMENT RESOLUTION

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) ss 197 210 215
I L R 42 Bom 172

GOVERNMENT REVENUE

See BARUANA GRANT
18 C W N 42 129

——— assignment of—

See UNITED PROVINCES LAND REVENUE ACT (III OF 1901) ss 51 55 AND 99
I L R 33 All 556

GOVERNMENT SALE

See WASTE LANDS L R 43 I A 303

GOVERNMENT SECURITIES

See SECURITIES

See P[illegible] ACT
25 C W N 875

GOVERNMENT SERVANTS

——— Conduct Rules for—

See Hindu Law **I L R 40 Bom 126**

——— *Acquitted at Criminal trial dismissed without opportunity to defend himself—Notification of dismissal in Gazette—Suit for declaration that dismissal without good grounds and in contravention of Government rules and that notification illegal if lies—Suit against Crown by dismissed servants for wrongful dismissal or libel if lies—Specific Relief Act (I of 1877) s 42* Where plaintiff who held a ministerial post in the Burdwan Collectorate having been tried under ss 116 161 and 466 of the Penal Code and acquitted was dismissed by the Collector who based his conclusion not only on the materials on the record of the criminal trial but also on matters outside the record and this was followed by a notification in the *Calcutta Gazette* to the effect that *R H* having been dismissed from Government service is debarred from re employment in any capacity under Government *Held* that since a servant of the Crown is liable to dismissal without cause assigned the plaintiff was not entitled to sue in a Civil Court for a declaration that there were no good grounds for dismissing him *Vos v Secretary of State I L R 33 Calc 669 King v Secretary of State 13 C L J 357 s c 15 C W N 486n Cursetji v Secretary of State I L R 27 Bom 189* relied on That he was not entitled to a declaration that his dismissal was in contravention of the rules framed by Government because such a relief does not come within the scope of s 42 of the Specific Relief Act any claim for consequential relief in respect thereof against Government not being maintainable *Deokali Koer v Kedar Nath I L R 39 Calc 704 s c 16 C W N 838* relied on That as the Crown could not be sued for libel the plaintiff was not entitled to a declaration that his dismissal should not have been notified assuming that the notification affected his reputation That Government is within its rights in notifying the dismissal of a servant and forbidding his re employment *Per* Mookerjee *J*—Under Government rules plaintiff was entitled to be heard in defence before his dismissal Ram Das Hazra v Secretary of State for India (1914)

18 C W N 106

GOVERNMENT SOLICITOR

See Costs **I L R 40 Bom 588**

GOVERNMENT TENURES

See Sale for Arrears of Revenue

I L R 39 Calc 981

GOVERNOR GENERAL IN COUNCIL

See Government

——— powers of—

See Habeas Corpus

I L R 44 Calc 459

See Jury right of trial by

I L R 37 Calc 467

See Leave to appeal to Privy Council

I L R 42 Calc 35

——— power of, to make Regulations—

See Election **I L R 41 Calc 384**

——— sanction by—

See University Lectureship

I L R 41 Calc 518

GOVERNOR GENERAL IN COUNCIL—*contd*

——— *Power of—Emergency Legislation to deal with rioting and acts committed in open rebellion—supersession of ordinary Criminal Courts—Martial Law—Ordinances I and IV of 1919 setting up Commissions for trial of offences—Legislation affecting laws on which depend the allegiance of subjects of the Crown—Government of India Act 1915 (5 and 6 Geo V, c 61) s 65 sub s (2) and (3) and s 72—Government of India (Amendment) Act 1916 (6 and 7 Geo V) s 2—Competency of Commissions appointed by Local Government to try offences —Laws in part repugnant not wholly void* The question in this appeal was as to the competency of the Commissions appointed under the Martial Law Ordinance of 1919 to try the appellants for offences committed in rioting and acts of open rebellion The rioting during which the offences were committed broke out into open rebellion at Amritsar on 10th April 1919 The appellant Bugga was arrested on 12th April and the other appellants on subsequent dates none of them was taken in arms or in the act of committing the offences alleged against them On 13th April the Governor-General in Council acting under the Bengal State Offences Regulation (X of 1804) which was extended to the Punjab by the Punjab Laws Act 1872 made an order whereby he suspended the functions of the ordinary Criminal Courts within the districts of Lahore and Amritsar (and subsequently in Gujranwala and Gujrat) as regards the trial of persons for offences such as the appellants were charged with and established Martial Law within those districts and by the same order he directed the immediate trial by Court Martial of all such persons On 14th April the Governor General in Council acting under s 72 of the Government of India Act 1915 made and promulgated the Martial Law Ordinances of *1919* whereby it was provided that every trial in the districts of Lahore and Amritsar (and the other districts) held under the Bengal State Offences Regulation 1804 instead of being tried by Court Martial should be held by a Commission of three persons appointed by the Local Government S 7 of Ordinance I of 1919 enacted that save as provided by s 6 the provisions of the Ordinance shall apply to all persons referred to in the Regulation who are charged with any of the offences therein described committed on or after the 13th April 1919 By Ordinance IV of 1919 made on 21st April the Commissioners were empowered to try any person charged with offences committed after March 30th 1919 S 65 of the Government of India Act 1915 while giving the Governor General in Council a general power to make laws for British India enacted by sub s (2) that he should not be able to make any law affecting the authority of Parliament or any part of the unwritten law or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or affecting the sovereignty or dominion of the Crown over any part of British India and by sub s (3) enacted that he should have no power without the previous approval of the Secretary of State in Council to make any law empowering any Court other than a High Court to sentence to the punishment of death any of His Majesty's subjects born in Europe or the children of such subjects or abolishing any Court By s 72 the Governor General in cases of emergency was empowered to make Ordinances for the peace and

GOVERNOR GENERAL IN COUNCIL—*concld.*

good government of British India which are to have for not more than six months the same force of law as Acts passed under s. 65 the power being subject to the restrictions in that section The appellants natives of India were at the trial charged with offences under the Penal Code and some of them were sentenced to death *Held* that Ordinance IV could not be construed as intended only to extend the operation of Ordinance I to offences committed before 13th April but not earlier than the 30th March and therefore did not apply only (*like* Ordinance I) to persons taken in the act of committing one of the offences specified in Regulation X of 1804 It was clearly stated in the recital introducing the Ordinance that its operation was not confined to the persons and offences described in the earlier Ordinance *Held* also that Ordinance IV was not invalid by reason of sub-s. (2) of s. 65 of the Government of India Act, 1915 as affecting the unwritten laws or constitution on which depended the allegiance of His Majesty's subjects in India That sub section did not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the Common Law upon the observance of which some persons may conceive that his allegiance depends It refers only to laws which directly affect the allegiance of the subject to the Crown as by a transfer or qualification of the allegiance or a modification of the obligations thereby imposed. *Held* further that Ordinance IV was not invalidated by sub s (3) of s 65 of the Government of India Act 1915 as infringing the provision which prevents the Governor General in Council from empowering any Court other than a High Court to sentence to death any of His Majesty's subjects born in Europe for s 2 of the Government of India Amendment Act 1916 which at the end of s. 84 of the Act of 1915 has added a clause which enacts that a law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall to the extent of that repugnancy but not otherwise be void. If Ordinance IV therefore contravened s. 65 sub s (3) and was repugnant to that section so far as British born subjects are concerned it is void only to the extent of that repugnancy BUGGA *v* KING EMPEROR I L R 1 Lah 326

"GOWNA" CEREMONY

——— gift at—

See HINDU LAW—GIFT
I L R 37 Calc 1

GRACE, DAYS OF

——— for payment of rent—

See LANDLORD AND TENANT
I L R 39 Mad 834

GRAMOPADHYA

See VATANDAR JOSHI
I L R 40 Bom 112

GRANT

See BOMBAY LAND REVENUE CODE 1879 ss 68 AND 79
I L R 45 Bom. 920

ss 66 AND 214
I L R 39 Bom. 915

GRANT—*contd*

See BOMBAY HEREDITARY OFFICES ACT (BOMBAY ACT III OF 1874) s 15
I L R 44 Bom 237

See CUSTOM I L R 45 Calc 835

See DEKKHAN AGRICULTURISTS RELIEF ACT s — EXPL (b)
I L R 38 Bom 151

See GRANT BY CROWN

See INAM I L R 42 Mad 673

See FISHERY I L R 42 Calc 489

See HINDU LAW ADOPTION
I L R 43 Bom 778

See JAGIR I L R 46 Calc 685

See ITMAM I L R 47 Calc 979

See MINERAL RIGHTS
I L R 42 Calc 346
I L R 47 Calc 95

See SARANJAM I L R 41 Bom 408

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 10 I L R 38 Mad. 867

See VRITTI I L R 37 Bom 409

——— as inam—

See LANDLORD AND TENANT
I L R 38 Mad 155

See MADRAS ESTATES LAND ACT (I OF 1908) s 8 I L R 38 Mad 891
I L R 41 Mad 1012

s 6 I L R 59 Mad. 494

See MADRAS IRRIGATION CESS ACT
I L R 40 Mad 886

——— by Crown—

See FISHERY I L R 42 Calc 489

——— conflicting descriptions of—

See LEASE I L R 37 Calc 293

——— doctrine of—

See LEASE I L R 36 All. 387

——— of melvaram—

See MADRAS ESTATES LAND ACT (I OF 1908) s 8 I L R 38 Mad 891

——— to wife and minor son—

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 10 I L R 38 Mad. 867

——— whether on political tenure—

See BOMBAY REVENUE JURISDICTION ACT 1876 s 12 I L R 45 Bom 463

——— Maintenance Grant—*Limitation—Tenancy by sufferance—Limitation Act (XV of 1877) Sch II Art 139—Grantor and Grantee—Adverse possession* A tenancy by sufferance would not by itself make the possession of the holder rightful so as to prevent limitation from running but if the landlord or the person entitled to resume the tenancy does anything to indicate his assent to the continuance of the tenancy that would itself be sufficient to convert the tenancy by sufferance into a [illegible] year and in such a case the [illegible] that provided by Article 139 of the [illegible] to the Limitation Act RAM [illegible] BRIKHAMBAR SINGH (1910) [illegible] 37 Calc. 674

GRANT—*contd*

———— Grant of occupancy by Government under a kabuliyat—*Condition as to resumption for Government purposes that is, for Railway and other purposes—Sale by Government—Construction of the condition—Government full proprietors* Under a *kabuliyat* the occupancy of certain land had been granted to the plaintiff by the Collector subject only to the condition that it should be competent to Government to resume the land whenever it should be required by Government for Government purposes that is for Railway or other purposes Afterwards the land was resumed and was sold to defendant 2 (*from whose grandfather* it was originally acquired for a Railway) The plaintiff thereupon brought the present suit against the Secretary of State for India in Council and defendant 2 for the recovery of the land on the *ground that the sale to defendant 2 was not for* Government purposes *Held* dismissing the suit that Government were the proprietors of the land and as such they could resume it whenever they required it for their proprietary purposes Government purposes must be construed as meaning that they were purposes of Government as the State proprietor purposes which Government alone were entitled to prescribe in the exercise of their discretionary powers SAPURLO SABSHETTI *v* SECRETARY OF STATE FOR INDIA (1912)

I L R 36 Bom 438

———— Ekrarnama—*Lease or Licence—Construction—Practice* Where a grant involved a transfer of an interest in immovable property the grantees were in the position of tenants if it did not they were at least in the position of licensees Where in an *ekrarnama* there were clauses by which the grantors reserved to themselves certain rights for limited purposes but which properly construed gave the grantees exclusive possession of the property the grant amounted to a lease To give exclusive possession there need not be express words It is sufficient if the nature of the acts to be done by the grantee requires that he should have exclusive possession. *Roads* v *The Overseers of Trumpington L R 6 Q B* 56 referred to Distinction between a license and a lease lies in the fact that in the case of license there is no transfer of interest in land whereas in the case of a lease there is transfer of such interest. *Upon the construction of the instrument as a whole* *Held* that the paramount intention of the parties was to create a present demise and that the grantee was in the position of a tenant MOHIPAT SINGH *v* LALIT SINGH (1912)

17 C W N 166

———— Conduct of parties—*Reliance on, for ascertaining intention of grantor* *Held* that reliance could not be placed on the conduct of the parties to ascertain the intention of the grantor except in the case of ancient grants where the terms are ambiguous CHRISTIAN *v* TEKAITNI NAFRADDA KOERI (1914)

19 C W N 796

———— Water cess—*Madras Water cess Act (VII of 1865)—Free grant of water before—No right to impose water cess thereafter* If for some [illegible] or other or even for no consideration a grant was before the passing of Madras Water [illegible] (VII of 18[illegible]) made by the Government of [illegible] part [illegible] quantity of water or a certain definite share of the water of a tank to a person irrespective of the use he might make of it the grant is in law a free grant and the Government is not entitled to any kind of payment thereafter for the water under Madras Act VII of 1865 *Maria Susai Mudaliar* v *The Secretary of State for India 14 Mad L J 350* followed *Secretary of State for India* v *Swami Naratheeswarar I L R 34 Mad* 21 distinguished VENKATASUBBIAH *v* SECRETARY OF STATE FOR INDIA (1912)

I L R 38 Mad 424

———— Grant for Barki service—*Resumption of grant—Non production of grant—Presumption as to right to resume cannot be made—Right of resumption must be proved* In the Bombay Presidency where Deshgat Vatan lands are granted for the performance of personal services no presumption can be made that the grantor has the option to determine the services and to resume the lands If a grantor takes up that position and claims that as his right he must show either that the terms of the grant give him that right or *if the* terms of the grant are unknown, that the proved circumstances justify an inference that he has that right YELLAVA SAKREPPA *v* BHIMAPPA GIREPPA (1914)

I L R 39 Bom 83

———— Grant of land "besides poramboke"—*Construction of—Padugai lands in Trichinopoly and Tanjore taluks ownership of Padugai' meaning of* A grant of land by the Government acknowledging the grantee s title to a whole village consisting of certain specified area besides poramboke gives the grantee a right to all the unassessed waste in the village *such as* waste or padugai land *i e* land between a river bed and the high flood bank of the river though it may not operate to give communal property such as burying grounds temple sites etc to the grantee *Narayanasami v Kannappa* Second Appeal No 1445 of 1910 and *Secretary of State v Kannapallee Venkataratnammah 23 Mad L J 109* referred to Padugai land in Trichinopoly and Tanjore taluks mean land on the lower level bank breadth of the river between the edge of the sandy stream bed and the high flood level bank. SADASIVA AYYAR *J*—The grant of poramboke does not operate to give the grantee the bed of the river Meaning of the word Poramboke considered SECRETARY OF STATE *v* RAGHUNATHA TATHACHARIAR (1912)

I L R 38 Mad 108

———— Custom of primogeniture—*Grant by the Maharaja of Chota Nagpur—Impartibility of the estate—Proof of custom onus of—Lex loci custom of Chota Nagpur—Meaning of putra pautradi* Certain grants of *jagirs* by the Maharaja of Chota Nagpur to a person related to *him or to his descendants dating from 1709* to 1786 were in terms to the grantee and his sons and grandsons (*putra pautradi*) The family of the grantee had for several generations interpreted the words *putra pautradi* in the literal sense namely to mean son and son s son *Held* that at the time of these grants the words had not acquired in Chota Nagpur the technical meaning which according to the Privy Council in *Lalit Mohan* v *Chukkun Lal I P 24 I* [illegible] *76 s c I L R* [illegible] *357* they came to have by 1868 when used in Wills executed in Bengal and the grants in this case did not convey an absolute estate

GRANT—*contd*

unconditional and unlimited *Per* ATKINSON *J* —That although as held by the Privy Council the words convey an absolute estate in lands descendable from generation to generation coupled with full power of alienation those words of limitation may be controlled by custom limiting their scope and operation *Lekh Lal v Rameswar Nath Singh I L R 31 Calc 509* relied on. Up to 1867 the lands granted descended regularly according to the rule of primogeniture to the eldest lineal descendant of the eldest son when the last male descendant of that line dying leaving a widow the Maharaja proceeded to resume the property whilst two brothers the descendants of a younger son claimed to succeed to the property The disputes terminated in two deeds one executed by the brothers agreeing that the widow should hold possession of the property as long as she lived upon payment of rent to the Maharaja and that they should take possession after her death and the other by the Maharaja purporting on receipt of consideration to release the lands to the brothers in equal shares *Held* that as there was no failure of heir in the line of the grantee the Maharaja had no right to resume and the *sanad* to the brothers was a nullity *Per* CHAPMAN *J* —That as the younger of the brothers had the right to succeed on the death of the elder without male issue his concurrence to the deed in favour of the widow might have been taken to avoid future trouble *Per* ATKINSON *J* —That the agreement was ineffective to alter or vary the impartible character of the property or to change its method of devolution. *Per* ATKINSON *J*—The custom of primogeniture which prevails in Chota Nagpur in the case of grants made by the Maharaja whereby the property so granted is deemed impartible and descends to the eldest male heir by lineal descent applies with greater force in the case of grants of property made between the Maharaja and his relations *Kopilnath v Government 22 W R 17* referred to Where a custom prevails in one branch of a family it is strong evidence to be relied on that it applies with equal force to another branch of the same family *Garuradhwaja Prasad v Saparandhwaja Prasad I L R 23 All 37 5 C W N 33* relied on The custom is recognised not only as a family custom prevailing in the Maharaja s family but also as the *lex loci* custom of Chota Nagpur GAJENDRA NATH SAHI DEO *v* MATHURA NATH SAHI DEO (1916)

1 Pat L J 109
20 C W N 878

——— Presumption of lost grant—*In absence of proof of legal title on the basis of user exercised and enjoyed* Where a Court is asked to presume a grant in favour of a party in the nature of a lost grant *i e* a lawful origin of a long and continuous user and enjoyment of property in the absence of legal proof of title it should presume a grant on the basis of the user exercised and enjoyed by that party NAWAGARH COAL COMPANY LTD *v* BHABILAL TRIGUNAIT (1916)

20 C W N 1135

——— Grant by Government—*As bounded by a non navigable river—Right of grantee to half the bed of the river presumption as to—Onus of proving contrary on grantor* *Held* by the Full Bench (i) that in the case of a grant of land by Government described as bounded by a non navigable river the presumption (which may be strong or weak according to circumstances of each case) is that the grant passes to the grantee the bed of the river *ad medium filum aquae* and (ii) that the onus of showing the contrary is on the grantor VENKATA LAKSHMINARASAMMA *v* THE SECRETARY OF STATE (1918) **I L R 41 Mad 840**

——— Grant by zamindar of Talabi Brahmottar tenure—*Antecedent to Permanent Settlement—Tenures permanent hereditary and transferable—Grantee rights of to minerals—Absence of express evidence that they formed part of the grant—Protraction of Indian litigation* A grant in India has not the special and technical meaning attached to the same word in English law A Talabi Brahmottar grant of a zamindar s village at a fixed rent made before the Permanent Settlement by the then Raja of Pachete to the predecessors in title of the appellant although found to be a permanent hereditary and transferable tenure was *held* (affirming the decision of the High Court) not to carry with it the mineral rights in the soil Minerals will not be held to have formed part of the grant in the absence of express evidence to that effect *Hari Narayan Singh Deo v Sriram Chakravarti I L R 37 Calc 723 L R 37 I A 136* and *Durga Prasad Singh v Braja Nath Bose I L R 39 Calc 696 L R 39 I A 133* followed Protraction of Indian litigation deprecated. SHASHI BHUSAN MISRA *v* JYOTI PRASAD SINGH DEO (1916) **I L R 44 Calc 585**

——— Grant of land proof of—*Title deeds what are—Original grant not forthcoming—Subsequent conveyances through which title derived by title deeds—Court refusing to consider them as title deeds and basing decision on conduct of parties—Error vitiating judgment—Real question not considered—Draining channel dispute between Municipality and private owner as to title to—Boundaries in title deeds if may be ignored and title declared up to centre line of channel—Court if may vary boundaries in title deeds* Plaintiffs who sued for recovery of possession of a strip of land lying between their premises and a public road including a *khal* or *nulla* which lay between the said premises and the road proved a clear title for over 50 years by a succession of duly registered conveyances mortgages reconveyances and other title deeds and also proved that during that period they had leased portions of the land by leases that themselves were registered. The Judge at the trial accordingly found in the plaintiff's favour dispossession having taken place within 12 years of the suit On appeal the High Court reversed that decision observing that the original grant of the land made by Government about the year 1830 to one Smith to whom plaintiff traced their title was not forthcoming and that though in the later conveyances referred to above the *khal* appeared to have been treated as a part of the subject of the grant it was unlikely that Government would include it in their grant without securing the continued maintenance in the public interest of a water channel which existed from time out of memory and played a conspicuous part in the drainage system of the local Municipality and that in the absence of the original grant none of the other documents referred to in the case could be regarded as being in any sense title deeds they [illegible] ... insufficient to create title and [illegible] mere as [illegible]

GRANT—*contd*

of title made from time to time by the predecessors in interest of the plaintiffs In this view it treated the case as though it was one in which the Court had nothing relevant before it but the conduct of the parties to decide whether the plaintiffs or the defendant Municipality were entitled to the land *Held* affirming the trial Judge that it was scarcely possible to conceive of a clearer title by deeds than that which was proved by the plaintiffs and the High Court was wrong in saying that the plaintiffs had no title deeds—in consequence of which error it never considered the real question in the case That having regard to the boundary consistently found in the deeds which was stated to be the public road it was impossible to hold that *the title of the plaintiffs went up only to the centre line of the khal* and thus make the deeds convey lands marked out by different metes and bounds from that which there appeared JOHN KING & CO *v* HOWRAH MUNICIPALITY (1914)
18 C W N 898

———— **Resumption of grant**—*Deshgat Vatan*—*Grant for p on s services*—*Resumption of grant*—*Grant burdened with service* prima facie *irresumable*—*Grant of office to which lands are annexed by way of remuneration* prima facie *resumable*—*Burden of proof* In the Bombay Presidency where ancient grants of lands are sought to be resumed all grants of the kind for the purpose of applying the law of resumption fall into two main categories (i) grants of lands burdened with service and (ii) grants of office to which lands are annexed by way of remuneration instead of or along with cash The former grants are always irresumable unless the grantor can show that they have been specially conditioned so as to enable him to resume for failure to perform these service or at his own will to discontinue the services and resume lands Grants under the second category are always resumable unless the grantee can show that they have been specially conditioned otherwise so as to prevent their resumability CHANDRAPPA *v* BHIMA BIN DASSAPPA (1918) **I L R 43 Bom 37**

———— *Of land by owner not running with any specified plots of binding on assignees from owner*—*Privy Council leave to appeal to to*—*Certificates granted in exercise of discretion requirements of*—*Grant or covenant*—*Covenant not running with the land does not bind assignee*—*Grant not vesting in present but to take effect by entry at an uncertain future date offending against rule of perpetuities* It is of the utmost importance that certificates of leave to appeal to the Privy Council when it is suggested that they are made in the exercise of discretion conferred should make plain upon their face that the discretion has in fact been exercised In an agreement between the Raja of Paresnath Hills and the Sitambari Jain Society the former stipulated that if the Society shall require any place on the Hill and below thereof at Madhuban for erecting mandir and dharamsala and for doing repairs and making bricks for the said purpose in that case I and my heirs shall give for making mandir dharmsala and bricks land stones from the hill and timber free of costs and if I and my heirs refuse to give in that case the Sitambari Jain Society shall take the same of its own power The Sitambari Jain Society on proceeding to exercise this power was resisted by the defendants who subsequently to the agreement had acquired leasehold interests in lands on which the Society sought to erect a temple *Held*, that the agreement did not create in the Society some present estate or interest which would prevent the owner from making a grant to the defendants and the covenant not being one running with the land could not be enforced against the assignees from the Raja That if the agreement were regarded as one to grant in the future whatever land might be selected as a site for a temple as the only interest created would be one to take effect by entry at a later date *and as this date was uncertain the provision* was bad as offending the rule against perpetuities MAHARAJ BAHADUR SINGH *v* BALCHAND CHAUDHURY (P C) **25 C W N 770**

GRANTEES

———— estate of—

See TRANSFER OF PROPERTY ACT (IV OF 1882) s 10 **I L R 38 Mad. 867**

GRANTOR AND GRANTEE

See ADVERSE POSSESSION **I L R 40 Calc 173**

See RENT **I L R 38 Calc 278**

See TITLE **I L R 44 Calc 771**

GRATUITOUS PAYMENT

See CONTRACT ACT (IX OF 1872) s 70 **I L R 40 All 555**

GRAVEL

———— stocking of on a military road—

See TORT **I L R 39 Mad 351**

GRAVEYARD

See MAHOMEDAN LAW—ENDOWMENT **I L R 40 Calc 297**

———— *Trespass*—*Erection of a shed over a visible grave in a disused private grave yard*—*Penal Code (Act XLV of 1860) s 297* The erection of a shed over *a visible grave belonging* to the complainant s family in a disused grave yard claimed to be private property of the trespasser with the knowledge that the feelings of the complainant would be likely to be thereby wounded is an offence under s 297 of the Penal Code *Per* RICHARDSON *J*—The word trespass in s 297 has not the same meaning as criminal trespass in s 441 of the Code but implies any violent or injurious act committed in the place and with the knowledge or intent defined in s 297 JHULAN SAIN *v* EMPEROR (1913) **I L R 40 Calc 548**

GREAT GRANDFATHER S SON S DAUGHTER S SON—

See HINDU LAW—SUCCESSION **I L R 43 Calc 1**

GRIEVOUS HURT

See PENAL CODE

ss 100 325 **I L R 40 Bom 105**

ss 300 325 Excep 4 **I L R 35 All. 329**
I L R 40 All. 686

ss 304 325 **I L R 40 All. 103**
I L R 42 All. 302

See RIOTING **I L R 41 Calc 43**

GROUND RENT

———— exemp ion from to be express—

See Right of Suit
I L R 36 Mad 3"3

GROUNDS OF FORFEITURE

See Forfeiture I L R 41 Calc 466

GROUNDS OF BELIEF

See Affidavit I L R 37 Calc 259

GROUNDS OF REVISION

See Criminal Revision
I L R 40 Calc 41

GROVE LAND

See Agra Tenancy Act (II of 1901)—

s 4 I L R 35 All 200

ss 4 16 I L R 39 All 605

18 and 88 I L R 43 All 606

ss 19 and 58 I L R 42 All 36

See Landlord and Tenant
I L R 34 All 545

See Mortgage I L R 41 All 45

See Oudh Rent Act

———— *Mortgage and sale of a grove—Claim of mortgagore to be ex proprietary tenants—* Sir Land which is simply grove and not agricultural lan l cannot be *sir* of the proprietor of which he could become the proprietary tenant even though it may have been recorded as *sir* in the village papers Bhagwan Din *v* Piari Lal
I L R 42 All 483

———— *Customary rights of grove holder—Right to maintain grove by plantation of new trees—Wajib ul arz—Relation of rights recorded in the wajib ul arz to the customary law* So far as decided cases (with reference to the rights of grove holders) go the tendency has been to limit the decision by the provisions of the wajib ul arz and to assume that the grove holder possesses all rights in respect of his grove which are not excluded by those provisions For example if it is intended to debar a grove holder from his usual right to maintain his grove by planting fresh trees from time to time it is to be expected that some mention of such a curtailment of the grove holder s customary right will be found in the wajib ul arz On suit filed by the zamindar against a grove holder for a declaration that the land in defendant s possession as a grove had ceased to be grove land and for an injunction to prevent him planting more trees thereon it was found that the grove holder had for some years been planting trees to replace trees which had fallen and this without interference on the part of the zamindars also on a construction of the wajib ul arz that although the planting of new groves or trees without the permission of the zamindars was forbidden there was no specific provision barring the customary right of a grove holder to replace dead or fallen trees and the conclusion was that the grove holder still possessed the customary right of a grove holder to plant fresh trees C[illegible] Lal *v* Bihari Lal
I L R 42 All 634

GUARANTEE

See Contract Act (IX of 1872) ss 126 128 I L R 42 Bom. 444

———— continuing—

See Contract L R 47 I. A. 16[illegible]

———— contract of—

See Principal and Surety
I L R 44 Calc. 978

———— Letter of—

See Construction of Document
16 C W N 769

———— *Contract construction of—Whether contingent or unconditional agreement—Inadmissibility of evidence of what took place after the execution of the contract on question of its construction—Contract Act (IX of 1872)* [illegible] *and 65* The question for determination in the appeal was the construction of the following letter dated 7th August 1909 which was signed by the defendant and given to the plaintiffs as security for the repayment of the loan of Rs 1½ lakhs mentioned therein — In consideration of your having at my request acceded to the proposal of the Secretaries Treasurers and Agents of the Tricumdas Mills Company Limited to advance to the Mills Rs 1½ lakhs I hereby bind myself to procure a loan within two weeks of Rs [illegible] lakh on the first mortgage of the Mills block property and to pay you thereout the said sum of [illegible] lakhs agreed to be advanced by you to the M[illegible] In a suit for damages for breach of the contract contained in the letter the Courts in India [illegible] in favour of the defendant that all he had undertaken to do was to procure the lending of [illegible] lakhs if a first mortgage of the Mills was [illegible] and to pay thereout Rs 1½ lakhs to the plaintiffs *Held* (reversing that decision) that on its true construction the document amounted to a [illegible] undertaking by the defendant that a loan of [illegible] lakhs should be procured and that out of [illegible] loan the sum of [illegible] 1½ lakhs should be [illegible] the plaintiffs *Semble* Evidence of wh[illegible] place after the execution of the document [illegible] admissible on the question of its construction [illegible] Vissanji Sons & Co *v* Shapurji Burjorji
I L R 36 Bo[illegible]

GUARDIAN

See Civil Procedure Code (Act [illegible] 1882) s 443 I L R [illegible]

See Compromise
I L R [illegible]

See Costs I L R [illegible]

See Guardian ad litem

See Guardians and Wards [illegible] of 1890)

See Hindu Law—[illegible]
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GUARDIAN—*contd*

See MAHOMEDAN LAW—GUARDIAN

See MAHOMEDAN LAW—MARRIAGE
I L R 42 Calc 351

See MINOR

——— alienation by—

See GUARDIAN AND WARD ACT 1890 s 7
I L R 37 Mad 33

See HINDU LAW—GUARDIAN
I L R 38 Mad 1125

See LIMITATION ACT (IX OF 1908) ART 44
I L R 44 Bom 742

——— application by—

See GUARDIANS AND WARDS ACT (VIII OF 1890) s 25
I L R 39 Bom 438

——— application for execution by—

See LIMITATION ACT (XV OF 1877) s 8 SCH II ART 179 EXPL I
I L R 34 Bom 672

——— appointment of—

See MINOR
L R 41 I A 314
I L R 48 Calc 802

——— for marriage—

See MAHOMEDAN LAW—MARRIAGE
I L R 42 Calc 351

——— natural, right of to manage pending appointment—

See GUARDIANS AND WARDS ACT (VIII OF 1890) s 34
I L R 40 Mad 775

——— powers of—

See MAHOMEDAN LAW—MINOR
I L R 37 Mad 514

1 ——— **Hindu widow**—*Re marriage—Guardians and Wards Act (VIII of 1890) s 39—Whether a Hindu widow appointed guardian under the Act loses her right of guardianship on re marriage—Hindu Widows Re marriage Act (XV of 1856) s 3* A Hindu widow who has obtained a certificate of guardianship in respect of the person and property of her infant sons does not merely on her re marriage lose her right to act as guardian of the minors GANGA PERSHAD SAHU *v* JHALO (1911) I L R 38 Calc 862

2 ——— **Appointment of nazir as guardian of the property of the minors by Court**—*Minor—Guardians and Wards Act (VIII of 1890) ss 8 13—Applications by mother and grandmother—Purdanashin lady—Recording of Evidence* Where a mother and grandmother of two minors separately applied to be appointed guardian of the persons and property of the minors and during the pendency of their applications it was agreed that a certain person should be appointed guardian of the property but he refused to take up the appointment the District Judge without holding an enquiry into the respective merits of the applications made an order appointing the Nazir of the Court to be the guardian of the property of the minors *Held* that the Court had no power to make an order appointing a guardian except on a substantive application under s 8 of the Guardians and Wards Act (VIII of 1890) and that the appointment of the Nazir was *ultra vires* Under s 13 of the Guardians and Wards Act (VIII of 1890) the Court is bound to hear such evidence as may be adduced in support of or in opposition to the application before passing an order The mere fact of the mother being a *purdanashin* lady was no obstacle to her being appointed guardian of the property the safe custody of the property and its due administration could be sufficiently guaranteed by security being taken from the proposed guardian by the Court JAIWANTI KUMRI *v* GAJADHAR UPADHYA (1911) I L R 38 Calc 783

3 ——— **Guardians and Wards Act VIII of 1890—Orders under made without jurisdiction**—*Proceedings not had* bona fide *orders in—Consent obtained by judicial pressure—Judge no arbitrator* One *D* died leaving a minor unmarried daughter by a predeceased wife and three widows One *R* with a view to secure the marriage of his son with the girl (*so that ultimately the property left by D might pass into the hands of the representatives of his own family*) got the maternal grandfather of the girl who was his servant to apply for the appointment of himself as the guardian of the property and person of the minor but no part of *D*s property had yet vested in her the widows being *according to Hindu law D*s heirs The widows objected to the application but the District Judge having owing to a misconception passed orders directing that unless the widows placed their properties in charge of *R* he would remove the girl whom they dearly loved from their custody to that of the maternal grandfather they were induced to grant a lease of the properties *to R after which they were made to present* an application for the appointment of themselves as guardians of the person of the girl and they were formally appointed as guardians *Held* that no guardian was needed for the protection of the person of the girl and she had no property of which a possible guardian could take charge The application of the widows for appointment as guardians *of her person was not voluntary* and the *application* of the maternal grandfather was not made *bonâ fide* and the orders passed by the Judge were without jurisdiction Orders passed in proceedings so instituted and conducted *even if they were nominally* in conformity with statutory provisions could hardly be regarded as invested with the efficacy of legal orders made in *bonâ fide* judicial proceedings *That the Judge could not be deemed in this case to* have acted as an arbitrator chosen by the parties voluntarily the ladies having in fact acted under judicial pressure of the highest degree to which they were not in a position to offer effectual and successful resistance and consequently *Ledgard v Bull I L R 9 All 191 L R 13 I A 134* did not apply SAHADRA KOER *v* RAMADIN CHOWDRY (1911) 16 C W N 444

4 ——— *Testamentary Guardian—Appointment by implication* Where a testator by his will appointed one *D* whom he called his trusted friend the executor and provided that *D was on his death to take care of* and supervise all his properties and manage his family and educate and maintain his sons *S* and *N* *Held* that these words amounted to appointing *D* guardian of both the persons and the properties of *S* and *N* DHANANJAY BHUNJO *v* NEMA CHAND DAS (1917) 21 C W N 1134

5 ——— **Will**—*Minor—Hindu widow—Guardians and Wards Act (VIII of 1890) s 7 sub*

GUARDIAN—*contd*

s (3)—Appointment of guardian to a minor—Will—Whether before probate taken out will may be considered in connection with appointment of guardian to a minor In an application for the appointment of a guardian of a minor the Court is bound to consider a will although probate has not been granted The fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other but it is not open to the Court to say it will refuse to take notice of the will *Sajad Shah v Hajiji Begam I L R 1 Bom 580 Chinnammal v Hurdarabadra I L R 16 Mad 350* and *Pathan Ali Khan Badlu Khan v Bai Panibai I L R 19 Bom 83* referred to SARALA SUNDARI DEBI *v* HAZARI DASI DEBI (1915) I L R 42 Calc 953

6 ———— Hindu father—*Entrusting sons for custody and education in England to another person who defrays expense of their maintenance and education—Revocation of such authority and demand for sons to be restored to his custody—Suit to enforce demand in District Court—Questions to be determined in such a suit—Jurisdiction of the District Court—Guardians and Wards Act (VIII of 1890) s 9—Ordinarily resident meaning of—Suit not the appropriate procedure—Transfer of suit from the District Court to the High Court under clause 13 of the Letters Patent 1865—Powers of the High Court in dealing with the suits so transferred—Mandatory order of the kind asked for not to be made—What a Court of competent jurisdiction in India could do under the circumstances—Order declaring a guardian when to be made—Guardians and Wards Act (VIII of 1890) s 19—Order declaring a guardian during respondent's life propriety of* Among Hindus as in England the father is the natural guardian of his children during their minority but this guardianship is in the nature of a sacred trust and he cannot therefore during his lifetime substitute another person to be guardian in his place He may in the exercise of his discretion as guardian entrust the custody and education of his children to another but the authority he thus confers is essentially a revocable authority and if the welfare of his children require it he can notwithstanding any contract to the contrary take such custody and education once more into his own hands If however the authority has been acted upon in such a way as in the opinion of the Court exercising the jurisdiction of the Crown over infants to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint such Court will interfere to prevent its revocation *Lyons v Blenkin (1821) Jac 245* followed The plaintiff (respondent) a Brahman residing at Madras and having only a small income had been for many years a member of the Theosophical Society of which the defendant (appellant) was President He had two sons born respectively on 11th May 1895 and 30th May 1898 In 1910 the appellant offered to take charge of his sons and defray the expense of their maintenance and education in England and at the University of Oxford The respondent accepted that offer and by a letter to the appellant dated 6th March 1910 authorised her to take charge and be guardian of his sons who were thereafter in her custody and were eventually in February 1912 taken by her to England where she left them after making arrangements for giving them a course of tuition such as would enable them to enter the University For reasons to which it is unnecessary to refer the respondent on 11th May 1912 cancelled his previous letter of 6th June 1910 and demanded that his sons should be restored to his custody and on the appellant (then in India) refusing to comply with his demand he instituted in the District Court of Chingleput the present suit which was transferred to the High Court at Madras under clause 13 of the Letters Patent 1865 and in the absence of the sons a decree was made and affirmed on appeal declaring that they were wards of Court that the respondent was guardian of their persons and ordering the appellant to make over custody of them to the respondent *Held* that the suit was entirely misconceived that the respondent remained guardian of his sons notwithstanding that he had substituted the appellant in his place that letter of 6th June 1910 has a revocable authority and that the real questions for decision were whether in the events that had happened the respondent was at liberty to revoke the authority and was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education and those questions had to be determined with regard to the interests and welfare of the infants and their parentage and religion and could only be decided by a Court exercising the jurisdiction of the Crown over infants and in their presence that the District Court had no jurisdiction over them except such as was conferred by the Guardians and Wards Act (VIII of 1890) which was confined to infants ordinarily resident in the district and as the infants who had months previously left India with a view to being educated in England and going to the University of Oxford could not be said to be ordinarily resident in the district of Chingleput that Court had no jurisdiction in the matter that a suit *inter partes* is not the form of procedure prescribed by that Act for proceedings in a District Court touching the guardianship of infants that the powers of the High Court in dealing with suits transferred to it under clause 13 of the Letters Patent 1865 would seem to be confined to the powers which but for the transfer might have been exercised by the District Court that a mandatory order directing the defendants to take possession of the infants in England and bring them to India was one which considering their age could not be enforced if they refused to return to India and ought not to have been made that the most which a Court of competent jurisdiction could do under the circumstances such as existed in the present case was to order the appellant to concur with the respondent as the infants guardian in taking proceedings in England to retain the custody and control of his sons *Held* further that with respect to the order declaring the infants wards of the Court and appointing the respondent as their guardian which the District Court could not have made in a suit which it was alleged that the High Court could in its general jurisdiction make that whatever may have been the jurisdiction of the High Court to declare infants wards of the Court an order declaring a guardian could only be made if the interests of the infants required it and that an order made when the infants were not before the Court and without adequately considering them their interest could not be supported that no order declaring a guardian could by reason of s 19 of the Guardians and Wards Act 1890 be made during respondent's life unless in the opinion of the Court he was unfit to be their guardian Since the admission of the appeal the infants had

GUARDIAN—*contd*

been allowed to intervene and they stated through counsel that they did not wish to return to India and abandon the chances of a University education in England The appeal was allowed and the suit dismissed without prejudice to any application the respondent might think fit to make to the High Court in England touching the guardianship custody and maintenance of his children. BESANT v NARAYANIAH (1914) I L R 38 Mad 807

7 ——————— *To minor girl—mother or grandmother—right of selecting bridegroom—Hindu Law* *Held* that under Hindu Law the mother is after the father the natural and legal guardian of her minor daughter and she does not lose her right by re marriage where such re marriage is recognised as valid by custom *Mussammat Nur Bibi* v *Mussammat Mehran* (*14 P R 1887*) and *Ganga Pershad* v *Jhalo* (*I L R 38 Calc 862*) referred to—also Mayne s Hindu Law 8th edition page 276 and Ram Krishna s Hindu Law Vol II pages 406 407 *Held* also that the mother or a maternal grandmother has a preferential title to the guardianship of a girl to a paternal grandfather *Mussammat Ambo* v *Ganga Sahai* (*18 Indian Cases 141*) *Mussammat Fatima* v *Mussammat Rani* (*28 Indian Cases 507*) and *Bindo* v *Sham Lal* (*I L R 29 All 210*) referred to *Held* further that Hindu Law does not confer on the grandfather a right to dispose of his grand daughter in marriage in opposition to the wishes of the mother but gives the latter preferential right to select a bridegroom *Ranganaiki* v *Ramanuja* (*I L R 35 Mad 728*) *Bai Ramkore* v *Jamnadas* (*I L R 37 Bom 18*) *Mul Chand* v *Bhudhia* (*I L R 22 Bom 812*) and *Musssammat Maya Devi* v *Ram Chand* (*20 P R 1916*) referred to—also *Dayal* v *Narain Das* (*64 P R 1884*) and Mayne s Hindu Law 8th edition page 101 MUSSAMMAT INDI v GHANIA I L R 1 Lah 646

GUARDIAN AD LITEM

See CIVIL PROCEDURE CODE 1882 s 440 445

See CIVIL PROCEDURE CODE (ACT V OF 1908)—

Ss 47 AND 50
I L R 38 Mad 1076

s 99
25 C W N 258

O IX R 13
I L R 37 All 179
I L R 39 All 8

O XXXII R 4
I L R 43 All 104

R 7
I L R 39 Mad 853
I L R 44 Bom 574

See HINDU LAW—JOINT FAMILY
I L R 35 All 571

See MINOR I L R 32 All 287
I L R 37 Mad 535

See MORTGAGE I L R 37 Calc 897

See MORTGAGE DECREE
4 Pat L J 213

——————— *Person of unsound mind* The provisions of the Civil Procedure Code (Act XIV of 1882) with respect to the representation of lunatics not being exhaustive a guardian *ad litem* should be assigned to a defendant who is of unsound mind although not so found LAKHYA DASYA v UMA KANTA CHAKERBUTTY (1909)
14 C W N 256

——————— *Joint Hindu family—Suit on mortgage against father and sons—Irregular appointment of father as guardian of minor sons—Ex parte decree—Suit by sons to recover their shares* In a suit for sale on a mortgage executed by the father of a joint family governed by the *Mitakshara* the plaintiffs impleaded as defendants the father and his three sons two of whom were minors The plaintiffs named the father as guardian *ad litem* of the minors but no steps were taken as required by the rules of the High Court to ascertain whether the father was willing to act as guardian The father did not appear and an *ex parte* decree was passed in execution whereof the family property was sold Subsequently on attaining majority the minor sons brought a suit for possession of their shares alleged that the original debt was an immoral debt which they were not bound to discharge and also they had not been legally represented in the previous suit The Court of first instance having dismissed the suit without going into the merits the lower Appellate Court made an order of remand *Held* that there had been a serious irregularity if nothing worse in the appointment of the father as guardian *ad litem* and as it was impossible to tell without knowing to what extent the plaintiffs were in a position to establish their case regarding the immorality of the debt how far the appointment of their father as guardian had prejudiced them the order of remand was right BAIJNATH RAI v DHARAM DEO TIWARI (1916) I L R 38 All 315

——————— *Absence of proposed guardian s consent to appointment effect of—Whether person who has executed a bond on behalf of minor should be appointed guardian* ad litem *in a suit on the bond* Mere omission to obtain the consent of a person appointed guardian *ad litem* to a minor is not a defect which is fatal to a suit against the minor unless the minor is prejudiced by the omission The Court however should be jealous on behalf of the infant Where a mother with full knowledge of its contents executed a bond on behalf of her minor son for necessity and the son benefited by the money *held* on a plea that the mother should not in a suit on the bond have been appointed guardian *ad litem* to the minor that the mother had no interest in the suit adverse to the minor and that the appointment was not improper To succeed on a plea of adverse interest a particular adverse interest must be proved The Courts will not act on surmise 2 Pat L J 390

GUARDIAN AND MANAGER

——————— power of—

See SPECIFIC PERFORMANCE
I L R 39 Calc 232

GUARDIAN AND MINOR

See ARBITRATION
I L R 43 Calc 290

See CONTRACT ACT (IX OF 1872) ss 10 AND 11 I L R 33 All 657

GUARDIAN AND MINOR—contd

See GUARDIANS AND WARDS ACT (VIII of 1890) CH. II
I L R 38 All 282

See MAHOMEDAN LAW—ALIENATION
I L R 34 All 213

See MAHOMEDAN LAW—GUARDIAN
I L R 36 All 280

See MAHOMEDAN LAW—MINOR
I L R 33 All 433

See MAJORITY ACT (IX OF 1875) s. 3
I L R 35 All 159

See MORTGAGE I L R 38 All 92

——— mistake of guardian—

See RES JUDICATA
I L R 45 Bom. 805

——— *Contract—Specific performance—Specific performance of a contract not favourable to minor refused* The District Judge sanctioned the sale by the certificated guardian of a minor of a house belonging to the minor for a price of Rs 1300 There arose however some dispute about the drafting of the deed of sale and the purchase was not carried through. Meanwhile other offers were made for the property and ultimately the District Judge directed that the house should be sold to one Abdullah for Rs. 2000 *Held* on suit brought by the person in whose favour the sale had originally been sanctioned that the Court was in the circumstances justified in refusing to grant a decree for specific performance *Chhote Mal v Jagan Nath Prasad I L R 29 All 213* referred to IMAMI v MUSAMMAT KALLO (1916)
I L R 38 All 433

GUARDIAN AND WARD

See GUARDIANS AND WARDS ACT (VIII of 1890)—

S 17 I L R 33 All 222

Ss 39 47 48 I L R 42 All 514

S 41 I L R 42 All 1

See PENAL CODE 1860 s 361
I L R 42 All 146

GUARDIANS AND WARDS ACT (VIII OF 1890)

See MAHOMEDAN LAW—WAKF
I L R 39 All 288

——— *Jurisdiction of District Court—No power to order payment of money for minor's marriage by person not guardian—Concurrent jurisdictions when order passed under one jurisdiction cannot be treated as passed under another* The Guardians and Wards Act (VIII of 1890) does not give the District Court any power or authority over persons other than the guardian or the minor except in so far as it deals with the question as to who is the proper person to be appointed guardian or whether a particular guardian should be removed or not and for the purpose of restoring the ward to the custody of the guardian Under the Guardians and Wards Act no order can be passed directing a person not a guardian to pay a sum of money for the purposes of a minor's marriage Where a Judge passing such an order under the Guardians and Wards Act could have passed a similar order as a Judge of a Court of ordinary civil jurisdiction the

GUARDIANS AND WARDS ACT (VIII OF 1890)—contd

order cannot be treated as a decree in a suit The two jurisdictions are wholly distinct though exercisable by the same official *Sabhapati Pillai v Ponnusami Pillai I R 2 I A 219* and *Lelyard v Bell I L R 9 All 191* distinguished SOMAKKA v RAMIAH (1913) I L R 36 Mad 39

——— *Petition under, whether only remedy for a father seeking custody of his child—Suit by father for custody of his minor child in ordinary Civil Courts of the mofussil maintainability of* No mofussil Court has jurisdiction to entertain a suit by a father for the custody of his child *Bessant v Narayaniah I L R 38 Mad 807 at p 820* relied on. *Ichchalal Jekisandas v Chimanlal Purbhudas I L R 40 Bom 609* not followed. SATHI v RAMANDI PANDARAM (1919)
I L R 42 Mad 647

——— ss 2, 12 21 24 and 25—*Mahomedan Law—Shafi school of—Guardianship of minor in—Indian Majority Act (IX of 1875)—Habeas Corpus nature of* A father can apply under s 25 of the Guardians and Wards Act (VIII of 1890) for the custody of his minor son though the minor had all along been in the custody of his grandmother but never in the custody of his father *Per* SADASIVA AYYAR *J*—The word custody in all the three places where that word occurs in s 25 (1) includes both actual and constructive custody of a minor Under Mahomedan law a minor continues to remain in the custody of his guardian till he attains the age of 18 notwithstanding (that under) the Shafi School to which he is subject his personal emancipation would have taken place when he attained the age of 15 or when he attained puberty between the ages of 9 and 15 The word guardian in s 24 includes the guardianship both of persons and property *Rudra v Krishna I L R 9 Mad 391* followed *Per* NAPIER *J*—The object of ss 24 and 25 is to declare the right of the guardian of the person of a minor to the continuous custody of his person and to provide a machinery for enforcing it The writ of *Habeas Corpus* proceeds on the fact of an illegal restraint and can have no application to cases where there is no question of restraint IBRAHIM NACHI v IBRAHIM SAHIB (1915) I L R 39 Mad 608

——— ss 4 (2) 24 25 26 41 47—

See MAHOMEDAN LAW—MARRIAGE
I L R 42 Calc 351

——— ss 5 to 20 (Chapter II)—

——— *Procedure—Evidence.* Three persons applied to the District Judge to be appointed guardian of the person and property of a minor The Judge asked the Collector to say which of the three was the fittest He in turn called for a report from the girdawar kanungo who reported in favour of the respondent The District Judge thereupon appointed him as guardian of the person and property of the minor *Held* that the report could not be treated as legal evidence and that the Judge should have called the different claimants before him SUBHAG SINGH v RAGHUNANDAN SINGH I L R 38 All 282

——— s 7—*Appointment of guardian—Welfare of minor—Application for appointment of guardian if may be summarily rejected—Contents of application—Grounds for dismissal—Mala fide application—Amendment of p[illegible]* The law no[illegible] to the Guardians and Wards A[illegible] In th[illegible] int[illegible]

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd*

———— s 7—*contd*

ductory words of s 7 that proceedings under this Act are to be taken for the benefit of the minor If an application is made for an ulterior purpose it ought not to be entertained Before proceeding with it the Court should under s 11 be satisfied that there is ground for proceeding with the application One of the material facts to be taken into consideration is the cause or causes which led to the making of the application Where the real object of the application by a husband for appointment as guardian of his minor wife was to recover her from the custody of her father who on his part alleged ill treatment of his daughter by the husband but this object was not disclosed in the application *Held* that it was within the powers of the Judge to dismiss the application summarily on the ground that it did not disclose the cause which led to the making of the application as required by s 10 sub s (1) cl (*k*) of the Act The Court being satisfied that the application was wholly *malâ fide* and not for the benefit of the minor it refused permission to the petitioner to amend his petition SARAT CHANDRA NANDAN *v* GIRINDRA CHANDRA GUIN (1910) **15 C W N 457**

———— ss 7 (2) 29 and 30—*Guardian appointed by Court encumbrance of minor's property by natural guardian while Court guardian in existence—Encumbrance void—Void deed no consideration for fresh contract on attaining majority* The appointment of a guardian under the Guardians and Wards Act (VIII of 1890) has the effect of extinguishing the rights of the minor's natural guardian to deal with the minor's property Where the natural guardian with rights thus extinguished but purporting to act as a *de facto* guardian encumbered the minor's property with his consent *Held* that the encumbrances were null and void An encumbrance thus created without authority cannot be ratified by the minor on attaining majority There can be no ratification of a transaction which is void owing to the promisor possessing no contractual capacity at the time Nor can a void deed form a good consideration for a fresh contract made by the minor on attaining majority ARUMUGUM CHETTI *v* DURAISINGA TEVAR (1914) **I L R 37 Mad 38**

———— s 7 (3)—

See GUARDIAN **I L R 42 Calc 953**

———— s 7—*Application for guardianship of property—Resistance to the guardianship order on the ground that the property was joint family property—Elaborate inquiries into the character of the property not competent—Summary nature of the inquiry* In an application for guardianship of a minor's property under s 7 of the Guardians and Wards Act (VIII of 1890) the applicant alleged that the property was the separate property of the minor's husband The opponents resisted the application contending that the property was joint family property which had survived to them The Court conducted a lengthy inquiry into the character of the property and having come to the conclusion that it was joint rejected the application The applicant having appealed *Held* reversing the order inasmuch as the application was made on the footing and with the claim that the minor was separately entitled to separate property the Court ought to appoint a guardian of the property of the minor and leave it to him to institute suits for the recovery of the property S 7 of the Guardians and Wards Act (VIII of 1890) contemplates only a summary enquiry followed by an order made for the welfare of the minor GURAPPA SHIVGENAPPA *v* TAYAWA SHIDDAPPA (1916) **I L R 40 Bom 513**

———— ss 8 13—

See GUARDIAN **I L R 38 Calc 783**

———— ss 8 11 21—*Application by relative or friend of minor—Notifying such application object of—Step mother if disqualified from being guardian of person of step son where parties governed by Mitakshara school of Hindu law—Purdanashin lady if may be appointed guardian of person and property of infant—Minor step mother if competent to act as guardian of infant adopted son—Considerations which should guide Courts in appointing guardian—Appointment of stranger as guardian of person* One Dayanidhi died leaving a widow *S* a daughter and an infant son whom he had adopted during the life time of his first wife before marrying *S* The widow applied to be appointed guardian of the person and property of the infant the application was opposed by the relations of her husband The objection was that the widow was herself a minor and was not competent as a *purdanashin* lady to take effective charge of the person and property of the infant and that the application in substance was not made *bonâ fide* in the best interests of the minor concerned One of the objectors proposed that *G* a pleader who was related both to the widow and to the infant should be appointed guardian and the Collector also acting under s 8 of the Guardians and Wards Act intimated to the District Judge that a guardian should be appointed and that the other objector was the most suitable person available for appointment as guardian The District Judge appointed *G* guardian of the person and property of the infant *Held* that the petition of objection suggesting the appointment of *G* as guardian was in substance an application by a relative or friend of the minor for the appointment of a guardian within the meaning of s 8 cl (*b*) of the Act and that the fact that this application was not notified in accordance with s 11 did not constitute a fatal defect inasmuch as the object of s 11 is to bring the application to the notice of persons interested in opposing it and in the present case all the persons interested in the matter of the appointment of a suitable guardian for the minor were present before the Court That under the Mitakshara school of Hindu law the step mother is not the heir of her step son and she cannot be deemed disqualified from being appointed guardian of the step son on that ground That it cannot be laid down as an inflexible rule of law that a *purdanashin* lady should not be appointed guardian of the person and property of her infant son but in the circumstances of the present case the widow could not be appointed guardian of the property of the infant with any prospect of advantage to the infant That s. 21 of the Act clearly refers to the guardian of the person of an infant and there is much force in the contention that the section is wide enough to cover the case of an adopted son and the step mother even if a minor is competent to act as guardian of the person of the infant adopted son That in the matter of

GUARDIANS AND WARDS ACT (VIII OF 1890)—contd

———— s 8, 11—contd

choosing a guardian of an infant the Court must be guided entirely by the interest of the ward and in the circumstances of the present case the step mother should be appointed guardian of the person of the infant such appointment being for the benefit of the infant The effect of the appointment of a stranger as the guardian of the person of a minor considered SUNDARMANI DEBI v CORTLAND CONDILEY (191)

18 C W N 160

———— s. 9—

See MINOR I L R. 43 Calc. 802

See MAHOMEDAN LAW—GUARDIAN I. L. R 35 All 280

———— *Application for guardianship of minor—Jurisdiction—Domicile—Place where the minor ordinarily resides* One Panachand a Jain inhabitant of Kapadwanj in the Ahmedabad District lived in his house at that place He died leaving him surviving a widow and two sons Lallu and Wadilal the latter a minor who all lived in the house. Panachand's widow died about a year after him Thereupon Panachand's house and a shop at Kapadwanj were sold and Lallu with his minor brother Wadilal went to Baroda in May 190 At Baroda Lallu embraced Christianity and placed his minor brother who was also baptized in the American Mission Boarding House at that place Afterwards Lallu renounced Christianity and in the beginning of February 190 clandestinely removed his minor brother from the Mission Boarding House at Baroda and placed him in the Jain Boarding House at Ahmedabad The minor lived at Ahmedabad till the 15th March 1909 and on the next day he was removed from Ahmedabad at the instance of the appellant a member of the American Mission at that place and taken to Baroda On the 20th April 1909 Lallu presented an application to the District Court at Ahmedabad for his appointment as the guardian of the minor person The appellant (opponent) at whose instance the minor was taken back to Baroda contended that inasmuch as the minor lived at Baroda which was beyond the Court's jurisdiction the Court had no jurisdiction to entertain Lallu's application under s 9 of the Guardians and Wards Act (VIII of 1890) The Court dismissed Lallu's application he being found unfit for the appointment but in the same proceeding appointed the respondent a Jain Pleader on his application as the guardian of the minor's person and property on the ground that as the minor lived with his father till the father's death at Kapadwanj which was within the jurisdiction of the Court and as the minor's domicile followed that of his father which was Kapadwanj the minor's domicile was in British India and he ordinarily resided within the Court's jurisdiction *Held* on appeal by the opponent setting aside the order that the question of domicile was wholly irrelevant to the question of jurisdiction The minor was living at Baroda and had no other place of residence He had lived at Baroda for three years with the exception of twenty eight days Therefore Baroda was the place where the minor ordinarily resided within the meaning of s 9 of the Guardians and Wards Act (VIII of 1890) ROBERT WARD (REV) v VELCHAND (1919) I L R 34 Bom 191

———— ss. 9 10—

See MINOR L. R 41 I A 314

———— ss 9 and 19—

See GUARDIAN I L R. 38 Mad 807

———— s. 11—

See s 8 18 C W N 160

———— s 12, cl 3 (b)—*Power to order money to be paid into Court—Civil Procedure Code (Act V of 1908) s 151 O XXXIX r 10 O XL r 1* *H* petitioned the Court under the Guardians and Wards Act 1890 to be appointed guardian of the property of *J* a minor he also applied to the Court in the following terms — In the meanwhile and pending these proceedings a receiver may be appointed to take charge of the amount of Rs 4 141 9 1 due and payable to this minor by *C* or such other order may be passed to protect the property of the said minor as to the Honourable Court may seem meet *Held* that it was open to the Court to pass an order directing *G* to forthwith deposit in Court the sum of Rs 4 141 9 1 to abide by the further order of the Court *In re* BAI JAMNABAI (1911) I L R 36 Bom 20

———— ss 12, 24 25—*Minor—Grant of certificate—Fresh application for custody of minor—Jurisdiction—No regular suit maintainable* The mother of a minor girl applied to be appointed her guardian The girl was alleged to have been taken away by her elder sister but no action under s 25 of Act VIII of 1890 was asked for She got a certificate of guardianship issued to her Later she applied asking for possession of the person of her daughter *Held* that she was entitled to do so She was charged with the custody of the ward and could ask the Court to assist her to perform the duties imposed upon her by s 24 of the Act The District Judge was empowered to enforce all the provisions contained in the Act for the benefit of the minor Further that no separate suit could have been brought for the purpose *Sham Lal v Bindo I L R 26 All 594* followed *Quære* Whether an appeal lay from the order of the Judge rejecting the application UTMA KUAR v BHAGWANTA KUAR (1915) I L R 37 All 515

———— ss 12 13 17 19 24 and 25—*Minor never in the custody of his father—Application by father for custody of his son under Guardians and Wards Act—Refusal of the District Court to make an order on the application—Remedy by way of suit—Jurisdiction of District Court* One *C* the maternal uncle of *B* a minor applied to the District Court at Ahmedabad for the appointment of himself as guardian of the person and property of the minor in preference to *A* the father of the minor The Court made no order as to the guardianship of the minor's person by reason of s 19 of the Guardians and Wards Act 1890 but appointed the Deputy Nazir as the guardian of the minor's property Subsequently the father who never had the custody of his minor son applied under the Guardians and Wards Act 1890 for the custody of the boy The Joint Judge refused to make an order on the application and referred the father to a regular suit On appeal to the High Court *Held* that the only remedy of the father was to file a suit for the custody of his son *Sharfa v Muzaffar I L R 25 Bom 574* followed *Held* further that the jurisdiction of the District Court was defined by the Guardians and Wards Act and that it ... given power

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd*

——— s 12—*contd*

to make orders with reference to minors which were not expressly conferred upon it by that Act *Annie Besant v Narayaniah I L R 38 Mad 597* followed ACHPATLAL JEKISANDAS v CHMANLAL PARBHUDAS (1916) **I L R 40 Bom 600**

——— ss 12 43 and 47—*Appointment of guardian of the person of a minor—Custody of minor with a relative pending appointment—Order passed by the Court regarding marriage of minor—Jurisdiction of the Court to pass the order* A minor girl was left in the custody of her grand mother pending the appointment by the Court of a guardian of her person In the meanwhile a proposal of marriage of the girl was brought before the Court which sanctioned it at first but the sanction was later rescinded A second proposal was similarly brought up and sanctioned by the Court An application having been made to the High Court against the order *Held* that though the order as to the temporary custody of the girl was a proper order under s 12 of the Guardians and Wards Act 1890 yet the order as to the marriage could not be brought under that section or s 43 of the Act and was made without jurisdiction LAXMINARAYAN SHESHGIRI v PARVATIBAI (1919)
I L R 44 Bom 690

——— s. 13—

See GUARDIAN
I L R 38 Calc 783

——— s 17—*Infant son of pre-deceased outcasted son residing with mother in the family of mother s sister—Mother appointing her sister guardian by will—Grandfather nominating a nephew as guardian but latter unwilling to admit him in family circle—Infant s preference for aunt—Court s discretion in appointing guardian—Welfare of minor chief consideration—Home influence value of—Purdanashin lady if unfit to be guardian of infant of 15 years* I who had been outcasted died in April 1899 leaving an infant son who in 1914 was about 15 years old a widow who died in 1913 and his father B who was appointed guardian of the person and property of the infant in *July 1899* B being unable owing to caste difficulties to keep the infant in his custody acquiesced in the appointment in December 190[illegible] of the infant s mother as guardian of his person he himself continuing to be the guardian of the infant s property The infant and his mother took up residence with the latter s sister F and before her death she made a will clearly expressing therein her wish that her sister F should after her death be the infant s guardian On her death B applied for the appointment of a nephew of his as the guardian of the person of the infant and F also made a similar application. The uncle and not the aunt was appointed by the District Court On appeal the High Court ascertained on enquiry from B as well as his nominee that neither of them was willing to take the infant into his family circle and their idea was to place him in charge of a tutor The infant himself on being examined by the High Court expressed his preference for the aunt It was found by the District Judge that the education of the infant in her aunt s house had been satisfactory *Held* that it was desirable for the welfare of the minor that the aunt and not the uncle should be appointed guardian of the infant s person and that her being a purdana shin lady did not make her unfit to be so appointed

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd*

——— s 17—*contd*

as it was undesirable that the infant should at his age be removed from the influences of home life But it was ordered and the aunt gave assurance that the grandfather and the uncle should have *free access to the infant* The primary point for consideration in such a case is what in the circumstances of the case is for the welfare of the infant In appointing a guardian the Court will pay great attention to the wishes of the father or mother of the infant unless such a course would be disadvantageous to the infant and regard is always paid to the wishes of the minor if he be of years of discretion FULKUMAREE BIBEE v BUDH SINGH DAUDHURIA (1914) **18 C W N 1198**

——— *Guardianship of minor children—Father marrying a second time, no disability* Under s 19 of the Guardians and Wards Act, the Court must be satisfied that the husband or father is unfit to be the guardian of his wife or child respectively before it can appoint another person as guardian The fact of the father marrying a second time is no ground for depriving him of the guardianship of his minor children *Bindo v Sham Lal I L R 29 All 210* dissented from AUDIAPPA PILLAI v NALLENDRANI PILLAI (1915)
I L R 39 Mad. 473

——— *Guardian and Ward—Considerations by which a court should be guided in the selection of a guardian* In considering the appointment of a guardian for a minor the proper test is the welfare of the minor Where the applicant was a distant relation of the husband of a childless widow of some 12 or 13 years of age who was living happily with her father it was *held* that the father of the minor widow was her proper guardian. *Khudiram Mookerjee v Bonwari Lal Roy I L R 16 Calc 584* referred to TOTA RAM v RAM CHARAN (1910) **I L R 33 All 222**

——— *Adopted son minor—Death of adoptive parents—Natural father if may be appointed guardian—Guardian of property of minor appointed executor of same property under father s Will—Probate supersedes guardianship order—Security inventory accounts* Both the adoptive parents being dead the natural father of the minor adopted son was appointed guardian of his person in preference to the brothers of the adoptive mother and the daughters of the adoptive father *Lakshmi Bai v Sridhar Vasudev Takle I L R 3 Bom 1* referred to The appellant who had been appointed by the District Judge the guardian of the *properties* of a minor was required by the Judge to furnish security and to produce an inventory of the minor s properties and accounts within six *months* During the pendency of the appeal the appellant having obtained probate of the unadministered effects belonging to the estate *of the father* of the minor *Held* that the properties to which under his father s Will the minor was beneficially entitled having by the grant of probate become *legally vested* in the executor no guardian in respect of that property could be appointed so long as the executorship continued and the order of *the District Judge* calling on the appellant to furnish security and file inventory and submit accounts became inoperative upon such grant and should be cancelled CHANDA PRASAD BHATTACHARJEE v HARI KANTA CHOWDHURY (1910) **15 C W N 533**

GUARDIANS AND WARDS ACT (VIII OF 1890)—contd

——— s. 19

See s 12 I L R 40 Mad 600

See s. 17 I L R 39 Mad 473

See GUARDIAN I L R 38 Mad 807

——— s. 21—

See s 8 18 C W N 160

——— ss. 24 and 25—

See s 12 I L R 37 All 515

I L R 40 Bom 609

———s 25—*Custody of Minor—Application by guardian—Guardian—need not be a certificated guardian* An application under s 25 of the Guardians and Wards Act (VIII of 1890) for the custody of a minor can be made by a guardian who need not be a certificated guardian. DAYABHAI LACHHMIDAS v BAI PARVATI (1915)

I L R 39 Bom 438

——— s 27—

See HINDU LAW 23 C W N 50

See MORTGAGE 1 Pat L J 563

——— s 29—

See MORTGAGE 1 Pat L J 563

———*Guardian and Minor—Certificated guardian—Sale—Power of certificated guardian different from those of a guardian under the general rule of law* The powers of a certificated guardian are regulated and defined by the Guardians and Wards Act and the rule of law that there being no mutuality in a contract to which a minor was a party it could not be enforced by him does not apply to a contract for the sale of immoveable property entered into by the certificated guardian of a minor with the sanction of the Court such a contract is valid and a suit for damages for breach of the contract will lie on behalf of the minor *Mir Sarwarjan v Fakhruddin Mahomed Chaudhur I L R 39 Calc 232* distinguished BABU RAM v SAID UN NISSA (1913) I L R 35 All 499

——— ss 29 30—

See MORTGAGE 16 C W N 715

——— s 31 (sub s 3)—*Condition precedent distinguished from condition subsequent—Condition subsequent if vital to a sale —Bona fides of sale of minor's property* A condition precedent if not complied with vitiates a sale but not a condition subsequent Where the District Judge acting under the Guardians and Wards Act empowers the guardian to sell a property of the minor for an alleged debt of theirs and further directs him to put in the bonds after they have been satisfied and so endorsed by the creditors it does not follow that non compliance with the latter direction vitiates the sale if actually carried out and the vendee has all along been in possession of the purchased property Where the same property is held partly by adult co sharers and partly by minors the very fact that the minors share was sold for a price a little over that for which the shares of the adults are sold goes to show *bona fides* DYAM KHAN v SARAT CHANDRA DAS

26 C W N 218

GUARDIANS AND WARDS (ACT VIII OF 1890)—contd

———s 31 sub s (4)—*Construction of words any person* The words any person in the last part of sub s (4) Guardians and Wards Act (VIII of 1890) are not limited by the words relative or friend in the previous part of the section The Court is competent to hear a person who is not a relative or friend VENU GOPAL BAHADUR v KADIRVELUSWAMI NAICKER (1912)

I L R 35 Mad 743

——— s 34—*Civil Procedure Code (Act V of 1908) s 36—Order—Decree—Marriage expenses of person dependent on the ward—Order against guardian—Ward attaining majority—Discharge of guardian—Application for execution against ward after majority—Jurisdiction of Court to order execution—Omission to object before attachment—Waiver—Estoppel* An order under s 34 of the Guardians and Wards Act directing a guardian to pay a sum of money out of his ward's estate for the marriage expenses of a person dependent on his ward is neither a decree nor an order executable as a decree under the Civil Procedure Code and cannot be enforced against the ward after he has attained majority and the guardian has been discharged There being an initial want of jurisdiction in the Court to execute such an order the omission of the ward to object after notice to an order for attachment of his property does not estop him from objecting to the jurisdiction of the Court to sell the property after attachment *Somalka v Pamiah I L R 36 Mad 39* referred to PARVATHI IMAL v CHOKKALINGA CHETTY (1917)

I L R 41 Mad 241

——— ss 34 35—*Bonds given to Court by guardian and sureties—Court obligee under the bonds—Persons entitled to sue on the bonds—Breach of conditions of bond when* Under s 34 of the Guardians and Wards Act (VIII of 1890) it is the Court that is the obligee under the bonds given by the guardian and his sureties in respect of the management of a ward's estate and except under an assignment from Court under s 35 of the Act nobody else can sue on the bond The conditions of bonds given under s 34 (c) and (d) of the Guardian and Ward Act and under Form No 93 of Civil Rules of Practice being to exhibit such accounts as may be directed by Court or pay such balance of the minor's moneys in the guardian's hands as the Court may direct there is no right of suit as for a breach of the conditions of the bonds unless there is a preliminary order of the Court either to exhibit accounts or to pay any specified balance and a breach thereof An assignment of the bonds by the Court without any such preliminary order on the ground that there was a *primâ facie* case of maladministration is invalid and does not give a right of suit on the bonds *Obiter* The loss of the bond is no impediment to its assignment KRISHNA CHETTIAR v VENKATACHELLAPATHI CHETTIAR (1918) I L R 42 Mad 302

——— *Guardian failing to pay full amount of purchase money of property sold with permission because purchaser retained a portion in discharge of old debt—Daily fine order to pay if legal* Where a certificated guardian of minors obtained permission to sell a portion of their estate on the representation that the money (about Rs. 3 000) was wanted [illegible] their house, and submitted accounts sho[illegible] out of Rs. 5 000

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd*

———— ss 34 35—*contd*

obtained by the ale R 4 000 had been retained by the purchaser in payment of a sum of Rs 4 000 which the guardian had borrowed from her to give the minors in marriage and the Judge thereupon called upon the guardian to pay the said amount of Rs 4 000 in Court within a specified time and directed that on failure to do so the guardian was to pay a fine of Rs 5 per diem *Held* that the *amount the guardian was called upon to pay was* not an amount of balance due from the guardian as the same had not been paid to her nor was it a balance due on accounts filed in compliance with a *requisition under* cl (*d*) of s 34 of the Guardians and Wards Act and the order imposing a daily fine was *ultra vires* NIKHRANNESSA BIBI *Re* (1916) 20 C W N 663

———————— *Order of appointment of guardian conditional on giving security when effective —Natural guardian s right to manage pending appointment* Where a guardian is appointed by a Court unconditionally the order takes effect at once although under s 34 of the Guardians and Wards Act (VIII of 1890) he may be required to furnish security subsequently But where the order is conditional upon the furnishing of security it does not take effect until the security has been furnished Such a conditional order does not therefore deprive the natural guardian of his or her power of management of the minor s estate till the condition is satisfied Hence an endorsement of a negotiable instrument belonging to the minor by the natural guardian before the condition is satisfied is not invalid *Defries* v *Creed* 34 *L J (Ch) 607* followed *Semble* Rr 240 to 24. and Forms Nos 92 and 93 of the Civil Rules of Practice which make the appointment of a guardian take effect only on furnishing security are not *ultra vires* The dictum of SADASIVA AYYAR *J* to the contrary in *Gopalmal* v *Srinivasa Ayyangar 30 Mad L J 608* not followed SUBBA NAICK v RAMA AYYAR (1916) I L R 40 Mad 775

———— 34A 35 and 36—*Person acting as a guardian—Appointment of guardian who passes a bond—Ward dying leaving minor widow heir—Re appointment of guardian without bond—Liability to account to minor—Liability of legal representative of the guardian* A minor having been left as the sole surviving male member of his family his estate was for a time managed by his maternal grandfather The latter was subsequently appointed by the Court as guardian of the property and passed a bond under s 34 (*a*) of the Guardians and Wards Act 1890 On the death of the minor he retained management of the property on behalf of the minor s widow without reappointment as guardian Some months afterwards he was again appointed guardian of the property by the Court but without a bond The guardian having died the minor s widow sued his legal representatives for an account of his management *Held* that the suit was maintainable for neither s. 34 nor s 36 of the Guardians and Wards Act 1890 operated as bar *Held* also that the legal representatives of the guardian were liable to account if it was established that property of the minor did go into the hands of the guardian and thence into the hands of his representatives NARAYAN BALAJI v KASHIBAI KESHAV (1919) I L R 44 Bom 8 2

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd*

———— ss 34A 35 and 36—*contd*

———————— *Guardian if can be removed without opportunity to show cause—ss 34 (c)* AND *45 (1) cl (b)—Punishment of guardian for non payment of balance due from him—Considerations which should prevail with Courts in appointing and removing guardians* The Guardians and Wards Act does not prescribe the procedure to be followed when the Court finds it necessary either of its own motion or at the instance of a party interested in the welfare of the infant to take steps for the removal of a guardian appointed by itself But on the elementary rule that no order adverse to a party litigant should be made by a Court of Justice till he has been apprised of the charges brought against him and has been allowed reasonable opportunity to show cause no order for removal of a guardian should be made till the guardian has been apprised of the charges brought against him and allowed reasonable opportunity to explain and if possible to defend his conduct S 45 sub s (*1*) cl (*b*) authorises the Court to impose a fine on a guardian if the guardian fails to pay into Court the balance due from him on the accounts exhibited by him in compliance with a requisition under s 34 (*c*) The payment contemplated has to be made in compliance with a requisition under s 34 (*d*) and no fine can validly be imposed on a guardian for failure to comply with a requisition calling upon him to bring into Court a larger sum than found due from him on the accounts exhibited under s 34 (*c*) That the sole point for considerations in cases where the management of the infant s property by the guardian in question is at issue is the welfare of the infant and the investigation should be from that point of view alone and it is eminently desirable that no person should be appointed guardian of the person or property of an infant without some enquiries about his fitness for the office JAGANNATH PANJA v MOHESH CHANDRA PAL (1916) 21 C W N 688

———— s 35—*Act XL of 1858—District Judge s power to take security bond from manager—Assignment of bond by District Judge—Suit against representatives of a deceased manager in respect of liability incurred by him if lie* It was competent to a District Judge acting under Act XL of 1858 to take a security bond in his own favour for the due discharge of his duties by a manager appointed by him Such a bond can be validly assigned by the District Judge under s 35 read with s – (–) of the Guardians and Wards Act BAHADUR SINGH v BASUNTA KUMAR ROY (1913) 17 C W N 695

———— s 36—*Suit against a guardian—Leave of the Court not obtained before filing the suit—Leave can be granted subsequently* Under s 36 of the Guardians and Wards Act 1890 proceedings are not entirely nullified because leave of the Court is not obtained before a suit is filed It would be open to the Court on a proper application by the plaintiff to remedy the mistake and to empower the plaintiff to continue the proceedings against a guardian MAINA v SHANKAR MORU (1919) I L R 44 Bom 602

———— s 39—

See GUARDIAN I L R 38 Calc 862

See MAHOMEDAN LAW—GUARDIAN I L R 38 All 886

GUARDIANS AND WARDS ACT (VIII OF 1890)—contd

———— s. 39 and 47— *App i tl H l fi ter a j ard a r of the p r a r l p o p r f f h a l r l in or s r n—I ch l i j of a p n t of g a r l a r of pr p rty—Will wr e a a ler instr c i o n f te s r p l o n l h sbe s previously a r el n ts of* A Hindu fat r is e ntled to a p po nt b will a guardian o the p r o of his mino son but no o the prop r t s in wh h his m no on will have a ri ht by l rth A will app o ntin a guardian of s h pr p rties b n invalid it n ed no be s aside and canno be s a ile in an ap li ation ma le on b alf of the minor on under s 39 o the Guardians and Wards A t for removal of the guardian *Dr llored v Bi le Jelamm Mal I J H and K a a l a r Madras v Korassima Maliha I L C 518* follow l The appointm n o a guard an of th properties bein invalid the mo h r as natural guar lian be one the guardian o the prop rties and if she be comp ent there is no n ess for th Court to appoint her as su h Prop r s a ta h l to *Tar ral jus* (hou es o r ons pre cepto) are privat and not trust prop rs A will s n l by the tes ator after compl tion on the sixth and th seventh sheets is not invalid b ca se he signed some of the earli r sheets before th will was written in them *Vamb rumal Chetty v Parvar l K a n n Ch tt 23 I (9 9* followed ALAGAPPA AYYANGAR v MANGATTAI AMMANGAR (191) I L R 40 Mad 672

———— ss 39 47 48—*Revocation of a order appointing a guardian on the ground that alleged minor attained majority before appointment of guard ian if an order under s 39 and if appealable—S 39 if exhaustive—Jurisdiction of District Judge to deal with matters of which cognizance may be required in the interests of justice—Inherent jurisdiction of Courts to recall orders obtained by suppression or misrepresentation of facts* On the application o the appellant she was appointed by the District Judge guardian of the person and property of the respondent her daughter in law who subsequently applied to the District Judge for revocation of his order on the ground that she had attained majority before the order appointing the appellant as her guardian was made The District Judge took evi d nce and findin that the respondent s allegation was true revoked his previous order Against this order of revocation the appellant preferred an appeal to the High Court *Held* that s 39 of the Guardians and Wards Act specifies the circum stances under which the Court may remove a guard ian appointed under the statute and the order in question was not made under the section and con sequently was not appealable under cl (9) of s 4 *Held* (as to the contention that as there was no section of the Guardians and Wards Act applicable in terms to the present matter the District Judge was incompetent to enquire into the allegations of the respondent) that a Court which exercises powers under the Guardians and Wards Act has ample inherent jurisdiction to deal with matters brought before it of which cognizance may be required in the interest of justice and the District Judge had jurisdiction to deal with the matter in question S 151 Civil Procedure Code which pro vides that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the pro cess of the Court does not formulate a new doctrine but merely furnishes legislative recognition of a well established principle which is applicable quite as much to Courts called upon to deal with matters under the Guardians and Wards Act as to ordinary Civil Courts If an order has been obtained from the Court by a suppression of facts if the Court has been overreached and has been misled to assume jurisdiction over a matter in which upon a true state of facts it does not possess jurisdiction the Court is competent to recall the order obtained from it by suppression or misrepresentation of facts That s 48 was not a bar to the present proceedings and the District Judge had jurisdiction to enter tain the application in the exercise of his inherent power PASHMONI DASI v GANODA SUNDARI DASSI (1914) 19 C W N 84

———— ss 39 47 and 48—*Application to remove guardian appointed by the court and to appoint another guardian instead—Application dismissed—Appeal* No appeal lies from an order refusing to remove a guardian appointed under the provisions of the Guardians and Wards Act 1889 ANWAR ALI KHAN v DARA SHAH KHAN I L R 42 All 514

———— s 41 (3)— *a n l i a l ward—Death of ward—Liability of guardian after ward's death* *Held* that after the death of a minor during his minority it was not competent to the court which had appointed a guardian of the property of the minor to pass an order calling upon that guardian to deliver up the moveable property cash and documents appertaining to the minor s estate *In the matter of the application of Narmadabai I L R 8 Bom 14* referred to CHANDRA BHUKHAN SINGH v SUJAN KUNWAR I L R 42 All 1

———— ss 43 45—*Order upon guardian not to marry ward without Court s leave disobedience of if punishable such order without jurisdiction—Order if may be passed when minor is Hindu—Guardian failure to produce ward in Court—Guardian if may be punished—Enforcement of order restraining of—Civil Procedure Code (Act V of 1908) O XXXIX r 1 (a)* Before proceedings can be taken on account of disobedience of an injunction issued by a Court it must be ascertained that the Court had jurisdiction over the subject matter in controversy If the Court had no jurisdiction over or had exceed ed its powers in granting an injunction in matters beyond its jurisdiction the injunction must be treated as absolutely void and the person who has disobeyed it cannot be punished for the alleged offence There is in this respect a clear distinction between an order erroneously made with jurisdic tion and an order made absolutely without juris diction Sub s (4) of s 43 of the Guardians and Wards Act applies to all cases of disobedience of an order passed under sub s (1) or sub s ( ) of that section whether or not the effect of the disobedi ence is capable of removal or reparation *Quære* Whether there is any bar to a District Judge giving directions in an order appointing a guardian of the person of a minor Hindu that the minor should not be married by the guardian without the consent of another relation and without the Court s leave where the guardian appointed is also the guardian for marriage according to Hindu law *Bai Diwali v Moti Karson I L R 22 Bom 514* referred to Where it was found that an application upon

GUARDIANS AND WARDS ACT (VIII OF 1890—*concld*)

——— ss 43 and 45—*contd*

which the order for appointment of a guardian was made was not made voluntarily *Held* that the order was without jurisdiction and disobedience on *the part of the guardian of the directions relating* to the marriage of the minor could not be punished under s 43 cl (4) of the Guardians and Wards Act like disobedience of an injunction Cl (a) of sub s (1) of s 45 of the Guardians and Wards Act does not contemplate orders on the guardian appointed under the Act for the production of the ward and such a guardian cannot be fined under the section for failing to produce the ward before the Judge when required SAHODRA KOER *v* DHAJADHARI GOSAIN (1911) 16 C W N 447

——— ss 43 and 48—

See s 12 I L R 44 Bom 690

——— s 45—

See s 31 20 C W N 663
21 C W N 688

——— ss 47 48 50—*Application to be appointed guardian of minor dismissed for default—Second application if lies—Application refused—Appeal if lies—Girl infant who has nearly attained majority—Marriage consent of infant to if necessary—Guardian of person if should be appointed to enable giving her in marriage* Where an application for appointment as guardian of an infant was dismissed for non appearance and an application for a re hearing was refused *Held* that a second substantive application for appointment as a guardian is maintainable Where the District Judge refused such an application as not maintainable *Held* that an appeal lies to the High Court against the order Where a Mahomedan after having divorced his wife applied to be appointed guardian of his infant daughter who was very close upon her majority with the object of her giving her away in marriage to a suitable bridegroom *Held* that at her age the consent of the girl to the marriage was required and the application should not be proceeded with AHMAD ALI *v* RAISUNNESSA (1913) 17 C W N 429

——— s 52

See MINOR L R 41 I A 314

GUARDIANSHIP

See GUARDIANS AND WARDS ACT (VIII OF 1890) ss 17 19
I L R 39 Mad 473

See HINDU LAW—GUARDIANSHIP

See MAHOMEDAN LAW—MARRIAGE
I L R 45 Calc 878

See PENAL CODE s. 361 366 AND 368
4 Pat L J 74

——— Minor girl—*Right of selecting husband* Hindu law *Held* that under Hindu Law the mother is after the father the natural and legal guardian of her minor daughter and does not lose her right by re marriage where it is recognised by custom MT [illegible] I. L. R 1 Lah 146

GUJARAT TALUKDARS ACT (BOM VI OF 1888)

See KABATIA I L R 39 Bom 625

GUJARAT TALUKDARS ACT (BOM VI OF 1888)—*contd*

See LAND REVENUE CODE (BOM ACT V OF 1879) s 79A.
I L R 35 Bom 72

——— ss 28 29B and 29E—*Civil Procedure Code (Act XIV of 1882) ss 235 320—Decree against Talukdar—Execution—Decree transferred to Talukdari Settlement Officer—Notification of management—Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment debtor—Certificate under s 29E of the Gujarat Talukdars Act (Bom Act VI of 1888)—Managing Officer—Talukdari Settlement Officer* When execution proceedings are commenced against a judgment debtor they can be continued after his death by substituting the name of the legal representative in place of that of the deceased judgment debtor in the application for execution It is not necessary to file a fresh application under the provisions of s 235 of the Civil Procedure Code (Act XIV of 1882) *Hirachand Harjivandas v Kasturchand Kasidas I L R 18 Bom 224* explained The effect of s 29E of the Gujarat Talukdars Act (Bom Act VI of 1888) is that before the execution of a decree can be proceeded with the Court must be satisfied that the decree claim has been duly submitted If the officer certifies that it has been duly submitted there is an end of the matter If he does not so certify the Court must wait for one month from the date of the receipt by the officer of an application for a certificate and upon being satisfied that the claim has been duly submitted in accordance with the provisions of s 29B of the Gujarat Talukdars Act (Bom Act VI of 1888) it may then proceed with the execution The expression managing officer in s 29E of the Act is merely a compendious term for the Talukdari Settlement Officer or any other officer appointed by Government to take charge of the Talukdar s estate and keep the same in his management referred to in s 28 of the Act and where the officer who takes charge of the estate and keeps the same in his management is the Talukdari Settlement Officer the managing officer is merely a synonym for Talukdari Settlement Officer When an application relating to a claim is presented to the Subordinate Judge and is forwarded by him to the Talukdari Settlement Officer it amounts to a submission of the claim in writing within the meaning of s 29B of the Act if the Talukdari Settlement Officer is also the managing officer PURUSHOTTAM *v* RAJBAI (1909)

I L R 34 Bom 142

——— ss 29 29B (1) (2) (3) and 29E—*Suit upon a mortgage—Talukdari Settlement Officer—Guardian of the minor defendants—Proceedings up to second appeal—Intermediate notification by the said officer calling upon claimants to submit their claims within six months—Plaintiff's non compliance with the notification—Plaintiff's application to the said officer for a certificate to execute the decree—Refusal of the application—Inability to comply with the notice—The word inability not confined to physical inability of the claimant* In 1904 the plaintiff sued the defendant who were minors represented by the Talukdari Settlement Officer as their guardian for a decree upon a mortgage The first Court held the mortgage to be invalid under the provisions of the Gujarat Talukdars Act (Bom Act VI of 1888) and granted to the plaintiff a personal decree On the 7th September

GUJARAT TALUKDARS ACT (BOM VI OF 1888)—*contd*

——— ss 29 29B—*contd*

1905 the plaintiff appealed to the District Court against the said decree and a notice of the appeal was issued to the Talukdari Settlement Officer On the 21st November following the Talukdari Settlement Officer took over the management of the defendant s estate The notice of the appeal was served on that officer on the 24th of the same month On the 28th December 190 the Talukdari Settlement Officer issued a notification under s 29B of the Gujarat Talukdars Act (Bom Act VI of 1888 as amended by Bom Act II of 1905) calling upon claimants to submit their claims within six months of the date of the notification On the 14th March 1906 the District Court decided the plaintiff's appeal and modified the decree of the first Court by holding that the plaintiff had a valid mortgage upon the property of the defendants On the 16th of the same month a copy of the appellate decree was sent to the Talukdari Settlement Officer on the application of his office In July 1906 that is after the expiry of the period of six months given under the notification of the 28th December 1905 the Talukdari Settlement Officer as representing the defendants preferred a second appeal to the High Court against the District Court s decree The second appeal having failed in August 1907 the plaintiff applied to the Talukdari Settlement Officer for a certificate in order that he might proceed with the execution of the decree and he was informed in reply on the 12th August 1908 that as he had not submitted his claim within six months of the date of the publication of the said notification his claim was deemed to have been duly discharged and no certificate could be granted to him One month after the date of the receipt of the said reply the plaintiff applied for execution and both the lower Courts dismissed his application for execution on the ground that the want of a certificate under s 29E of the Gujarat Talukdars Act (Bom Act VI of 1888 as amended by Bom Act II of 1905) was a valid bar to the execution On second appeal by the plaintiff *Held* that the word unable in s 29B of the Gujarat Talukdars Act (Bom Act VI of 1888 as amended by Bom Act II of 1905) was not confined to physical inability on the part of the claimant that the plaintiff was unable to put forward his real claim at the date of the notification and at the date of the notice he was unable to comply with it within the meaning of s 29B (3) of the Gujarat Talukdars Act (Bom Act VI of 1888 as amended by Bom Act II of 1905) and that the inability of the plaintiff having continued during the period of the six months from the date of the notification the plaintiff was not barred by s 29B from prosecuting the proceedings in Court MANILAL GOPATLAL *v* KHODABHAI SARTANSANG (1914) I L R 38 Bom 604

——— s 29 E—*Talukdari Settlement Officer managing a Talukdar s estate—Creditor submitting his claim—Time taken up before the Talukdari Settlement Officer—Exclusion of time—Limitation Act (XV of 1877)* B obtained a decree for money against G a Talukdar on the 22nd February 1903 and presented his first *darkhast* for execution on the 8th December 1903 On the 21st September 1905 G's estate came by notice to be in the management of the Talukdari Settlement Officer under s 29B of the Gujarat Talukdars Act 1888 B submitted his claim to the officer on the 6th March 1906 but it was rejected on the 12th August 1908 B then applied to the Civil Court on the 12th March 1909 and sought to bring it within time by claiming to exclude the period taken up before the Talukdari Settlement Officer *Held* that the period in question could not be excluded in computing the time for the *darkhast* for s 29F of the Act placed no absolute bar on B s right to apply to the Court for execution by reason of the submission of his claim to the Talukdari Settlement Officer Per Chandavarkar J "The Learned District Judge has gone beyond the plain meaning of Section 29F of the Gujarat Talukdars Act (Bom VI of 1888) in differing from the Subordinate Judge and holding that the present *darkhast* of the Respondent for execution of his decree is not barred by limitation GANPATSING HIMATSING *v* BAJIBHAI MAHAMAD (1911)

I L R 35 Bom 324

——— *Decree against Talukdar—Execution of decree—Certificate from the managing officer—Exclusion of time from the date of the decree to the date of the application for the certificate—Prior application to execute the decree unaccompanied by the certificate—Is such application in accordance with law—Limitation Act (IX of 1908) Art 182 (5)* On the 16th September 1910 an instalment decree was passed on the 1st April 1911 on failure to pay the first instalment the whole amount of the decree became payable The decree was passed against Talukdars whose estate was taken under management under the provisions of the Gujarat Talukdars Act (Bombay Act VI of 1888) The first application to execute the decree was made on the 1st April 1914 but as it was not accompanied by a certificate from the managing officer under the provisions of s 29E of the Gujarat Talukdars Act 1888 it was rejected on the 15th June 1914 In August of the same year the certificate was applied for it was obtained on the 29th idem The second application to execute the decree was made on the 28th February 1916 Against the contention that the application was barred by limitation it was urged that the first application was in accordance with law within the meaning of Art 182 of the Indian Limitation Act in spite of the absence of the certificate under the provision of s 29F of the Gujarat Talukdars Act 1888 and that the applicants were entitled to exclude the time from the date of the decree to the date of the application for the certificate under s 29E sub s 3 of the Act Both the lower Courts rejected the application as being time barred On appeal *held* allowing the appeal that the second application for execution was within time for under s 29E sub s 3 the applicants were entitled to exclude the time from the 16th September 1910 (the date of the decree) up to August 1914 (the date of the application for the certificate) But the Court differed as to whether the appeal ought to be allowed apart from s 29E (3) of the Gujarat Talukdars Act SHAH J held that it ought as the application of 1914 was in accordance with law within the meaning of Art 182 of the Indian Limitation Act 1908 though no certificate of the managing officer under s 29E (1) of the Gujarat Talukdars Act 1888 was produced

GUJARAT TALUKDARS ACT (BOM VI OF 1888)—*contd*

———— s 29 E—*contd*

Semble per MARTEN J that the application of 1914 was not made to the proper Court as defined in Explanation II to Art 182 of the Indian Limitation Act as at its date it was the duty of no Court to execute the decree or order there having been no certificate from the managing officer HARGOVIND FULCHAND *v* NAJA SURA (1918) **I L R 43 Bom 44**

———— s 29 (g)—

———— **whether notice to Talukdari Settlement Officer necessary—**

See BOMBAY COURT OF WARDS ACT 1905 s 31 **I L R 44 Bom 986**

———— s 31—

———— *Talukdar's estate—Talukdari estate—Estate held by a Talukdar on any other tenure* The expression Talukdar's estate means only the estate held by a Talukdar on Talukdari tenure and not property held on any other tenure which is distinguishable from the former *Khodabhai v Chaganlal 9 Bom L R 119* followed BHACHUBHA MAVSANGJI *v* PATEL VELA DHANJI (1909) **I L R 34 Bom 55**

———— *Land Revenue Code (Bom Act V of 1889)—Talukdari tenure—Wanta land (at Sarsa)—Alienated land—Attachment of income* Wanta lands are lands held by Rajputs or the representatives of Rajputs who after the Mahomedan conquest of Gujerath received one fourth of the land of certain villages on condition of keeping order in those villages The lands were held either rent free or at a small quit rent Where *Sirsa Wanta* land the income of which is attached in execution of a decree is proved to have been entered as alienated land under the Land Revenue Code (Bom Act V of 1889) the Court may presume that it is not land held upon Talukdari tenure in the strict sense of the word The words Talukdar's estate in s 31 of the Gujerath Talukdars Act (Bom Act VI of 1888) are used in a technical sense *limited to the Talukdar's interest in the estate held by him by reason of his status as a* Talukdar *Khodabhai v Chaganlal 9 Bom L R 1192* and *Bhachubha v Vela Dhanji I L R 34 Bom 55* followed TALUKDARI SETTLEMENT OFFICER *v* CHHAGANLAL DWARKADAS (1910) **I L R 35 Bom 97**

———— *Incumbrance created by a Talukdar—Adverse possession for more than twelve years after the death of the Talukdar—Title—Limitation* A person claiming as an incumbrancer for more than twelve years from the death of a Talukdar can acquire title by adverse possession The incumbrance which is claimed by virtue of adverse possession since the death of a Talukdar would not fall within s 31 of the Gujarat Talukdars Act (Bom Act VI of 1888) but would be an incumbrance arising from the operation of the law of limitation TALUKDARI SETTLEMENT OFFICER GUJARAT *v* BHIKHAVI DAS PARSHOTTAMDAS (1912) **I L R 37 Bom 380**

———— *Talukdar's estate—Incumbrance by Talukdar and his son—Son has no power to encumber property during his father's lifetime—Talukdar's encumbrance valid during his lifetime—Summary eviction by Talukdari Settlement Officer—Land Revenue Code (Bom Act V of 1879) s 79A—Jivaidar is a Talukdar* The property in dispute which was a Talukdari estate was mortgaged with possession to the plaintiff by a Talukdar and his son. After the death of the Talukdar the son sold the equity of redemption to the plaintiff The estate having passed into the management of the Talukdari Settlement Officer that officer issued a notice to summarily evict the plaintiff from the property under s 79A of the Land Revenue Code 1879 The plaintiff sued for a declaration that he was entitled to remain in possession of the property *Held* that all that was mortgaged was the life interest of the Talukdar which came to an end with his death under s 31 (*1*) of the Gujarat Talukdars Act 1888 *Held* further that at the date of the mortgage the son was not a co sharer with his father in the Talukdari property and not having any interest in the property at the time he was not competent to encumber the interest to which he might succeed on his father's death *Held* also that the sale by the son of the mortgaged property was an invalid alienation under s 31 (*2*) of the Gujarat Talukdars Act *Held* therefore that the notice of summary eviction of the plaintiff was properly issued under s 79A of the Land Revenue Code 1879 A Jivaidar is a Talukdar *Per* MACLEOD C J The land held in Talukdari tenure is totally distinct from land ordinarily held as joint family property by a Hindu family It is not subject to the ordinary law of inheritance or succession and partition of Talukdari land is governed by particular laws It is only a person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a Talukdari estate and every co sharer whose name has been recorded as such in the Settlement Register prepared in accordance with s 5 (Gujarat Talukdars Act) who can be entitled to have his share divided from the rest of the estate S 79A of the Land Revenue Code refers to any person unauthorizedly occupying or wrongfully in possession of any land and therefore it does not matter whether a person is in unauthorized occupation of land before the date when the section became applicable BHAIJI ISHWARDAS *v* THE TALUKDARI SETTLEMENT OFFICER (1920) **I L R 44 Bom 832**

———— s 33—

See LAND REVENUE CODE (BOM ACT V OF 1879) ss 144 160 **I L R 43 Bom 6**

H

HABEAS CORPUS

See CRIMINAL PROCEDURE CODE s 491
See EXTRADITION ACT **I L R 48 Calc 31**

———— **nature of—**

See GUARDIANS AND WARDS ACT (VIII OF 1890) s 2 **I L R 39 Mad 608**

HABEAS CORPUS—*contd*

——— writ of—

S Jury trial in

I L R 44 Calc 723

——— High Court jurisdiction—*Extradition proceedings jurisdiction of High Court in—Code of Criminal Procedure (Act V of 1898) s 491—Indian Extradition Act (XV of 1903) s 3 sub-ss (3) (4) (6) ( ) and (8) and s 4 sub-s (1)—Evidence Act (I of 18) if exhaustive—English Extradition Act (33 and 34 Vict c) part of the lex fori—Foreign Records authenticated and admissible—Copy of document proved in Foreign Court if admissible—Deposition taken in absence of accused—Order on which Magistrate issued warrant—Arrest irregularity of if vitiates proceedings before regular—Magistrate who may be empowered by Government—Government of Bengal if can issue order on requisition made to Government of India—If such order can be ratified by Government of India—Fresh proceedings legality of while previous ones pending—Magistrate if can record evidence after sending report to Government—Refusal of reasonable opportunity to fugitive to produce evidence whether affects jurisdiction of Magistrate* It must be shown clearly that a supreme right such as that to *habeas corpus* or to directions in the nature of that writ has been expressly (if that be possible to the Legislature) taken away There is no such express provision in the Indian Extradition Act The English Extradition Act did not give the right to *habeas corpus* It merely declared a right which existed independently of that the statute *In re Siletti 87 L T 332 71 L J K B 935* and *Ex parte Besset 6 Q B 481* followed When a person appears before the High Court and says that he is illegally detained, the High Court can enquire whether the warrant for his custody was validly issued in extradition proceedings If the provisions of the Legislature have not been carried out the High Court can interfere notwithstanding that the warrant has been given in extradition proceedings *Rudolf Stallmann* v *Emperor I L R 38 Cal 547* distinguished Section 3 sub s (6) of the Indian Extradition Act 1903 is not a substitute for and does not interfere with proceedings taken under s 491 of the Code of Criminal Procedure 1898 the provisions of which are as much binding as those of the Extradition Act The Indian Evidence Act (I of 1872) does not contain the whole law of evidence governing this country Under s 2 which saves certain rules of evidence the English Extradition Act which is applicable to this country is part of the *lex fori* Records therefore of the Berlin Court which are authenticated in the manner prescribed by ss 14 and 15 of the English Extradition Act can be properly admitted in evidence A *copy* of a document (*Bill*) the *original* of which was proved in the German Court is admissible as part of the records of the German Court There may however be cases in which the production of the original document may be necessary for the enquiry in this country If there is evidence before the Magistrate the fugitive criminal cannot ask the Court to determine whether a *prima facie* case has been properly found on such evidence *In re Siletti 87 L T 33 71 L J K B 935* followed The High Court will not sit in appeal to review and weight the evidence It is sufficient that there should be some evidence of the offence upon which the Magistrate may reasonably act Any irregularity in the original arrest of the accused is immaterial provided that the subsequent proceedings have been right *Ex Hall 9 Q B D 701 15 Cox C C 159* followed The substantial question is not how the accused is brought into Court but whether the Court which enquired into his case had jurisdiction to do so The Government of India may issue its order to any Magistrate and such Magistrate may issue a warrant provided he is one who has jurisdiction to enquire into the crime of the nature of that for which extradition is sought Therefore an enquiry into the case of a fugitive criminal under arrest in Calcutta can be made by the Magistrate of Alipore if duly authorised An order issued under s 3 sub s (1) of the Indian Extradition Act 1903 by the Government of *Bengal* upon a requisition made to the Government of *India* is invalid and cannot be ratified by a subsequent order of the Government of *India* Where however the latter order directs the Magistrate in pursuance of the former order and of the statutory provisions in that behalf to enquire into the said case the Government gives valid effect to its intention and the Magistrate has jurisdiction to enquire Under s 528 of the Code of Criminal Procedure 1898 the District Magistrate can transfer to his own file from that of the Deputy Magistrate an application by the fugitive criminal for return of his property The Magistrate making the enquiry under s 3 of the Indian Extradition Act 1903 can initiate fresh proceedings notwithstanding proceedings taken under a previous order When the Magistrate sends up his report to the Government of India under s 3 sub s (6) of the Indian Extradition Act 1903 he becomes *functus officio* and renders himself incapable therefore of recording evidence that may be subsequently produced The Legislature intended that the fugitive criminal should be given an opportunity of defence If such opportunity is not given it goes to the jurisdiction of the Magistrate The enquiry therefore is not according to law and the issue of the warrant is itself invalid If the Magistrate suspected that the accused had no evidence it is open to him to question the accused If the latter stood on his right not to answer the Court might draw such inference as the refusal to reply and the circumstances of the case suggested *Per* MOOKERJEE *J*—The burden lies very heavily upon those who assert that a right of so much importance to the criminal as *habeas corpus* given by the Common Law has been taken away by implication S 491 of the Code of Criminal Procedure 1898 is applicable to cases under the Indian Extradition Act *Rudolf Stallmann* v *Emperor I L R 38 Calc 547* distinguished. The jurisdiction of the High Court has not been taken away merely because the Government of India has already issued a warrant for surrender under s 3 sub s (8) of the Indian Extradition Act 1903 Depositions which have not been taken in the presence of the accused may be admitted by the Magistrate *In re Counhaye L R 8 Q B 410* Where there is no evidence before the Magistrate the Court will interfere *R* v *Maurer 10 Q B D 513* approved. The Court will not consider questions regarding evidence unless the objection is such that if effect were given to it there would be no evidence left upon which the order for extradition could be supported Under s 4 sub s (1) the Magistrate may issue a warrant when the person to be arrested is within his jurisdiction S 4 merely provides a preliminary procedure Until it an arrest may

HABEAS CORPUS—*contd*

be effected before the receipt of the requisition mentioned in s 3 otherwise the criminal might escape The two sections do not overlap Under s 3 sub s (1) of the Indian Extradition Act 1903 *the only* Government competent to issue the order for enquiry is the Government to whom the foreign state has made a requisition This function must be performed strictly and cannot be delegated Where the provisions of the statute have not been followed the report of the Magistrate cannot afford a foundation for the order of the Government of India under s 3 of the Indian Extradition Act 1903 *In the matter of* RUDOLF STALLMANN (1911) **I L R 39 Calc 164**

2 ———————— *High Court jurisdiction of—Power to issue writ—Procedure—Rights of the East India Company—Allegiance of the subject and sovereignty of the Crown—Prerogatives—Governor General in Council powers of legislation of—Emergency legislation—Act embodying provisions of Ordinances—Order for internment—Form of order—Warrant to arrest and imprison—Application for bail—Code of Criminal Procedure (Act V of 1898) s 49—Emergency Legislation Continuance Act (I of 1915)—Ordinances III and V of 1914—Indian Councils Act (24 and 25 Vict c 67) ss 22 and 23—East India Company s Act (26 Geo III c 57) s 29—Foreign Jurisdiction and Extradition Acts (XI of 1872) (XXI of 1879) and (X of 1903)—Interpretation Act (52 and 53 Vict c 63) s 11—General Clauses Acts (I of 1868) s 3 and (X of 1897) ss 6 and 7* Under s 23 of the Indian Councils Act 1861 (24 and 25 Vict c 67) no Ordinance can have any force of law for more than 6 months from its promulgation but the Governor *General in Council has the power to pass an Act* embodying the provisions of an Ordinance The Governor General in Council has also the power to oust the jurisdiction of the Courts and s 11 of Ordinance III of 1914 which is embodied in Act I of 1915 and which seeks to oust the jurisdiction of the Court does not offend against s 22 of the Indian Councils Act 1861 Act I of 1915 is not an Ordinance extended but an Act It does not offend against the allegiance of the subject or the sovereignty of the Crown It is not *ultra vires* and this Court has no jurisdiction to call in question the orders which have been passed thereunder It is for the Governor General in Council to be satisfied on the materials before him The Court cannot call for the materials to examine them *In the matter of Rudolf Stallmann I L R 39 Calc 164 Ieringer v Reg L R 3 P C 287 In the matter of Tuckut Roy 1 Boulnois 351 In the matter of Ameer Khan 6 B L R 392 The same Case on appeal 6 B L R 459 Wer Caufman v The Government of Bombay I L R 18 Bom 636 The Queen v Burah L R 3 P C 889 L R 5 I A 178* and *Rex v Halliday [1917] A C 260 20 C W N (Note) xc* referred to Where an Act repeals a previous Act or a certain provision thereof and the repealing enactment is itself subsequently repealed by another Act—*Held* that the last repeal did not since 1850 revive the Act or provision before repealed unless words there are reviving them There was nothing in any of the Acts subsequent to the repealing Act (XI of 18) which revived s 29 of the East India Company Act (26 Geo III c 57) Where a person is detained in custody and an application is made to the Court under s 491 of the Criminal Procedure Code *Held* that the usual procedure was to

HABEAS CORPUS—*concld*

issue a Rule in the first instance and not to order the production of the petitioner *In re* JEWA NATHOO AND OTHERS (1916) **I L R 44 Calc 459**

3 ———————— *Jurisdiction—Arrest—Criminal Procedure Code (Act V of 1898) ss 54 190 491 498—Procedure—Applications under s 491 to whom should be made—Arrest under s 54—Reasonable suspicion or credible information what to be based upon—Duties of police officer arresting—Practice* Applications under s 491 of the Code of Criminal Procedure ought to be made to the Judge sitting on the Original Side and exercising the Ordinary Original Criminal Jurisdiction of the High Court *In the matter of Rudolf Stallmann I L R 39 Calc 164* referred to S 54 of the Code of Criminal Procedure gives very wide powers and ought to be rigorously construed Reasonable suspicion or credible information upon which an arrest can be made by a police officer under s 54 must be based upon definite facts and materials placed before him which the officer must consider for himself before he can take any action under that section He cannot delegate his discretion or take shelter under another person s belief or judgment but must act on his own personal responsibility *Queen v Behary Singh 7 W R Cr 3* followed CHARU CHANDRA MAZUMDAR *In re* (1916) **I L R 44 Calc 76**

4 ———————— *Extradition (Act XV of 1903)—Criminal Procedure Code (Act V of 1898) s 491—Jurisdiction* The High Court s power to issue a writ of *Habeas Corpus* has not been taken away by the procedure provided in the Indian Extradition Act (XV of 1903) s 3 sub ss (6) and (7) The arrest and detention of the applicant having been outside the local limits the Court had no jurisdiction Detention of a fugitive criminal pending *the consideration of the* Government is not illegal *In the matter of Rudolf Stallmann I L R 39 Calc 164* considered A C TOPE *v* EMPEROR (1918) **I L R 46 Calc 52**

HABIT

———— evidence of—

See PREVIOUS CONVICTIONS EVIDENCE OF **I L R 38 Calc 408**

HAKKS

See SANAD CONSTRUCTION OF **I L R 36 Bom 639**

HALF SISTER S SON OF WIDOW

See HINDU LAW—STRIDHAN **I L R 40 Calc 82**

HALAI MEMONS OF KATHIAWAR

See MEMONS **I L R 43 Bom 647**

HAND NOTE

See EVIDENCE ACT s 93 **14 C W N 1100**

———————— *Demand note—No stipulation for interest—whether interest payable—date from which interest payable* A hand note payable on demand but which does not provide for the payment of interest carries interest at the rate of 6 per cent per annum from the date the

HAND NOTE—*contd*

money ought to have been paid until the realization of the debt BISHUN CHAND *v* BABU AUDH BEHARI LAL 2 Pat L J 451

HANDWRITING

See WILL 15 C W N 729

———— comparison of—

See CHARGE I L R 42 Calc 957

See EVIDENCE I L R 41 Calc 545

———— proof of—

See SEDITION I L R 39 Calc 606

————PROOF OF HANDWRITING—*Per* JENKINS *C J* —Methods of proving handwriting discussed A document does not prove itself nor is an unproved signature proof of its having been written by the person whose signature it purports to bear S 73 of the Evidence Act does not sanction the comparison of any two document but require *first* that the standard writing shall be admitted or proved to be that of the person to whom it is attributed and *secondly* that the disputed writing must *itself purport* to have been written by the same person A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive and especially so when made by one not conversant with the subject and without guidance from the arguments of counsel and evidence of experts *Khoodee Bibee* v *Gobind Chunder Roy 2 W R P 279* referred to The value of expert evidence of handwriting discussed *Reg* v *Harvey 11 Cox C C 546* referred to *Per* CARNDUFF *J* —Handwriting may in addition to the usual method be proved by circumstantial evidence under s 67 of the Evidence Act which prescribes no particular kind of proof *Neel Kanto Pandit* v *Juggobundho Ghose 12 B L R App 18 Abdool Ali* v *Abdoor Ruhman 21 W P 494* and *Abdulla Paru* v *Gannibai I L R 11 Bom 690* referred to BARINDRA KUMAR GHOSE *v* EMPEROR (1909) I L R 37 Calc 467

———————— A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of Counsel and the evidence of experts A comparison of writings has consequently been deemed a mode of ascertaining the truth which ought to be used with very great caution

SREEMUTTY SARAJANI *v* HARI DAS GHOSE 26 C W N 113

HANSARD S PARLIAMENTARY REPORTS

———— admissibility of—

See LIBEL I L R 37 Calc 760

HAQ CHAHARUM

See AGREEMENT I L R 41 All 417

See PROVINCIAL SMALL CAUSE COURT ACT 1887 S H II Cl 1 I L R 43 All 681

HARVEST

———— experimental Landlord s right of—

See ESTATES LAND ACT (MAD ACT I OF 1908) s 4 27 73 143 I L R 40 Mad 640

HAT

————————Right to hold the holding of a Hat on a man s land is not in itself a wrongful act RAKHAL DAS SINGH *v* EMPEROR 19 C W N 248

———————— *market franchise in rivals—Grant of such franchise if may be presumed —Inducing traders to come away from rival hat by intimidation—Compulsion if actionable* There is in Bengal no such thing as a market franchise or a right to hold a market conferred by grant from the Crown nor can such right be acquired by prescription In Bengal the right to hold a market is treated as an incident to the ownership of land The proprietor of the old market has no monopoly or privilege which is entitled to protection and no immunity from competition Where illegal means in the nature of intimidation and physical compulsion were employed by agents of the Defendant acting within the scope of their employment to induce traders who would have gone to Plaintiff s old hat to attend Defendant s new hat and as a natural consequence thereof there was diminution of Plaintiff s profits from his *hat* *Held*—That the Plaintiff was entitled to a civil remedy by way of a suit for damages *Per* GREAVES *J* —whether mere besetting or watching apart from violence which according to the doctrine of common law is an unlawful means in case of trade disputes is unlawful in the case of rival *hat* owners HEM CHANDRA ROY *v* BEPIN BEHARY SAHA SARDAR 24 C W N 800

HATCHITTA

————————*Acknowledgment—Limitation Act (IX of 1908) s 19—Contract Act (IX of 1872) s 25 (3)* A *hatchitta* is an acknowledgment within the meaning of s 19 of the Indian Limitation Act *Maniram Seth* v *Seth Rupchand I L R 33 Calc 1047* followed MAHENDRA NATH CHATTERJEE *v* LALIT MOHAN DATTA (1918) I L R 46 Calc 746

HEADINGS OF CLAUSES

See BOMBAY CITY MUNICIPAL ACT s 27 I L R 36 Bom 405

HEADINGS OF STATUTES

See NON OCCUPANCY RAIYAT I L R 44 Calc 267

HEADS OF CHARGE

See TRIAL BY JURY I L R 47 Calc 795

HEARSAY EVIDENCE

See EVIDENCE ACT (I OF 1872) s 33 I L R 39 Mad 449

HEBA BIL EWAZ

————————*If valid without consideration* The incidents of a gift for a consideration are very different from those of a simple gift If the passing of a consideration be not proved a *Heba bil ewaz* is not valid as a simple gift without consideration Mahomedan Law JIDDA JAN BIBI *v* SHEIKH BAKTAR 24 C W N 96

HEBA-BIL-EWAZ—*contd*

——— ——— *Heba bil ewaz—Heba valid without consideration.* The incidents of a gift for a consideration are very different from those of a simple gift. If the passing of the consideration be not proved a *Heba bil ewaz* is not valid as a simple gift without consideration. *[illegible]* distinguished. [illegible] **24 C W N 926**

HEIR

See [illegible] **I L R 48 Calc 518**

—— claim of—

See OCCUPANCY HOLDING **I L R 42 Calc 254**

—— of legatee—

See SUCCESSION ACT (X OF 1865), s. 187 **I L R 38 Mad 988**

—— of Promisor

See [illegible] **I L R 38 Mad 114**

—— sale by one of several—

See MAHOMEDAN LAW—ALIENATION **I L R 40 Mad 243**

—— to self-acquired property of woman—

See ALIYASANTANA LAW **I L R 39 Mad 12**

HEREDITARY OFFICE.

See HINDU LAW—[illegible] OFFICE MAHOMEDAN LAW

See LIMITATION **I L R 42 Calc 244**

See SHEBAIT **I L R 39 Calc 887**

See VRITTI **I L R 37 Bom 409**

—— emoluments of

See MADRAS HEREDITARY VILLAGE OFFICERS ACT ss. [illegible] **I L R 37 Mad 548**

HEREDITARY OFFICES ACT (BOM III OF 1874).

See BOMBAY HEREDITARY OFFICES ACT

——— s. 2—*Vatan Inam—Jat* [illegible] *personal Inam—Grant for maintenance—Settlement* [illegible] *Government* [illegible] *as private property* [illegible] The property in suit was known as Vatan Desai Vatan property. It consisted of four villages, Surela, [illegible] [illegible] [illegible] [illegible] [illegible] result of the investigation [illegible] holdings in the [illegible] found that the [illegible] tenure. The Desais [illegible] in 1879 and [illegible] [illegible]

HEREDITARY OFFICES ACT (BOM III OF 1874)—*contd*

Alienation existing that the village had been found to be held as personal Inam without the condition of service. In respect of the other two villages Lalardi and [illegible] the Sanads were not forthcoming but it appeared from the Alienation Register that the Sanads were issued in respect of these villages also and the register showed that the Inam lands in all the villages were permanently enfranchised as private property. In 1917 the plaintiff as the daughter and reversionary heir of the last male holder of the Inam sued to recover a fourth share in the Inam lands and [illegible] allowances. The defendants contended that the plaintiff being a female was excluded by the provisions of Act V of 1886 from participation in inheritance as the property in suit was all Vatan property. *Held* that the plaintiff was entitled to succeed as the quality of the Inam was Jat Inam. The settlement of 1884 was a settlement in perpetuity giving to the holders full and complete rights of ownership free from service and subject only to the reserved quit rent. [illegible] distinguished. DWARKADAS MOTILAL [illegible] (1918) **I L R 43 Bom 323**

—— ss 4 & 15—

See [illegible] REVENUE JURISDICTION ACT [illegible] s 4 **I L R 43 Bom 277**

—— ss 4 and 53 and (Bom Act V of 1886) s 2—*[illegible]—Meaning of the term family in the Act.* One Gopinath the original acquirer of a Vatan died without leaving any lineal descendant. At the time of his death his nearest relations were his [illegible] Girdharlal [illegible] (senior uncle's son) and Mahalakhra Maharaji (younger uncle's son). In 1868 two commutation Sanads were issued by Government in respect of the Vatan and the grantees were Dinanath [illegible] and Dinanath's great grand nephew [illegible] The actual possession and enjoyment of the Vatan property thus continued with the family of Girdharlal down to the time of its last male holder Prankhram and after wards with his widow until her death. On widow's death the defendants (daughter and daughter's son of Prankhram) retained possession. The plaintiffs therefore representing the branch of Malasukram claimed to be entitled to possession of the Vatan property on the strength of s. 2 of Bom. Act V of 1886. Both the lower Courts held that the plaintiffs were members of the family qualified to inherit and as such excluded the female defendants. In second appeal it was contended that the respondents (plaintiffs) were not descended from the original Vatandar and therefore they were not members of his family and were not entitled to exclude females in possession. *Held* that the term family as used in the Vatan Act is not confined to descendants from a common ancestor but means all Vatandars and that the respondents were entitled to exclude the appellants from possession. [illegible] (1917) **I L R 41 Bom 677**

—— s. 5—

——— *Vatan—Effect of Collector's certificate* [illegible] *where land is* [illegible] *sale of Vatan Land in execution of* [illegible] *Vatan—the Collector* [illegible] *full* [illegible] *land does not lose* [illegible] [illegible] SUKHARAM v. [illegible] **I L R 37 Bom 81**

HEREDITARY OFFICES ACT (BOM III OF 1874)—contd

——— s 5—contd

——— *Mortgage by Vatandar—Suit for account and redemption—Adverse possession by mortgagee—Dekkhan Agriculturists' Relief Act (XVII of 1879) s 13—Mesne profits from the date of suit* One Madhavrao grandfather of the plaintiff by a deed dated the 1 th July 1867 mortgaged with possession certain Vatan Inam lands to Balaji Anant an ancestor of the defendants. Madhavrao died 18 3 and in 1909 plaintiff sued to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act 1879 The defendants contended that by reason of the provisions of s. 5 of the Vatan Act the mortgage became void on the death of Madhavrao and that they had been in possession adversely since that date The Court of first instance disallowed the contention on the ground that the mortgagee claimed to hold the property as such and not as owner and after taking accounts passed a decree in favour of the plaintiff awarding mesne profits from the date of suit till possession at rupees four hundred a year This decree was confirmed by the lower appellate Court On appeal to the High Court *Held* that the mortgagee remained a mortgagee for the purpose of the redemption suit even assuming that he had been in possession for more than twelve years since the death of the original mortgagor Unless there was some definite indication on the part of the person in possession that he would from a certain date claim as absolute owner and not as mortgagee he could only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death namely that of a mortgagee *Held* further that mesne profits from the date of suit could not be awarded as the enforcement of the provisions of s. 13 of the Dekkhan Agriculturists' Relief Act 1879 placed the mortgagor in a much more favourable position than he would be in if he relied upon the terms of the contract and no presumption could arise that the mortgagee was apart from the provisions of the Act not entitled to retain possession after the date of the institution of the suit *Janoji* v *Janoji I L R 7 Bom 185* applied RAMCHANDRA VENKAJI NAIK v KALLO DEVJI DESHPANDE (1915)

I L R 39 Bom 587

——— ss 10 and 13—*Land Acquisition Act (I of 1894) s 18—Mahar's Vatan land—Acquisition by Government—Award—Compensation—Title by adverse possession against Vatandars—Collector's certificate—Jurisdiction* Certain land with buildings thereon having been acquired by Government under the Land Acquisition Act (I of 1894) the Assistant Collector passed an award whereby he awarded by way of compensation one sum to the owner of the buildings on the land and another to certain Mahar Vatandars on account of the land being Maharki Vatan The owner of the buildings having objected to the award the Assistant Collector at the instance of the objector referred the matter to the District Court under s 18 of the Act The District Judge found that the objector had acquired title to the land by adverse possession and thus became entitled to the compensation on account of the land as against the Mahar claimant Subsequently the Collector forwarded to the District Court a certificate issued under s 10 of the Hereditary Offices Act (Bom Act III of 1874) that the order for the payment of the compensation to the objector should be set aside in accordance with the provisions of ss 10 and 13 of the Act Thereupon the District Judge holding that he had no jurisdiction to decide whether the property was Vatan or not in the face of the Collector's certificate cancelled his order The objector having appealed against that order —*Held* restoring the award of the District Court that an award under the Land Acquisition Act (I of 1894) was not a decree or order capable of execution under the Civil Procedure Code (Act V of 1908) and was therefore not within the purview of s 10 of the Hereditary Offices Act (Bom Act III of 1874) *Held* further that the award of the District Court which was the cause of the certificate made it clear that the Mahar's property had been acquired by the objector by adverse possession before the commencement of the proceedings for the acquisition of the land by Government *Per Curiam* Even if it could be said that there was any danger of the passing of the ownership by virtue or in execution of a decree or order in the Land Acquisition proceedings it could not be said that that result was arrived at without the sanction of Government who set the machinery of the Act in motion for the acquisition of the land *Nilkanth* v *The Collector of Thana I L R 22 Bom 802 Collector of Thana* v *Bhaskar Mahadev I L R 8 Bom 264 Puchayya* v *Amingowda I L R 5 Bom 283* referred to LADDHA EBRAHIM AND Co v THE ASSISTANT COLLECTOR POONA (1910)

I L R 35 Bom 146

——— ss 11 11 (A)—*Revenue Jurisdiction Act (X of 1876) s 4 (a)—Deshmukhi Vatan—Miras lease and mortgage by the Vatandar—Death of the Vatandar—Collector's order declaring the alienation null and void and directing the land to be restored to the representative of the deceased Vatandar—Adverse possession—Jurisdiction of Civil Courts* A Deshmukhi Vatandar executed a *mirasi* lease and mortgage of certain vatan land to the plaintiff in the year 1877 and died in 1892 Before the expiry of twelve years from his death his legal representative made an application to the Assistant Collector for an order for possession on the ground that the land was Deshmukhi Vatan In February 1905 the Assistant Collector passed an order which declared the alienation to be null and void under s 11 of the Hereditary Offices Act (Bom Act III of 1874) and directed the land to be restored to the applicant Thereupon the plaintiff brought the present suit in the year 1908 against the legal representative (applicant before the Assistant Collector) and others for a perpetual injunction restraining the defendants from recovering possession of the land The defendants contended that the suit was not maintainable by reason of s 4 (a) of the Revenue Jurisdiction Act (X of 1876) *Held* that the order passed by the Assistant Collector directing the plaintiff to restore possession to the defendant being unauthorised under s 11 of the Hereditary Offices Act (Bom Act III of 1876) the Revenue Jurisdiction Act (X of 1876) was no bar to the maintenance of the suit. *Held* further that the mere fact that an application was made by the defendant to the Assistant Collector within twelve years of the death of the alienor did not interrupt plaintiff's adverse possession against the defendants MAGANCHAND [illegible] VITHALRAV (1913)

[illegible] 37 Bom 37

HEREDITARY OFFICES ACT (BOM III OF 1874)—*contd*

——— s 18—

See BOMBAY REVENUE JURISDICTION ACT (X OF 1876) s 4 (a)
I L R 43 Bom 277

See LIMITATION ACT (IX OF 1908) s 14
I L R 43 Bom 201

——— ss 25 and 36—Under s 25 it is the duty of a Collector to determine the Custom of a Vatan and what person shall be recognised as representative Vatandar A suit for a declaration that Plaintiff is the nearest heir of a deceased Vatandar is maintainable under s 36 notwithstanding it is manifest that the declaration is sought for the purpose of establishing a fact which would enable the Plaintiff to have his name entered in the Vatan Register RAHIM KHAN v DADAMIYA HYDERKHAN
I L R 34 Bom 101

——— A suit for a declaration that Plaintiff is nearest heir of a deceased representative Vatandar is within the jurisdiction of a Civil Court although a declaration that the plaintiff is entitled to have his name entered in Vatan Register is beyond the jurisdiction of the Court SHANKAR BABAJI KULKARNI v DATTATRAYA BHIWAJI
I L R 40 Bom 55

——— ss 25 36 63 and 64 (as amended by Bom Act III of 1910)—*Mharki Vatan—Suit to be declared a Vatandar—Civil Court—Jurisdiction* —The plaintiffs by a suit filed in the Civil Courts sought a declaration that they were the Vatandars of a *Mharki* Vatan It was contended that although the Civil Courts had jurisdiction to make a declaration as to Vatandars claiming *Patils* or *Kulkarnis* Vatans the Courts had no jurisdiction to make any declaration as regards *Mharki* Vatans *Held* that it was competent to the Civil Courts to grant a declaration that the plaintiffs were Vatandars of a *Mharki* Vatan *Ramchandra Debhollar v Anant Sat Shenvi I L R 8 Bom 25* followed RAOJI FAKIRA v DADDU (1916) **I L R 41 Bom 23**

——— s 67—*Collector—Vatandars—Service Register—Suit for declaration as head of family—Civil Court—Jurisdiction* The plaintiffs brought a suit to have it declared that they were entitled to a share of the vatan and to have their names recorded as such in the Service Register kept by the Collector *Held* that the suit fell under the bar of clause (d) of s 67 of the Hereditary Offices Act (Bom Act III of 1874) and was not cognizable by the Civil Court *Govind Sitaram v Bapuji Mahadeo I L R 18 Bom 516* and *Balkrishna Chimnaji v Balaji Pandurang I L R 9 Bom 25* explained JIVAJI SAMBHAJI v FAKIR SABAJI (1911) **I L R 36 Bom 420**

HEREDITARY OFFICES ACT (BOM V OF 1886)

——— s 2—

See HINDU LAW **I L R 37 Bom 598**

HEREDITARY PRIEST

See HINDU LAW—HEREDITARY PRIEST

HEREDITARY TENURE.

——— it implies fixity of rent—

See LANDLORD AND TENANT
24 C W N 874

HEREDITARY VILLAGE OFFICES ACT (MAD III OF 1895)

See PENSIONS ACT s 4
I L R 38 Mad 559

——— s 3—*Other offices meaning of* The words other hereditary village offices in cl 3 of s 3 Mad Act III of 1895 do not mean offices of a description different from those referred to in cls (1) and (2) of the section but offices other than those in the localities dealt with by those clauses A suit for the recovery of the office of karnam in an inam village falls within cl (3) and not cl (1) of s 3 of the Act and is not cognisable by the civil courts AUDIPAZU VEERAYYA v AUDIRAZU SANGAYYA (1910)
I L R 34 Mad 177

——— ss 3 21—*Act applicable to offices mentioned in s 3 cl 4 only in villages other than proprietary estates* Cls 3 and 4 of s 3 of Act III of 1895 must be read together The Act is applicable to offices mentioned in cl 4 of s 3 only in villages other than those in proprietary estates and s 21 of the Act does not oust the jurisdiction of Civil Courts in regard to such offices in proprietary estates VEERADRAN ACHARI v SUPPIAH ACHARI (1909) **I L R 33 Mad 488**

——— s 5—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 47 EXPL.
I L R 41 Mad 418

——— *Permanent lease not a transfer within the meaning of s 5* S 5 of Madras Act III of 1895 only prohibits the transfer of ownership A permanent lease of lands forming the emoluments of an office does not amount to a transfer of ownership within the meaning of s 5 and is not prohibited by its provision *Venkatasawmy Yettapah Naicker v Alagoo Moothoo Servagaran 8 Moo I A 327* referred to KSHIRABARO BISSOYI v SOBHANADRI RAM HARIKRISTNA NAIDU (1909) **I L R 33 Mad 340**

——— ss 13 21—*S 21 is no bar to suit for recovery of land* A suit in the Civil Courts for land not based on the ground that such land constituted part of the emoluments of any of the offices described in s 13 of Madras Act III of 1895 is not barred by s 21 of the Act The effect of the words in s 13 of the Act but such decision etc is to preserve the jurisdiction of the Civil Courts even in cases where the Collector decided the case on the assumption mentioned therein and not to oust such jurisdiction where he did not CAVALA RAMAN v ADABALA RATTAYYA (1909)
I L R 33 Mad 235

——— *Prohibition in s 21 applies only when jurisdiction is conferred on Revenue Courts by s 13—Construction of statute* Notwithstanding the apparent generality of the language of s 21 of Madras Act III of 1895 it must be held that the section takes away the jurisdiction of Civil Courts only in those cases in which jurisdiction is conferred on Revenue Courts by s 13 A suit for a village officer's inam land on the expiry of a lease granted by such village officer to the defendant is cognizable by the Civil Courts as the plaintiff has only to prove the letting and expiry of the term and he is not called upon to prove his title which the defendant will be estopped from disputing The plaintiff cannot however base his claim on his title to the land *Narasimhalu v Narasimhalu 16 Mad L J 3*[illegible] referred to

HEREDITARY VILLAGE OFFICES ACT (MAD III OF 1895)—*contd*

——— s 5—*contd*

Kesava Narasimhulu v. Narasimhulu Jintrarlu I L R 20 Mad 1 referred to It is a general principle of law that every presumption shall be made in favour of the jurisdiction of a Civil Court and that it shall not be taken away except by express words or by necessary implication MUNSULA SEETHAM NAIDU *v.* DODDI RAMI NAIDU (1909) I L R 33 Mad 208

HEREDITY

——— principle of—
See MAHOMEDAN LAW—MUTAWALLI I L R 38 Mad 491

HERITABILITY
See BUILDING LEASE I L R 37 Calc 377
See NON OCCUPANCY RIGHT I L R 41 Calc 1108

HERITABLE ESTATE
See JAGIR I L R 42 Calc 305
See LANDLORD AND TENANT I L R 47 Calc 280

HERITABLE RIGHT
See SARBARAKARI TENURE I L R 46 Calc 378

HIGH COURT
See CIVIL PROCEDURE CODE (ACT V OF 1908) s 115 I L R 42 Bom 119
See DISTRICT MUNICIPAL ACT (BOMBAY) s 160 I L R 36 Bom 47
See HIGH COURT JURISDICTION OF
See HIGH COURTS ACT (24 AND 25 VICT c 104) ss 2 9 AND 13 I L R 39 Bom 604
See LAND ACQUISITION ACT (I OF 1894) s 54 I L R 37 Bom 506

——— concurrent jurisdiction of (with District Court)—
See PROBATE I L R 37 Calc 224

——— certificate of—
See PRACTICE I L R 48 Calc 894

——— constitution of—
See STATUTE 24 AND 25 VICT 104 s 1 AND I L R 36 All 168

——— criminal Revisional Jurisdiction—
See CRIMINAL JURISDICTION 14 C W N 806 I L R 37 Calc 714
See CRIMINAL PROCEDURE CODE (ACT V OF 1898) 435 439 I L R 43 Bom 607

——— Criminal Sessions—
See PERJURY I L R 43 Calc 542

———difference of opinion on Appellate Bond—If opinion of Senior Judge to prevail—
See LETTERS PATENT 25 C W N 695

——— disciplinary jurisdiction—
See BOMBAY REGULATION (II OF 1827) 36 I L R 37 Bom 354

HIGH COURT—*contd*
See HIGH COURT JURISDICTION I L R 44 Bom 418
See LEGAL PRACTITIONERS ACT 1879 s 13 I L R 42 All 86
See LETTERS PATENT s 8 I L R 42 All. 450

——— error of law—
See EVIDENCE ACT (I OF 1872) s 5 I L R 42 Bom 352

——— extraordinary civil jurisdiction of—
See CIVIL PROCEDURE CODE (ACT V OF 1908) s 115 I L R 40 Bom 86

——— inherent jurisdiction of—
See BOMBAY CITY IMPROVEMENT TRUST ACT (BOM IV OF 1898) 48 (*11*) I L R 42 Bom 54
See INHERENT JURISDICTION

——— inherent power of—
See APPEAL I L R 42 Calc 433
See INHERENT POWERS

——— interference by—
See ACQUITTAL I L R 42 Calc 612

——— jurisdiction of —
See EXTRADITION I L R 46 Calc 31
See SANCTION FOR PROSECUTION I L R 37 Calc 13

——— jurisdiction of to grant bail—
See BAIL I L R 37 Calc 412
See EXTRADITION I L R 46 Calc 31

——— On transfer from District Court—
See GUARDIAN I L R 38 Mad 807

——— original side jurisdiction—
See CONTEMPT OF COURT I L R 41 Calc 173
See SALE I L R 48 Calc 69
See STAY OF EXECUTION I L R 48 Calc 796

——— power of—
See CIVIL PROCEDURE CODE 1908 s 115 I L R 42 All 18 & 26
See CRIMINAL PROCEDURE CODE ss 439 AND 56 I L R 37 All 31
See EVIDENCE I L R 47 Calc 671
See EXTRADITION WARRANT I L R 42 Calc 793
See HIGH COURT JURISDICTION OF
See INTERLOCUTORY ORDER 14 C W N 147
See LAND ACQUISITION I L R 48 Calc 916
See REMAND I L R 42 Calc 888

——— Power of to acquit instead of ordinary New Trial—
See JURY 25 C W N 623

HIGH COURT—*contd*

See CRIMINAL PROCEDURE CODE ss 115 435 439 I L R 41 All 302

See MUNICIPAL ELECTION I L R 46 Calc 132

——— power of interference by under Charter Act—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 144 I L R 38 Mad 469

——— powers of to alter acquittal into conviction in revision—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) ss 423 439 I L R 37 Mad 119

——— powers to give directions to an administrator—

See SUCCESSION ACT 1865 s 264 I L R 44 Bom 682

——— power to interfere with the discretion of District Judge—

See DIVORCE ACT (IV OF 1869) s 14 I L R 41 Bom 26

——— power to call for record of interlocutory orders—

See CIVIL PROCEDURE CODE 1908 s 115 I L R 44 Bom 619

——— practice of—

See CRIMINAL PROCEDURE CODE s 438 I L R 36 All 378

——— revisional jurisdiction—

See CIVIL PROCEDURE CODE (1908) s 115

See CRIMINAL PROCEDURE CODE ss 145 AND 435 I L R 36 All 233
I L R 42 All 214

ss 345 AND 439 I L R 37 All 419

s 435 I L R 43 Bom 864

s 439 I L R 41 Bom 560

——— superintendence and control by—

See CIVIL PROCEDURE CODE (ACT V OF 1908) s 3 115 I L R 37 Bom 114

——— It is the duty of a subordinate court to follow the decision of the High Court to which it is subordinate (per Sir JOHN EDGE) LUTTU LAL v PARBATI KANWAR I L R 37 All 359

——— *General Rules of for Civil Courts Chapter XXI rule 1—Certificate of fee—Authorised agent* A fee certificate filed by a pleader under rule 1 of Chapter XXI of the General Rules for Civil Courts was duly sworn to by the pleader and by a person who had actually paid the fee and who stated that he was the agent (*karinda*) of the client *Held* that the certificate was in sufficient compliance with the rule and there was no necessity that the agent of the client should be authorised in any special manner GUDDAR MAL v BHIT RAM (1918) I L R 41 All 240

HIGH COURT—*contd*

——— *Revision—Practice—Discretion of Court—Criminal Procedure Code ss 435 and 439—Indian Penal Code (Act XLV of 1860) ss 448 and 451* Where at the hearing of an application in revision it appears that the facts established by the record do not justify the conviction of the applicant of the offence of which he has been convicted but do justify his conviction of a minor offence of a similar nature it is within the discretion of the Court to convict the applicant of such minor offence but it is also within the discretion of the Court to refrain from doing so The rule of practice according to which the High Court ordinarily refuses to entertain an application in revision where the applicant might have gone in the first instance to the Sessions Judge or to the District Magistrate is not a rule of absolutely invariable application and an order of admission made by a Judge of the High Court under cl. (1) of s 435 of the Code of Criminal Procedure though passed ex parte will be sufficient to take the case out of the operation of such rule of practice EMPEROR v MANSUR HUSAIN (1919) I L R 41 All 587

HIGH COURT JURISDICTION OF

See CIVIL PROCEDURE CODE 1908
s 115 I L R 43 All 564
O XLVI r 1 s 141 I L R 39 Mad 16

See CONTEMPT OF COURT I L R 41 Calc 173

See CRIMINAL PROCEDURE CODE (ACT V OF 1898)
s 195 sub s (6) I L R 41 Bom 631
s 203 I L R 38 Mad 512
s 307 I L R 37 Mad 236

See CRIMINAL REVISIONAL JURISDICTION

See CRIMINAL TRIBES ACT s 5 I L R 47 Calc 843

See DISPUTE CONCERNING LAND I L R 38 Calc 24

See DIVORCE I L R 44 Bom 924

See DIVORCE ACT (IV OF 1869) ss 3 16 37 44 I L R 40 Bom 109

See EXTRADITION I L R 38 Calc 547
I L R 39 Calc 164

See FORFEITURE I L R 41 Calc 466
I L R 47 Calc 190

See HABEAS CORPUS
I L R 39 Calc 164
I L R 44 Calc 459

See HIGH COURT

See JURISDICTION OF HIGH COURT

See LAND ACQUISITION I L R 8 Calc 2[illegible]0

See LETTERS PATENT (AMENDED) OF THE BOMBAY HIGH COURT I L R 27 Bom 4[illegible]3

See LUNACY ACT 3[illegible] 25 C W N 1[illegible]8

See MORTGAGE I L R 4[illegible] Calc [illegible]0

See MUNICIPAL ELECTION I L R 45 Calc [illegible]

HIGH COURT JURISDICTION OF—*contd*

See PARSIS I L R 38 Bom 615

See PERJURY I L R 43 Calc 542

See PRACTICE—WITHDRAWAL OF SUIT I L R 41 Calc 632

See PRESS ACT (I OF 1910) ss 3 (1) 4 (1) 17 19 20 AND 22 I L R 39 Mad. 1164

See REVIEW I L R 41 Calc 809

See SANCTION FOR PROSECUTION I L R 44 Calc 816

See SONTHAL PARGANAS I L R 41 Calc 876

———— to order person not to proceed in other court—

See CIVIL PROCEDURE CODE 1908 s 10 I L R 44 Bom 283

———— to re instate legal practitioner after disbarment—

See MUKTEAR I L R 38 Calc 309

———— to remand—

See INHERENT JURISDICTION I L R 44 Calc 929

———— to stay execution pending Appeal to Privy Council—

See PRIVY COUNCIL, PRACTICE OF I L R 38 Calc 335

1 ———— Criminal Revisional Jurisdiction—*Order by a first class Magistrate for discontinuance of a house as a brothel—Criminal Procedure Code (Act V of 1898) ss 6 435 and 439—Eastern Bengal and Assam Disorderly Houses Act (II of 1907) ss 2 to 6—Procedure in cases under ss 3 and 6 of the Act—Offence* A Magistrate of the first class acting under s 3 of the Eastern Bengal and Assam Disorderly Houses Act 1907 is a Criminal Court within s 6 of the Criminal Procedure Code and the High Court has jurisdiction to revise his proceedings under ss. 435 and 439 But where such proceedings were in themselves perfectly fair and reasonable the only error being possibly the administration of oaths to the witnesses the High Court refused to interfere Ss 2 and 3 of the Act do not create any offence the only offence created by the Act being as provided in s 6 disobedience to the order of the Magistrate passed under s 3 The procedure to be followed under the Act is that upon a sanction report or order under s 5 the Magistrate must if he intends to go further summon the owner or other person mentioned in s 3 to show cause and in the event of his failure to appear he may proceed in his absence He must next satisfy himself that the house is used as described in s 2 (i) (b) or (c) doing so in any way that does not violate the ordinary rules of fairness and propriety but he is not bound to act only on legal evidence and he need not and possibly may not administer oaths to persons of whom he may make enquiry If he makes an order under s 3 proceedings for disobedience must be taken independently under s 6 and conducted according to the ordinary procedure prescribed for the trial of offences RAJANI KHEMTAWALI *v* PRAMATHA NATH CHOWDHRY (1910) I L R 37 Calc 287

2 ———— *Criminal revisional jurisdiction—Interference on questions of law—Findings of facts when can be questioned—Criminal Procedure Code (Act V of 1898) s 435—Indian Penal Code (Act XLV of 1860) ss 511 124A—Attempt to commit offences—Attempt to commit the offence of sedition—Intention a question of fact* It is the settled practice of the High Court of Bombay to refuse to interfere in the exercise of its revisional jurisdiction in regard to findings of fact except on very exceptional grounds, such as a misstatement of evidence by the lower Court or the misconstruction of documents or the placing by that Court of the *onus* of proof on the accused contrary to the law of evidence *Queen Empress v Sheikh Saheb Badrudin I L R 8 Bom 194 Queen Empress v Mahomed Hasan (1886) Unrep Cr Cas 244* and *Queen Empress v Chagan Dayaram I L R 14 Bom 331* followed Under the Indian Penal Code (Act XLV of 1860) all that is necessary to constitute an attempt to commit an offence is some external act something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence It does not matter that the progress was interrupted An attempt to publish sedition is complete as soon as the accused knowingly sells a copy containing the seditious article It is none the less an attempt because something external to himself happens which prevents a perusal of the article by the buyers or any other member of the public In cases of sedition the question of intention is one of fact EMPEROR *v* GANESH BALVANT MODAK (1909) I L R 34 Bom 378

3 ———— *Revisional jurisdiction over Presidency Small Cause Court—Civil Procedure Code (Act V of 1908) s 115— Appeal —Practice—Sanction to prosecute—Code of Criminal Procedure (Act V of 1898) ss 195 (6) 439* A Judge of the Presidency Small Cause Court Calcutta had summarily refused an application for sanction to prosecute the plaintiff for making a false claim in a suit before him On an application to the High Court under s 115 of the Code of Civil Procedure to set aside this order and to compel the Judge to determine the application —*Held* that the jurisdiction of the High Court in all such revisional applications whether in respect of suits or other matters is vested in a single Judge sitting on the Original Side *Samsher Mundul v Ganendra Narain Mitter I L R 29 Calc 498 Sarat Chandra Singh v Brojo Lall Mukerjee I L R 30 Calc 986* followed. *Haladhar Maiti v Choytonna Maiti I L R 30 Calc 588* referred to A Civil Court when acting under s 195 of the Criminal Procedure Code is not in any way exercising criminal jurisdiction and is subject to the revisional jurisdiction of the High Court under s 115 of the Code of Civil Procedure *Salig Ram v Ramji Lal I L R 28 All 554 In the matter of the petition of Bhup Kunwar I L R 26 All 249 Ram Prosad Roy v Sooba Roy 1 C W N 400 Guru Churn Saha v Grija Sundari Dasi 7 C W N 112 Kali Prosad Chatterjee v Bhuban Mohini Dasi 8 C W N 75 Eranholi Athan v King Emperor I L R 26 Mad 98* referred to An application under s 195 sub s 6 of the Criminal Procedure Code is not an appeal, hence the revisional jurisdiction under s 115 of the Civil Procedure Code is not excluded. *Harde[illegible] v Hanuman Dat*

HIGH COURT JURISDICTION OF—*contd*

Narain I L R 26 All 244 distinguished. PAMA DHIN BANIA *v* SEWBALAK SINGH (1910)
I L R 37 Calc 714

4 ———————— *Revisional Jurisdiction—Error by Small Cause Court on a question of limitation—Civil Procedure Code (Act V of 1908) s 115—Limitation.* An error by the Small Cause Court on a question of limitation does not justify the interference of the High Court under s 115 of the Civil Procedure Code *Amritrav Krishna Deshpande* v *Balkrishna Ganesh Amrapurkay I L R 11 Bom 488 Sundar Singh* v *Dura Shankar I L R 20 All 78* and *Amir Hassan Khan* v *Sheo Baksh Singh I L R 11 Calc 6* referred to RAMGOPAL JHOONJHOONWALLA *v* JOHRMALL KHEMKA (1912)
I L R 39 Calc 473

5 ———————— Trial of Indian Seaman *for an offence committed on board a British vessel on the high seas—Stoppage of the vessel thereafter at intermediate ports—Accused brought to Calcutta in custody—Applicability of English law to the offence and the charge and of Indian law to the procedure and sentence—Courts (Colonial) Jurisdiction Act (37 and 38 Vict c 27) s 3—Merchant Shipping Act (57 and 58 Vict c 60) ss 684 686* The High Court of Calcutta has jurisdiction in its Original Criminal Side under ss 684 and 686 of the Merchant Shipping Act (57 and 58 Vict c 60) to try a Native Indian seaman for murder or manslaughter committed on board a British vessel on the high seas, who is brought to Calcutta under custody notwithstanding that the vessel touched after the commission of the offence at intermediate ports in the course of the voyage The offence should be tried and the charge framed under the English law but the procedure at the trial and the sentence must be regulated by the law of India. S 3 of 37 and 38 Vict c 27 does not deal with the trial of the case but with the sentence after conviction. *Queen Empress* v *Sheikh Abdool Rahman I L R 14 Bom 227* and *King Emperor* v *Chief Officer of the Mushtari I L R 2 Bom 636* dissented from. EMPEROR *v* SALIMULLAH (1912) **I L R 39 Calc 487**

6 ———————— Restraint of suit outside the jurisdiction—*Persons not residing within jurisdiction—Injunction* The High Court has power only to restrain a person who happens to be within its jurisdiction from prosecuting a suit without its jurisdiction. On the principle of equity acting *in personam* the mere fact that he possesses property moveable or immoveable within the jurisdiction but does not reside within it does not give the High Court jurisdiction over him since in the event of an injunction being granted against him and that being disobeyed he could not be subjected to the process of contempt *Vulcan Iron Works* v *Bishumbhur Persad I L R Cal 233 13 C W N 316 1 Ind Cas 9 7* followed. *The Carron Iron Co* v *Maclaren 5 H L C 416 s c 24 L J Ch 620 Mangle Chand* v *Gopal Ram I L R 34 Cal 101* relied on JAMNA DAS *v* HARCHAR *v* DASS (1911) **I L R 38 Calc 405**
16 C W N 4

7 ———————— Trespass *High Court 1865 cl 12—Wrongful cutting and removal of coal—Trespass Disputed boundary —Suit for land—Agreement between predecessors in title of parties—Privity of contract and estate.* The plaintiff company's predecessors in title who held certain coal lands known as Mouza Lodna in Manbhum, under a permanent lease granted an under lease of a share thereof to *S* and it was agreed that the boundary should be demarcated between the portion underleased and the portion retained by the grantors and that a barrier of 30 feet of coal *should be maintained between the two portions* of the mouza, and that if either party *encroached* within 15 feet of the boundary line he should make good any loss sustained by the other party No boundary was demarcated at the time The permanent lease of the said mouza was subject to the said underlease to *S* subsequently assigned to *T* and others and thereafter the boundary was laid down and marked by the respective agents of *T* and others and of *S* and a plan showing the boundary was signed by both parties Subsequent thereto *T* and others assigned their permanent lease of the mouza to the plaintiff company and *S* granted an underlease of his share *in* the mouza to *P L S* who granted an underlease of the same to the defendant who there carried on a colliery The plaint alleged that the defendant *had wrongfully cut into and removed portions of* coal from the 30 feet of barrier and beyond it that the trespass and conversion had taken place within two years and that the coal so removed had been sold and delivered to the plaintiff company under an agreement to purchase the output of the defendant's colliery and claimed damages for the value of the coal so removed and damages caused by the breach of contract *in* cutting through the barrier The defendant denied that *he had* carried away any coal from the 30 feet barrier and stated that he had confined his operations well within the area underleased to him and that the plaintiff company had never been in possession of the area from which he had carried away coal *Held* that the suit *so* far as it sought to recover damages for carrying away the plaintiff company's coal was founded on a case of trespass *quare clausum fregit* which necessitated the title in respect of that coal being gone *into* and was therefore a suit for land within the meaning of cl. 12 of the Charter *Rajmohun Bose* v *East Indian Railway Co 10 B L R 241* distinguished. That so far as the agreement not to cut into the 30 feet of barrier was concerned there was no privity of contract or estate between the defendant and the plaintiff company and the defendant was not personally liable on any of the covenants *in* the underlease granted to *S* and that the plaint did not disclose any cause of action against the defendant based on the agreement LODNA COLLIERY CO LD *v* BIPIN BEHARI BOSE (1912)
I L R 39 Calc 739

8 ———————— Order under s. 476 of the Criminal Procedure Code—*by Settlement Officer—Whether civil appellate or criminal appellate side can revise—Criminal Procedure Code (Act V of 1898) s 439—Civil Procedure Code (Act V of 1908) s 115—High Courts Act (24 and 25 Vict c 104) ss 14 and 15* In the case of an order passed by a Civil or Revenue Court under s. 476 of the Criminal Procedure Code (i) S 439 of the Criminal Procedure Code has no application (ii) The High Court can exercise the powers vested in it by s. 115 of the Civil Procedure Code or s. 15 of the High Courts Act and (iii) The Bench of the High Court exercising criminal jurisdiction cannot, as such deal with the matter on revision but the Judges composing the

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Bench may do so if authorised by the Chief Justice under s. 14 of the High Court Act. *Kali Prasad Chatterjee v Bhuban Mohini Dasi S C W N 73* and *Emperor v Gopal Baril I L R 34 Calc. 42* considered and approved of to a certain extent. EMPEROR v HAR PRASAD DAS (1913)

I L R 40 Calc 477

9 ——— **Chota Nagpur Tenancy Act (Beng VI of 1908) s 27**—*Application for enhancement of rent—Jurisdiction of the High Court to set aside an order of Deputy Commissioner passed without jurisdiction on appeal from an order of Deputy Collector—Judicial proceeding* Proceedings on applications for enhancement of rent under s. 27 the Chota Nagpur Tenancy Act are judicial proceedings and Deputy Commissioners in the performance of their judicial duties under the Act are Courts subject to the appellate jurisdiction of the High Court The High Court has jurisdiction to interfere in cases where the Courts of Collectors have either exceeded the jurisdiction or failed or refused to exercise the jurisdiction vested in them by the Chota Nagpur Tenancy Act *Chaitan Patjosi Mahapatra v Kunja Behari Patnaik I L R 38 Calc 837* referred to KARTIK CHANDRA OJHA v GORA CHAND MAHTO (1913)

I L R 40 Calc 518

10 ——— **Stay of Execution**—*Inherent powers of Court—Special leave to appeal to the Privy Council —Civil Procedure Code (Act V of 1908) ss 112 and 151 O XLI r 5 (2)—Letters Patent 1865 cl 36* The High Court is competent to make an order for stay of proceedings in execution of its decree in view of an application by the Judgment debtor to the Judicial Committee for special leave to appeal to His Majesty in Council. *Hurro Chandar Roy Chowdhry v Shoorodhonee Debia 9 W R 402 Panchanan Singha Roy v Dwarka Nath Roy 3 C L J 29 Hukum Chand Boid v Kamalanand Singh I L R 33 Calc 927 3 C L J 67 Mahomed Wahiduddin v Hakiman I L R 25 Calc 757 Tara Pado Ghose v Kamini Dassi I L R 29 Calc 644 Mahadeo v Budhai Ram I L R 26 All 358 Gajju v King Emperor 2 All L J 173 Brij Coomaree v Ramrick Dass 5 C W N 781 Nityamoni Dasi v Madhu Sudan Sen I L R 38 Calc 335 L R 38 I A 74* referred to NANDA KISHORE SINGH v RAM GOLAM SAHU (1913)

I L R 40 Calc 955

11 ——————— **Power to set aside order under s 145 Criminal Procedure Code**—*and to make consequential or incidental orders—Inherent powers of the Court—Criminal Procedure Code (Act V of 1898) ss 145 435 439—Government of India Act (5 & 6 Geo V c 61) s 107* It is now well established that the High Court has power under s 107 of the Government of India Act (5 & 6 Geo V c 61) to set aside proceedings under s 145 of the Criminal Procedure Code instituted without jurisdiction notwithstanding s 435 (3) of the Code *Hurbullubh Narain Singh v Luchmeswar Prasad Singh I L R 26 Calc 188 Laldhari Singh v Sukdeo Narain Singh I L R 27 Calc 892 Jagmohan Pal v Ram Kumar Gope I L R 28 Calc 416 Kulada Kinkar Roy v Danesh Mir I L R 33 Calc 33 Sukh Lal Sheikh v Tara Chand Ta I L R 33 Calc 68 Khosh Mahomed Sirdar v Nasir Mahomed I L R 33 Calc 352* referred to The Court has power under the general terms of s 107 when setting aside the proceedings to make such consequential or incidental orders as may be necessary in the interests of justice in the circumstances of a particular case and to reach and remedy all forms of judicial highhandedness *Lekhraj Ram v Debi Pershad 12 C W N 678* relied on Though the Criminal Procedure Code contains no provision analogous to s 151 of the Civil Procedure Code (Act V of 1908) Criminal Courts no less than Civil Courts have inherent power to make such orders as are necessary in the ends of justice Such power is not however to be exercised capriciously or arbitrarily but *ex debito justitiæ* on sound general principles and subject to the statutory provisions applicable to the matters *Pulin Behary Das v King Emperor 15 C L J 517 Budhu Lal v Chattu Gop I L R 44 Calc 816 Ram Chandra Mistry v Nobin Mirdha I L R 25 Calc 630 Rodger v Comptoir D Escompte de Paris I L R 3 P C 465 Ahmed Ali v Kenoo Khan I L R 36 Calc 44* In re *Lakshman Govind Nirgude I L R 26 Bom 552* approved *Basudeb Surma Gossain v Naziruddin I L R 14 Calc 834 Queen Empress v Fattah Chand I L R 24 Calc 499 Prayag Mahaton v Gobind Mahaton I L R 32 Calc 602 Arju Mea v Arman Mea 7 C L J 369 Surjya Kumar Upadhya v Dinabandhu Pal 15 C W N* ccliv *Karimuddi Falsir v Naimuddi Kaviraj 3 C L J 573 Tulshi Ram v Abrar Ahmad I L R 27 All 655* In re *Annapurnabai I L R 1 Bom 630* In re *Palanlal Ringildas I L R 17 Bom 748* In re *Devidin Duraaprasad I L R 22 Bom 844* In re *Kuppammal I L R 29 Mad 375* and *Chenna Reddi v Ramasamy Gounden 16 Cr L J 104* referred to and explained The High Court has therefore inherent power to give directions as to disposal of property attached and dealt with by a Magistrate in the course of proceedings instituted without jurisdiction under s 145 of the Code The Court ordered that the lac in dispute remaining unsold and the proceeds of the lac already sold should be kept in the custody of the Subordinate Judge pending the decision of a Civil Court as to the title to the same and gave further directions in the matter *Chenna Reddi v Ramasamy 16 Cr L J 104 Hood Barrs v Heriot* [1896] *A C 174 Peruvian Guano Co v Dreyfus Bros* [1892] *A C 166* referred to PIGOT v ALI MAHAMMAD MANDAL (1920)

I L R 48 Calc 522

12 ——— **Disciplinary Jurisdiction**—*Amended Letters Patent clause 10—Bombay Regulation 2 of 1827 s 56—Signing of a pledge to civilly disobey certain laws to be fixed thereafter*—*Satyagraha movement—Lawyers taking the pledge are amenable to the Disciplinary Jurisdiction—Advocates Vakils and Pleaders status and duty of* The respondents who were lawyers practising in the Courts of the Ahmedabad District joined a movement called the Satyagraha Sabha which was started as a protest against the enactment of the Anarchical and Revolutionary Crimes Act (XI of 1919) and signed a pledge whereby they bound themselves to refuse civilly to obey these laws (*viz* the Anarchical and Revolutionary Crimes Act) and such other laws as a Committee to be hereafter appointed may think fit A question having arisen whether the respondents had by taking the pledges made themselves liable to be dealt with under the *Disciplinary Jurisdiction of the High Court* —*Held* that the action of the respondents brought them within the Disciplinary Jurisdiction of the High Court [illegible] that under the circum

HIGH COURT JURISDICTION OF—*concld*

stances a warning to them was sufficient Per MACLEOD C J — Advocates and pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice but also for giving professional advice for which they are entitled to be paid to those members of the public who require their services Their position training and practice give them immense influence with the public and their example must necessarily have a much greater effect whether for good or for evil than the example of those who do not occupy this privileged position It is not necessary in order for us to be able to exercise our jurisdiction that any offence should have been committed nor is it necessary that what the respondents have done should have subjected them to anything like general infamy or imputation of bad character *In re* JIVANLAL VARAJRAY DESAI (1919) **I L R 44 Bom 418**

13 ——— **Suit against Receiver** *without leave of Court —Application for leave after filing of suit—Amendment of title of plaint —Summons—Practice —Costs* A suit was filed by the plaintiff against the defendants who were the Receivers of an estate appointed by the High Court in a certain suit The defendants were not described in the title to the plaint as Receivers of the estate nor was the leave of the Court first obtained before the filing of the suit The plaintiff subsequently applied for leave to continue the suit against the defendants as Receivers and to amend the title of the plaint and the proceedings accordingly *Held* allowing the plaintiff's application that the defect could be cured by leave subsequently granted if there was no bar to the institution of the suit that is to the jurisdiction of the Court to admit the plaint *Rustomjee Dhanjibhai Sethna v Frederic Gaebele (1918) 46 Calc 552* followed. *Chandulal v Auad bin Umar Sultan (1896) 21 Bom 351* and *Narayan Shankar v Secretary of State (1906) 30 Bom 570* referred to *Per* CURIAM —The necessity for leave to sue the Receiver rests upon two considerations (*1*) that such a suit is incompatible with the dignity and authority of the Court (*2*) that it might interfere with the duty of the Court to maintain the Receiver s possession Neither of these considerations affects the jurisdiction of the Court They are matters which the Court can deal with after the suit is filed and the Court could order the suit to be stayed until it was satisfied that there was no encroachment upon its authority nor attempt to interfere with the Receiver s possession. JAMSHEDJI *v* HUSSEINBHAI AHMEDBHAI (1919) **I L R 44 Bom 903**

HIGH COURT POWER OF

See under VARIOUS HIGH COURTS
See CRIMINAL PROCEDURE CODE ss 145 AND 43 **I L R 36 All 233**
s 435 **I L R 25 All 109**

See HIGH COURT
See HIGH COURT JURISDICTION OF
See LAND ACQUISITION **I L R 43 Calc 916**

HIGH COURT RULES AND ORDERS

See under VARIOUS HIGH COURTS
——— **Allahabad, Chap III, r 2 (1908)—**

HIGH COURT RULES AND ORDERS—*contd*

See CIVIL PROCEDURE CODE (1908) s 122 **I L R 40 All 1**
O XLI R 1 and 3 **I L R 43 All 660**

——— **Ch IV rr 5 and 8 (1911)—**

See EXECUTION OF DECREE **I L R 36 All 33**

——— **Ch XXI r 1 (1911)—**

——— *Held* that there was no necessity that an agent for a client should be authorised in any special manner GUDDAR MAL *v* HET RAM **I L R 41 All 246**

See FEE CERTIFICATE **I L R 42 All 542**

——— **Bombay (original) rr 16 (2) and 17—**

See CIVIL PROCEDURE CODE 1908 s 47 XXI R 92 **I L R 44 Bom 551**

——— **r 62—**

See HIGH COURTS ACT (24 AND 25 VICT c 104) ss 2 9 AND 13 **I L R 39 Bom 604**

——— **rr 81 321 and 323**—*Delegation of powers under rr 321 and 323 to the Prothonotary—Power of the Prothonotary to deal with applications to give short service of notice of motion* The plaintiff filed a suit against the defendants claiming *inter alia* the appointment of an *interim* receiver and an *interim* injunction The plaintiff obtained from the Prothonotary leave to give the defendants short notice of a motion in the said suit under rr 321 and 323 of the Bombay High Court Rules The defendants objected that the Prothonotary had no power to shorten the time for notice *Held*, that the Prothonotary had such power MOORJI MANECK *v* JASSU PARBHAT (1911) **I L R 36 Bom 418**

——— **rr 397 399—**

See COMMISSIONER **I L R 41 Bom 719**

——— **r 704—**

See COSTS **I L R 39 Bom 383**

——— **Bombay appellate rr 1 and 5—**

See HIGH COURTS ACT (24 AND 25 VICT c 104) ss 2 9 13 **I L R 39 Bom 604**

——— **r 65—**

See BOMBAY REGULATION II OF 1827, s 52 **I L R 37 Bom 303**

——— **r 517—**
See COSTS **I L R 45 Bom 1234**

——— **r 725—**

See CIVIL PROCEDURE CODE 1908 O XLI R 10 AND s 129 **I L R 37 Bom 572**

——— **Bombay Civil Circular**
——— **51**

See CIVIL PROCEDURE CODE 1908 O XLI R 11 **I L R 37 Bom 610**

HIGH COURT RULES AND ORDERS—*contd*

———— 96 cl (l)—*Decree on mortgage—Mort age executed by father and two sons for family purpo e—S it against the father and his sons—Decree—Execution against father and sons—Pro clamation of sale putting up the right title and intere t of the father and sons for sale—A condition of sale in terms of cl (l)—Grand ons who were not parties to the suit or execution proceedings not bound by the sale* G and two out of his six sons forming an undivided family mortgaged family property to plaintiffs father for family purposes The plaintiffs brought a suit upon the mortgage against G five of his sons and three grandsons by his sixth son who had died. The suit was decreed in plaintiffs favour In execution of the decree the mortgaged property was put up to sale and pur chased by the plaintiffs at the Court sale In the proclamation of sale the right title and intere t of the defendants to the suit was mentioned and one of the conditions of sale was in the terms of clause (l) to High Court Civil Circular 96 The plaintiffs were put in posses ion of the property The defendants Nos. 7 to 14 16 and 17 to 19 the grandsons of G by five of his sons who were not parties to the mortgage suit or to the execution proceedings having obstructed the plaintiffs in their possession to plaintiffs brought the present suit to establish their title again t those defendants. The defendants contended that their right to the property did not pass at the sale to the plaintiffs and they were not bound by the decree to which they were not parties The lower Courts disal lowed the contention on the ground that the de fendants were repre ented in the suit by their fathers and consequently their rights passed at the sale to the plaintiffs On second appeal —*Held* that the defendants interests in the mort gaged property did not pass to the plaintiffs at the Court sales inasmuch as by an express de claration made by the selling Court and accepted by the purchasing plaintiffs those interests were formally and deliberately excluded from the sale TIMMAPPA *v* NARSINHA TIMAYA (1913)
I L R 37 Bom 631

————17—*Civil Procedure Code (Act V of 1908) O XXI rr 89 90—Indian Limitation Act (IX of 1908) Art 166—Decree—Execution proceedings—Execution tran f rred to the Collecto —Sale by Collector—Application to set aside sale to be made to Court—Practice and procedure* Th attention of the District Officers called to Rule 17 of the High Court Civil Circulars at page 106

In every proclamation for sale carried out under the Rules it should be notified that any person wishing to set aside the sale under O XXI of the Code of Civil Procedure hould make his applica tion to the Court and not to the Collector to whom the decree has been sent for execution within thirty days from the date of the sale If in spite of the notification any person makes an applica tion to the Collector to set aside the sal he should be referred to the Court without a mom nt s d lay

SHANTMURTI DEVAPPA *v* NARAYAN RAMCHANDRA
I L R 45 Bom 1132

———— rr 127 to 133 (original side)—
See THIRD PARTY NOTICE
I. L R 45 Bom 24

———— Ch VI para 2—
See CIVIL PROCEDURE CODE (ACT V OF 1908) ss. 115 151
I L R 38 Bom 638

HIGH COURT RULES AND ORDERS—*contd*

———— Ch VIII—
See COSTS I L R 39 Bom 383
See THIRD PARTY NOTICE
I L R 45 Bom 24

———— Calcutta—
See PLEADER I L R 44 Calc 290

———— r 426—A Registrar cannot be directed to enquire under this rule as to whether vendor could make a good title sold by the Commi ioner of partition under order of Court JOGIMAYA DASEE *v* AKHOY COOMAR DAS
I L R 40 Calc 140

———— r 740—
See PROBATE I L R 37 Calc 224

———— Vol I, Ch XI r 45 (e)—
See VAKALATNAMA
I L R 43 Calc 884

———— Ch XIII, r 9—
See LEASE 24 C W N 1007

———— Ch XVII, r 24—
See EXECUTION OF DECREE
I L R 47 Calc 515

———— Ch XXIII r 1—
See ARBITRATION I L R 46 Calc 721

———— ch XXXVI r 69—*If free from the statute of Limitation—Application by attorney for payment order again t client out of money in attorney s han l—Limitation Act (IX of 1908) if applies to such application— Arts 31 and 181—Discretion of Court how to be exercised— Attorney s lien if exercisable when debt barred—Limitation if applies to claim of set off* R 69 Chap 36 of the High Court Rules (Original Side) is technically free from the statute of limitation neither Art 84 nor Art 181 applying thereto It is impossible to hold that becau e the Limitation Act sets a limit only to suits and applications contemplated by the Civil Proce dure Code and has provided none for other applica tions therefore the High Court s power under its charter to make rules to regulate proceedings can never be exercised by providing special forms or opportunities of making applications to the Court The rule thereore is not *ultra vire* Under the rule in question the Court can exercise its discretion in favour of the attorney even in case where a suit if brought cannot succeed owing to the bar of limitation The d cretion of the Court is to be exercised upon the well known lines and in the well established manner or an particular facts of each case On an application under the Rul in question where a real dispute exi ts as to the facts then not only would a suit be safer form of remedy for other reasons but the principle of limitation is it elf a highly de irable safeguard In the case of per onal action for a debt limitation merely bars the Plaintiff from having the particular remedy by way of suit and does not extinguish the debt so that if the attorney has any form of lien upon property in re pect of his bills of costs he can exercise that lien notwi hstanding hat by the terms of the Limitation Act he could not bring a suit A Def ndant may pro ecute a set off if the claim was not barred at the time of the is ue of the plaint but subject to this it is the law in India a well as in England that limitation applies to a s t off RAJ[illegible]NDRA LAL KHAN *v* TARUBALA DA SI [illegible] W N 800

HIGH COURT RULES AND ORDERS—*concld*

——— Ch XXXVI r 32—(Taxation) *Held* that the fact that the matter was not raised by *means of a reference by the Taxin. Officer does not* deprive the Judge of his jurisdiction to deal with the application on its merits SAILENDRA MOHAN DUTT v DHARANI MOHAN ROY
26 C W N 870

——— Ch XXXVIII r 67—
See ATTORNEY AND CLIENT
I L R 46 Calc 249

——— Ch II r 5 (Appellate)—
See SANCTION FOR PROSECUTION
I L R 44 Calc 816

——— Madras
rr 35 36 and 38—
See PRACTICE I L R 43 Mad 282

——— r 101—*Held* that this rule *is only directory and not mandatory and the time* mentioned is not of the essence of the rule VELLI APPA v SUBRAHMANYAM
I L R 39 Mad 485

HIGH COURTS ACT 1861 (24 & 25 VICT CL 104)

See CHARTER ACT
See INDIAN HIGH COURTS ACT

——— ss 1 8 9 and 15—
See CONTEMPT OF COURT
I L R 41 Calc 173

——— ss 2 9 and 13—*Amended Letters Patent clauses 11 and 26—High Court Rules Original Side R 62—High Court Rules Appellate Side rr 1 and 5—Single Judge sitting on the Original Side of the High Court—Power to stay suit pending before a Subordinate Judge's Court in the mofussil* It is not competent to a single Judge of the Bombay High Court exercising the ordinary original civil jurisdiction of the Court to stay the hearing of a suit pending for trial in a Subordinate Judge's Court *in the mofussil unless authorised* so to do by rules. *Per* MACLEOD J—A single Judge sitting on the Original Side of the High Court is competent to restrain the parties in a suit before him from proceeding with a suit in a Sub Judge's Court in the mofussil and so in effect stay the proceedings. NARAYAN VITHAL SAMANT v JANKIBAI (1915) I L R 39 Bom 604

——— s 9—
See CIVIL PROCEDURE CODE (ACT V OF 1908) s 115 I L R 40 Bom 86
See DIVORCE ACT (IV OF 1869) ss 2 4 7 AND 45 I L R 38 Bom 125

——— ss 9 11 13 and 15—
See DEFENCE OF INDIA ACT
3 Pat. L. J 581

——— s. 11—
See HINDU LAW—WILL.
I. L. R. 44 Mad 200

——— s 13—
See APPEAL I L R 41 Calc 323

——— ss 14 15—
See HIGH COURT JURISDICTION OF
I L R 40 Calc 477

——— s 15—
See JURISDICTION I L R 41 Calc 913
S PRACTICE I. L. R. 241 Calc. 632

HIGH COURT ACT 1861 (24 & 25 VICT CL 104)—*concld*

——— s 15—*concld*
See MADRAS CITY MUNICIPAL ACT (III OF 1904) I L R 38 Mad 581

——— s 104—
See DEFENCE OF INDIA ACT s 1
3 Pat L J 537

HIGH SEAS

——— offence committed on—
See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 188
I L R 41 Bom 667
See HIGH COURT JURISDICTION OF
I L R 39 Calc 487

——— *Offence committed by a foreigner on a foreign ship—The ship 18 miles off Karwar coast—Jurisdiction of British Indian Court to try the accused—Admiralty Offences (Colonial Act (12 and 13 Vic c 96)—Statute 23 and 24 Vic c 88 Merchant Shipping Act (57 and 58 Vic c 60) s 686* The accused who was a subject of the State of Junaghad committed an offence on a ship owned by a subject of the Junaghad State when it was on the *high seas some 18 miles off the* coast of the Kanara District A question having arisen whether he could be tried for the offence by the First Class Magistrate of Karwar *Held* that the Magistrate had no jurisdiction to try the accused. EMPEROR v PUNJA GUNI (1917)
I L R 42 Bom 234

HIGHWAY

——— dedication— No formal Act is necessary for the acceptance of a highway dedicated to the public SURAJ MAL KHODRAM v AKSHOY KUMAR ROY 21 C W N 595

——— religious processions—Continued user by the public of a way raises a presumption of dedication All members of the public have a right to carry a religious procession through a public highway in a lawful way MANNADA MUDALI NALLAYA GOUNDON
I L R 32 Mad 527

——— Obstructions as Special damage—The stopping of a highway in such a way as to make it necessary for a person to make a detour is *sufficient special damage as would justify* him in instituting a suit for the removal of the *obstruction* RAM CHANDRA v JOTI PRASAD (1910)
I L R 33 All 286

——— *Suit for declaration—Requisites* of a suit for a declaration of a public right of way discussed HARIHAR DAS v CHANDRA KUMAR GUHA 23 C W N 91

——— *Right to carry procession in—Where user of highway proved presumption will be that the right is unrestricted—Trustee dedication by* Where user as a highway sufficient to raise a presumption of dedication has been proved the dedication will in the absence of evidence to the contrary be presumed if possible to be unrestricted Marching in procession on a highway is not an excessive user of the highway and a right of unrestricted user will include the right of marching in procession on the highway *Sundaramoorthy v Krishnamurthy Rao I L R 39 Mad 155* referred to A presumption of dedication by trustees will not be made when such dedication will contravene the purpose of the

HIGHWAY—*contd*

trust The illegality of such a dedication by the trustees must be clearly proved. VIBUDAPRIYA THIRTHASWAMY v ESOOF SAHIB (1910)

I L R 35 Mad 28

——— *Right of a person or body of persons to go in procession along a high way—Order of Magistrate under Criminal Procedure Code (Act V of 1898) prohibiting a body of persons from going in procession—Right of suit of prohibited persons—Special damage whether should be alleged and proved—Trespass and public nuisance—Declaratory suit—Cause of action—English and Indian law* An order passed by a Magistrate under the Criminal Procedure Code forbidding a person or body of persons from using a highway for the purpose of processions invests the person or persons interdicted with a cause of action, if they allege it to be an infringement of their legal rights though such order be in itself *intra vires* and no special damage be alleged or proved. A person or body of persons who claim a right to go in procession along a public highway can bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage *Per* WALLIS *C J* —If defendants assembled to prevent the plaintiffs from exercising their lawful right to pass along the highway in a particular manner that would not be a case of public nuisance but of trespass or threatened trespass to plaintiffs and in trespass an action lies without proof of special damage VELAN PAKKIRI TARAGAN v SUBBAYAN SAMBAN (1918) I L R 42 Mad 271

——— *Rights of user of general public—Religious procession—Obstruction caused by procession halting at frequent intervals—Suit for declaration of right to obstruct highway* Although the members of religious procession may have a right to use a public highway for purpose of passage just as any other members of the public they have no right to extend such user by halting every few yards for several minutes at a time and blocking up the thoroughfare and no suit will lie to uphold a claim to such a right *Vijiaraghava Chariar v Emperor I L R 26 Mad 554* referred to MUHAMMAD ZAMAN v MANZUR HASAN

I L R 43 All. 692

——— In determining whether a road through private property is a public highway although not expressly dedicated it is important to distinguish between evidence showing an intention to dedicate to the public generally and evidence showing that visitors to tenants whose shops abut on the road have by permission a right of passage MAHOMED RUSTAM ALI v KARNAL CITY MUNICIPAL COMMITTEE

L R 47 I A 25

HINDU COMMON LAW

See HINDU LAW—WIDOW

I L R 36 Bom 383

HINDU CONVERTS

See SUCCESSION L R 43 I A 35

See SUCCESSION ACT 1865 ss 2 AND 331

I L R 43 All. 525

HINDU DEITIES

——— suit for removal of—

See LIMITATION I L R 38 Calc 284

HINDU FAMILY

——— Absconding member of attachment of interest of—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) s 88 I L R 39 Mad 831

HINDU LAW

See ACCUMULATION

I L R 47 Calc 76

See BANKRUPTCY I L R 40 Mad 581

See CUTCHI MEMONS

I L R 41 Bom 181

See KHOJAS I L R 38 Bom 449

See SPECIFIC RELIEF ACT (I OF 1877)

s 15 I L R 37 Mad 387

s 42 I L R 42 Mad 699

——— decree against uncle executed against nephew—

See CIVIL PROCEDURE CODE 1882 s 234

I L R 32 All 404

——— Position of surviving members not heirs of deceased members—

See CIVIL PROCEDURE CODE (1908)

O II r 5 I L R 38 Bom 120

O XXIII r 3

I L R 38 Mad 850

——— rules of when binding on Courts—

See HINDU LAW—MAINTENANCE

I L R 37 Mad 596

——— whether applicable to illegitimate children of Hindu by Mahomedan—

See CUSTOM (MAINTENANCE)

I L R 2 Lah 243

HINDU LAW—ADOPTION—*contd*

8 ———— Implied prohibition in the will—*absolute bequest to daughters—Hereditary Offices Act (Bom. Act III of 1874 amended by Bom Act of 1886)—Amendment of the Act excluding daughters from succeeding to vatan lands—Adoption of a son of the daughter by the widow—Adoption invalid—Will—Construction* A testator by his will dated the 9th March 1885 bequeated his property which for the most part consisted of vatan lands to his two daughters in perpetuity He enjoined his wife not to make over the property to anybody except to my daughters The daughters were authorised only to relinquish their right in favour of each other but not to anybody else In 1886 the Bombay Hereditary Offices Act (III of 1874) was amended by the Bombay Act V of 1886 whereby the female members of a vatan were postponed to male members in the matter of succession The testator s widow there upon adopted defendant No. 1 who was a son of one of the daughters The plaintiffs the rever sioners of the testator filed a suit to obtain a declaration that the adoption of defendant No 1 was invalid alleging that there was in the will an implied prohibition forbidding the widow to adopt. It was contended in defence that the right of the widow to make the adoption was not taken away by anything expressed in the will *Held* that the adoption was invalid inasmuch as it could not be upheld without giving the go by to the testator s expressed wishes In the will not only was there a complete bequest of the whole estate to the daughters but the widow was in terms prohibited from disposing of the property to anyone except the daughters *The Collector of Madura* v *Mootoo Ramalinga Sathupathy 12 Moo I A 397* dis tinguished MALGAUD PARAGAUDA v BABAJI DATTU (1912) I L R 37 Bom 107

9 ———— By widow of the last vatandar—*Death of the adopted son unmarried—Second adoption by the adopted son—Vesting of the property in the male member of the vatandar family—Divesting of estate by adoption—Bombay Hereditary Offices Act (Bom Act V of 1886) s 2—Second adoption not valid* On the death of the last vatandar his widow went into possession of the vatan property She adopted a son who died in 1902 unmarried In 1904 she adopted another boy The plaintiff a reversioner sued in 1909 for a declaration that he was the vatandar and to recover possession of the vatan property *Held* that the widow could not make a second adoption for the property was on the death of her first adopted son vested in the plaintiff a male member of the family and it could not subsequently be divested by any adoption made by her BHIMABAI v TAYAPPA MURARRAO (1913) I L R 37 Bom 598

10 ———— Settlement of immoveable property by adopting widow *in favour of her daughter—Settlement assented to by the natural father of the adopted boy—Attainment of majority by the adopted son—Repudiation of the Settlement—Settlement not enforceable.* A settlement of immoveable property by an adopting widow in favour of her daughter to take effect upon the daughter attaining majority assented to by the natural father of the adopted boy at the time of adoption cannot be enforced by the daughter against the adopted son who repudiated it on majority VYASACHARYA v VENKUBAI (1912) I L R 37 Bom 251

11 ———— Consent of Sapinda, obtained for consideration—*Evidence Act (I of 1872) s 32 sub ss 3 and 5—Admissibility of statement made by deceased person* Where under the Hindu Law the consent of a sapinda is required to validate an adoption by a widow and that consent is ob tained in exchange for a valuable consideration the transaction will vitiate the adoption. *Rami Reddi* v *Rangamma 11 Mad L J 20* followed *Srinivasa Ayyangar* v *Rangasami Ayyangar I L R 30 Mad 450* distinguished. A statement made by a deceased sapinda admitting that he had received sum of money in connection with an adop tion was sought to be proved in order to invalidate the adoption —*Held* that the statement was admissible under s 32 sub s (3) of the Evidence Act it being a statement made against his pecuniary or proprietary interest *Held* also that the state ment was admissible under s 32 sub s 5 as it related to the existence of a relationship and this notwithstanding that the relationship was not in dispute at the time when the statement was made. DANAKOTI AMMAL v BALASUNDARA MUD ALIAR (1913) I L R 36 Mad 19

12 ———— By mother with the assent of a deceased son—*Objection by existing sapinda—Invalidity of adoption* A consent previously obtained from a deceased sa pinda cannot be efficacious to validate an adoption which is not approved of or objected to by the persons who are the *nearest sapindas* at the time the adoption is actually made Strange s Hindu Law Vol I p 80 and Sircar on adoption p 2[illegible] not followed *Per* CURIAM There is a distinc tion between the case of an adoption in an undi vided family and that in a divided family as re gards the persons whose assent is sufficient *The Collector of Madura* v *Mootoo Ramalinga Sathu pathy 12 Moo I A 396 442 Vellanki Venkata Krishan Rao* v *Venkata Rama Lakshmi I L R 1 Mad 174* and *Subrahmanyam* v *Venkamma I L P 26 Mad 627 635* referred to MAMI v SUBBARAYAR (1913) I L R 36 Mad 145

13 ———— Authority to adopt given to two widows—*Construction—Authority whether several or joint—Exercise of power by survivor—Restriction as to class of boys—Powers how to be construed—Power given by a Hindu how to be construed when ambiguous* Where a testator by his will provided Permission will be granted to my two wives to adopt a boy to arrange to offer water and funeral oblations to me the adopted boy will have to be taken from amongst my near representatives but my wives will adopt whomso ever they would select and on the death of one of the widows the surviving widow adopted her brother s son *Held* that the testator intended to confer authority to adopt by the will itself and not by a separate instrument That the authority to adopt was conferred on the widows severally and not jointly and the surviving widow could lawfully exercise the power of adoption conferred by the Will In construing a document of this de scription the Court would consider that the person giving the authority intended his widows to do that which the law allowed and not to do some thing which was if not absolutely illegal very unusual and not practised amongst Hindus *Quære* Whether when an authority to adopt is in fact conferred on two widows jointly adoption by the survivor of them alone is valid. *Venkata* v

HINDU LAW—ADOPTION—*contd*

Pangaya I L R 29 Mad 437 444 doubted. That the expression from amongst my near representatives being strictly speaking meaningless no restriction as to the class of boys within which the choice was to be made was to be read into it That it was not intended that the selection was to be made by the widows concurrently Where the general intention of a Hindu to be represented by an adopted son is clear effect should be given to such intention if it is possible to do so without contravening the law and the Court will not be astute to defeat the intention of the testator *Surja Narayan v Venkata Ramana I L R 26 Mad 681* All powers are to be liberally construed in equity in furtherance of the purpose for which they were created. SARADA PROSAD PAL v RAMA PATI PAL (1912) 17 C W N 319

14. ———— By widow of pre deceased son—*Contemporaneous consent of her mother in law in whom estate vested as heir* Under Hindu Law the widow of a predeceased son can make a valid adoption with the contemporaneous consent of her mother in law in whom the estate of the last full owner is vested as an heir *Payapa v Appanna I L R 23 Bom. 327* followed. SIDAPPA v NINGANGAVDA (1914) I L R 38 Bom 724

15 ———— Orphan adoption—*Estoppel—Presumption in favour of adoption when arises—Practice—Conversion of suit in ejectment into one for partition* Only the parents of a child can give him in adoption and therefore an orphan cannot be validly given in adoption either by himself or by any one else *Subbaluammal v Ammakutti Ammal 2 Mad H C 129 Balvantrav Bhaskar v Bayabhai et al 6 Bom H C 83* and *Bashettappa v Shivlingappa 10 Bom H C 268* applied An invalid adoption does not *per se* destroy the adoptee's rights in the natural family *Bhavani Shankara Pandit v Ambabay Ammal 1 Mad H C 363* and *Lakshmappa v Ramava 12 Bom H C 364 397* followed No estoppel arises in such a case unless in consequence of the adoption the position of the party setting up the estoppel is changed to his disadvantage so as to render it inequitable that the adoptee should be restored to his place in his natural family *Gopalayyan v Raghupatiayyan 7 Mad H C 250* and *Parvati Bayamma v Ramakrishna Row I L R 18 Mad 145* followed. No presumption in favour of an adoption arises in the absence of evidence of the giving or acceptance or of circumstances by which such a presumption can be supported though the adoption may have taken place long before and been acquiesced in by all concerned *Anandrav Shivaji et al v Ganesh E Bokil 7 Bom. H C R App xxxiii at p xxxiv* distinguished A suit in ejectment cannot be converted into a suit for partition. VAITHILINGAM v NATESA (1914) I L R 37 Mad 529

16 ———— Half brother—*Mitakshara* The adoption of a half brother is not invalid under Hindu Law GAJANAN BALKRISHNA v KASHINATH NARAYAN (1915) I L R 39 Bom 410

17 ———— Non performance of ceremony of datta homam—*Will giving power to widow to adopt with consent of trustees where one declines to act—Omission to follow provisions of s 145 of Evidence Act as to using documents to contradict witnesses—Inferences drawn from documents so used and basing decision on them to prejudice of witnesses—General allegations of undue influence and fraud without specific issues or pleas* On this appeal their Lordships of the Judicial Committee in a suit to establish the validity of an adoption *Held* (reversing the decision of the High Court) that on the evidence and under the circumstances of the case the adoption was valid Where the boy to be adopted is of the same *gotra* as the adoptive father the performance of the ceremony of *datta homam* is not essential to the validity of the adoption among Maratha Brahmins in Bombay *Valubai v Govind Kashinath I L R 24 Bom. 218* approved as being based not on the particular degree of relationship but upon the broad ground of the identity of *gotra* A Hindu testator by his will appointed five trustees of his property and gave power to his widow to adopt a son with their consent and advice and one of the trustees declined to act *Held* that the consent of the declining trustee was not necessary and the adoption made with the consent of the other four trustees was valid It is a general salutary and intelligible rule and one substantially embodied in s 145 of the Evidence Act (I of 1872) that if a witness is under cross examination on oath he should be given the opportunity if documents are to be used against him to tender his explanation and clear up the particular point of ambiguity or dispute and the duty of enforcing such a rule is clear especially where a witness's reputation or character is at stake In this case where the general principle of this rule and the specific provisions of s 145 had not been followed but documents had been used for the purpose of contradicting witnesses without calling their attention to the portions of the documents so used their Lordships were of opinion that the decision of the High Court on the evidence amounted to an inferential verdict of perjury against the witnesses which was not justified *Semble* Where coercion undue influence fraud and misrepresentation are set up as rendering a transaction invalid each one should be specifically pleaded and a definite issue upon it settled In attacking an adoption an issue whether the plaintiff is a validly adopted son is not one on which any of the above grounds should be permitted to be raised by general allegations *Wallingford v Mutual Society L R 5 App Cas 685* per Lord Selborne and *Gunga Narain Gupta v Tiluckram Choudhry I L R 15 Calc 533 L R 15 I A 119* referred to as to the defence of fraud BAL GANGADAR TILAK v SHRINIVAS PANDIT (1915) I L R 39 Bom 441

18 ———— Effect of invalid adoption—*Invalidly adopted son not entitled to maintenance—Declaration in writing that the declarant will give certain lands as maintenance—Formal agreement not executed—Grantor cannot be sued on the declaration—Incomplete contract* Under Hindu Law a boy whose adoption has been found to be invalid has no right to be maintained out of the estate of the adopted family The plaintiff claiming to be the adopted son of the late Thakor of Mehelol applied to obtain certain lands from the estate by way of maintenance to the Collector who was in charge of the estate The Collector persuaded the present Thakur (defendant) to settle the matter Accordingly the defendant made a declaration in writing that he would give the Kankapur wanta by way of mai[illegible] to the plaintiff and [illegible]

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direct lineal heirs The defendant did not execute any formal deed to convey the lands The plaintiff sued to recover the Kankanpur *wanta* from the defendant on the strength of the declaration — *Held* that the defendant was not bound by the declaration which marked only a stage in the negotiations which unless completed could be broken off at any time by either side DALPATSINGHJI *v* RAISINGJI (1915)

I L R 39 Bom 528

19 ———— Authority to adopt construction of—*Extrinsic evidence admissibility of—Successive adoptions—Limits for the exercise of the power to adopt—First adopted son death of—His widow alive—Second adoption by widow of previous owner validity of—Impartible zamindari how far joint family property—Vesting of property in a co parcener meaning of —Divesting of property by adoption—Rule as to adoption to last male holder—Applicability of rule to ordinary co parcenary and to impartible zamindari* A the holder of an impartible zamindari died in 1869 without issue leaving a widow K Prior to his death he executed a document authorising her to adopt a son to him On his death his brother R succeeded to the estate Subsequently in 1870 K adopted B who recovered the zamindari from R by suit and died in 1906 without issue leaving a widow R M On the death of B the son of R succeeded to the zamindari but died fifteen days after his accession the first and second defendants were his sons. In 1907 K purporting to act under the power given by her husband adopted the plaintiff as a son to her husband while R M the widow of B was alive The plaintiff sued to recover the zamindari from the defendants The latter pleaded that the power to adopt given to K by A (her husband) did not authorise her to make a second adoption that the existence of R M was a bar to the exercise of the power even if it was not exhausted by the first adoption and that the adoption not having been made to the last male holder was invalid *Held* that the power to adopt given by A to K was wide enough to enable her to make a second adoption but that the power was not exercisable by reason of the fact that R M (B s widow) was alive when the second adoption was made by K *Per* WHITE C J — The rule that an adoption should be made to the last male owner is applicable to a joint Hindu family living under the Mitakshara law *Sivagnanam Servaigar* v *Ramasawmy Chettiar* 22 *Mad L J* 85 referred to *Per* SESHAGIRI AYYAR, J — The canon of construction regarding powers to adopt is not different from that of ordinary testamentary dispositions the intention of the testator has to be gathered from the language employed by him and from the circumstances existing at the time of the grant of the power The authority given by a Hindu to his wife should be regarded as being general in its nature unless conditions have been imposed or limitations placed upon it by him Where the exercise of a power to make a second adoption will not result in creating a new line of succession but will only transfer the estate from one intermediate owner to another until the prospect of the latter being eventually divested the limit of the power to adopt should be held to have been reached An estate taken by [illegible] ship by a member of a joint Hindu family [illegible] a [illegible] conditional estate subject to defeasance on the coming into existence by adoption or otherwise of a new member into the co parcenary the rule of law that in order that an estate once vested may be divested the adoption should be made to the last male holder is not applicable to co parcenary property and an impartible zamindari is joint family property subject to an exception. MADANA MOHANA *v* PURUSHOTHAMA (1914) I L R 38 Mad 1105

20 ———— By widow of brother's son—*Acting with her deceased husband s authority—Authority to adopt a particular boy whom her husband could and would have adopted had he lived—Rejection of the extension by Nanda Pandit in Dattaka Mimansa to adoption by females of rule of Hindu Law against adoption of son whose mother the adopter could not have legally married* The adoption by a Hindu widow acting in accordance with authority given her by her deceased husband is an adoption not to herself but to her husband and is therefore not according to Hindu Law invalid by reason of the adopted boy being her brother s son *Jai Singh Pal Singh* v *Bijai Pal Singh* I L R 27 All 417 *Sriramulu* v *Rammayya* I L R 3 Mad 15 and *Bai Nani* v *Chunilal* I L R 22 Bom 973 approved of The gloss of Nanda Pandit in the Dattaka Mimansa purporting to extend to adoption by females the rule of Hindu Law that no one can be adopted as a son whose mother the adopter could not have legally married rejected as being an extension not based upon the authority of the Smritis or institutes of sages and not being shown to have been accepted as the law of India so far as adoptions by widows to their deceased husbands are concerned In the present case the authority of the husband to the widow was a specific authority to her to adopt a particular boy whom she did adopt and whom he could and presumably would have adopted had he lived JUTTU LAL *v* PARBATI KUNWAR (1915)

I L R 37 All 359

21 ———— By junior widow—*without consulting senior widow but with sapindas consent invalidity of—Preferential right of senior widow to adopt* An adoption made by a junior widow of a deceased Hindu purporting to be made with the consent of the sapindas but without consulting the senior widow is invalid *Kakerla Chukkamma* v *Kakerla Punnamma* 28 *Mad L J* 72 followed *Yellanki Venkata Krishna Rao* v *Venkatarama Lakshmi* I L R 1 *Mad* 174 referred to *Per* WALLIS C J —In the absence of an express authority by the husband to any one of the widows the senior widow has the preferential right to adopt with the consent of the sapindas The senior widow is one of the kinsmen whom it is the duty of the junior widow to consult within the meaning of the rule enunciated in *The Ramnad Case* 12 *Moo I A* 397 RAJAH VENKATAPPA NAYANIM BAHADUR *v* RENGA RAO (1915)

I. L R 39 Mad. 772

22 ———— Consent of sapindas—*Refusal of consent by nearest sapinda on personal grounds improper—Consent of remoter sapindas—Adoption validity of* Where the nearest sapinda refused to give his consent to an adoption by a widow on the ground that he would forfeit the right to property which he would otherwise get and the widow made the adoption with the consent of remoter

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sapindas *Held* that the refusal of the nearest sapinda was based on improper grounds and that the adoption with the consent of the remoter sapinda was valid VENKATARAMA RAJU v PAPAMMA (1914) I L R 39 Mad. 77

23 ———— Divesting of estate on—*Property of the natural father vested exclusively in the son before adoption — After adoption the property remains in the natural family* Under Hindu Law when a boy is given in adoption he loses all the rights he may have acquired to the property of his natural father including the right to property which has become exclusively vested in him before the date of his adoption *Rajah Venkata Narasimha Appa Row v Sri Rajah Panagyya Appa Row I L R 29 Mad 437* dissented from DATTATRAYA SAKHARAM v GOVIND SAMBHAJI (1916) I L R 40 Bom 429

24. ———— Simultaneous execution of adoption deed as well as will—*Construction of documents—Adopted son's consent binding effect of—Disposition good as a family arrangement* One B died leaving him surviving his widow L and a predeceased son's daughter K (plaintiff) B before his death recommended L to adopt A his brother's son. L made the adoption by a deed dated the 10th June 1895 and simultaneously executed a will in favour of K On the strength of this will K claimed the properties in suit The Subordinate Judge decreed K's suit holding that the will being made with the full consent and concurrence of A who was then major must take effect On appeal the decree was reversed. On appeal to the High Court *Held* (i) that the adoption deed and the will must be read together and that so read they constituted a single family arrangement (ii) that the adopted son who was of full age having deliberately accepted the family arrangement and its advantages must be held to it *Visalakshi Ammal v Sivaramien I L R 27 Mad 577* referred to (iii) that the disposition in favour of plaintiff was good not because it was a bequest made by L but because it was a part of the single family arrangement which all parties accepted KASHIBAI v TATYA (1916) I L R 40 Bom 668

25 ———— By Brahmin—*Dattahoma ceremony not performed—Adoption if valid—Adopter and adoptee of same gotra* *Held* on a review of authorities that the *dattahoma* ceremony is not essential when the adopted boy is of the same *gotra* as the adopter even amongst the twice born classes RETKI v LAK PATI PUJARI (1914) 20 C W N 19

26 ———— Authority to adopt verbally given before death—*Proof —Relevancy of will which contained no directions for adoption made two months before death in estimating probabilities—Probable change of intentions—Witnesses testimony of opinion of Trial Judge value of discrepancy in witnesses statements consideration of —Non-citation by either side of witness who went over from one side to the other—Case raised in first Court not urged in appeal if should be allowed to be raised on further appeal* R a Hindu mahajan of means died on 11th February 1896 leaving him surviving a widow and a daughter He had been suffering from pthisis for some time Two months before his death he executed a will by which he made a very modest provision for his daughter and gave his wife a life interest in the bulk of his properties (which however she was liable to forfeit if she behaved contrary to the injunctions of the will) The testator had been hopeful that a son might be born to him and the son if born was under the will to be the sole executor donee and owner The will contained no power to adopt a son. Seven years after the death of R his widow adopted an infant son of R's nephew J born after R's death. By his will R had expressly excluded J on account of his profligacy and irreligion from participation in his funeral ceremonies preferring for that purpose his sister's son B in whom he had confidence and who lived in the same house with him and whom he appointed one of his executors The authority for the adoption was alleged to have been given by P shortly before his death (when he appeared to have become aware of the serious nature of his illness) verbally to his wife in the presence of several respectable witnesses most of whom deposed that R had expressly directed a son of J (should one be born) to be taken in adoption The Trial Judge had held the alleged authority to adopt to have been proved But the High Court on appeal reversed that finding relying chiefly upon the contrary inferences regarding probabilities arising from the language of the will and discrepancies in the depositions of the several witnesses who spoke to P's giving authority to adopt *Held* by the Judicial Committee that the probabilities were not adverse to the view that the testator might have modified his original intentions as expressed in his will which was executed before he came to realise how short his life was and the balance of testimony being distinctly in favour of the story that the authority to adopt had been given not only had the Trial Court not aproached the case with *bias* but had taken a fairer and less one sided view of the facts than that which prevailed in the High Court. That the view of the Judge who tried the case and saw nearly all the witnesses on a question of evidence such as this was obviously entitled to great weight. That such discrepancies as these were might well be accounted for by the fact that the conversation which the witnesses described had taken place some 13 years previously At the trial the widow of P who first came forward to support the adoption appeared later on to have gone over to the opposite camp of B who was opposing the adoption *Held* that the omission by both parties to cite her as a witness was in the circumstances justifiable The question whether assuming authority to adopt to have been given, the adoption of J's son would make him a son of the testator capable of taking under the terms of the will was raised in the Trial Court and decided in favour of the adopted son and it was not raised in the Appeal Court. The Judicial Committee in the circumstances did not allow the question to be raised before them. ADWAITYA PRASAD v BALDEO DASS (1916) 20 C W N 650

27 ———— Kayasthas in Bengal—*Adoption amongst Kayasthas religious ceremonies if essential—Religious ceremonies postponed after actual giving and taking—Adoption during pollution through birth of agnate—Validity—Afterborn natural son of Sudra and adopted son shares of if equal—Agreement by adoptive father to give equal share if*

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valid—Properties held by adoptive father as shebait & adopted son if may claim to hold as shebait jointly with afterborn son—Pitrikrityas and Debakrityas—Proof that property has been endowed as debutter—Dattaka Chandrika authority of Kayasthas according to the law prevalent in Bengal, are considered as Sudras. No religious ceremony is necessary for an adoption amongst Kayasthas mere giving and taking of a son being sufficient to give it validity The *putrestai jag* and *namkaran* not being essential ceremonies in an adoption between Sudras the fact that they took place subsequently to the giving and taking did not affect the validity of the adoption Pollution on account of the birth of a relative does not vitiate an adoption It is only a bar to religious acts and renders religious ceremonies inefficacious but gift and acceptance of a son are secular acts. *Santappayya v Rangappayya I L R 18 Mad 397 396* followed. Such pollution results from the knowledge of the fact of birth. In laying down the rule that the adopted son of a Sudra shares the inheritance equally with the afterborn natural son the Dattaka Chandrika has in no way deviated from the *Smritis* and the rule which has been accepted as correct by both the Madras and Calcutta High Courts should not be departed from An *ekrar patra* of the adoptive father covenanting that an afterborn natural son of his shall not be entitled to claim a larger share but will divide the inheritance equally with the son he was adopting is *valid and operative Surendra Keshab Roy v Doorga Soondary Dassee I L R 19 Calc 513 536* and *Khala Kahana v Prabhu Hari I L R 2 Bom 67* referred to It is now settled law that as regards inheritance the adopted son holds in all respects the same position as an *aurasa* son except in some special matters. An *aurasa* son has a superior right in respect of *pitri matri krityas* but there is no such preference in respect of *shebas or deva krityas Held* therefore that an adopted son of a Sudra was entitled to inherit *debutter* properties in the right of *shebaitship* jointly with an afterborn natural son. ASITA MOHON GHOSH MOULIK v NIRODE MOHON GHOSH MOULIK (1916) 20 C W N 901

28 ———————— Evidence of—*Absence of any deed or written record of adoption—No entries of expenditure on ceremonies in account books—Adopted child's name not changed and child left with its natural parents* In this appeal which arose out of a suit by the natural father of the appellant to have his adoption declared valid, their Lordships of the Judicial Committee (affirming the decision of the Court of the Judicial Commissioner of the Central Provinces) *held* on the evidence that the alleged adoption was never made It appeared that though the suit might well have been brought in the life time of the alleged adoptive father who consistently denied that the adoption ever took place it was not commenced until some months after his death. There was no deed of adoption or any other formal record of the event *Sootrugun Sutputty v Sabitra Dye 2 Knapp P C 287* referred to. There was no reference to any expenditure on the ceremony in the account books of either the natural or the adoptive father *Lal Kunwar v Chiranji Lal I L R 3 All. 101 L R 37 I A 1* referred to No feast was proved to have taken place on the occasion of the alleged adoption the ceremonies said to have been performed were of the briefest possible description no notification was made to the authorities the child's name was not changed and he was never taken to live with his adoptive parents, or recognised by them in any way and all the surrounding circumstances and conditions not only did not support the adoption but made it highly improbable that the ceremony of adoption was ever performed in regard to the appellant DIWAKAR RAO v CHANDANLAL RAO (1916) I L R 44 Calc 201

29 ———————— Dvyamushyayana adoption—*Presumption* In every case of *a nitya dvyamushyayana* form of adoption there must be an agreement to that effect such an agreement must be proved by the person setting up the *dvyamushyayana* adoption like any other question of fact as much in the case of the adoption of an only son of a brother as in any other case of such an adoption *See* LAXMIPATIRAO v VENKATESH (1916) I L R 41 Bom 315

30 ———————— Adoption by a minor widow—*Want of independent disinterested advice—Validity of adoption—Ratification by widow after attaining majority effect of* A widow authorized by her husband to adopt a boy *if* and *when* she chose adopted her own brother when she was eleven years of age on the interested advice of her father *Held* that the adoption made by the widow while a minor and without independent advice was void *ab initio* and could not be therefore validated by subsequent ratification. *Sri Rajah Venkata Narasimha Appa Row v Sri Rajah Rangayya Appa Row I L R 29 Mad 437* dissented from SATTIRAJU v VENKATASWAMI (1917) I L R 40 Mad 925

31 ———————— By one adjudged a lunatic—*valid only if of sound mind at the time—Presumption of continuity of unsound mind—Onus of proving the contrary* The effect of an adjudication under the Lunacy Act (XXXV of 1858) that a person is a lunatic is to raise a presumption that he continued to be of unsound mind until the contrary is shown. *Van Grutteen v Foxwell [1897] A C 658* and *Snook v Watts 11 Beavan 105* followed. Though the effect of an order under the Act appointing a manager for the properties of a lunatic is not to incapacitate him from making an adoption till the order is set aside still unless it is proved that the lunatic was of sound mind at the time he is alleged to have made the adoption the adoption is invalid. *Semble* Adoption is not an act which amounts to an alienation of property It affects status and it has, in the opinion of Hindus religious efficacy and it would not be right for a Court to hold that a Hindu is deprived by any statute, of the power of making an adoption unless there are clear unambiguous words to that effect. SESHAMMA v PADMANABHA RAO (1916) I L R 40 Mad 660

32 ———————— Of an orphan by a widow in 1882—*Possession of estate by adopted son—Death of adopted son in 1884—Adoption by his widow—Possession of latter adopted son till 1876—Dispossession by former widow in 1876—Death of adopted son in 1881—Suit by latter's widow against former widow for possession—Decree—Death of former widow in 190 —Suit by reversioners of the original owner in 1905—Suit for possession against widow*

and alienees from both widows of barrel—Title of reversioners if extinguished—Limitation Act IX of 1871 Art 129 and s 29—Later Limitation Acts (XV of 1877 and IX of 1908) effect of—Res judicata—Sudra ascetic or Tambiran—Entry into order of—Right of inheritance if forfeited—Texts as to Yati applicability of to Sudras—Usage—Civil Procedure Code (Act V of 1908) O XLI r 4—Decree on appeal A a Hindu died in 1849 without issue, leaving a widow C She adopted B an orphan as a son to her husband in 1862 and put him in possession of her husband s properties other than those alienated by her prior to adoption. B died issueless in 1864 leaving a widow M who adopted T The latter was in possession of the properties till 1876 when he was dispossessed by C T died issueless in 1881 leaving a widow who also died in 1882 M who succeeded to the estate as T's heiress, sued C in 1887 and recovered possession of the estate from her C died in 1902 In 1905 the plaintiffs, claiming to be the reversioners of A on C's death sued to recover the estate of A from the defendant Some of the defendants were alienees from M who was the fourth defendant some others were alienees from C while the first defendant claimed a fourth share in the estate as the widow of one A who was a co reversioner along with the plaintiffs but had become a *Tambiran* before C died in 1902 The defendants other than the first contended *inter alia* that the suit was barred by limitation and by the rule of *res judicata* *Held* (i) that a suit by the reversioners of A for recovery of possession of such of A s properties as were in the possession of the heirs of the adopted son had become barred in 1874 under art 129 of the Limitation Act (IX of 1871) and that a title to such property was acquired by the heirs of the adopted son under s. 29 of the same Act and could not be affected by the provisions of the later Limitation Act XV of 1877 or Act IX of 1908 (ii) that although the plaintiffs who were the actual reversioners of A in 1902 were not in existence when the twelve years limited by art. 129 expired their title as reversioners was barred (iii) that consequently the present suit as against the fourth defendant (the widow of the adopted son) and her alienees was barred by limitation (iv) but that in respect of the properties alienated by the widow of A the present suit for recovery of possession from her alienees was not barred by limitation *Jagadamba Chowdhrani v Dakhina Mohun Roy Chaodhri I L R 13 Calc 308* and *Mohesh Narain Munshi v Taruck Nath Moitra I L R 20 Calc 487* followed *Tirubhuwan Bahadur Singh v Rameshar Baksh Singh I L R 28 All 727* explained and applied *Held* also that the present suit was not barred by the rule of *res judicata* by the decision in the previous suit instituted by M against C *Hari Nath Chatterjee* suit instituted by M against C *Hari Nath Chatterjee v Mothur Mohun Goswami I L R 21 Calc 8* distinguished. The texts of Hindu Law as to disinheritance applicable to *Yatis* or *Sanyasis* do not apply to Sudra ascetics unless a usage to this effect is established *Dharmapuram pandara Sannadhi v Vira Pandiyan Pillai I L R 22 Mad 302* and *Harish Chandra Roy v Atir Mahmud I L R 40 Calc 545* referred to *Held* (on the evidence) that no usage was established in this case consequently that the first defendants husband was not excluded from inheriting as a co-reversioner with the plaintiffs by reason of his having entered the order of *Tambirans* before the succession opened in 1902 and that the first defendant was entitled to recover one fourth share in the estate in right of her husband : *Held* further that where an appeal was preferred by some only of the alienees who were defendants but no appeal was preferred by the other alienees or the alienor who were also defendants a decree can be passed in the appeal dismissing the suit in favour of the latter defendants also *Kulaikada Pillai v Viswanatha Pillai I L R 28 Mad 229* and *Subbarayalu Naidu v Pappammal* Second Appeal No 537 of 1914 followed Where some of the appellants who were defendants died and their legal representatives were not brought on the record in the appeal *Held* that it was competent to the Court under O XLI r 4 to set aside the decree as regards the whole of the plaintiff's claim and not merely in respect of the interest of those appellants only whose appeals had not abated *Chintaman v Gangabai I L R 27 Bom 284* followed *Dhuttaloor Subbaya v Paidigantam Subbayya I L R 30 Mad 470* referred to SOMASUNDARAM CHETTIAR v VAITHILINGA MUDALIAR (1916) I L R 40 Mad 846

33 ———— Adopted person having a son in conception—*Such son passes into the adoptive family* At the time when a person was adopted he had no son born but had a son who was conceived A question having arisen whether such a son passed on adoption into the adoptive family *Held* that for all purposes of succession and inheritance the legal entity of the after born son must be taken to date from the date of his birth and that therefore the after born son passed into the adoptive family ADVI *bin* FAKIRAPPA v FAKIRAPPA ADIVEPPA (1918) I L R 42 Bom 517

34 ———— By widow of son to deceased husband—*Subsequent suit by her to set aside adoption on ground that she had no authority—Estoppel dismissal of suit on ground of —Decision by Privy Council that she had authority and that adoption was valid—Decree properly made against widow representing estate binding effect of on reversioner—Res judicata—Civil Procedure Code (1908) s 11* After adopting a son to her deceased husband a Hindu widow in a suit by an alleged reversioner against her to set aside the adoption on the ground that she had no authority from her husband to make the adoption alleged in her written statement and stated in Court through her pleader that she had authority to make the adoption and that it was valid. The suit was dismissed because the plaintiff was found not to be a reversioner The widow then brought a suit against the adopted son to set the adoption aside pleading that she was not vested with authority from her husband to adopt and denied having made the adoption. The adopted son contested the suit and it was decided by the Courts in India on the ground that the widow was estopped from maintaining it On appeal, however the Privy Council raised an issue as to her authority to adopt, and held on the evidence on that issue that the adoption was valid. In a suit by an alleged reversioner to the estate of her husband against the adopted son for a declaration that the adoption was invalid and for possession of the estate. *Held* that notwithstanding the personal estoppel which bound

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her the widow represented the estate on the question of fact as to whether the defendant (respondent) had or had not been validly adopted and that she represented it within the meaning of the rule laid down in *Katama Natchiar* v *The Raja of Shivagunga 9 Moo I A 539* and under the circumstances the decree against her would bind the reversioners Though the rule of *res judicata* as enacted in s 11 of the Code of Civil Procedure 1908 was not s rictly applicable as the appellants (plaintiffs) were not parties to the widow s suit against the adopted son and did not claim through a party to that suit yet the principle of *res judicata* had been rightly applied by Courts in India so as to bind reversioners by decisions in litigation fairly and honestly given for or against Hindu females representing estates In the absence of all authority their Lordships could not decide that a Hindu lady otherwise qualified to represent an estate in litigation ceases to be so qualified merely owing to personal disability or disadvantage as a litigant although the merits of the case were tried and the trial was fair and honest RISAL SINGH v BALWANT SING (1918)
I L R 40 All 593

35 ——— **Consent of nearest sapindas not sought**—*Consent of remote sapindas whether sufficient—Knowledge that sapinda will refuse whether a good ground for not asking for his consent* In the Dravida country an adoption by a Hindu widow having no authority from her deceased husband to adopt made with the consent of remote sapindas but without asking for the consent of the nearest sapindas is invalid. It is immaterial that the widow knew that the nearest sapindas if asked for their consent would have refused it *Collector of Madura* v *Mootoo Ramalinga Sathupathy 12 Moo I A 397 400 440* *Venkata Krishna Rao* v *Venkata Rama Lakshmi I L R 1 Mad 174 190 L R 4 I A 1 13 14* and *Raghunada Deo* v *Bro o Kishore Patta Deo I L R 1 Mad 69* s c *L R 3 I A 154* discussed and followed *Quære* Whether the widow of a co parcener who died in or before 1853 could adopt a son in *1896 after the joint family* property had vested in the widow of his brother s son? VEERABASAVARAJU v BALASURYA PRASADA RAO (1918) **I L R 41 Mad. 998**

36 ——— **Consent of Sapindas revok d**—*Arbitrary revocation whether competent—Delay in adoption or death of Sapinda effect of—Divesting of estate* A Sapinda who has given his consent to a widow to make an adoption to her husband cannot *arbitrarily* withdraw his consent before it is acted upon by the widow The party giving his consent can deliberately revoke it for justifiable reason but where no reasons are given by him Courts will not find out a justification for the revocation Mere lapse of time without more or the death of the consenting *Sapinda* will not put an end to a consent freely and *bond fide* granted. The assent of the Sapinda is presumptive evidence of the goodne s of the act of adoption by the widow Analogy of the rules as to consent of the nearest reversioner to an *alienation* by a widow applied. *S i Virada Pratapa Raghunada Deo* v *Sri Bro o Kishore Patta Deo I L R 1 Mad 69* *Vinayappa* v *Dasawa I L R 29 Bom 400* *Narasimha* v *Parthasarathy I L R 37 Mad 199* referred to *Mami* v *Subarayar I L R 36 Mad 145* and *Subrahmanyam* v *Venkamma I L R*

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26 Mad 635 explained Where a widow having succeeded as heir to her adopted son who died unmarried adopted with the consent of the nearest Sapinda another son to her late husband the latter would divest the estate vested in the adoptive mother whether the estate was the ancestral or the self acquired property of the first adopted son *Vallanki Vendata Krishna Rao* v *Venkata Rama Lakshmi I L R 1 Mad 174* and *Mussumat Bhoobum Moyee Debia* v *Ram Kishore Achari Chowdry 10 Moo I A 209* referred to SURYANARAYANA v RAMADOSS (1917)
I L R 41 Mad 604

37 ——— **Dvyamushyayana—Presumption** Under Hindu law in the absence of any express agreement to the effect that the adoption was to be in the *Dvyamushyayana* form *it must be presumed to be an ordinary adoption* *Laxmipatirao* v *Venkatesh I L R 41 Bom 315* followed. HUCHRAO TIMMAJI v BHIMARAO GURURAO (1917) **I L R 42 Bom 277**

38 ——— **Successive adoptions**—*Limit for exercise of power to adopt—Death of first adopted son leaving widow but no son—Second adoption by widow of previous owner of impartible zemindari—Family governed by Mitakshara Law—Divesting of property by adoption—Rule that adoption must be made to last male owner* *A* the holder of an impartible zemindari and a member of a joint family governed by Mitakshara Law gave authority to his wife to adopt a son to him On *A* s death his brother *R* took possession of the property The widow subsequently adopted a son *B* who recovered the estate of *R* and held it until 1906 when he died leaving a widow but no son. A descendant of *R* then took possession of the property but died in the same year and was succeeded by his son the respondent In 1907 *A* s widow purported to make a second adoption to *A* under the authority from him by taking in adoption the appellant In a suit brought by him to recover the zemindari *Held* that the law imposed a limit within which a widow can exercise a power of adoption conferred on her and the limit to her power was reached when *B* died after attaining full legal capacity to continue the line of descent either by a natural born son or by the adoption to him of a son by his own widow against whom it had not been established (she not being a party *to the suit*) that she had no power to adopt This conclusion was in no way in conflict with the previous decision of the Board in *Raghunada Deo* v *Bro a Kishore Patta Deo I L R 1 Mad 69* *L R 3 I A 154* It was therefore not necessary to decide whether the authority to adopt empowered *A* s widow to take a second adoption MADAVA MOHANA DEO v PURUSHOTTHAMA DEO (1918) **I L R 41 Mad 855**

39 ——— **Power to widow to adopt either in life-time of son or after his death**—*validity of—Authority to adopt how long can be exercised—Adoption object of* *P* a Hindu died leaving his only son *A* and a widow *M* By a will *P* dedicated his 4 annas share in a certain property to the service of certain duties and directed that the widow *M* should be *shebait* and the son *A* should succeed her in that office His other immoveable properties he divided between *A* and *M* bequeathing 12 annas to *A* and 4 annas

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to *M* for her life He next authorized *M* to adopt three sons in succession whether in the life time of *K* or after his death and provided that on *M*s death, the adopted son if any and failing any adopted son *K* should succeed to her 4 annas share *K* died at the age of about 50 leaving no son but his widow as heir After *K*s death *M* adopted the plaintiff Later on *K*s widow adopted defendant No 1 which was not found to be a valid adoption In a suit for declaring the plaintiff s right to the 12 annas of *P*s property bequeathed to *K* and for setting aside the adoption of defendant No 1 and for other reliefs —*Held* that the authority to *M* to adopt was not vitiated as a whole because she was given power to adopt even in the life time of her son *Held* further that the adoption by *M* was valid as it would confer spiritual benefit on the adoptive father *P* and as it did not involve a divesting of *K*s estate and that *M*s power to adopt could be exercised so long as the adoption did not involve divesting of the heirs estate *Bhoobun Moyee Debia* v *Ram Kishore Acharj Chowdhry* 10 Moo I A 279 3 W R P C 15 *Puddo Kumaree Debee* v *Juggut Kishore Acharjee* I L R 5 Calc 615 *Padmakumari Debi Chowdhrani* v *Court of Wards* I L R 8 Calc 302 L R 8 I A 229 *Thayammal* v *Venkatarama* I L R 1 Mad 205 L R 14 I A 67 *Tarachurn Chatterji* v *Suresh chunder Mukerji* I L R 17 Calc 122 L R 16 I A 166 *Ramkrishna Ramchandra* v *Shamrao Yeshwant* I L R 26 Bom 526 *Amulya Charan Seal* v *Kali Das Sen* I L R 3 Calc 861 *Manik yamala Bose* v *Nanda Kumar Bose* I L R 33 Calc 1306 and *Madana Mohana Panga Bheema Deo* v *Purushottama Panga Bheema Deo* I L R 41 Mad 855 distinguished The object of adoption among Hindus is not merely the due perpetuation of lineage but is also to secure for the adoptive father and his ancestors the spiritual blessings which only an heir male can confer KUMUD BANDHU SAHA v PARESH CHANDRA SAHA (1919) **I L R 46 Calc 749**

40 ———— **Custom of illatom**—*Adoption of son in law—Adoption by person who had a natural son living at the time and was a member of a joint family—Parties to suit Sudras and members of the Kamma caste* In this case in which the parties were Sudras of the Kamma caste and governed by the law of the Mitakshara except where that law had been altered by custom a custom was alleged by which an adoption made by a member of the caste of an *illatom* son in law was valid though the adoptive father had a natural son living at the time and was a member of a joint family with his brothers The appellant contended that no such custom had been proved and that such a custom even if proved would be invalid The Courts below found that the custom had been judicially recognized by the High Court in an unreported case *Hammayya* v *Yellamanda S A No 45 of 1905* in which many instances of *illatom* adoption by persons who had sons living were proved and upheld it on that ground together with the evidence in the case *Held* that having regard to the decision in *Hymmayya* v *Yellamanda S A No 45 of 1905* and to the fact that the Courts below agreed that the adoption was valid in law and had been so treated by the family for many years their decisions should be affirmed and the appeal dismissed KRISTNAMMA v VENKATASUBBAYYA (1919) **I L R 42 Mad. 805**

41 ———— **By two widows**—*Special authority—Widow married first has a preferential right to adopt—Competency of minor to adopt—Age of discretion* According to the recognised law in the Bombay Presidency the senior widow that is the widow married first has a preferential right to adopt She does not require any special authority from her husband or from her husband s Sapindas but the junior widow unless the adoption by her is consented to by the elder widow does require a special authority from her husband A Hindu girl of fifteen years of age who has been married for two years or more living with her husband would be regarded as having attained the age of discretion and competent to adopt a son BASAPPA v SIDRAMAPPA (1918) **I L R 43 Bom 481**

42 ———— **Adopted son treated as having been from his birth in adoptive father s family**—*Adopted son cannot acquire a vested interest in the property of his natural father* Under Hindu law an adopted son is treated as having been from his birth in the family of his adoptive father and therefore he cannot for any purpose be regarded as having existed so as to acquire a vested interest in the property of his natural father The applicant having applied after the date of his adoption to execute a decree which was obtained by his natural father when the applicant was a member of the natural family *Held* that he could not execute the decree as by reason of his adoption he must be treated as non existent for the purpose of the execution of the decree RAMCHANDRA v MANUBAI (1919) **I L R 43 Bom 774**

43 ———— **Of father's first cousin**—The adoption of father s first cousin is not invalid under Hindu law MALLAPPA PARAPPA v GANGAVA (1918) **I L R 43 Bom 209**

44 ———— **Successive adoptions by widow under authority**—*Second adoption on the death of the first adopted son after attaining full legal capacity and leaving a widow if valid—Power conferred by authority not exerciseable by law though no question of divesting arose* The Hindu law no doubt recognises the validity of an authority given to a Hindu widow by her deceased husband to make a second or even a third or fourth adoption on failure of the previous adoption to attain the object for which the power is given viz the perpetuation of the deceased s line to discharge the obligations that rest on a pious Hindu But there is a limit imposed by law to the period within which a widow can exercise a power of adoption conferred on her and when that limit is reached the power is at an end Where the son first adopted under a written authority left to a Hindu widow by her deceased husband died after attaining full legal capacity to continue the line either by the birth of a natural born son or by the adoption to him of a son by his own widow *Held* that apart from the question whether on a construction of the authority the widow had power to make a second adoption or not in the circumstances of the case,

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the power if any, had come to an end, specially when it was not established in the presence of the widow of the first adopted son that she had no power to make a valid adoption to him MADANA MOHANA ANANGA BHEEMA DEO v. PURUSHOTHAMA ANANGA BHEEMA DEO (1918) 23 C W N 177

45 ———— Time within which widow may adopt—*Custom excluding widow from inheriting—Adopted son has all the rights of a natural born son—Retrospective effect of adoption—Grant of part of estate for jivai or maintenance of junior member of family reverting to grantor on failure of grantee s male heirs—Words in deed conveying an absolute estate* Unless there is a time limit imposed in the authority which empowers a Hindu widow to adopt or she is directed to adopt *promptly* she may make the adoption so long as the power is not extinguished or exhausted. Her right to make an adoption is not dependent on her inheriting as a Hindu female owner her husband s estate she can exercise the power even though the property is not vested on her *Sri Virada Pratapa Raghunada Deo* v *Sri Brozo Kishoro Patta Deo, I L R 1 Mad 69 L R 3 I A 154* and *Bachoo* v *Mankorebai I L R 31 Bom 373* referred to The rights of an adopted son, unless curtailed by express texts are in every respect the same as those of a natural born son and an adoption, so far as the continuity of the line of inheritance is concerned has a retrospective effect The respondent the Thakor of Gamph, brought the present suit for possession of a village which, in accordance with a family custom (the parties were Chudasama Girasias a caste of Hindu Rajputs) had been granted for *jivai* or maintenance by one of his ancestors to a junior member of the family to be held and enjoyed so long as the grantee s male line lasted, and then reverted to the Thakor The last owner died without male issue in 1903, but he left a widow who though by custom not permitted to inherit her husbands estate continued in possession of it, and on 12th March 1904 adopted the first appellant as a son to her husband *Held* (reversing the decision of the High Court) that the *jivai* grant did not revert to the Thakor but was inherited by the adopted son Words in a deed executed in 1871 by the reigning Thakor in favour of a relative that you and your vansa varas are maliks, mukhtiyars dhanis of a certain village confer an absolute estate on the donee *Per curiam* It is an explicit principle of the Hindu Law that an adopted son becomes for all purposes the son of his father and that his rights unless curtailed by express texts are in every respect the same as those of a natural born son and a learned authority on Hindu law has explained that the only express text by which the heritable right of an adopted son are "contracted" refers to the case of his sharing the heritage with an after born natural (aurasa) son In every other instance the adopted son and the son of the body stand exactly in same position Again it is to be remembered that the adopted son is the continuator of his adoptive father s line exactly as an aurasa son and that an adoption so far as the continuity of the line is concerned, has a retrospective effect In fact as Messrs. West and Buhler point out in their learned treatise on Hindu law the Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without a male issue until the death

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of the widow renders the continuation of the line by adoption impossible PRATAPSINGH SHIVA SINGH v AGARSINGJI RAJASAJI (1918)

I L R 43 Bom 778

46 ———— Conditional adoption—*Adoptive father directing payment of an annual sum in charity out of his property at the time of making the adoption—Consent of the natural father of the adopted boy—Grant of annuity not valid* A Hindu who was in possession of ancestral property executed when he took the defendant in adoption a *vyavasthapatra* with the consent of the natural father of the defendant, whereby he directed payment of an annual sum for the purpose of lighting lamps in a specified temple A dispute having arisen as to the validity of the grant *Held* that the grant in favour of the temple was invalid as not having been recognized by custom to be appropriate at the time of adoption or binding upon the adopted son in modification of the strict rules of Hindu law BALKRISHNA MOTIRAM v SHRI UTTAR NARAYAN DEV (1918)

I L R. 43 Bom. 542

47 ———— Madras school—*Adoption by widow—Assent of what sapindas necessary when husband of widow had separated—Adoption without reference to nearest sapinda with assent of remoter sapindas if valid* An adoption is more a temporal than a spiritual institution and though there are expressions in the judgment of the Judicial Committee in the *Pamnad Case 12 Moo I A 397* which might imply that the question of reversionary interest forms only a secondary consideration in determining what *sapinda s* assent is primarily requisite for the validity of an adoption by the widow of a Hindu governed by the Dravadian branch of the Mitakshara law there are other passages in that and the subsequent judgment in *Raja Vellanki* v *Venkatarama L R 4 I A 1 14 s c I L R 1 Mad 174* which clearly show that rights to property cannot be left out of consideration in the determination of the question The fact that a Hindu had separated from the joint family does not affect the personal dependence of his widow or give her an independent status to alter by her own authority the succession to the estate which she takes as the widow of her husband She is still dependent for counsel and protection upon the nearest *sapindas* of her husband who are the most closely united to him by ties of blood The authorisation of the father of the deceased (who if still alive continues to be her natural guardian and protector and who has further a direct interest in the protection of the estate) is therefore essentially requisite to the validity of an adoption by her to her husband In the absence of the father the assent of the divided brothers is equally requisite for the validity of the widow s adoption If a majority assent and one refuses, his objection may be discounted But the absence of their consent or in case there is only one of his consent cannot be made good by the authorisation of distant relatives remotely connected whose interest in the well being of the widow or the spiritual welfare of the deceased, or in the protection of the estate is of minute character and whose assent is more likely to be influenced by improper motives

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The reasons which make the assent of divided brothers a requisite condition apply *mutatis mutandis* to the case of the nearest *sapindas* other than brothers, and when there is only one such *sapinda* to that of such a one Where the assent of the nearest *sapinda* was not obtained *Held* that the adoption with the assent of some remoter *sapindas* was invalid and the knowledge that the nearest *sapinda* if applied to would have refused his assent was no reason for not applying for it KANDUKURI VEERA *v* KANDUKURI BALASURYA PRASADA RAO PANTULU (1918) 23 C W N 251

47(a) ———— **Power of adoption contingent on testator not having issue**—*Presumption—Hindu widow surrender by of whole estate if to be made in any form—Admission for a consideration in favour of reversioner that she had no right if surrendered* Where a Hindu by his Will gave his widows power to adopt if no male or female child was born to him and a posthumous female child was born after his death *Held* That an adoption made after the death of the child was invalid as not being authorised by the Will *Held* on a true construction of the Will that the estate was given to the testator's widows successively for life and after the death of the survivor to the daughter so that the daughter became entitled at birth to a reversionary estate under s 106 of the Indian Succession Act On the death in 1872 of one of two Mitakshara brothers leaving a widow the surviving brother applied for a certificate to collect debts due to his estate and was opposed by his widow who alleged partition The Judge found that the brothers were joint and granted the certificate The widow instead of contesting the question of title in a civil suit through her brother and attorney accepted the decision and executed an agreement on 17th May 1874 stipulating in consideration of certain property being allotted to her for maintenance during her life not further to contest the matter and thereupon the brother took possession of the estate and the widow during a period of thirty years thereafter went on receiving the stipulated maintenance *Held* that the agreement having been accepted and acted upon for this length of time was not open to attack on the allegation that it had been executed by the widow's attorney in consideration of a bribe paid to him That though there was no formal surrender by the widow of her estate, and the document as drawn up on its footing was expressed as an admission that the right did not exist in substance there was a complete self effacement by the widow which precluded her from asserting any further claim to the estate. It is settled by long practice and confirmed by a series of decisions that a Hindu widow can renounce the estate in favour of the nearest reversioner and by a voluntary act efface herself from the succession as effectively as if she had then died. This voluntary self effacement is sometimes referred to as a surrender sometimes as a relinquishment or abandonment of her rights and it may be effected by any process having that effect provided that there is a *bond fide* and total renunciation of the widow's right to hold the property MUSAMMAT BHAGWAT KOER *v* DHANUKHDHARI PRASHAD SINGH 24 C W N 274

48. ———— **Construction of will**—*Position of Widow under Bombay School of Hindu Law as to adoption—Widow's power to adopt—Will naming boy on bad terms with widow* According to the Bombay School of Hindu Law the duty of a Hindu widow to obey her husband's command compels her to act upon any mandatory direction that he may give by will as to the way in which her power of adoption should be exercised The will of a Mahratta Brahmin governed by the Bombay School of Hindu Law directed that my wife should as far as possible adopt Shankar the second son of my elder brother If he (the boy) cannot be obtained any other boy should be adopted with the advice of the trustees The will provided that the son adopted should keep the widow treat her with affection and give her maintenance Shankar and the family of which he was a member were on bad terms with the widow who adopted with the advice of the trustees a son of her sister At the time of that adoption Shankar could have been obtained for adoption *Held* that the terms of the will left no discretion to the widow but imposed upon her a mandate which she was bound to obey and that the adoption she made was invalid SITABAI *v* BAPU ANNA PATIL (1920) I L R 47 Calc 1012

49 ———— **Brother's daughter's son**—*adoption of whether valid—Custom—South Kanara—Kshatriyas—Custom whether established* Adoption of a brother's daughter's son is allowed by custom which has been proved to exist among a community of Rajputs of the Kshatriya caste settled in South Kanara SEORATHA SINGA *v* KANAKA SINGA (1920) I L R 43 Mad 867

50 ———— **By widow during life time of a son adopted by her husband**—Under Hindu law a widow cannot adopt to her husband when there is in existence a son adopted by her husband Her right to adopt remains suspended so long as the adoption made by her husband is not set aside BHUJANGOUDA ADGONDA *v* BABU BALA BOKARE (1919) I L R. 44 Bom 627

51 ———— **By widow of twelve years of age**—*Adoption invalid—Age of discretion* A Hindu widow of twelve years of age, who has not reached puberty cannot make a valid adoption MURGEPPA *v* KALAWA (1919)

I L R 44 Bom 327

52 ———— **By widow after husband dying in union with co parceners**—*Widow succeeding as heir to her unmarried son after partition—Power of the widow to adopt—Validity of adoption* One *B* died in union with his brothers leaving a minor son *M* Thereafter there was a partition between *M* and his uncles *M* died unmarried leaving his mother *S* as his heir Subsequently *S* adopted the plaintiff who sued to recover possession of *M*'s share in the hands of the latter's uncles, the defendants The defendants contended that the adoption of the plaintiff was invalid because *B* died in union and thereafter his widow could not adopt without the consent of his co parceners and that her right to adopt came to an end at the separation and could not be revived. *Held* that the adoption of the plaintiff was valid as the widow's power to adopt remained suspended even after separation and could be exercised as there were no longer any co-parceners whose consent was necessary MALLAPPA *v* HANMAPPA (1919) I. L. R. 44 Bom. 297

53 ———— **By widow of a co parcener after death of surviving co-parcener**—*Absence of consent—Authority [illegible] to adopt* One

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P owning a jivai estate died leaving a widow S and his brother s son M S and M jointly mortgaged a part of the jivai estate M died in 1882 leaving two widows and in 1884 S adopted plaintiff s father The plaintiff having sued to redeem the mortgage made by S and M *Held* that the plaintiff could not succeed as his father was not validly adopted by S who as the widow of a deceased co parcener of a joint Hindu family could not in the absence of any specific authority make an adoption subsequent to the death of a co parcener who survived her husband although the property was impartible TEJRANI v SARUP CHAND CHHAGANBHAI (1919)

I L R 44 Bom 483

54 ——— By widow—authority of to adopt—*Adoption called in question after the lapse of many years—Presumption as to widow s authority* The question being whether B had been validly adopted as the son of R by R s widow after his death it was found that for a large number of years B had as a matter of fact been treated and had behaved himself as the adopted son of R and that the adoption had been recognized by persons who would have been interested in denying it On the other hand as the adoption must have taken place at some date between the years 1822 and 1847 there was no direct evidence as to the circumstances under which it took place or as to the authority of the widow to adopt *Held* that in the above circumstances it might be presumed that the widow was properly authorized to adopt PREM DEVI v SHAMBHU NATH

I L R 42 All 382

55 ——— By widow of last male holder —*Adopted son if has title—Custom alleged of exclusion of adopted son—Onus of proof—Power of widow to adopt if subject to any timelimit not imposed by the authority to adopt—Power if dependent on widow succeeding as heiress—Divesting of estate resulting from adoption—Rights of alienee before adoption—Jivai grant defeasible on extinction of male line* When a hereditary grant is made by a Hindu subject to the limitation that it shall enure so long as the grantee s male line lasts the existence of the line must be determined by the rules and provisions of the Hindu law unless there be any custom varying those rules Where a custom is alleged confining the line to the natural born issue alone it must be proved affirmatively and conclusively and not derived from implications *Held* Without deciding whether such a custom even if proved to exist in certain localities would be recognized in the British Indian Courts that the Plaintiff had failed to establish the custom alleged by him *Verabhai Ajubhai* v *Bai Hiraba L R 30 I A 234 s c I L R 27 Bom 492 7 C W N 716 (1903)* referred to It is an explicit principle of the Hindu law that an adopted son becomes for all purposes the son of his father and that his rights unless curtailed by express texts are in every respect the same as those of a natural born son An adopted son is the continuator of his adoptive father s line exactly as an aurasa son and an adoption so far as the continuity of the line is concerned, has a retrospective effect. The right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband s estate and the rule applies to the case of a jivai (maintenance) grant as to any other kind of property *Bamundoss Mookerjea* v *Mussumat Tarini 7 M I A 169 (1858) Bose* v *Bhoobun Moyee 10 M I A 165 (1865) Madana Mohana Deo* v *Purushothama Deo L R 45 I A 156 s c 23 C W N 177 (1918) Raghunadha* v *Brojo Kishor L R 3 I A 154 s c I L R 1 Mad 69 (1876)* and *Bachoo Harkisondas* v *Mankorebai L R 34 I A 107 s c I L R 31 Bom 373 11 C W N 769 (1907)* referred to PRATAP SING SHIVSING v THAKOR SHRI AGARSINGHJI RAISINGHJI 24 C W N 57

56 ——— By widow who has no authority from her husband—*Mitakshara law as administered in the Dravada district of the Madras Presidency—Consent of sapindas* Under the law of adoption as administered in the Dravada district a Hindu widow in the absence of any authority from her husband to adopt a son to him may make such an adoption with the consent of his sapindas *The Collector of Madura* v *Mootoo Ramalinga Sathupathy (1868) 12 M I A 397* There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives in order to defeat the interest of this or that sapinda but on a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband *Vellanki Venkata Krishna Rao* v *Venkata Rama Lakshmi (1876) I L R 1 Mad 174 L R 4 I A 1* The absence of consent on the part of the nearest sapindas cannot be made good by the authorization of distant relations whose assent is likely to be influenced by improper motives *Veera Basavaraju* v *Balasurya Prasada Rao (1918) I L R 41 Mad 998 (P C) L R 45 I A 265* The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter But save in what are obviously exceptional cases the nearest sapindas must be asked, and if not asked it is no excuse to say they would certainly have refused *Venkamma* v *Subrahmanyam (1907) I L R 30 Mad 50 53 L R 34 I A 22 26* It is the duty of the Court to keep the power strictly within the limits which the law has assigned to it *Sri Virada Pratapa Raghunatha Deo* v *Sri Brozo Kishoro Patta Deo (1876) I L R 1 Mad 69 (P C)* In this case on a consideration of the evidence the widow was proved to have applied for the consent of the third plaintiff but not of the other four plaintiffs and that none of these five nearest sapindas is proved to have withheld his consent for any malicious or corrupt reason. The necessary consent of sapindas was not obtained and the adoption was invalid KRISTNAYYA v LAKSHMIPATHI (1920) I L R 43 Mad 650

57 ——— Of daughter's son or sister s son—*Validity of—Custom among Brahmans of Andhra or Telugu portion of Madras Presidency—Adoption by widow—Consent of sapindas—Gnatis—Bhinnagotra sapindas—Consent of daughter s son, whether necessary—Invalid adoption—Upanayanam in adopted family after an invalid adoption subsequent adoption whether barred—Subsequent upanayanam, whether competent* Adoption of a daughter s son is valid by custom among

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the Brahmans of the Andhra or Telugu portion of the Madras Presidency as it is in the southern districts. Consent of the sapindors to an adoption by the widow is material as guaranteeing the propriety of the widow s action in making the adoption. Where such consent has not been shown to have been obtained by fraud coercion or corruption it is sufficient authority for the adoption and the Court s right to scrutinize the sapindas reasons extends only to ca es in which consent is refused and not to cases where it is granted. A daughter s son is not entitled to be consulted regarding an adoption by a widow who has obtained the consent of the nearest sapinda, as he is not a *gnati* and Bhinnagotra sapindas are not included under the term sapindas in the texts which require their consent to an adoption An upanayanam is not valid unless performed by the father or in his absence by another kinsman in the family to which the boy concerned actually belongs The performance of the upanayanam in a family into which the boy is wrongly believed to have entered by an invalid adoption is nullity and is no bar to his sub equent adoption VISWASUNDARA RAO v SOMASUNDARA RAO (1920)

I L R 43 Mad 876

58 ———— By junior daughter in law of a son with the consent of her father in law—*Validity of the adoption* P a Hindu had a son living in union with him The son died during P s life time leaving him surviving two widows Of the two widow the junior had a son who also died a minor without attaining ceremonial competence P adopted the plaintiff as his son Later the junior widow adopted defendant No 11 with the consent of P The plaintiff sued contending that the adoption of defendant No 11 was invalid *Held* that the adoption of defendant No 11 was valid under Hindu law The preferential right of the senior widow to make an adoption exists when the widows inherit the property of their husband that i when the husband is a separated member of the family Even then it is subject to any authority given by the husband to the junior widow to adopt or any express or implied prohibition by the husband against the senior widow The doctrine of the preferential right of the senior widow to adopt is not extended to a case where the husband dies in union with his father and wh re the widow can adopt if at all with the consent of her father in law *Vithoba* v *Bapu* (1890) *15 Bom 110* referred to DNANU v TANU (1919)

I L R 44 Bom 508

59 ———— Putrishta Jag—*Whether essential among twice born castes—Suit for declaration of fact of adoption whether prayer for consequential relief is necessary* The performance of the *putrishta jag* ceremony is not essential in an adoption among the twice born castes where the adoptor and the adoptee belong to the same *gotra* A suit by an adopted son against his adoptive father and the latter s natural sons for a declaration of the fact of plaintiff's adoption is not maintainable under s 42 of the Specific Relief Act in the absence of a prayer for recovery of joint possession or for confirmation of possession jointly with the defendants The plaintiff cannot however be compelled to a k for partition SHEOLOTAN RAY v BHIGUN RAY 2 Pat L J 481

HINDU LAW—ADOPTION—contd

60 ———— Kshatriyas—brother's son—*Adoption of —Doctrine of pollution whether applicable to adoption among twice born castes* There is no prohibition among *Kshatriyas* against the adoption of a brother s child before the eleventh day after birth by reason of the doctrine of pollution or before the twenty fir t day by reason of the impurity of the body of the child Where religious rites are not a necessary requisite as for instance where a Hindu of one of the twice born castes adopts a boy of the same *gotra* as himself the omission of such rites cannot affect the validity of the adoption and therefore the fact of pollution which only affects the degree of merit attached to the religious rights is also immaterial to the validity of the adoption SREEMATY LAKSHMIMALI JEMAMANI BAHURIA v UDIT PRATAP SINGH

3 Pat L J 499

61 ———————— customs—*Proof of special —adoption*—Baisi Chowrasi gaddidars *origin of and inheritence among—marriage within gotra applicability of rule—plaint amendment of at what stage not permissible*—Res judicata—*Code of Civil Procedure (Act V of 1908) s 11* Explanation *4—Limitation (Act IX of 1908) Articles 118 and 141*—In dealing with the custom of an entire community it is of more importance to have regard to the history of the main body then to the history of le s important branches The *Baisi Chourasi Gaddidars* are a recognized community Probably the community was non Hindu in origin but the members have all now accepted Hinduism to such a degree as to raise a presumption that the whole community has assimilated the law of adoption SHAHDEO NARAIN DEO v KUSUM KUMARI 5 Pat L J 164

61(a) ———— By widow—*under authority in Will—Bombay School—Terms whether mandatory or give widow a discretion* By his Will a Hindu governed by the Bombay S hool directed that if I did not adopt a son during my life time my wife should as far as possible adopt S the second son of my elder brother T If the boy cannot be obtained any other boy should be adopted etc *Held*—That this means that unless there were conditions outside the Will preventing the possibility of the adoption the widow when he does adopt is to exercise her power in favour S SITABAI v BAPU ANNA PATIL (P C)

25 C W N 97

62 ———— Amongst Sitambari sect of Jains—*Sitambari sect—Adoption—Application of Hindu Law—Giving and taking only necessary—The person adopted may be of age and married—Placing of son on lap not necessary* The Jains are of Hindu origin they are Hindu dissenters and although generally adhering to the ordinary Hindu Law that is the law of the three superior castes they recogni e no divine authority in the Vedas and do not practise the *shradhs* or ceremony for the dead But though the due performance of the *shradhs* or religious ceremony for the dead is at the ba e of the religious theory of adoption the Jains have so generally adopted the Hindu law that the Hindu rules of adoption are applied to them in the ab ence of some contrary usage It was common ground in this ca e that in the Sitambari sect of Jains to which the parties belonged the only ceremony necessary to the validity of an adop[illegible] the giving and taking

HINDU LAW—ALIENATION—contd

On appeal to the High Court by the defendant *Held* that if one or other of the plaintiffs were entitled to succeed the suit should not be dismissed simply because the first of the plaintiffs alone had failed to make out a title particularly when by so dismissing the suit, the right of the co plaintiffs (who if the first plaintiff were not joint with the last male holder would on failure of the first plaintiff's case be entitled) would be thereby barred and that in such a case the Appellate Court could exercise the power provided for in the Code of Civil Procedure O XLI r 33 *Held* also that lapse of time did not affect the question of onus of proof regarding legal necessity except in so far as it might give rise to a presumption of acquiescence or save the alienee from adverse inference arising from the scanty proof which might be offered *Held* further that in order to justify legal necessity it must be shown that the expenses could not have been met from the income of the property in the widow s hands and that they were reasonable *Held* lastly that payment of full value for the property did not of itself justify a sale by a Hindu widow in the absence of legal necessity RAMESHWAR PRASAD SINGH v CHANDI PRASAD SINGH (1911)
I L R 38 Calc 721

4 ——— Without the consent of a co-parcener—*Legal necessity—Right of subsequently born co parcener to impugn the transaction* Where an alienation of ancestral property is invalid as having been made without legal necessity by one member of the co parcenary without the consent of the rest it is open to co-parceners to object to such alienation notwithstanding that they were born subsequently thereto *Kali Shanker v Nawab Singh I L R 31 All 507* referred to. *Chuttan Lal v Kallu I L R 33 All 283* distinguished TULSHI RAM v BABU (1911) I L R 33 All 654

5 ——— Trustees of temple—*power of to grant permanent lease of trust property* The grant of a permanent lease o temple property by the trustee is *prima facie* in excess of the powers of such trustee Special circumstances of necessity may justify such alienation *Maharanee Shibessouree Debia v Mothooranath Acharjo 13 Moo I A 270* followed *Narasimhachari v Gopalu Iyengar I L R 3 Mad 391* referred to There is no distinction in this respect between a religious institution like a temple and a charitable foundation The powers of the trustee of a temple are analogous to those of the manager of an infant heir *Hunooman Persaud's Case* referred to in *Konwur Doorga Nath Roy v Ramachunder Sen I L R 2 Calc 341* referred to The requirements of daily worship, of building suitable for the carrying out of such worship and of performance of festivals are among the purposes for which the trustees of a temple may alienate the *corpus* in the absence of other reasonable means of providing for such needs In the case of such alienations, the alienee will be protected if after proper enquiries he is satisfied of the existence of such necessity SREEMUTHU DEVASIKAMONEY PANDARASANNADHI v LALANIAPPA CHETTIAR (1910)
I L R 34 Mad 535

6 ——— Widow—*Enquiry to be made by purchaser as to necessity of transaction—What is sufficient enquiry* Where it appeared that the purchaser of immoveable properties from a Hindu widow did not enquire from the creditors mentioned in the sale deed as those who were to be paid off out of the *consideration money* as to the necessities of the transaction but satisfied himself with an enquiry merely from the widow herself and it was found that the statement regarding the payment to the alleged creditors was false: *Held* that the purchaser had not made the necessary enquiries as laid down in *Hunooman Persaud v Mussit Babooee Munraj Koonweree 6 Moo I A 393* and the sale could not be supported JAWHARI v BULBHADRA DUAR (1911) 15 C W N 793

7 ——— Suit by alienee of a co parcener in family property—*Time when the share is ascertained* In Hindu Law the alienee of the interest of a co parcener is entitled to enforce his claim against the share to which the vendor was entitled to at the time of the alienation The mortgagee of a Hindu father is therefore entitled to proceed against the share of a son subsequently born in family property mortgaged by the father *Rangasami v Krishnayyan I L R 14 Mad 408* dissented from *Ayyagari Venkataramayya v Ayyagari Ramayya I L R 25 Mad 690* followed *Hardi Narayan Sahu v Ruder Perkash Misser I L R 10 Calc 626* followed. CHINNU PILLAI v KALIMUTHU CHETTY (1911) I L R 35 Mad 47

8 ——— Alienation by manager—*Undivided family—Manager position of—Effect of subsequent assent of co parceners* The Manager of a joint Hindu family is not in the exercise of his powers the agent of the family in the strict sense of the term and consequently no ratification of his act by the other members of the co parcenary is possible The assent of the other members of the family to an alienation by the manager is only evidence of justifiable family necessity Where therefore it is found that there was no such necessity such assent is no evidence for that purpose As, however the property vests in the undivided family the manager with the assent of the other members may give a good title to an alienee even though the alienation is not for any family necessity Such assent is not that of a principal to the acts *of an agent but supplies the want of capacity* on the part of the manager to alienate family property An alienation by a manager without justifiable necessity is void as regards the shares of the other members of the family and where such necessity exists it is valid in its entirety An assent by all the members at the time of alienation without taking part in it will pass the property An assent by some only though evidence of necessity will not in the face of positive evidence of the impropriety of such alienation suffice to pass their interests. The subsequent assent of all the members will not apart from any question of estoppel validate an alienation *by the manager which is* void in its inception for want of justifiable necessity *Annamalai Chetty v Murugesa Chetty I L R 26 Mad. 544* referred to *Ummi v Kunchi Amma I L R 14 Mad 26* referred to. RANGANAMI ASARI v SOMASKANDA ELA NIDHI LTD (1910) I L R 35 Mad 1[illegible]

9 ——— Custom of agriculturists in the Punjab—*Ancestral land—Power of father to alienate—Father's debts—Burden of proof—Debts of p op[illegible] to incurred by reckless extravagance and for il[illegible] or immoral purposes* In a suit by the respondents to have set aside an alienation of part of the family property made by their father in favour of the appellant, alleging that by

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the custom of agriculturists in the Punjab he was not competent to sell ancestral land without necessity that there had been no necessity for the sale that their father was a debauchee and an extravagant person, and that the debts for which the sale was made were incurred for immoral and illegal purposes, the appellant did not deny the custom though he traversed all the other allegations in the plaint, and contended that, the alienation having been made for their father's antecedent debts, it was for the respondents to show that the debts were contracted for illegal or immoral purposes There were concurrent findings by the Courts below that the respondents father was recklessly extravagant and did not know how to manage his affairs properly and that certain specific debts were 'just debts, and others were not *Held* (affirming the decision of the Chief Court of the Punjab) that the custom set up not being disputed, was applicable to the case that the payment of a just debt by the male proprietor of lands to which the custom applied was a necessity for which he could validly alienate ancestral property and that the respondents were entitled to possession of the property sued for on re payment to the appellant of such part of the purchase money as both Courts concurrently found to be just debts, the payment of which was a necessity The ruling in *D i Ditta* v *Saudagar Singh* (1900) Punjab Rec No 65 that a just debt means a debt which is actually due and is not immoral illegal or opposed to public policy and has not been contracted as an act of reckless extravagance or of wanton waste, or with the intention of destroying the interests of the reversioners, was approved of by their Lordships of the Judicial Committee. KIRPAL SINGH *v* BALWANT SINGH (1912)

I L R 40 Calc 288

10 ———— Mortgage by widow of part of the estate——*Legal necessity—Presumption—Reversioner* Alienation by way of mortgage by Hindu widow as heiress of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable enquiry and honest belief as to its existence but with the consent of the next reversioner for the time being will be valid and binding on the actual reversioner if the presumption of legal necessity or of reasonable enquiry and honest belief raised by such consent is not rebutted by more cogent proof *Nobokishore Sarma Roy* v *Hari Nath Sarma Roy* I L R 10 *Calc 1102* considered *Bajrangi Singh* v *Manokarnika Bakhsh Singh* I L R 30 All 1 L R 35 I A 1 referred to DEBI PROSAD CHOWDHURY *v* GOLAP BHAGAT (1913) I L R 40 Calc 721

11 ———— By father in favour of adopted son whose adoption alleged to be illegal—*Form of suit—Suit for partition in case of stranger in Hindu family—Inaction and acquiescence of father of joint family how far binding on sons—Limitation—Minority—Form of decree* In a suit instituted in 1907 by members of a Hindu joint family governed by the Mitakshara law to set aside their father's alienation of ancestral property against the assignee, the first respondent, the father being made a *pro formâ* defendant the appellants alleged that their father improperly made in 1898 a disposition of a specific portion of the property to the respondent who had been adopted by the widow of one or two brothers (with the consent of the other) from whom their father (the adopted son of the other brother) inherited the family property and they contended that the adoption of the first respondent was invalid for various reasons and that they were entitled to recover the property alienated The defence so far as material was that the appellants were bound by the acquiescence of their father in admitting the first respondent to the family and that the suit was barred by limitation The respondents also objected to the form of the suit which they contended should have been for partition At the settlement of issues the appellants pleader admitted that their father had actually given possession in 1898 of the property in suit to the first respondent to enjoy it exclusively previously since 1887 he was living as a joint member of the family and jointly enjoying the profits by reason of the inaction and acquiescence of the appellants father in that mode of enjoyment The suit was decided without evidence on that admission, and on the allegations in the plaint and written statements and was dismissed and that decree was affirmed on appeal *Held* as to the form of suit that to deny any relief except in a suit for partition would be to deny the right to relief altogether since the basis of the claim was that the appellants were entitled to the estate as a joint and undivided estate and desired to enjoy it as such. Also it might be that the first respondent was entitled to stand in the shoes of the appellants father as to the share which would come to the latter on a partition and if he established such a position the Court would at the instance of the respondent decree a partition between the appellants and their father Without therefore expressing any opinion as to its validity in law or fact their Lordships thought that on the pleadings it was open to the first respondent to set up such a case *Held* also that though a partition made by a Hindu father may under some circumstances bind his minor sons [as in *Balkishen Das* v *Ram Narain Sahu* I L R 30 *Calc 738* L R 30 I A 139 yet if on the partition a share is given to an absolute stranger (as the first respondent would be if his adoption were invalid) the partition may be impeached as a disposition of property made without consideration unless it can be supported as a *bonâ fide* compromise of a disputed claim If therefore the adoption of the first respondent were wholly invalid, the appellants were entitled to succeed in the absence of any other defence The Appellate Court as to limitation had decided that the suit was not barred as against the first appellant but only as against the rest of the appellants who were minors and had not been born at the time (1887) when it was alleged the adverse possession began to run *Held* that if the first appellant was entitled to relief the other appellants would also be so entitled Under the circumstances their Lordships in allowing the appeal, were of opinion that they could not on the materials before them finally determine the rights of the parties, and remanded the case for trial with a declaration that it was competent to the Court in the event of the first respondent failing in his other defences to make the whole or any part of the relief granted to the appellant conditional on their assenting to a partition so far as regarded the father's interest in the estate so as to give effect to any right to which the first respondent might be entitled claiming through his assignor RAMKISHORE KEDARNATH *v* JAINARAYAN RAMRACHHPAL (1913)

I L R 40 Calc 966

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12 ———— By widow—*Arrangement come to by the widow with consent of their reversioners—Alienation beyond life of widow—Acquiescence in arrangement by persons afterwards suing to set it aside—Ijara beneficial to estate* The question in this case was as to the validity of an *ijara* for 60 years dated 7th September 1863 which had been executed by a Hindu widow a *pardanashin* lady aged 42 with the consent of the then reversioners and which was part of an arrangement of settlement in which all the branches of her husband s family shared In a suit brought after the death of the widow by the reversionary heirs of her husband to set aside the *ijara* on the ground that it was an unauthorized interference by the widow with the reversionary interest which she had no power to make *Held* (affirming the decision of the High Court) that under the circumstances the arrangement was one dictated by the necessities of the case and the choice of the term of 60 years was for the benefit of the estate In accordance with the practice of the Board their Lordships attached great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was made under circumstances which rendered it lawful and valid In this case from 1882 to 1893 when the widow died the persons who now sought to set the *ijara* aside acquiesced in and took the benefit of the arrangement which it might therefore be inferred from their conduct had in their opinion been made in good faith and under such circumstances of necessity as would give it validity according to Hindu law and the conduct of the appellants themselves during those years afforded evidence on which the respondents were entitled to rely BIJOY GOPAL MUKERJI *v* GIRINDRA NATH MUKERJI (1914) I L R 41 Calc 793

13 ———————— Evidence of legal necessity—*In mortgages or sale-deeds* The *onus* of supporting a sale from a Hindu widow is on a purchaser Recitals in mortgages or deeds of sale with regard to the existence of legal necessity for an alienation by a Hindu widow are not of themselves evidence of such necessity without substantiation by evidence *aliunde* BRIJ LAL *v* INDA KUNWAR (1914) I L R 36 All 187

14 ———————— Legal necessity—*Spiritual welfare of her husband—To what extent alienation permissible—Recital in a deed by itself not conclusive evidence* Where a deed by a limited owner with qualified power of alienation is impeached the test is whether the purpose for which the alienation was made was proper or legitimate *Collector of Masulipatam v Cavaly Vencata 8 Moo I A 529* referred to Necessity is only one of the phases of the test of propriety *Raj Lukhee v Gokool Chunder 13 Moo I A 209 Sham Sunder Lal v Achhan Kunwar I L R 21 All 71 L R 25 I A 183 Bijoy Gopal Mukerji v Girindra Nath Mukerji I L R 41 Calc 793* referred to The widow has a larger power of disposition for religious or charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes An exhaustive enumeration of these religious or charitable purposes is neither possible nor necessary *Cossinaut Bysack v Hurroosoondry Dossee 2 Morley s Digest 198* referred to This being a question purely of Hindu law great care must be taken in coming to a decision upon it [illegible] in order to prevent English Judges being warped by impressions made upon their minds in consequence of their habitual application of English law and the nature of English decision to which they are accustomed and to consider in what way a Hindu Court of Justice would have decided the point The true rule appears to be that there is a distinction between legal necessity for worldly purposes on the one hand and the promotion of the spiritual welfare of the deceased on the other hand and that within proper limits the widow may alienate her husband s property for the performance of religious acts which are supposed to conduce to his spiritual benefit *Mulkoda v Kullani 1 Mac Sel Rep 82 Ram Chunder Surma v Gungagovind 4 Mac Sel Rep 147 Kartick Chunder v Gour Mohun 1 W R 48 Runjeet Ram v Mohamed Waris 21 W R 49 Ram Kawal Singh v Ram Kishore Das I L R 22 Calc 506 Churaman Sahu v Gopi Sahu I L R 37 Calc 1 Harmange v Ram Gopal 17 C W N 782 Rama v Ranga I L R 8 Mad 552 Lakshminarayana v Dasu I L R 11 Mad 288 Vuppuluri v Garimilla I L R 34 Mad 288 Puran Dai v Jai Narain I L R 4 All 481 Kupur v Sebak Ram 1 Bor 405 Joguban v Deoshankar 1 Bor 394 Chunilala v Jussoo 1 Bor 55* referred to A gift of a moderate portion of the property of her husband by the widow with a view to his spiritual benefit is valid whether the alienation covers a reasonable portion of the property of the husband of the lady is a question which must be determined with reference to the circumstances of each particular disposition *Ram Chunder Surma v Gungagovind 4 Mac Sel Rep 147 Churaman v Gopi Sahu I L R 37 Calc 1* referred to Recitals in a deed are not by themselves conclusive evidence of their truth and the facts alleged should be proved *aliunde* *Brij Lal v Inda Kunwar I L R 36 All 187* referred to KHUB LAL SINGH *v* AJODHYA MISSER (1915) I L R 43 Calc 574

15 ———————— *Legal necessity—Onus of proof of legal necessity as affected by lapse of time—Proof of custom of succession to estate—Limitation—Adverse possession—Res judicata* On this appeal their Lordships of the Judicial Committee affirmed the decision of the High Court which is reported in *I L R 38 Calc* at page 725 RAVANESWAR PRASAD SINGH *v* CHANDI PRASAD SINGH (1915) I L R 43 Calc 417

16 ———— Mortgages executed with alleged consent of reversioner —*Nature of proof required of consent which must be established by positive evidence—Absence of proof of legal necessity—Presumption afforded by consent of reversioner* In this appeal which arose out of suits to recover property mortgaged by a Hindu widow it was *held* (affirming the decisions of the Courts in India) that the part taken by the reversioners with respect to the mortgages in question did not under the circumstances amount to a consent to bind their interests When a stringent equity arising out of an alleged consent by reversioners is sought to be enforced against them such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony such as appeared to have been relied upon in this case *Jiwan Singh v Misri Lal I L R 18 All 146 L R 23 I A 1* [illegible]

HINDU LAW—ALIENATION—*contd*

HOBHOUSE referred to HARI KISHEN BHAGAT v KASHI PERSHAD SINGH (1914)
I L R 42 Calc 876

17 ————————— **Construction of deed of sale** *executed by widow—Whether it conveyed an absolute interest in the property or only a limited interest—Legal necessity—Evidence of intention of parties—Construction of deeds executed by natives of India—Recitals in deed as showing necessity and intention of executants* In this appeal their Lordships of the Judicial Committee held (reversing the decree of the High Court and restoring that of the Subordinate Judge) that on the construction of a deed of sale executed by a Hindu widow of property held by her as heir of her husband in favour of the appellant, she conveyed her absolute interest in such property and not only the limited interest of a Hindu widow Recitals to the effect, (a) that the husband did not leave property the produce of which was sufficient to meet her necessary expenses (b) that she had been obliged to borrow money to provide the ordinary necessaries of life (c) that there were ancestral debts still unpaid and creditors pressing for payment and (d) that the only way to discharge them was to sell a portion of the property of her deceased husband recitals which were necessary if the executant were disposing of her absolute interest, but serving no purpose if the object was to convey merely the limited interest of a widow were held to show that the circumstances were such as to give her power to dispose of her absolute interest and from which the inference could reasonably be drawn that it was her intention so to dispose of it Referring to the case of *Hunooman Persaud Pandey* v *Babooee Munraj Koonweree 6 Moo I A 393 419* as to the liberal construction it was necessary to put upon deeds executed by natives of India their Lordships were of opinion that an examination in detail of the provisions of the deed in this case left no doubt in their minds that all the parties to it meant that the absolute interest in the property should be conveyed to the purchaser and thought that it had by the deed been effectually conveyed to him That interest might well be construed as meaning the right to and interest in the property which the widow had in the particular circumstances of the case powers for the purpose indicated to sell and dispose of that is the absolute interest and not (as held by the High Court) as merely meaning the right and interest which a widow normally takes in the immoveable property which her husband owned at his death and leaves after him Any other construction their Lordships thought would plainly defeat the object and intention of the contracting parties VAONJI MORARJI v CHANDA BIBI (1915)
I L R 37 All 369

18 ———————— **Contract by father to sell family land**.—*Suit for specific performance against father—Son added subsequently as defendant—No necessity for contract—Contract not binding on son—Plaintiff's right to conveyance from father of his share only—Partial performance meaning of —Specific Relief Act (I of 1877) s 15 —Contract by a coparcener to sell his share in family property and contract to sell specific family property distinction between* The plaintiff sued for specific performance of a contract of sale of certain lands and for possession The contract was entered into by the first defendant the undivided father of the second defendant who was subsequently added as a party to the suit The first defendant pleaded that the contract was vitiated by undue influence and was a hard bargain that ought not to be enforced against him The second defendant pleaded that the contract was entered into by the first without any legal necessity and was not enforceable in law It was found that there was no undue influence or hard bargain and that there was no necessity to enter into the contract The plaintiff offered to pay the full consideration for a conveyance of the lands which were the separate property of the first defendant and of his interest in the family lands *Held* that the plaintiff was not entitled to a decree for specific performance of the contract against the first defendant or the second defendant *Per* SANKARAN NAIR J —A person is entitled to specific performance of a contract by a member of a Hindu family to sell his share of the family property If a junior member of a Hindu family agrees to sell any specific property belonging to his family a decree cannot be passed against him to sell his share of that specific property *Kosuri Ramaraju* v *Kaluri Ramalingam I L R 26 Mad 74 Srinivasa Reddi* v *Sivarama Peddi I L R 30 Mad 320* and *Porala Subbarami Peddi* v *Yadlamudi Seshachalam Chetti I L R 33 Mad 359* referred to *Nagiah* v *Venkatarama Sastrulu I L R 3 Mad 387* dissented from *Ranjaya Mudali* v *Shanmuga Mudali 15 Mad L T 186* followed *Maharaja of Bobbili* v *Venkataramanjulu Naidu 16 Mad L T 181* referred to SUBBA v VENKATRAMI (1914)
I L R 38 Mad 1187

19 ———— **Onus of proof of legal necessity** —*Recitals in deeds as to necessity—Evidence of representation to purchasers—Value of recital after lapse of time when actual proof of enquiry has become impossible—Attestation of deed effect of as evidence of knowledge of contents or of consent by reversioner—Unexplained delay in prosecution of appeals—Costs disallowed if delay due to appellant* In a suit for property alienated by a Hindu widow in possession of her husband's estate the burden of proving legal necessity for the alienations lies on the purchasers *Maheshar Baksh Singh* v *Ratan Singh I L R 23 Calc 766 L R 23 I A 57* followed Recitals in deeds cannot by themselves be relied upon for the purposes of proving the assertions of fact which they contain They can only be evidence as between the parties to the conveyances and those who claim under them After a long period however has elapsed between the alienation and the suit to set it aside when all those who could have given evidence on the relevant points have grown old or have passed away a recital consistent with the probabilities and circumstances of the case assumes greater importance and cannot lightly be set aside The recital is clear evidence of the representation and if the circumstances are such as to justify a resonable belief that an enquiry would have confirmed its truth then when proof of actual enquiry has become impossible the recital coupled with such circumstances would be sufficient evidence to support the deed. Where the total value of the estate was small and there were expenses like the husband's *shradh* and any debts against his estate w[illegible] d to be paid. besides the necessity for the [illegible] nce of the widows which need not be [illegible] ely by a sufficient

sum to support existence the periods at which between 1848 and 1865 the properties were sold the small sums for which the sales were made and the disposition of the property piece by piece with fair regularity for 16 years all went to support the view that the widows found themselves unable to provide sufficient maintenance out of the income of the estate until their means came to an end in 1865 and the circumstances were such as would be sufficient to justify the assumption that proper enquiry would have disclosed that necessity existed There was only the one fund for payment and if money was needed to pay debts the amount of money available for maintenance would to that extent be reduced and if the debts had been paid by the widows out of borrowed money it would make no difference whether the necessity to pay debts or to maintain themselves was stated in the recitals as reason for the sale Attestation of a deed proves no more than that the signature of an executing party has been attached to a document in the presence of a witness It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions If it had been quite impossible for either of the widows lawfully to dispose of any interest in the properties and it was shown that the witness knew the nature of the deed more value might be given to his attestation but by itself it would neither create an estoppel nor imply consent *Hari Kishen Bhagat* v *Kashi Prasad Singh I L R 42 Calc 8 6 L R 42 I A 64* referred to Comments were made by their Lordships on the delay that had occurred between the decrees of the High Court in August 1909 and the setting down of the appeals for hearing in April 1916 for which no sufficient reason appeared Unexplained it constituted a grave reproach to the administration of justice All the respondents had been unjustly attacked in the lawful possession of property and for seven years had been subject to the anxiety and distress of knowing that the judgment of the High Court in their favour was subject to the inevitable uncertainties of the law Their Lordships said that had the appeals succeeded they would have refused the appellants any costs of the appeals unless they could have cleared themselves of the imputation of having needlessly protracted the proceedings and that course would be taken in similar cases in the future if occasion arose BANGA CHANDRA DHUR BISWAS v JAGAT KISHORE ACHARJYA CHOWDHURI (1916)
I L R 44 Calc 186

20 ———— **By father not for necessity**—*Mitakshara school—Joint family property—Alienation by father not for necessity and not for antecedent debt—Sons if bound by* Joint property of a Mitakshara Hindu family cannot be alienated as against co sharers by way of mortgage or otherwise except for necessity or for the payment of an antecedent debt quite distinct from the debt incurred in the mortgage itself and the sons of the mortgagors are not bound by any such alienation by reason of any pious obligation to pay their father's debt JOGI DAS v GANGA RAM (1917)
21 C W N 957

21 ——————*Joint Hindu family—Sale of ancestral property by father without legal necessity—Suit to set aside sale at instance of sons—Vendee not entitled to refund of consideration by sons* A sale of the property of a joint Hindu family made by the father for an antecedent debt or for the payment of an antecedent debt is binding on the sons but if the consideration for such sale is not for any of the purposes mentioned above the sons are entitled to recover the property But in such case the sons are not liable to refund the purchase money to the vendee *Ram Doyal* v *Suraj Mal 23 Indian Cases 891 Manbahal Rai* v *Gopal Misra All Weekly Notes 1901 p 57* and *Chandra Deo Singh* v *Mata Prasad I L R 31 All 176* referred to *Koer Hashmat Rai* v *Sundar Das I L R 11 Calc 396* dissented from MADAN GOPAL v SATI PRASAD (1917) **I L R 39 All 485**

22 ———— *Sale by father of joint family property without legal necessity—Suit by sons to repudiate the sale—Mesne profits payable by purchaser from date of such repudiation* Where the father as manager alienates joint Hindu family property without legal necessity and the sons repudiate the sale a purchaser who had no notice that the father was incompetent to sell the property is in equity only liable to pay mesne profits from the date of such repudiation *Nugun Chunder Chattoraj* v *Surbessur Chuckerbutty 3 W R 479 Dakhina Mohan Roy* v *Saroda Mohan Roy I L R 21 Calc 142* and *Girish Chander Lahiri* v *Soshi Sikhareswar Roy I L R 27 Calc 95 L R 27 I A 100* referred to BHIRGU NATH CHAUBE v NARSINGH TIWARI (1916)
I L R 39 All 61

23 ———— **By some members of joint Hindu family**—*Alienation of joint property of family governed by Mitakshara law—Mortgage not for family necessity or to pay antecedent debt—Suit on mortgage—Non liability of sons and grandsons of mortgagors* Where a mortgage had been made by some of the members of a Hindu joint family governed by the Mitakshara law who joined in borrowing Rs 1 200 on the security of the property of the joint family of which they were the heads without the consent of their co partners and it was found that the mortgage was *primâ facie* invalid as against the family property as being neither for an antecedent debt nor for any proved necessity of the joint family *Held* that the mortgage could not be upheld on the doctrine laid down in the case of *Mahabeer Prasad* v *Ramyad Singh I B L R 190 20 W R 192* which was distinguishable on the ground that there were special circumstances in that case which did not exist in the present case and it therefore did not lay down the general law The general law was laid down in *Madho Parshad* v *Mehrban Singh I L R 18 Calc 157 163 L R 17 I A 194 198* which governed this and all other cases of the kind and according to those principles the mortgage in suit was invalid as against the sons and grandsons of the mortgagors LACHMAN PRASAD v SARNAM SINGH (1917) **I L R 39 All. 500**

24 ———— **By manager when benefits result to minors' estate**—*Of estate as just fying alienation—Speculative development of minor's estate if for benefit* The rule laid down by the Judicial Committee in *Hanooman Pershad Pandey* v *Munraj Koonwar 5 Moo I A 393 423* is not restricted to cases of mortgage or other forms of partial alienation nor is it restricted in its application to cases of necessity alone for a benefit of the estate is there differentiated from the need

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of the estate as a circumstance justifying alienation But mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is for the benefit of the estate within the meaning of the rule which could not have been intended to include cases of speculative development of estates of minors KRISHNA CHANDRA CHOUDHURY v RATAN RAM PAL (1915)

20 C W N 645

25 ———— **Mortgage by manager of joint family**—*Who was not father of the other members—Burden of proof of legal necessity for mortgage—Where no necessity proved the interest of such manager not saleable in enforcement of mortgage—Mortgage only operative to the extent to which the mortgage money was proved to be necessary* The mortgage of joint estate made by the manager of a joint family who is not the father of the other member of the family can only be justified so far as it is wanted for the joint family purposes If the necessity cannot be established by direct evidence it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith [s 38 of the Transfer of the Property Act (IV of 1882)] In either case the burden of proof lies on the person who claims the benefit of the mortgage *Bhanga Chandra Dhur Biswas* v *Jagat Kishore Acharjya Chaudhuri I L R 44 Calc 186 L R 43 I A 249* followed There was no difference between the burden of proof when it is desired to support a mortgage made by a manager of a joint estate and that which is required to support the mortgage made by a widow who has only a similar limited power of disposition If the debt was not incurred for family necessity the interest of the manager of the family with respect to mortgages in the same province as that from which the present case has been brought cannot be sold in enforcement of the mortgage *Lachman Prasad* v *Sarnam Singh I L R 39 All 500 L R 44 I A 163* referred to In the present case the mortgagee had only discharged the burden thrown upon him of proving necessity for the deed to the limited extent as held by the High Court and the security therefore stood only to the limited extent [proved ANANT RAM v COLLECTOR OF ETAH (1917 I L R 40 All 171

26 ———— **By Widow**—*Subsequent adoption—Right of adopted son to set aside alienation and recover alienated property* A Hindu widow alienated certain properties for a purpose not binding on the inheritance and thereafter adopted a son *Held* by the FULL BENCH that the alienation was not binding on the adopted son and that he could sue during the life time of the widow to set aside the alienation and recover the properties so alienated his cause of action arising from the time of his adoption *Sreeramulu* v *Kristnamma I L R 26 Mad 143* overruled. *Bonomalı Roy* v *Jagat Chandra Bhowmick I L R 32 Calc 669* and dictum in *The Collector of Madura* v *Mootoo Ramalinga Sathupathy 12 Moo I A 397 443* followed. VAIDYANATHA SASTRI v SAVITHRI AMMAL (1917)

I L R 41 Mad 75

27 ———— **Circumstances justifying alienation**—*Spiritual benefit of husband—To what extent alienation permissible* For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband a Hindu widow has a larger power of disposition than that which she possesses for purely worldly purposes There is a distinction between legal necessity for worldly purposes on the one hand and the promotion of the spiritual welfare of the deceased on the other hand A gift of a moderate portion of the property of her husband by the widow with a view to his spiritual benefit is valid Whether an alienation covers a reasonable portion of the property of her husband is a question which must be determined with reference to the circumstances of each particular disposition *The Collector of Masulipatam* v *Cavaly Vencata Narrainapah 8 Moo I A 529 Khub Lal Singh* v *Ajodhya Misser I L R 43 Calc 574 Lakshminarayana* v *Dasu I L R 11 Mad 288 Vuppuluri Tatayya* v *Garimilla Ramakrishnamma I L R 34 Mad 288 Rama* v *Ranga I L R 8 Mad 552 Ram Kawal Singh* v *Ram Kishore Das I L R 22 Calc 506 Panachand Chhotalal* v *Manoharlal Nandlal I L R 42 Bom 136 Puran Dai* v *Jai Narain I L R 4 All 482* and *Balkishan Bharti* v *Sat Ram Singh All Weekly Notes 1908 202* referred to KUNJA BIHARI LAL v LALTU SINGH (1918)

I L R 41 All 130

28 ———— **Ijara granted by a Hindu widow to her manager 40 years before suit**—*Value of recitals of legal necessity in the deed—Alienation if may bind reversioner apart from legal necessity—Acquisition of the widow out of income if part of the corpus of the estate* The recitals of legal necessity in an alienation by a Hindu widow made more than 40 years before suit could not be given the weight attached to similar recitals in *Banga Chandra* v *Jagat Kishore L R 43 I A 249 s c I L R 44 Calc 186 21 C W N 275* inasmuch as in this case evidence was available as to the pecuniary condition of the estate at the time of the alienation and it was made to a person who in fact managed the estate for the widow *Held* on the evidence that the alienation in this case a permanent *ijara* was not made for legal necessity nor was it binding on the reversioners apart from legal necessity as being for the benefit of the estate *Held* also that the reversioners did not by getting themselves substituted as the legal representatives of the widow in a suit for arrears of *ijara* rent which had fallen due in her life time did not ratify the *ijara* Property acquired by the widow out of the income of the estate became part of the *corpus* of the estate where it appeared that her intention was to treat the purchased property as part of the original estate UPENDRA KISHORE MANDAL v NOBO KISHORE MANDAL (1918)

23 C W N 64

29 ———— **Power to alienate husband's estate**—*Surrender or relinquishment by widow—Consent of reversioners—Whether alienation is binding on a mortgagee from transferee—Estoppel* As to the power of a Hindu widow to deal with the property of her husband to which she has succeeded for a life estate on his death there is a distinction between the power of surrender or renunciation which is the first head of the subject, and the power of alienation for certain specific purposes, as necessity which is the second. The result of the consideration of the decided cases may be summarized as follows —(i) An alienation

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by a widow of her deceased husband s estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation In such circumstances the question of necessity does not fall to be considered But the surrender must be a *bond fide* surrender and not a device to divide the estate with the reversioner (ii) When the alienation of the whole or part of the estate is to be supported on the ground of necessity then if such necessity is not proved aliunde and the alienee does not prove enquiry on his part and honest belief in the necessity the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction, will be held to afford a presumptive proof which if not rebutted by contrary proof will validate the transaction as a right and proper one Where property was transferred by the widow to an alienee from whom a prospective reversioner takes a mortgage of a portion of it he is not estopped on the death of the widow from disputing the validity of the alienation RANGASAMI GOUNDEN v NACHIAPPA GOUNDEN (1919)

I L R 42 Mad 523
L R 46 I A. 72

30 ———— By daughter—*Of entire house inherited by her to discharge debt of father—House not saleable piecemeal —Legal necessity—Suit by reversioner to recover house from vendees* To pay off an antecedent debt of her father the daughter of a separated Hindu sold a house which had been the property of her father in his life time and had been previously mortgaged by herself and her mother jointly as security for the same debt The debt at the time of the sale amounted to Rs 7 775 and the house was sold for Rs 19 500 On the other hand, it was found that the house was not one which could have been divided and sold piecemeal *Held* that the reversioner to the last male owner was not in the circumstances entitled to recover the house from the vendees BAL KRISHNA DAS v HIRA LAL (1918) I L R 41 All 338

30(a) ———— By father—A suit was instituted against a Hindu father and his sons on a mortgage bond executed by the father alone The Court found that it was not for any purpose binding upon the sons *Held* that the mortgagee was entitled to a conditional decree under O XXXIV r 6 against the father personally and against the Joint Family property of himself and his undivided sons for the recovery of the balance in case the sale proceeds of the father s share of the mortgaged property was insufficient KANDASAMI GOUNDAN v KUPPU MOOPPAN

I L R 43 Mad 421

31 ———— By widow—Onus of proof of legal necessity—*Suit to set aside an alienation after long lapse of time—Presumptions to complete proof* The suit which gave rise to this appeal was one by a reversioner to set aside an alienation by a widow made in 1830 on the ground that it was made without legal necessity The widow died on the 14th December 1900 and the suit was instituted on 12th December 1912 involving an inquiry into the circumstances of a transaction more than 82 years after it took place The District Court found that there was no legal necessity for the sale and decreed the suit The High Court held that legal necessity had been proved and reversed the judgment of the Trial Judge.

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In the course of their judgment they said, "It is not disputed that the onus lay upon the defendant to prove the necessity for the sale, but having regard to the great lapse of time since the transaction took place perhaps the highest on record, it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienations made at more recent dates In such circumstances presumptions are permissible to fill in the details which have been obliterated by time Their Lordships of the Judicial Committee in affirming the decision of the High Court cited the above with approval as being in their opinion a correct statement of the law VENKATA REDDI v RANI SAHEBA OF WADHAVAN (1920)

I L R 43 Mad 541
L R 47 I A 6

32 ———— By widow—proof of necessity *debt paid to third person* *Held* that under Hindu Law a widow cannot alienate immoveable property inherited by her from her husband except for special purposes For religious and charitable purposes or for those which are supposed to conduce to the spiritual welfare of her husband she has a larger power of disposition than that which she possesses for purely worldly purposes and to support such an alienation she must show necessity *Held also* that the payment of a debt contracted by the widow from a third person does not of itself justify an alienation by her of immoveable property GOWARDHAN DAS v VIRU MAL

I L R 1 Lah 48

33 ———— By widows in accordance with a decree for maintenance obtained against them —*Suit by reversioners to challenge alienation*—Res judicata—*Bengal Tenancy Act (VIII of 1895) s 22* Where *S* the daughter of a deceased Hindu by a wife who had predeceased him sued his two surviving widows on the ground that they declined to deliver a certain *pattah* and had also dispossessed her from a part of the property covered by the *pattah*, the said *pattah* having been executed by them in accordance with a custom prevalent in the family by which married daughters who resided in the family dwelling house were entitled to receive a certain amount by way of maintenance for themselves their husbands and their children, to be enjoyed after their death by their descendants and it was found that the alleged custom did exist in the family and the suit was accordingly decreed *Held* in a suit by the reversioners against the son of *S* for recovery of joint possession with the defendant of the land covered by the *pattah* that the suit against the widows was not a suit to enforce an alienation made in their personal capacity and that the decree obtained in that suit was binding on the reversioners inasmuch as in that suit the widows represented the estate of their deceased husband ATUL CHANDRA METRA v MRITUNJOY BOSE

3 Pat L J 426

34 ———— By widow before birth of son—*Whether after born son divests his mother s estate as a widow from the date of his birth or from the date of his father s death* The house and site in dispute belonged to the plaintiff's father T a Hindu, who died in May 1911 On the following July the property was sold by T's widow R The plaintiff who was born to R five days after the sale sued to contest its validity The first Court decreed the claim, holding that the plaintiff was

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in contemplation of law actually existing at the time of his father's death that at the time of the sale he and not his mother was the owner of the property and that therefore the sale by the latter was void This decree was upheld by the District Judge on appeal *Held* on second appeal that the rights of a son under Hindu Law in the estate by his father commence at birth and not before and that R was consequently at the date of the sale competent to alienate the property for necessity *Bamundoss Mookerjea v Mussammat Tarinee (7 Moo I A 169 P C)* followed. Mayne's Hindu Law 8th Edition page 499 and West and Buhler's Digests of Hindu Law 3rd Edition volume I page 803 referred to *Jatindra Mohan v Ganendra Mohan (9 Beng L R 347 P C)* *Mussammat Mangli v Sobha Singh (20 Indian Cases 2 2)* *Minakshi v Virappa (I L R 8 Mad 89)* and *Ramakrishna v Tripura bai (I L R 33 Bom 88)* distinguished *Sabapathi v Somasundaram (I L R 16 Mad 76)* and *Hanmant Ramachandra v Bhimacharya I L R 12 Bom 105)* not followed HIRA *v* BUTA

I L R 1 Lah 128

35 ——— **By way of Compromise**—*—By Limited owner—whether binds reversioners* An alienation by way of compromise entered into between a limited owner and persons who had no *bona fide* claim to the property at the time of the compromise is not binding on reversioners ANUP NARAIN SINGH *v* MAHABIR PRASAD SINGH

3 Pat L J 83

36 ——— **Alienation of occupancy right by father** *whether binding on minor sons—Central Provinces Tenancy Act (XI of 1898) S 46 (1)* An alienation by the father of a Hindu joint family of his interest in an occupancy holding appertaining to the ancestral property of the family is not binding on a minor except in those cases in which an alienation of the family property would ordinarily bind the son SUKRU MALI *v* SRI BRAHMAPURA BALBHADRA MAHAPARBHU **4 Pat L J 354**

37 ——— **Decree against father**—*joint family property sold in execution—whether sons are bound* Where the name of the father of a Hindu joint family was entered in the Record of Rights as being in possession and he unsuccessfully defended a suit brought against him *held* that the sons were bound by an attachment of joint family property made at the instance of the successful plaintiff in execution of the decree which awarded him recovery of possession mesne profits and costs The rule of Hindu Law under which a son is not liable for debts of his father incurred for an illegal or immoral purpose does not apply when the debt has merged in a decree GANESH LALL *v* DEO SARAN AHIR

4 Pat L J 692

38 ——— **Antecedent debt**—*loan by father—subsequent execution of mortgage to secure loan—suit by mortgagees to enforce security—onus* Where a Hindu father borrows money independently of the joint family property and subsequently finding that he is not able to repay the loan, executes a mortgage bond as security the bond is one for an antecedent debt In a suit on a bond by the mortgagee the onus of proving that the debt is an antecedent one lies on the plaintiff SUKHDEO JHA *v* JHAPAT KAMAT **5 Pat. L. J 120**

HINDU LAW—ALIENATION—*contd*

39 ——— **Interest necessity for high rate of**—*burden of proving* The principle that it is incumbent on those who support a mortgage made by the manager of a joint Hindu family to shew not only that there was a necessity to borrow but that it was not unreasonable to borrow at a high rate of interest applies to a case of a mortgage by a Hindu widow In the absence however of a specific plea in the written statement that there was no necessity to borrow at a high rate of interest the burden of establishing that necessity does not lie on the mortgagee JAG SAHU *v* RAI RADHA KISHUN

5 Pat L J 287

40 ——— **Mortgage by member of the family validity of—whether mortgagor's share liable**—*Evidence Act (I of 1872) S 32 Illustration (1)—horoscope admissibility of* A mortgage by an individual member of a *Mitakshara* family of the whole or a share of the joint family property where no family necessity or antecedent debt is proved is void and inoperative as against the property hypothecated and gives the mortgagee no right even against the mortgagor's undivided share Where however the mortgagor's interest has been separated from that of the other members of the family actual partition by metes and bounds not being essential for this purpose or where the share has by legal process been attached or sold at the instance of the creditor it may become available as security for the mortgage debt In special circumstances where the property has already passed into the hands of the mortgagee the court, if satisfied that the equities of the case require it may in its discretion set aside the alienation upon the terms that the property when restored shall be held in separate shares the share of the mortgagor being subject to a lien for the mortgage debt and interest In a suit to enforce a mortgage against the joint family property the mortgagors being in possession, no equities can arise as in a case where the property has been sold in execution of a decree or has otherwise passed into the hands of the mortgagees An intention to separate from the rest of the joint family cannot be inferred from the fact that the member of the family executing the mortgage purported to hypothecate only his own share out of the whole property A horoscope drawn up by a person who has since died is admissible in evidence to prove the age of the person mentioned in the horoscope by reason of *Illustration (1)* to s 32 of the Evidence Act 1872 but the horoscope is not conclusive of the age of the person AMAR DAYAL SINGH *v* HAR PERSHAD SAHU

4 Pat L J 605

41 ——— **By manager**—Mitakshara—*Joint family—karta, power of to deal with family property—alienations of joint property in order to purchase other property validity of—enjoyment of proceeds by members of the family whether amounts to ratifications—whether mortgagor's share liable—Contract Act (IX of 187) s 65 Burden of proof* The power of the *karta* of a joint family to deal with the joint family property is the same as that of the manager for an infant heir under the Hindu Law as defined in 6 M I A. 393. Actual compelling necessity is not the sole test of the validity of an alienation by the manager acting without the express consent of the other [illegible]rs. When

HINDU LAW—COPARCENER—*contd*

2 ——————— *Coparceners—Junior member of a joint Hindu family—Bond in the name of manager—Payment to a junior member during lifetime of manager—Liability of promisor—Discharge—Rule as to co heirs and co promisees—English Law* Payment made to a junior member of a joint Hindu family during the lifetime of its manager in whose favour a bond has been executed will not discharge the promisor from his liability under the bond Rule as to co heirs applied and the rulings as to co promisees considered and cases reviewed ANNALAMMA v CHENCHAYYA (1917) **I L R 41 Mad 637**

3 ——————— *Mitakshara joint family—Power of adult co parcener to appoint by will a guardian for minor co parceners property* *Held* by the Full Bench that the only adult co parcener of a Mitakshara family consisting of himself and his minor co parceners is not competent to appoint a testamentary guardian to the co parcenary properties of the minor co parceners *Cases* on the subject reviewed CHINDAMBARA PILLAI v PANGASWAMI NAICKER (1918)
I L R 41 Mad 561

4 ——————— *Sale by a co parcener of specific lands—Sale by vendee to another pending suit for partition in vendor's family—Allotment of different lands by the decree to the vendor—Co parcener—Right of vendee's vendee to get lands of same value out of the lands allotted to vendor—Right to damages—Measure of damages* Even though a vendee of specific lands from a co parcener of a Hindu family may be entitled to recover lands of equal value out of the lands allotted to his vendor in a subsequent partition in the family a vendee from the first vendee has no such right his only remedy being to get damages from his vendor In assessing damages the vendee is entitled to ask that they should be assessed at the present enhanced value of the lands DHADHA SAHIB v MUHAMMAD SULTAN SAHIB (1921)

I L R 44 Mad. 167

HINDU LAW—CUSTOM

See HINDU LAW—ADOPTION (AMONG JAINS) **I L R 32 All 247**

1 ——————— **Right to officiate at cremation ceremony**—*Morporah Brahmin—Right to religious office suit for if maintainable in Civil Court—Exclusive right of a priest to officiate at ceremonies if enforceable at law—Customary exclusive right to officiate at cremation if valid—Bengal Municipal Act (III B C of 1884) s 59—Grant of exclusive licence for sale of firewood if ultra vires* Suits in which the principal question relates to the right to an office are suits of a civil nature and not the less so because the right claimed may depend upon the decision of questions as to religious rites and ceremonies *Krishnama v Krishnasami I L R 2 Mad 62 ... I L R 6 ... 120 Krishnaramı v Krishnamachariar I L R ... Mad 313* referred to Where the plaintiff claimed a hereditary right to officiate exclusively as priest on the occasion of the cremation ceremony of all dead bodies brought for funeral to a particular place the priest being paid for such service by a gratuity regulated by contract or custom *Held* that the suit could not be thrown out as not maintainable in a Civil Court *Mahommed v Sayad Ahmed I Bom H C I App 15 Mamat Ram v Bapu Ram*

HINDU LAW—CUSTOM—*contd*

I L R 15 Calc 159 Kali v Gouri I L R 1 Calc 906 Dinanath v Protap Chandra 4 C W N 79 c s I L R 27 Calc 30 Tholappala v Venkata I L R 19 Mad 62 Subbaraya v Vedantachariar I L R 28 Mad 23 Lamba v Rama I L R 13 Bom 518 Gursangaya v Tamana I L R 16 Bom 281 Murari v Suba I L R 6 Bom 725 Sayad Hashim v Husein Sha I L R 13 Bom 429 Barsati v Chamru 4 All L J R 715 Chumma v Babu 7 All L J R 529 discussed Under Hindu law the exclusive right claimed by a priest to officiate at ceremonies of a family because his ancestors had before him performed similar ceremonies is not enforceable at law *Radha Kishen v Sham Kissen 2 Mac Sel Rep 259 Chaurasi v Dewan Chand 6 Mac Sel Rep 182 Kali Churn v Hurree Kisto (1818) Beng S D A 532 Hurgobind v Bhowanee (1850) Beng S D A 290 Gour Dass v Annund (1849) Beng S D A 428 Rama Kant v Gobind (1852) Beng S D A 393 Roodurmun v Damodar 1 Hay 365 Madhub v Mobeen 5 W R 224 Becha Ram v Thakurmani 10 W R 114 8 B L R 58 Magju v Ram, 15 W R 531 8 B L R 50 Lala v Ganeshi (1856) Agra S.D A 609 Hur Lall v Jeo Rakhun (1862) Agra S D A 514 Belaree v Baboo 2 Agra H C R 80 Chunnu v Babu 7 All L J R 529 Rama Krishna v Ranga I L R 7 Mad 421 Mooljee v Nagmy (1834) Bom Sel Rep 116 Muncharam v Amba (1831) Bom Sel Rep 159 Vithal v Bababhut 1 Bom Pr Jud 471 Sitaramblat v Sitaram 6 Bom H C R 257 Vithal v Anant 11 Bom H C I 6 Dino Nath v Sadashiv 1 L P 3 Bom 9 Waman v Balaji I L P 11 Bom 167* referred to Where the plaintiff a degraded Brahmin of the *morporah* class claimed the right to officiate at the cremation ceremony of all dead bodies brought to a particular ghat and proved that she and her father had officiated as such *Held* that the custom pleaded could not be recognised because in the first place it was not immemorial in the second place it was not reasonable inasmuch as it tended to create a *monopoly* in the third place because it was shown not to have continued without interruption since its origin and fourthly because it was uncertain in respect of the locality in which it was alleged to obtain and in respect of the persons whom it was alleged to affect *Tyson v Smith ... 539 Mercer v Denne (1904) ... Ch 534 ... Johnson v Clark (1908) 1 Ch 303 311 ... Gladstone 9 H L C 697 ... Dyce v Allen 11 Cal ... Hammerton v Honey 24 W R (Eng) 603 Fitch v Rawling ... H Bl 393 399 ... Mayor of Birmingham 10 L T N S 437 ... Rural Board v Flores 19 W R (Eng) 83 Wood v Burial Board (1857) 1 Q B ... 713* referred to COLEMAN DEBI v CHAIRMAN OF LANIHATI MUNICIPALITY (1910) **14 C W N 1057**

2 ——————— **Succession**—*Family custom in derogation of ordinary Mitakshara law governing the subject—Proof of custom—Wajib ul arz—Evidence in case in which there was no instance of custom ever having been observed—Instances showing contrary ... proof of ... rather than that of existence of a custom* In a family of Ahban Thakur in Oudh the respondent took possession on the death of his full brother of a share of an estate called Deokalia The appellant ... brother of the respondent and of the deceased,

HINDU LAW—CUSTOM—*contd*

sued for a moiety of the share of the estate which had belonged to the deceased on the ground that by a custom in the family a step brother was entitled to succeed equally with the full brother supporting his case wholly by wajib ul arzes made 30 years before suit the entries in which were admittedly made by the settlement officials after inquiries from the members of the family then living and were duly attested and signed The Court of the Judicial Commissioners found that though there was no rebutting evidence no instance was adduced in which the alleged custom had ever governed the devolution of the property and that besides the entries as to the custom the wajib ul arzes contained other entries in which contradictory views of the parties who attested them were expressed and which afforded internal evidence against the existence of the alleged custom and held that the entries in the wajib ul arzes were not although unrebutted sufficient proof of a custom in derogation of the ordinary Mitakshara law *Held* affirming the decision of the Judicial Commissioner that no class of evidence was more likely to vary in value than that of wajib ul arzes—*Muhammad Imam Ali Khan* v *Husain Khan I L R 26 Calc 81 L R 25 I A 161* and *Parbati Kunwar* v *Chandarpal Kunwar I L R 31 All 457 L R 36 I A 125*—and whereas here it seemed probable that the entries recorded connoted the views of individuals as to the practice they would wish to see prevailing rather than the ascertained fact of a well established custom the Judicial Commissioners rightly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed ANANT SINGH *v* DURGA SINGH (1910)

I L R 32 All 363

3 ———— **Babuana and Sohag grants**—*Proof of Custom—Custom excluding females from succession in Darbhanga Raj family estate—Custom of exclusion not only from succession to Raj but extending to succession in collateral branches of family—Custom effective notwithstanding partition had taken place in family branch* In a suit by one of two brothers in a junior branch of the family of the Darbhanga Raj (an estate governed by the rule of male lineal primogeniture) against the widow of the other brother for possession of her deceased husband's property on the ground that widows were by the custom of the family wholly excluded from succession not only to the Raj itself but also in the collateral branches of the family —*Held* that there was on the evidence a valid custom established in the junior branch of the family to which the parties belonged that widows did not inherit *babuana* properties and that the succession in the case of *sohag* grants was governed by the same custom as governed the succession in the case of *babuana* grants The custom applied in this case notwithstanding a separation and partition of the property which had been effected between the plaintiff and his brother and consequently on his brother's death the plaintiff became entitled to such of the estate of his deceased brother as consisted of *babuana* and *sohag* properties together with accretions which had been made to the former property *Held* also that the custom was strongly supported by instances in the family of widows, who would otherwise have been entitled to a Hindu widow's interest having been excluded from or not having claimed possession of property on the death of the husbands and that the custom being proved to be well established could not under the circumstances be defeated by the fact that in one instance as the evidence showed it was not enforced Words used in the *babuana* and *sohag* grants *auras putra poutradi* were held not to be words of general inheritance which would include female as well as male heirs but words of limitation consistent with the custom which excluded females from succession under *babuana* and *sohag* grants which could not be made under the ordinary Hindu (in this case the Mithila) law *Ram Lall Mookerjee* v *Secretary of State for India I L R 7 Calc 304 L R 8 I A 46* EKRADESHWAR SINGH *v* JANESHWARI BAHUASIN (1914) **I L R 42 Calc 582**

4 ———— **Right to perform festival in a temple—Ubayakar**—*Right of married daughter of last ubayakar—Special custom—Onus of proof* The right to perform a festival in a temple is a secular privilege and does not confer on the holder an office The daughter of the last *ubayakar* or holder of the right being his heir is in the absence of proof of a special custom excluding females entitled to exercise such right although she has been married into another family *Tangirala Chiranjivi* v *Raja Manikya Rao 21 Mad L J 179 Raja Rajesuari Ammal* v *Subramania Archakar 30 Mad L J 2..* and *Vengamuthu* v *Pandaveswara I L R 6 Mad 151* referred to PANKAJAMMAL *v* THE SECRETARY OF STATE FOR INDIA (1916) **I L R 40 Mad 1108**

5 ———— **Forfeiture of maintenance right by widow not residing in the family dwelling house**—*If applies when absence due to just and reasonable cause* Where the plea set up in defence to a suit for maintenance by a widow who had ceased to reside in the family dwelling house was a family custom under which it was alleged a widow unless she resided at the place appointed for her residence forfeited her right to maintenance *Held* that such a custom even if established does not deal with the question of an absence from the appointed residence due to just and reasonable cause BRAJA SUNDAR DEB *v* SWARNA MANJARI DEI (1917)

22 C W N 433

5 a) ———————— *Hindu law—Family custom—Migration of family carrying custom of primogeniture—Custom of necessarily ceases with the cesser of office* In a suit for partition of family properties the principal Defendant claimed that succession in the family was governed by the rule of primogeniture the properties being in consequence impartible and as such belonging exclusively to him as the holder of the *gadi* and the title of Rana It was not disputed that the family to which the parties belonged were Chohan Rajpoots who had migrated from their original homes into the Nimar District in the Central Provinces *Held*—That the presumption was that they carried with them to their new homes the customs and institutions to which they were subject in the land of their birth That the evidence showed that the custom of primogeniture which the family brought with them continued [illegible] family under the Mahomedan the [illegible] British rules up to the present [illegible] the existence

HINDU LAW—CUSTOM—*concld*

of the family as an entity through so many centuries was mainly owing to this custom and the theory favoured in the Judicial Commissioner's Court that *after the head of the family ceased to be the holder* of a hereditary fiscal office the junior members must naturally assert themselves as share holders according to the ordinary Hindu law which in consequence would displace the custom was based on *a priori* reasoning of a speculative character The mere cessation of services to which *watan* lands are attached which are by custom impartible does not ordinarily destroy that custom. RANA MAHATAB SINGH *v* BADAN SINGH

26 C W N 226

6 ———————— *Hindu law, customary law at variance with if enforceable—Dhusars of Gurgaon emigrating to the Central Provinces—Adoption of orphan if valid* It is beyond question that according to the law of the Mitakshara as recognised by the School of Benares an orphan cannot be adopted It is also beyond doubt that in some parts of Northern India particularly in Districts now in the Punjab or adjacent to the Punjab the strict rules of the Mitakshara as recognised by the School of Benares have not been followed by *some castes tribes and families of* Hindus and that customs which are at variance with that law have for long been consistently followed and acted upon and that when such customs are established they and not the strict rules of the Mitakshara with which they are at variance are to be applied They are found principally amongst the agricultural classes but they are also to be found among classes which are not agricultural The Dhusars of Gurgaon are governed *in matters of adoption not* by the orthodox Hindu law but by customary law and the adoption of orphans by Dhusars being consistent with that customary law is valid RAM KISHORE *v* JAI NARAYAN **26 C W N 882**

7 ———————— Where a family is governed by the rule under which succession to an impartiable estate does not go to females So long as the family remains united the burden of proving the family has ceased to be united lies on the person alleging it *Rani Jagadamba Kumari v Thakur Wazir N Singh* **2 Pat L J 239**

8 ———————— In dealing with *the custom of an entire community it is more* important to have regard to the history of the main body than to the history of the less important branches Position of *Brin Chowrasi Gadidas* discussed SHAHDEO NARAIN DAS *v* KUSUM KUMARI **5 Pat L J 164**

HINDU LAW—DAUGHTER'S ESTATE

See HINDU LAW—INHERITANCE

I L R 34 Bom 510

1 ———————— *Decree for possession of father's estate obtained by daughter—Right of daughter's sons to execute such decree* The daughter of a separated Hindu obtained a decree for possession of her father's estate against certain trespassers Before however she could obtain possession she died and her sons applied for execution *Held* that the daughter represented her father's estate when she brought her suit for possession and that the persons who succeeded to the estate were entitled *to execute the decree* which she had obtained MAHADEO SINGH *v* SHEO KARAN SINGH (1913)

I L R 35 All 481

2 ———————— *Suit by unmarried daughter for possession of her father's property—Death of plaintiff—Right of married daughters to continue the litigation* A separated Hindu died leaving him surviving a widow and four daughters, three married and one unmarried *After* the death of her mother the unmarried daughter sued to recover possession of her father's estate naming her three married sisters as *pro formâ* defendants The plaintiff however died during the pendency of the suit The three married daughters were then on their application transferred from the array of defendants to that of plaintiffs Nevertheless the suit was dismissed upon the ground that it had abated by reason of the death of the original plaintiff *Held* that the suit should not have been dismissed. The original plaintiff represented the estate and her sisters were entitled to continue the litigation which she had commenced. *Mahadeo Singh v Sheo Karan Singh I L R 35 All 481* and *Venkata Narayana Pillai v Subbammal I L R 38 Mad 406* referred to *Balak Puri v Durga I L R 30 All 49* not followed. JADUBANSI KUNWAR *v* MAHIPAL SINGH (1915)

I L R 38 All 111

HINDU LAW—DEBT

See HINDU LAW—ALIENATION

See HINDU LAW—JOINT FAMILY

See HINDU LAW—MORTGAGE

See HINDU LAW—SURETY

1 ———————— Father's debts—*Mitakshara—Son's obligation to pay costs awarded against father in litigation— Danda — Not byavaharika* Certain persons who had applied for a succession certificate *in respect of debts* due to a *deceased* relative were successfully resisted in these proceedings by *one L* They then sued *L* for a declaration of their right of heirship and the suit was decreed with costs against *L* *L* who was living with his son and grandson as members of a joint Mitakshara family having died the decree holders sought to recover the amount of the decree from *L*'s son and grandson *Held* on a review of the authorities that *L*'s son and grandson were bound to satisfy this decree *Per* CHATTERJEE *J* Costs awarded by Court against a defeated litigant is not danda within the meaning of the text of Yajnavalkya quoted in Mitakshara, Ch VI s 3 verse 47 *Nor are they* covered by the description not *vyavaharika* in the text of Ushanas referred to in *Durbar Khachar v Khachar Harsur I L R 32 Bom 348* PARYAG SAHU *v* KASI SAHU (1910)

14 C W N 659

2 ———————— Limitation—*Son not liable for Father's debt when barred—Contract Act s 134 151—Surety not discharged if claim against principal debtor allowed to become barred—Limitation Act 1877 Sch II Art 93* Undivided family property devolving on the son by survivorship is not the general estate of the father within the meaning of Art 93 of Sch II Limitation Act

HINDU LAW—DEBT—*contd*

1877 and a suit to recover from the son out of such estate the *loss occasioned* by his father's breach of trust is not governed by Art 98. A son is not under the Hindu Law liable to pay a debt of *the father which was barred against* him. A debt the recovery of which is barred by limitation is not extinguished and the debtor *is not by reason of the bar of* limitation discharged therefrom. The omission of the creditor to sue the debtor within the period of limitation *is not an act the legal consequence of which is* the discharge of the debtor and such omission has not the effect of discharging the surety under ss 134 and 137 of the Indian Contract Act. *Carter v White 25 Ch D 666* referred to *Ranjit Singh v Naubat I L R 24 All 504* dissented from SUBRAMANIA AIYAR v GOPALA AIYAR (1909) I L R 33 Mad 308

3 ———— Defamation suit costs—*Debts—Son's liability for father's debt—Money borrowed to defend a suit for defamation not an immoral debt* *Held* that under the Hindu Law money borrowed by the father to defend a suit for defamation is a debt *for which a Hindu son* and grandson are liable SUMER SINGH v LILADHAR (1911) I L R 33 All 472

4 ———— Damages—*Execution of decree—Decree against father for damages—Liability of son—Mitakshara Law—Immoral or illegal debt* A decree obtained by a person for damages on account of injury done to his crops by the obstruction *of* a channel through which he was entitled to irrigate his lands against one *B* who was governed by the Mitakshara school of Hindu Law could be executed on his death against his son, where it could not be said that the decree *obtained* was due to an act of the *judgment* debtor which was a wanton interference with the rights of the decree holder and that the *liability imposed thereby on the judgment debtor* was an illegal or immoral debt CHHAKAURI MAHTON v GANGA PRASAD (1911)

I L R 39 Calc 862

5 ———— *Unsecured debt contracted by* limited owner when binding on estate—*—Will bind if made after due enquiry—Proof of due enquiry—Nature of right liable to be devested by adoption—Transfer of Property Act s 38* Unsecured debts contracted by a limited owner will be binding on the estate if incurred *for purposes* which will justify a charge on such estate The rule laid *down in the case of Hanuman Pershad Panday v Kooveri 6 Mad I A 393* as to the sufficiency of a reasonable inquiry satisfying the creditor of the existence of *reasonable necessity* to validate a claim against the estate in the hands of a manager applies in the case of all loans whether secured or unsecured Representations by the borrower are evidence of the existence of such *necessity but are not generally in* themselves sufficient to discharge the burden which rests upon the creditor of showing a reasonable inquiry as to the binding nature of the *purpose for which* the loan is contracted *In particular* circumstances *however* they may suffice to shift the burden of proof to the person impeaching the debt or alienation If s 38 of the Transfer of *Property Act is deemed to enact a rule as to* reasonable inquiry in excess of what is required by the Privy Council in Hanuman Persad's case

HINDU LAW—DEBT—*contd*

perty *which in the eye of law* was nil BHOGA RAJU VENKATARAMA JOGIRAJU v ADDEPALLI SESHAYYA (1912) I L R 35 Mad 560

7a ——————Grandfather's debts—*Mitakshara—Grandson if liable for interest on grandfather's debts—Son's liability if may be thrown primarily on the share obtained by survivorship from father and grandfather* A decree for mesne profits with interest was passed against *A* and *D* grandfather and father respectively of *R* after *R* was born Subsequently on the death of *A* and *D* the decree holder sought to execute the decree against the entire ancestral property in the hands of *R* *R* claimed that in as much as the debt was his grandfather's he was not liable for the interest *Held* that the wrong being the joint act of the father and grandfather and the liability arising therefrom being that of the father as well as of the grandfather the son was liable for interest That after the entire property vested in *R* on the death of *A* and *B* there was no distinction between what was obtained by *P* by survivorship from them and his own share so as to enable *P* to compel the decree holder to proceed first against share of the father and grandfather to the exclusion of his own share *Quære* Whether the rule in *Kishun Pershad v Tipan Pershad I L R 34 Calc 735 s c 11 C W N 613* throwing the burden primarily on the share of the father applies to the case of a simple money debt as distinguished from a mortgage RAMDEO PRASHAD SINGH v GOPI KOERI (1911) 16 C W N 383

8 —————— Pious obligation—*Decree debt incurred by father as devastanam committee member—Avyavaharika meaning of* The liability of a Hindu father who as a member of a devastanam committee unauthorisedly spends the devastanam funds for expenses of a litigation and is afterwards directed by the Court to pay the costs out of his own private funds constitutes a debt which his sons and grandsons are under a pious obligation to discharge The expression *Avyavaharika* debt means a debt which is not supportable as valid by legal arguments and on which no right could be established by the creditor in a Court of Justice *Durbar Khachar v Khachar Harsur I L R 32 Bom 348* dissented from *Chakouri Mahton v Ganga d Parshad 15 C L J 298* followed *Natasayyan v Ponnusami I L R 16 Mad 99* and *Khalilul Rahman v Gobind Pershad I L R 20 Calc 328* referred to *Ramasengar v Secretary of State 20 Mad L J 89* distinguished VENUGOPALA NAIDU v RAMANADHAN CHETTY (1914) I L R 37 Mad 458

9 —————— Duty of widow to pay her husband's debts—*Even though time barred—Widow not bound to pay debts repudiated by her husband in his life time* Under Hindu Law a widow is under a pious obligation to pay her deceased husband's debts even though they may be time barred but she is not bound to pay debts which her deceased husband had repudiated before his death BHAGWAT BHASKAR v NIVRATTI SAKHARAM (1914) I L R 39 Bom 113

10 —————— Father's debts wrongfully incurred—*Debts contracted in trade carried on against Government Servants Conduct Rules 1904* Sons cannot escape liability for payment of the debts of their father contracted in a trade carried on by him in contravention of Government Servants Conduct Rules on the ground that the conduct of their father in contracting debts in such trade was *avyavahar* RAMKRISHNA TRIMBAK v NARAYAN (1915) I L R 40 Bom 126

11 —————— Antecedent debt—*Prior mortgagee by father of joint family estate whether an antecedent debt to support a subsequent mortgage so as to charge sons shares also* An independent debt neither illegal nor immoral contracted by a Hindu father on the security of the joint family estate antecedent to a mortgage sued on is an antecedent debt so as to support a charge on the sons shares also to the extent of the sums secured on the prior mortgage *Sahu Ram Chandra v Bhup Singh I L R 39 All 437* explained *Badagala Jogi Naidu v Bendalam Papiah Naidu 35 M L J 389* overruled ARMUGHAM CHETTY v MUTHU KOUNDAN (1919) I L R 42 Mad 711

12 —————— Debts incurred for breach of civil duty as trustee—*whether Avyavaharika—Liability of sons to pay during father's life time* A money decree was obtained against a Hindu father for his failure to account as a trustee and in execution the ancestral family property was attached The sons having applied to raise the attachment on the ground that the money debt in the decree against their father was tainted with illegality and immorality and that their shares could not be made liable in execution during the life time of their father *Held* that the decretal debt of the father for breach of civil duty as trustee was not *Avyavaharika* *Held* further that the shares of the sons in the ancestral property could be attached and sold during the life time of the father for the satisfaction of his personal debt not tainted with illegality or immorality *Sahu Ram Chandra v Bhup Singh I L R 44 I A 126* discussed HANMANT KASHINATH v GANESH ANNAJI (1918) I L R 43 Bom 612

13 —————— Legal necessity—*Mitakshara—Joint Hindu family—Debt—Money borrowed to comply with a decree for pre emption in favour of the father* A decree for pre emption providing that the pre emptor shall acquire the property if he pays the amount mentioned therein but otherwise his suit will be dismissed is a debt such as will support a bond given by the father of a joint Hindu family to raise money for its satisfaction NATHU v KUNDAN LAL (1910) I L R 33 All 242

14 —————— Widow—*Money borrowed for legal necessity—Construction of well—Feast on return from pilgrimage—Daughter's marriage* Money borrowed to defray the expenses of the marriage of the daughter of a Hindu widow in possession of her husband's property is money borrowed for legal necessity but a feast given on return from pilgrimage is not so connected with the pilgrimage as to justify its allowance as money expended for legal necessity Expenses incurred in the construction of a well may be a legal necessity if it be proved to be for the benefit of the estate MAKHAN LAL v GAYAN SINGH (1910) I L R 33 All 255

15 —————— Promissory note executed by father before partition—*Renewal of the note*

HINDU LAW—DEBT—*contd*

by father after partition—Son's liability on such note—Pious obligation to discharge father's debts extent of A Hindu son is not liable during his father's life time on a promissory note executed by his father after partition in renewal of a note executed by the father before partition The recent decision of the Judicial Committee in *Sahu Ram Chandra v Bhup Sing L R 44 I A 1 6* does not overrule the long line of decisions as to the right of the creditor of a Hindu father to sue the father and the sons for an antecedent debt incurred by the father for purposes neither illegal nor immoral and to attach and to bring to sale the interest of the sons as well as of the father in execution of the decree in such a suit *Per* KUMARASWAMI SASTRIYAR J The decision in *Sahu Ram Chandra v Bhup Sing L R 44 I A 1 6* makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son assuming that it arises at all during the life time of the father arises only if the father's share or his self acquisitions are insufficient to meet the debts PEDA VENKANNA v SREENIVASA DEEKSHATULU (1917) I L R 41 Mad 136

16 ———— Sale of family property—*Under decree against father personally—Validity of such sale where debt not proved to be illegal or immoral—the Antecedent debt* Where a Hindu father in a Mitakshara family contracted debts not proved to be illegal or immoral and a decree was passed against him personally *Held* that the decree was binding on the family property and was enforceable against the joint family estate The decision of the Judicial Committee in *Shahu Ram Chandra's Case I L R 39 All 437 L R 44 I A 1 6* does not overrule the long line of cases according to which a creditor who has obtained a personal decree for money against a Mitakshara father is entitled to levy execution against the entirety of the joint family property MADHUSUDAN DAS MOHANT v ISWARI DAYI DEBI (1920)

I. L R 48 Calc 341

17 ———— *B* a Hindu governed by Mitaksara law devised his properties which were self acquired by a will whereby he provided that each of his sons was to live in joint mess with his brothers up to the age of 30 when the share of each would fully belong to him in title after vesting absolutely in his sons and grandsons etc during the minority of his *I* the eldest son and *P* borrowed from his brothers represented by the guardian with the permission of the District Judge for purchasing a residence Subsequently a decree was obtained against *I* for the money and in order to get a stay of execution of the decree in terms of the order of the High Court *I* executed a security bond charging his property including his share of Tanl has *Held* that the money was lent and borrowed for legitimate family purposes and the decree could be executed against the entire coparcenary LALA MUTTI PROKASH NANDE v SRIMATI ISWARI DEI DEBI 24 C W N 938

HINDU LAW—DEBUTTER

———— *Debutter absolute—Dasnami Gossain—Succession—Custom and usages of the community—Removal and appointment by punch—Punchnama—Stamp Act (II of 1899) Sch I Art 7—Alienation by shebait without legal necessity—Permission of the District Judge obtained under s 90 of Probate and Administration Act (V of 1881) by fraudulent misrepresentation effect of—Purchasers no privy to the fraud but purchase with knowledge of such fraudulent misrepresentation* A who belonged to the sect of Giri Dasnami Gossains dedicated by his will the properties acquired by him to two deities The will stated that all the properties moveable and immoveable and the profits of the said properties would be deemed as the *debutter* properties of the two deities It then provided for the succession to the office of the *shebait* who would carry on the *sheba* and perform other acts according to the customs and usages of the family that none of the properties left by A would be liable to be sold or be subject to any charge for any debts contracted by the *shebait* or any person appointed to that office that if any such thing happened the same would be liable to be set aside by the next *shebait* according to law and that if any *shebait* became extravagant or were found guilty of any grave offence by the *punch* of the community he would be removed from office After A's death probate was obtained by his *chela* who on his death was succeeded by his *chela* B B made a will by which he appointed defendant No 1 *shebait* after his death On B's death defendant No 1 obtained probate of his will contracted debts and obtained permission under s 90 of the Probate Act to sell certain properties which B sold to several purchasers Other Gossains of the same community assembled and having found defendant No 1 guilty of misconduct excommunicated him and by a *punchanama* removed him from *shebaitship* and appointed the plaintiff as *shebait* The plaintiff brought this suit for recovery of possession of the properties alleged to be *debutter* after setting aside the alienations thereof *Held* that the will of A created an absolute *debutter* *Ashutosh Dutt v Doorga Charan Chatterji I L R 5 Calc 438* distinguished *Held* that the parties belonged to the order of sanyasis governed by the rules of the community to which they belonged The ordinary rules of inheritance in their entirety could not apply to such persons for although the succession was through *chelas* any question as to preference between *chelas* (when it was not provided for by the *guru*) might be decided by the customs and usages of the community and the representatives of the community were the proper persons to decide such matters Although the secular property of a *guru* might be inherited by the *chela* the properties in this case were absolute *debutter* and the succession to the office of *shebait* would be governed by the rules laid down by the creator of the endowment and in their absence by the *punch* of the community who would naturally be the proper persons to decide the question what constituted grave offence or acts contrary to custom or usages of the family *Held* that when a member of the *punch* was unable to attend on account of his illness or being on pilgrimage the other members of the *punch* could act MOHESH CHANDRA ROY v GOSAIN GANPAT GIR (1916) 23 C W N 401

———— *Debutter—Transfer of pala apart from debutter Transfer of pala inter vivos to two persons—Validity* A custom authori

HINDU LAW—DEBT—*contd*

perty *which in the eye of law* was nil BHOGA RAJU VENKATARAMA JOGIRAJU v ADDEPALLI SESHAYYA (1912) I L R 35 Mad 560

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I L R 40 Bom 126

11 ——————Antecedent debt—*Prior mortgagee by father of joint family estate whether an antecedent debt to support a subsequent mortgage so as to charge sons shares also* An independent debt neither illegal nor immoral contracted by a Hindu father on the security of the joint family estate antecedent to a mortgage sued on is an antecedent debt so as to support a charge on the sons *shares also to the extent of the sums secured* on the prior mortgage *Sahu Ram Chandra* v *Bhup Singh I L R 39 All 437* explained *Badagala Jogi Naidu* v *Bendalam Papiah Naidu 35 M L J 387* overruled ARMUGHAM CHETTY v MUTHU KOUNDAN (1919)

I L R 42 Mad 711

12 —————— *Debts incurred for breach of civil* duty as trustee—*whether Avyavharika—Liability of sons to pay during father s life time* A money decree was obtained against a Hindu father for his failure to account as a trustee and in execution the ancestral family property was attached The sons having applied to raise the attachment on the ground that the money debt in the decree against their father was tainted with illegality and immorality and that their shares could not be made liable in execution during the life time of *their father* *Held* that the decretal debt of the father for breach of civil duty as trustee was not *Avyavaharika* *Held* further that the shares of the sons in the ancestral property could be attached *and sold during the life time* of the father for the satisfaction of his personal debt not tainted with illegality or immorality *Sahu Ram Chandra* v *Bhup Singh I L R 44 I A 126* discussed HANMANT KASHINATH v GANESH ANNAJI (1918) I L R 43 Bom 612

13 —————— *Legal necessity—Mitakshara —Joint Hindu family—Debt—Money borrowed to comply with a decree for pre emption in favour of the father* A decree for pre emption providing that the pre emptor shall acquire the property if *he pays the amount mentioned therein but other* wise his suit will be dismissed is a debt such as will support a bond given by the father of a joint Hindu family to raise money for its satisfaction NATHU v KUNDAN LAL (1910)

I L R 33 All 242

14 —————————— Widow—*Money borrowed for legal necessity—Construction of will—Feast on return from pilgrimage—Daughter s marriage* Money borrowed to defray the expenses of the marriage of the daughter of a Hindu widow in possession of her husband s property is money borrowed for legal necessity but a feast given on return from pilgrimage is not so connected with the pilgrimage as to justify its allowance as money expended for legal necessity Expenses incurred in the construction of a well may be a legal necessity if it be proved to be for the benefit of the estate MAKHAN LAL v GAYAN SINGH (1910) I L R 33 All 255

15 —————— Promissory note executed by father before partition—*Renewal of the note*

claim to hold the land rent free on that ground was put forward at that time by the *shebait* and was on that account admitted by the revenue authorities When the family of the *shebait* appointed by the founder died out the *shebaitship* would, in the natural course revert to a member of the family of the original grantor *Sital Das Babaji* v *Pratap Chandra Sirma 11 C L J 2* referred to The mere fact that two branches of the family of the *shebait* each collected a half share of the rents of the endowed property did not prove that the property was treated as secular property Rent decrees showing recovery of such half shares of the rent from the tenants on behalf of the Thakur were properly admitted in evidence under s 13 of the Evidence Act The fact that a *shebait* devised the endowed property along with his secular properties went no further than to indicate that he purported to bequeath his right to the *shebaitship* of that property to his widow and not the property itself Alienation of the endowed property recently made by the *shebaits* were held to amount to instances of abuse of trust by the *shebaits* which would not by themselves be sufficient to destroy the *debutter* character of the land if otherwise established. Unlawful diversions of the profits from the services of the Thakur to other purposes in recent years also did not affect the validity of the grant as *debutter* *Held* on the entire evidence that the endowment in this case was not of a private character and that the members of the family of the original grantor had not resumed the property endowed and converted it into secular property MADHUB CHANDRA BERA v SARAT KUMARI DEBI (1910)

15 C W N 126

4 ———— **Gift in favour of an idol which is to be subsequently consecrated**—*Possession given to manager* By a deed of gift certain zamindari property was expressed to be given to the idol which was not at the time of execution in existence and possession of the property was made over to a certain person as *pujari* *Held* that the deed was valid and created a trust in favour of the idol *Mohar Singh* v *Het Singh I L R 32 All 337* and *Bhupati Nath Smriti tirtha* v *Ram Lal Moitra I L R 37 Calc 128* referred to CHATARBHUJ v CHATARJIT (1911)

I L R 33 All 253

5 ———— **Gift void for uncertainty**—*Gift in favour of the Thakurji in his Thakur dwara —No temple built or idol installed* *Held* that a dedication not to any particular deity which was subsequently to be installed in a temple but to the Thakurji in his Thakur dwara without mentioning the particular Thakurji to whom the property was dedicated was void for uncertainty *Bhupati Nath Smriti tirtha* v *Ram Lal Moitra I L R 37 Calc 128* *Mohar Singh* v *Het Singh I L R 32 All 337* and *Chatarbhuj* v *Chatarjit I L R 33 All 253* distinguished PHUNDAN LAL v ARYA PRITHI NIDHI SABHA (1911) I L R 33 All 793

6 ———— **Debutter —private consensus of co sharers**—*If may change character of treatment of property as secular effect of—Partition of property by shebait if converts property into secular —Legal conversion proof of* Where a private *debutter* had been partitioned between members of the family for the better enjoyment thereof and there had been sales and mortgages of portions of the property by some members but there was nothing to show that there was a consensus to give the property a different turn *Held* that the original *debutter* character of the property being established these facts did not operate to destroy its *debutter* character *Doorga Nath* v *Ramo Chandra I L R 2 Cal 341* referred to Per CHATTERJEE J —A partition of *debutter* property for the purpose of convenience of the user for the *sheba* is not a violation of the trust for the *sheba* of the property Per JENKINS C J —Where the original *debutter* character of a property is found in a suit to establish such character against one who claims under an original *shebait* lies upon the defendants to show the subsequent legal conversion of the land to the ordinary user of the property *Jugut Mohecnee* v *Rajendra Nath 19 B L I 19 81* referred to DHARMA DAS MANDOL v GOSTA BEHARY MANDOL (1911) 16 C W N 29

7 ———— **Shebait office of**—*Succession —Deed of appointment—Construction— Shishya shishyanukrame* Where it was provided by deed that the succession to the office of a *shebait* should be *shishya shishyanukrame* (*i e* disciple following disciple) *Held* that upon a proper construction of the document there was nothing to prevent one disciple from succeeding a co disciple in the line of the original *shebait* GOPAL CHANDRA CHAKRABARTY v RADHARAMAN DAS BABAJI (1911) 16 C W N 108

8 ———— **Right of succession to shebaitship of temple belonging to Ballavacharya Gossains**—*Evidence of dedication—Claim of persons incompetent to be sebaits (as being Bhats) of Ballav temple disallowed as defeating the purpose for which the founder established the worship—Title—Proof of independent title to succession as shebait* In a suit for possession and the right of sebaitship of a temple belonging to the Ballavcharya Gossains founded by one Muttuji the maternal grandfather of the plaintiffs (appellants) the defendant (respondent) contended that the ordinary Hindu law was not applicable as alleged by the plaintiffs and that daughters sons were excluded by customs from succession *Held* that apart from positive testimony on the point the performance of the worship of the idol in accordance with the rites of the sect for whose benefit it was held might be treated as good evidence of dedication and the ordinary rule of Hindu law relating to the descent of private property was not applicable *Held* also that the rule that the heirs of the founder succeed to the sebaitship laid down in *Gossamee Sree Greedhareejee* v *Romanlalljee Gossamee I L R 17 Calc 3 L R 16 I A 137* was as there implied, subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship In the present case the appellants being Bhats and not belonging to the Gossain *kul* were not competent to be shebaits of a Ballav temple where the rites were performed according to the Ballav ritual, which it was clearly established they could not perform To allow their claim would defeat the purpose for which the worship was established *Held* further that the respondent had established an independent title of his own to the temple as being the nearest male relative of Muttuji both

HINDU LAW—DEBUTTER—*concld*

sing the transfer by a *shebait* of his *pala* only and with it the right to the offerings without at the same time transferring the interest in the *debutter* property appertaining to the *pala* is not established by evidence of transfers which passed both the *pala* and the property A transfer of the *pala* apart from the property is not beneficial to the deity The severance of a *pala* of worship by transfer by the *shebait inter vivos* to two persons is not beneficial to the trust NITYA GOPAL BANERJI v NOBILAL MUKHERJI

24 C W N 369

HINDU LAW—ENDOWMENT

See HINDU LAW—RELIGIOUS ENDOWMENT

See LAND ACQUISITION

I L R 39 Calc 33

1 ———— Limitation—*Adverse possession—Dispute between senior and junior chelas as to succession to Hindu maths—Ekrarnama allotting one math to senior chela in perpetuity and the other to junior chela as adhikari—Suit instituted within twelve years from senior chela's death but 27 years from date of ekrarnama—Hindu Law—Endowment* The Mohant of the temple of a Hindu idol who was in possession of two *maths* one at Bhadrak and the other at Bibisarai died leaving two *chelas* or disciples between whom a controversy arose as to the right of succession to the *maths* and the property annexed to them The dispute was settled by an arrangement embodied in an *ekrarnama* dated 3rd of November 1874 executed by the senior *chela* in favour of the junior *chela* by which the *math* at Bhadrak was allotted in perpetuity to the senior *chela* and his successors while the *math* at Bibisarai and the properties annexed to it were allotted to the junior *chela* (described therein as an *adhikari*) and his successors for the purposes connected with his *math* subject to an annual payment of Rs 15 towards the expenses of the Bhadrak *math* Less than twelve years after the death of the senior *chela* but considerably more than that period after the date of the *ekrarnama* the appellant the successor of the senior *chela* brought a suit against the junior *chela* to recover possession of the properties annexed to the Bibisarai *math* on the allegation that they were *debutter* property dedicated to the worship and service of the plaintiff's idol, and held by the respondent (representing the junior *chela*) as an *adhikari* in charge of the Bibisarai *math* and asserting it to be a *math* subordinate to the Bhadrak *math* —*Held* (affirming the decision of the High Court) that the property dealt with by the *ekrarnama* was prior to its date to be regarded as vested not in the Mohant but in the idol the Mohant being only its representative and manager and consequently that from the date of the *ekrarnama* the possession of the junior *chela* by virtue of its terms, was adverse to the right of the idol and of the senior *chela* as representing that idol and that the suit was barred by limitation. DAMODAR DAS v LAKHAN DAS (1910)

I L R 37 Calc 885

2 ———— Alienation of endowed property—*Power of shebait to grant lease in perpetuity at a fixed rent—Limitation Acts (XV of 1877) Sch II Art 134 and (IX of 1908) Sch I Art 134—Bonâ fide Purchaser—Purchaser of absolute title—Privy Council practice of—Review of former decision* In a suit brought by the Raja of Panchakote as the shebait of certain Hindu deities to recover possession of *debutter* property which had been alienated more than 12 years before the institution of the suit by the plaintiff's predecessor in title who had granted a mokurari lease of the property in consideration of a fixed rent and payment of a fine equal to two years rent *Held* (reversing the decision of the High Court) that the suit was not barred by limitation under Art 134 of Sch. II of Act XV of 1877 the lessees (defendants) not being the purchasers of an absolute title and therefore not purchasers within the meaning of that article *Abhiram Goswami* v *Shyama Charan Nandi I L R 36 Calc 1003 L R 36 I A 148* followed The Judicial Committee of the Privy Council are averse from reviewing on an *ex parte* application a considered decision in a former case delivered after full argument ISHWAR SHYAM CHAND JIU v RAM KANAI GHOSE (1911)

I L R 38 Calc 526

3 ———— Proof that grant was for bonâ fide public religious purpose—*Debutter—Dealings with the property and income—Separate collection by persons jointly interested as shebaits—Bequest of properties both endowed and secular—Breaches of trust—Alienation of property and diversion of income—Evidence—Admissibility—Copy of sanad—Decision of revenue authorities in lakheraj resumption proceeding under Reg II of 1819—Rent decrees recovered on behalf of Thakur—Evidence Act (I of 1872) s 13—Shebait's line failure of—Reverter of office to donor* In order to prove that certain lands form the subject of a valid public endowment it must be established that an absolute grant was made with the intention that the profits should be applied for the services of the idol and to establish the *bonâ fide* character of the endowment it must be proved that the profits have since been so applied, and the members of the family of the founder have not treated property as one the profits of which were mainly intended to be applied for their benefit *Keshessuree Dassee* v *Krishna Kaminee Debia 2 Hay's Report 557 Gunga Narain Sircar* v *Brindabun Chandra Kur Choudhry 3 W R 142 Ram Pershad Das Adhikaree* v *Sri Huree Dass Adhikari 18 W R 399 Sonatun Bysack* v *Srimati Jugut Soondari Dassi 8 Moo I A 66 Ashutosh Dutt* v *Doorga Charan Chatterjee I L R 5 Calc 438* referred to A document which was found to be a copy of a *sanad* of 1775 which itself did not purport to be the deed of grant by which the endowment was constituted but merely referred to the fact that the grant had been made and was recognised by the executive authorised was properly admitted in evidence on proof of proper custody The statement in *Rudh Singh Dhudhuria* v *Niradbaran Roy 2 C L J 431* that the question whether the lands had been absolutely dedicated for a public charitable purpose was wholly foreign to the enquiry and indeed beyond the jurisdiction of the revenue authorities in a proceeding under Reg II of 1819 goes too far. Where the decision in such a proceeding that certain lands are rent free proceeded on grounds based on allegations that the lands were dedicated as public *debutter* the decision would not be conclusive evidence of the validity of the grant but would at all events be evidence to show that a

HINDU LAW—ENDOWMENT—*contd*

claim to hold the land rent free on that ground was put forward at that time by the *shebait* and was on that account admitted by the revenue authorities When the family of the *shebait* appointed by the founder died out the *shebaitship* would, in the natural course revert to a member of the family of the original grantor *Sital Das Babaji* v *Protap Chandra Sarma 11 C I J ?* referred to The mere fact that two branches of the family of the *shebait* each collected a half share of the rents of the endowed property did not prove that the property was treated as secular property Rent decrees showing recovery of such half shares of the rent from the tenants on behalf of the Thakur were properly admitted in evidence under s 13 of the Evidence Act The fact that a *shebait* devised the endowed property along with his secular properties went no further than to indicate that he purported to bequeath his right to the *shebaitship* of that property to his widow and not the property itself Alienation of the endowed property recently made by the *shebaits* were held to amount to instances of abuse of trust by the *shebaits* which would not by themselves be sufficient to destroy the *debutter* character of the land if otherwise established. Unlawful diversions of the profits from the services of the Thakur to other purposes in recent years also did not affect the validity of the grant as *debutter* *Held* on the entire evidence that the endowment in this case was not of a private character and that the members of the family of the original grantor had not resumed the property endowed and converted it into secular property MADHUB CHANDRA BERA v SARAT KUMARI DEBI (1910)

15 C W N 126

4 ———— **Gift in favour of an idol which is to be subsequently consecrated**—*Possession given to manager* By a deed of gift certain zamindari property was expressed to be given to the idol which was not at the time of execution in existence and possession of the property was made over to a certain person as *pujari* *Held* that the deed was valid and created a trust in favour of the idol *Mohar Singh* v *Het Singh I L R 32 All 337* and *Bhupati Nath Smrititirtha* v *Ram Lal Moitra I L R 37 Calc 128* referred to CHATARBHUJ v CHATARJIT (1911)

I L R 33 All 253

5 ———— **Gift void for uncertainty**—*Gift in favour of the Thakurji in his Thakur dwara —No temple built or idol installed* *Held* that a dedication not to any particular deity which was subsequently to be installed in a temple but to the Thakurji in his Thakur dwara without mentioning the particular Thakurji to whom the property was dedicated was void for uncertainty *Bhupati Nath Smrithi tirtha* v *Ram Lal Moitra I L R 37 Calc 128* *Mohar Singh* v *Het Singh I L R 32 All 337* and *Chatarbhuj* v *Chatarjit I L R 33 All 253* distinguished PHUNDAN LAL v ARYA PRITHI NIDHI SABHA (1911) **I L R 33 All 793**

6 ———— **Debutter—private consensus of co sharers**—*If may change character of treatment of property as secular effect of—Partition of property by shebait if converts property into secular—Legal conversion proof of* Where a private *debutter* had been partitioned between members of the family for the better enjoyment thereof and there had been sales and mortgages of portions of the property by some members but there was nothing to show that there was a consensus to give the property a different turn: *Held* that the original *debutter* character of the property being established the above facts did not operate to destroy its *debutter* character *Durga Nath* v *Ramo Chandra I L R 2 Calc 341* referred to *Per* CHATTERJEE J—A partition of *debutter* property for the purpose of convenience of the user for the *sheba* is not a violation of the trust for the *sheba* of the property *Per* JENKINS C J—Where the original *debutter* character of a property is found in a suit to establish such character against one who claims under an original *shebait* lies upon the defendants to show the subsequent legal conversion of the land to the ordinary user of the property *Jugjut Moheenee* v *Rajendra Nath 10 B L R 19 81* referred to DHARMA DAS MANDOL v GOSTA BEHARY MANDOL (1911) **16 C W N 29**

7 ———— **Shebait office of**—*Succession—Deed of appointment—Construction— Shishya shishyanukrame* Where it was provided by deed that the succession to the office of a *shebait* should be *shishya shishyanukrame* (i e disciple following disciple) *Held* that upon a proper construction of the document there was nothing to prevent one disciple from succeeding a co disciple in the line of the original *shebait* GOPAL CHANDRA CHAKRABARTY v PADHARAMAN DAS BABAJI (1911) **16 C W N 108**

8 ———— **Right of succession to shebaitship of temple belonging to Ballavacharya Gossains**—*Evidence of dedication—Claim of persons incompetent to be sebaits (as being Bhats) of Ballav temple disallowed as defeating the purpose for which the founder established the worship—Title—Proof of independent title to succession as shebait* In a suit for possession and the right of sebaitship of a temple belonging to the Ballavcharya Gossains founded by one Muttuji the maternal grandfather of the plaintiffs (appellants) the defendant (respondent) contended that the ordinary Hindu law was not applicable as alleged by the plaintiffs and that daughters sons were excluded by customs from succession *Held* that apart from positive testimony on the point this performance of the worship of the idol in accordance with the rites of the sect for whose benefit it was held might be treated as good evidence of dedication and the ordinary rule of Hindu law relating to the descent of private property was not applicable *Held* also that the rule that the heirs of the founder succeed to the sebaitship laid down in *Gossamee Sree Greedhareeje* v *Romanlalljee Gossamee I L R 17 Calc 3 L R 16 I A 137* was as there implied subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship In the present case the appellants being Bhats and not belonging to the Gossain *kul* were not competent to be shebaits of a Ballav temple where the rites were performed according to the Ballav ritual which it was clearly established they could not perform To allow their claim would defeat the purpose for which the worship was established. *Held* further that the respondent had established an independent title of his own to the temple as being the nearest male relative of Muttuji but

being descendants of two full brothers The idol in the temple was brought from his temple at Nathdwara and the worship founded by Muttuji was an off shoot of the worship at Nathdwara The temple was also built on land belonging to the Tekait respondent *with the permission of his* ancestor who held the office of Tekait at the time He had therefore a clear title according *to the customs and usages of the Ballav Kul* to the sebaitship of the temple MOHAN LALJI *v* GORDHAN LALJI MAHARAJ (1913)

I L R 35 All 283

9 ———— Idol mutilation of—*It terminates endowment—Consecration of new idol effect of—Land given for worship of idol—Grantee if bound to apply proceeds for service of new idol—Statement partly against one's interest and partly self regarding—Admissibility* When an image is mutilated or destroyed the religious purpose does not come to an end, and a new image may be established and consecrated in order that it may be worshipped as intended by the original founder Where the site where an image which was established by an ancestor of the plaintiff was forty *years before the suit* washed away and the image itself was broken to pieces but continued to be worshipped in that condition out of the profits *of some land* made over by *the ancestor of the* plaintiff to an ancestor of the defendant for that purpose and the plaintiff having now established and consecrated a new image under the same name in a new temple in the same village called upon the defendant to perform the worship of the image out of the profits of the land and the defendant having refused plaintiff brought this suit to compel the defendant to perform the worship and in the alternative for ejectment *Held* that upon these facts the plaintiff was entitled to a decree for ejectment A statement by a predecessor of the defendant that the land had been given in order that the income might be applied for the worship of the grantee's family idols and also of the image established by the plaintiff's ancestor was admissible against the defendant to prove that the land was given for the purpose of the image but not in his favour to prove that it was given for the worship of the defendant's family idols BIJOY CHAND MAHATAP *v* KALI PADA CHATTERJEE (1913) 17 C W N 1013

10 ———— *Endowment for worship of an image—Destruction of image how it affects endowment* An endowment of land the income of which is meant to be applied for the purposes of the service of an image of *Shiva* is not affected by the destruction or mutilation of the image The religious purpose survives the destruction or mutilation A new image may be established and consecrated in order that it may be worshipped as intended by the original founder *Purna Chandra Bysack v Gopal Lal Seth 8 C L J 369* and *Bhupati Nath Smriti tirtha v Ram Lal Maitra I L R 3 Calc 128* referred to A tenure dedicated to the service of an image of an idol comes to an end if the person entrusted with the worship repudiates his obligation in that behalf *Hurrogobind Raha v Ramratno Dey I L R 4 Calc 67* and *Ansar Ali Jemadar v Grey 2 I J C 103* followed in principle BIJOY CHAND MAHATAB *v* KALIPADA CHATTERJEE (1913)

I L R 41 Calc 57

11 ———— Mahant of a Temple—*Mahant appointing a married man and father of children to be Mahant—Abdication by Mahant of his functions—Right of his senior chela to succeed him* In this appeal the question was whether the appellant who claimed to the senior *chela* of the first respondent the late *mahant* who had retired or the second respondent who claimed to have been appointed by him *was entitled to succeed him* as the *mahant* of the Patepur *asthal* or *muth* On this question their Lordships of the Judicial Committee *held* (reversing on the evidence the decision of the High Court) in favour of the appellant mainly on the ground that the second respondent was a married man who had not on initiation renounced his worldly ties and the begetting of children and was not an ascetic or *bairagi chela* but was disqualified from holding the office of *mahant* As to the nature object custom and practice of such a religious institution *Sammantha Pandara v Sellappa Chetti I L R 2 Mad 175* was referred to The question as to who had the right to *succeed to the office of mahant* depended according to the well known rule in India not on the general customery law but upon the custom and usage of the particular *muth* *Mahant Ramanooj Doss v Mahant Debraj Doss 6 S D A (Beng) 262* *Greedharee Doss v Nundkissore Doss 11 Moo I A 405* *Muttu Ramalinga Setupati v Perianayagum Pillai L R 1 I A 209* and *Raja Vurmah Valia v Ravi Vurmah Kunhi Kutti I L R 1 Mad 235 L R 4 I A 76* referred to On the question as to the second respondent being a married man on which the Courts below had differed their Lordships were of opinion that the verdict given by the Subordinate Judge who had the advantage of seeing and hearing the witnesses could not be lightly set aside especially as that Judge was also presumably acquainted with the manners and customs of the people among whom such a transaction was alleged to have occurred There were moreover no sufficient grounds stated by the High Court for disturbing that verdict Having themselves investigated the facts their Lordships held that the rule—of attaching weight to the opinion of the Judge of first instance —could not safely be departed from in the present case Though the deeds appointing the second and third respondents to be successively *mahants* were ineffective the former being not competent to hold the office and the latter having died the first respondent could not in their Lordships opinion be considered to be still the *mahant* He had abdicated all his function and had himself retired from the office A *mahant* was not only a spiritual preceptor but a trustee in respect of the *asthal* He had by appointing a married man and father of children to the office consented to a violation of those vows of asceticism and celibacy which it was his duty as a trustee to maintain and protect His abdication must therefore be accepted as a fact in the case A vacancy in the office had therefore been created which under the circumstances would devolve upon the appellant who was found to be senior *chela* and was not alleged to be incompetent to be *mahant* RAM PRAKASH DAS *v* ANAND DAS (1916)

I L R 43 Calc 707

12 ———— Sadhak or disciple of deceased mahant—*Election by a majority of*

HINDU LAW—ENDOWMENT—*contd*

th da nasi bh l (t n cl sses of mendicants) as sembled for purp of such election—Separate election by faction of dasnam bhik An election of a mahant of a temple by the *dasnam bhik* (the ten cl es of mendicants) in order to be a valid and effectual election mu t be made by a majority of the *da am bh* a sembled for that purpose A separate election by a faction of the *da nam bhik* is not a valid and effectual election In this case which related to the el tion of a *mahant* to a temple at Hardwar called Akhara Baba Sarwan Nath both the appellant (plaintiff) and re pondent (def ndant in po es ion of the math property) claimed to have been duly electe l on the same day the 24th of February 190 (being the *tervin* the 13th day ceremony after the death of the late *mahant*) their Lord hips of the Judicial Committee (affirming the deci ion of the High Court which had reverse l that of the Subordinate Judge) *Held* that on the evidence and under the circumstances of the ca e the appellant who claimed to be the *sajjal* (di cipl) of the deceased *mahant* had failed to prove that he had been duly elected *mahant* of the templ On the oth r hand th re was lar e body of eviden e in support of the respondent (the *atial* of a former *mahant*) who election an l al o the bhandara or feast usual on the occasion had taken place within the temple which was cu tomary whereas the election of and the feast given by the appellant took place out id the temple that a majority of the persons pre ent at the election of the respondent who were qualified to elect a *mahant* vote l in favour of the respondent that in point of numbers and influence the respondent received more support than th appellant and that there was no attempt on the part of the respondent to conceal (as the appellant alleged he had done) the arrangements he ha l made for the occasion As it had not been shown that these points had been wrongly deci le l by the High Court their Lord hips dismi ed the appeal LAHAR PURI *v* TURAN NATH (191) I L R 37 All 298

13 ———— Shebait—*Nature of debutter grants where grante is to enjoy properties from generation to generation on performance of 1 ba of the godde s—Perm nent lea by grantee validity of—Civil Proce l Code (Act V of 1908) s 99—Ambiguity—Ev l* In the construction of ancient grants an l dee ls evidence is admi sible as to the manner in which the thing granted has alway been po sessed and u d for so the parties thereto must be supposed to have intende l *Weld v Hornby 7 East 197 8 R R 608 Rex v Osborne 4 East 32* followed The Court may call in aid acts under the deed as a clue to the intention *Doe v Pe 8 Bing 181* followed This principle does not apply unle s there is an ambiguity *Attorney General v The Corporation of Rochester 5 De G M & G 797* followed Consequently while in a case of ambiguity the Court will uphold that construction of a deed which justifies a long usage as to the application of trust fund the Court will not whe e there is no ambiguity accept an erroneous interpretation though con istent with usage so as to sanction a manifest breach of trust *Drummond v Attorney General 2 H L C 837* followed If there is a deed which says, according to its true con truction one thing you cannot say that the deed means something else merely because the parties have gone on for a long time so understanding it *Sadlier v Biggs 4 H L C 435* followed Where two ancient *debutter* grants by one of the Maharajas of Pachete were held to be ambiguous the properties having been given to the grantee *who was to enjoy them from generation to generation* on performance of the *sheba* of the goddess and in 1829 the successors of the grantee gave two permanent leases to the predece sors in interest of the plaintiffs *Held* that in those circumstances the Court might determine the true charact r of the endowment from the manner in which the dedicated properties had been held and enjoyed That the properties in dispute were not absolute *debutter* properties of the goddess but were the personal properties of the grantees subject to the charge of the worship of the goddess *Ganga v Brindaban 3 W P 142 Majan v Kamal 8 W R 42* referred to That the permanent leases had become indefeasible by lapse of time *Jagamba Goswamini v Ram Chandra Goswami I L P 31 Calc 314 Damodar Das v Lakhan Das I L P 37 Calc 885 L P 3 I A 147* as explained in the case of *Madhu Sudan Mandal v Radhika Prosad Das 16 C L J 349* followed KULADA PROSAD DEGHORIA *v* KALI DAS NAIK (1914) I L R 42 Calc 536

14 ———— Construction of deed of endowment—*Deed contended to be invalid as being not a real dedication to idol—Appointment of members of donor s family as mutawallis—Deed held valid as creating an endowment* The question in this appeal was as to the construction of a deed of endowment executed and regi tered by a Hindu on the 20th of July 1898 In a suit after his death to set aside the deed the appellants as next reversioners claimed that no valid endowment had been created or was intended to be created by it Their Lordships in dismi sing the appeal distinguished the ca es of *Sonatan Bysack v Juggutsoondree Dossee 8 Moo I A 66* and *Ashutosh Dutt v Doorga Churn Chatterji I L P 5 Calc 438 L R 6 I A 182* cited in support of the appellants contention, on the ground that although nominally there was a gift to the idol, that gift was so cut down by subsequent disposition that there was no gift to the idol such as to make the property pass as an absolute and entire intere t in his favour *Held* that there was no such cutting down in the present case There was in the beginning a clear expression of an intention to apply the whole estate for the benefit of the idol and the temple and the rest of the di position was only a gift to the idol by a direction that of the whole estate which had already be n given on half was to be applied for the upkeep of the idol it elf an l the repair of the temple and the other half was to go for the upkeep of the *mutwalli s* There was no reason why the donor should not nominate the members of his family as the *mutawall s* of the temple and he had done o And there was nothing in that which militated against the property of his earmarking a certain part of the money to remunerate them as managers so long as they shoul l so continue By the regi tration of the deed the executant showed that it represented an intention which he desired to treat as carri d into execution JADU NATH SINGH *v* THAKUR SITA RAMJI (191) I L R 39 All 553

15 ———— Debt contracted by head of adinam—*Onus of proof of necessity—Suit to recover*

HINDU LAW—ENDOWMENT—*contd*

money borrowed on mortgage of endowed property—Recognition of debt binding the property by successive heads of institution—Account books not produced. The appellant sued to recover money advanced on a mortgage bond dated 4th November 189? to the head of an adinam or mutt and to enforce the mortgage against the property of the mutt which was hypothecated as security for the loan. The deed was for Rs. 20,000 the balance of principal and interest due on a former bond of 24th June 188? and it stated that the bond is granted as was the former one over the lands belonging to the adinam. The bond of 1883 had been executed for the sum of Rs. 14,94? for the balance due on a promissory note and recited that it was for the expenses of the aforesaid adinam. And the promissory note for the original loan stated that the sum received by us to-day in cash for the expenses of our adinam is Rs. 14,000. That was taken in December 1881 shortly after the termination of some litigation necessary in the interest of the adinam. The binding nature of the debt was recognized by successive managers of the mutt who paid from time to time interest on the money and other amounts towards the discharge of the debt over a period of 2? years. *Held* that though the onus was on the lender to show that the loan was made for the purpose of the mutt and was a necessary expense of the institution itself, yet where the debt had been so recognized as binding and dealt with on that basis, their Lordships were of opinion that there was a sufficient body of evidence that the loan was made for purposes binding on the mutt and there was no evidence to the contrary. In favour of this view it was an important fact that the account books of the mutt were not produced in which it is the habit of the head or manager to make entries with much detail and elaboration forming a current record on the financial side of the history of the institution. The parties to a suit should bring before the Court their best evidence and when it is not produced the Court is justified in concluding that it would, if brought into Court, not support the case of the party omitting to produce it. MUTTUKRISHNA PILLAI *v.* MANICKAVASAKA PANDARA SANNADHI (1917)

I. L. R. 40 Mad. 402

16. ———— Power of shebait to grant permanent lease of endowed property—Necessity—Permanent lease—Lease at fixed rent—Small premium—Land in building site in village—Grant of permanent lease—Question of mixed law and fact—Proof of local custom—Evidence of custom. In this appeal it was held by their Lordships of the Judicial Committee that the grant at a fixed rent, and on payment of a premium of a permanent lease by a shebait of a portion of the lands dedicated to the worship of the idol, of which he was trustee, was invalid as, not being necessary in their Lordships' opinion, the evidence did not establish that the shebait was constrained by any necessity to make such a lease, or that any benefit accrued to the estate from it. *Deo v. Konwar ... ... affirmed.* Where as in this case there is no deed of endowment forthcoming the rules according to which the endowment property ... income are to be dealt with in order to carry out the intention of the original endower can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case. *Ram Parkash Das v. Anand Das, I. L. R. 43 Calc. 707 ; 43 I. A. 73,* referred to. The rules must not be inconsistent with or repugnant to the very nature and purpose of the endowment. Both the worship of the idol and the preservation and use of the dedicated property to support and maintain that worship must be assumed to have been intended to be perpetual. A rule therefore which authorized the *shebait* arbitrarily at his own wish and pleasure to alienate any of the dedicated property would be so repugnant to the whole purpose and objects of the endowment that it could not be held to embody the original endower's intention. A *debutter* estate may be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration. *Hunooman Persad Panday v. Babooee Munraj Koonweree, 6 Moo. I. A. 393, 423 ; A. Prosunno Kumari Debya v. Golab Chand Baboo, L. R. 2 I. A. 145, 151 ; 14 B. L. R. 450, 460* and *Konwur Doorganath Roy v. Ram Chunder Sen, I. L. R. 2 Calc. 341, 352 ; L. R. 4 I. A. 52, 62, 64* referred to. In these cases there was to be found no indication as to what was in this connection, the precise nature of the things to be included under the description benefit to the estate, and no definition of it applicable to all cases can be given. It is a breach of duty on the part of a *shebait*, unless constrained by an unavoidable necessity, to grant a lease in perpetuity of *debutter* land at a fixed rent however adequate that rent may at the time of granting, by reason of the fact that by this means the *debutter* estate is deprived of the chance it would have if the rent were variable of deriving benefit from the enhancement in value in the future of the lands leased. *Maharanee Shibessouree Debia v. Mothooranath Acharjo, 13 Moo. I. A. 270 ; 5 Narayana Chetty v. Chidambaram Pillay, I. L. R. 27 Mad. 91, 99 ; L. R. 31 I. A. 83, 88,* and *Abhiram Goswami v. Shyama Charan Nandi, I. L. R. 36 Calc. 1003, 1012 ; L. R. 36 I. A. 148, 165* referred to. These cases dealt with agricultural lands, but there was no reason why the principles they establish should not apply to a building site in the street of a village as in the present case. No authority had been cited to show that a *shebait* is entitled to sell *debutter* land solely for the purpose of investing the price of it so as to bring in an income larger than that derived from the *debutter* land itself. Questions of the existence of an ancient custom are questions of mixed law and fact. Although there are the two Courts had purported to find that a local custom modifying the law had been proved, there were no such concurrent findings of fact as according to the practice of the Board it was bound to accept. Neither of the Courts below moreover had stated its conclusion in a form which amounted to a finding that any ancient custom such as modified the law existed in the locality. PALANIAPPA CHETTY *v.* DEIVASIKAMONY PANDARA SANNADHI (1917)

I. L. R. 40 Mad. 709

17. ———— Power of head of mutt to grant permanent lease—Limitation Act (IX of 1908), Art. ... Although the head ... [illegible]

HINDU LAW—ENDOWMENT—*contd*

to appropriate part of the income of the properties of the mutt to his own maintenance he is only a trustee in respect of those properties and he is ordinarily incompetent to grant a permanent lease of the *mutt* properties. A permanent lease for an annual rent is a transfer for a valuable consideration within Art 134 of the Limitation Act (IX of 1908) and the transferee acquires an indefeasible title to the permanent lease by possession for 12 years as provided by the article. Knowledge that the title of the transferor is only a limited one cannot by itself disentitle the transferee to the benefits of Art 134. *Ram Parkash Das v Anand Das I L R 43 Calc 0 . Subbaiya Pandaram v Mahammad Mustapha Maracayar Appeal No 13 of 1916* and *Ram Kanai Ghose v Raja Sri Hari Narayan Singh Deo Bahadur 2 C L J 546* followed. BALASWAMY AYYAR *v* VENKATASWAMY NAICKER (1916) **I L R 40 Mad 745**

18 ———— Guardian of minor Mahant of Math—*Power of disposition over Asthal property and acquisitions thereout and income thereof—Debts of Mahant when binds Math—Suit to set aside sale by successor* The whole assets of an *Asthal* or *Math* are vested in the *Mohant* as the owner in trust for the institution and although large administrative powers are undoubtedly vested in the reigning *Mahant* the trust does exist and must be respected. *Held* that in this case a village L. attached to the *Asthal* was endowed property subject to the trust set out in the grant and all acquisitions with the income thereof were subject to the same trust. A guardian of a minor *Mahant* has no larger powers of disposition over endowed property than the actual *Mahant*. In the absence of a necessity which would make the debts contracted by him binding on the institution the *Mahant* has no power to alienate its properties for the purpose of discharging those debts and if the *Asthal* was not liable for such debts his successor would be clearly entitled to have the sales set aside. *A fortiori* the same considerations apply to the dealings of the guardian of a minor *Mahant* and the latter can sue to have the guardians sales set aside on the same grounds. BASUDEO ROY *v* MAHANT JUGAL KISHWAR DAS (1918) **22 C W N 841**

19 ———— Dedication for worship of God without naming the deity—*Uncertainty* Under the Hindu system of law a general endowment for the worship of God without giving the name of the deity for whose benefit the endowment is to take effect is void for uncertainty. *Phundan Lal v Arya Prithinidhi Sabha I L R 33 All 793* followed. *Bhupati Nath Smrititirtha v Ram Lal Maitra I L R 37 Calc 128 Mohar Singh v Het Singh I L R 3 All 637* and *Chaturbhuj v Chatarjit I L R 33 All 253* distinguished. CHANDI CHARAN MITRA *v* HARIBOLA DAS (1919) **I L R 46 Calc 951**

20 ———— Property of math—*Trust—Usage of math—Right to Possession—Adverse Possession—Limitation* Property belonging to a religious institution may by the usage and custom of the institution vest in trustees other than its spiritual head. In any case the property is held solely in trust for the purposes of the institution surplus income must be added to the endowment and not applied for the personal enjoyment of the trustee or trustees. The respondent the head of a math sued the appellants for possession of a village forming part of its endowment. The evidence showed that for a period of eighty years trustees represented by the appellants had had possession and management of the village and had applied the income to the purposes of the institution; they were recorded as trustees in an Inam Register of 1864 which mentioned the assent of the zamindar for whose predecessors the original title to the land had flowed. —*Held* that the respondent had no title to the village further that the appellants possession was adverse to him and that the suit was barred by limitation. In the absence of actual and authentic evidence as to the history of a math the utmost importance attaches to information set forth in an Inam Register. ARUNACHELLAM CHETTY *v* VENKATACHALAPATHI GURUSWAMIGAL (1919) **L R 46 I A 204**

21 ———— Custom and usage of mutt—*Adverse possession—Limitation* This appeal arose from a suit brought by the respondent to declare that the defendants (appellants) have no right to the village of Patharakudi and that the plaintiff as head of the mutt is entitled to the possession of the village and to receive the income of the same from the hands of the receiver. The village was part of the property of the mutt and had been for a long time in the possession of and under administration by the defendants who were Nagara Chetties as hukdars trustees and managers though the head of the mutt appointed in 1864 was the plaintiff who made his claim by virtue of that office and alleged that the defendants held the position of trustees as his agents. The defence was that the defendants and their predecessors who had held the village for about 80 years not for their own advantage but for the benefit of the mutt were entitled to be continued in possession and management of it and that the suit was barred by limitation. The respondent proved no management by the defendants as his agents. On the contrary there was documentary evidence strongly in favour of the defendants which the Judicial Committee accepted as proof of their long possession and proper management. *Held* that the plaintiff was not entitled to the village in suit. On the evidence he had entirely failed to prove his right to possession either by himself or the defendants as his agents nor was his right to possession supported by the history of the land. The general state of the law with regard to religious institutions in India is that the nature of the ownership is an ownership in trust for the institution itself. The settled rule of administration is that it must be not for personal use but entirely for and on behalf of the interests of the mutt and that while the ownership is generally with the spiritual head of the institution such property may be held by the usage and custom of the mutt by the trustees and managers and that by the usage and custom in this case as disclosed by the evidence the ownership of the village was in the defendants. *Ram Parkash Das v Anand Das (1916) I L R 43 Calc 707 (P C) L R 43 I A 73 Sethurama swamiar v Meruswamiar (1918) I L R 41 Mad 296 (P C) L R 45 I A 1* and *Sammantha Pandara v Sellappa Chetti (1879) I L R 2 Mad 175* approved. *Held* further that the possession of the defendants therefore in their own right was adverse to the plaintiff and the suit was consequently barred by limitation. *Palvart*

HINDU LAW—ENDOWMENT—*contd*

money borrowed on mortgage of endowed property—Recognition of debt binding the property by successive heads of institution—Account books not produced The appellant sued to recover money advanced on a mortgage bond dated 4th November 1897 to the head of an adinam or mutt and to enforce the mortgage against the property of the mutt which was hypothecated as security for the loan The deed was for Rs 20 000 the balance of principal and interest due on a former bond of 24th June 1883 and it stated that the bond is granted as was the former one over the lands belonging to the adinam The bond of 1883 had been executed for the sum of Rs 14 946 for the balance due on a promissory note and recited that it was for the expenses of the aforesaid adinam And the promissory note for the original loan stated that the sum received by us to day in cash for the expenses of our adinam is Rs 14 000 That was taken in December 1881 shortly after the termination of some litigation necessary in the interests of the adinam The binding nature of the debt was recognized by successive managers of the mutt who paid from time to time interest on the money and other amounts towards the discharge of the debt over a period of 26 years *Held* that though the onus was on the lender to show that the loan was made for the purposes of the mutt and was a necessary expense of the institution itself yet where the debt had been so recognized as binding and dealt with on that basis their Lordships were of opinion that there was a sufficient body of evidence that the loan was made for purposes binding on the mutt and there was no evidence to the contrary In favour of this view it was an important fact that the account books of the mutt were not produced in which it is the habit of the head or manager to make entries with much detail and elaboration forming a current record on the financial side of the history of the institution The parties to a suit should bring before the Court their best evidence and when it is not produced the Court is justified in concluding that it would if brought into Court not support the case of the party omitting to produce it MUTTOFSAMI PILLAI v MANICKAVASAKA PANDARA SANNADHI (1917)

I L R 40 Mad 402

16 ———— Power of shebait to grant permanent lease of endowed property—*Necessity— Benefit to estate —Lease at fixed rent—Some principles apply to building site in village street as to agricultural lands—Question as to existence of ancient custom—Question of mixed law and fact—Concurrent findings—Privy Council practice of—Error in form of finding of custom* In this appeal it was held by their Lordships of the Judicial Committee that the grant at a fixed rent and on payment of a premium of a permanent lease by a *shebait* of a portion of the lands dedicated to the worship of the idol of which he is a trustee was invalid as against his successor in the *shebaitship* as in their Lordships opinion the evidence did not establish that the *shebait* was constrained by any necessity to make such a lease or that any benefit accrued to the estate from it *Devasikamony Pandara Sannadhi v Palaniappa Chettiar* I L R 31 Mad 53, affirmed Where as in this case there is no deed of endowment forthcoming the rules according to which the endowed property and its income are to be dealt with in order to carry out the intention of the original endower can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case *Ram Parkash Das v Anand Das I L R 43 Calc 707 716 L R 43 I A 73 78* referred to The rules must not be inconsistent with or repugnant to the very nature and purpose of the endowment Both the worship of the idol and the preservation and use of the dedicated property to support and maintain that worship must be assumed to have been intended to be perpetual A rule therefore which authorized the *shebait* arbitrarily at his own wish and pleasure to alienate any of the dedicated property would be so repugnant to the whole purpose and objects of the endowment that it could not be held to embody the original endower s intention A *debutter* estate may be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration *Hunooman Persad Panday v Babooee Munraj Koonweree 6 Moo I A 393 423 424 Prosunno Kumari Debya v Golab Chand Baboo L R 2 I A 145 151 152 14 B L R 450 469* and *Konwar Doorganath Roy v Ram Chunder Sen I L R 2 Calc 341 352 353 L R 4 I A 52 62 64* referred to In these cases there was to be found no indication as to what was in this connection the precise nature of the things to be included under the description benefit to the estate and no definition of it applicable to all cases can be given It is a breach of duty on the part of a *shebait unless constrained by an* unavoidable necessity to grant a lease in perpetuity of *debutter* lands at a fixed rent however adequate that rent may at the time of granting by reason of the fact that by this means the *debutter* estate is deprived of the chance it would have if the rent were variable of deriving benefit from the enhancement in value in the future of the lands leased *Maharanee Shibessouree Debia v Mothooranath Acharjo 13 Moo I A 270 275 Mayandi Chettiar v Chokalingam Pillai I L R 27 Mad 291 299 L R 31 I A 83 88* and *Abhiram Gossami v Shyama Charan Nandi I L R 36 Calc 1003 1013 L R 36 I A 148 165* referred to These cases dealt with agricultural lands but there was no reason why the principles they establish, should not apply to a building site in the street of a village as in the present case No authority had been cited to show that a *shebait* is entitled to sell *debutter* lands solely for the purpose of investing the price of it so as to bring in an income larger than that derived from the *debutter land itself* Questions of the existence of an ancient custom are questions of mixed law and fact Although therefore the two Courts had purported to find that a local custom modifying the law had been proved there were no such concurrent findings of fact as according to the practice of the Board it was bound to accept Neither of the Courts below moreover had stated its conclusion in a form which amounted to a finding that any ancient custom such as modified the law existed in the locality PALANIAPPA CHETTY v DEVASIKAMONY PANDARA SANNADHI (1917)

I L R 40 Mad 709

17 ———— Power of head of mutt to grant permanent lease—*Limitation Act (IX of 1908) Art 134—Permanent lease a transfer within the article* Although the head of a *mutt* is entitled

HINDU LAW—ENDOWMENT—*contd*

to appropriate part of the income of the properties of the math to his own maintenance he is only a trustee in respect of those properties and he is ordinarily incompetent to grant a permanent lease of the math properties. A permanent lease for an annual rent is a transfer for a valuable consideration within Art 134 of the Limitation Act (IX of 1908) and the transferee acquires an indefeasible title to the permanent lease by possession for 12 years as provided by the article. Knowledge that the title of the transferor is only a limited one cannot by itself disentitle the transferee to the benefits of Art 134. *Ram Iarlash Das* v *Anand Das I L R 43 Calc 0 Subbiya Pandaram* v *Mahammad Mustiapa Maracayar Appeal No 13 of 1916* and *Ram Kanai Ghose* v *Raja Sri Hari Narayan Singh Deo Bahadur 2 C L J 546* followed BALASWAMY AYYAR v VENKATASWAMY NAICKEN (1916) I L R 40 Mad 745

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21 ———— **Custom and usage of mutt**—*Adverse possession—Limitation* This appeal arose from a suit brought by the respondent to declare that the defendants (appellants) have no right to the village of Patharakudi and that the plaintiff as head of the mutt is entitled to the possession of the village and to receive the income of the same from the hands of the receiver The village was part of the property of the mutt and had been for a long time in the possession of and under administration by the defendants who were Nagara Chetties as hukdars trustees and managers though the head of the mutt appointed in 1867 was the plaintiff who made his claim by virtue of that office and alleged that the defendants held the position of trustees as his agents The defence was that the defendants and their predecessor who had held the village for about 80 years not for their own advantage but for the benefit of the mutt were entitled to be continued in possession and management of it and that the suit was barred by limitation The respondent proved no management by the defendants as his agents On the contrary there was documentary evidence strongly in favour of the defendants which the Judicial Committee accepted as proof of their long possession and proper management *Held* that the plaintiff was not entitled to the village in suit On the evidence he had entirely failed to prove his right to possession either by himself or the defendants as his agents nor was his right to possession supported by the history of the land The general state of the law with regard to religious institutions in India is that the nature of the ownership is an ownership in trust for the institution itself The settled rule of administration is that it must be not for personal use but entirely for and on behalf of the interests of the mutt and that while the ownership is generally with the spiritual head of the institution such property may be held by the usage and custom of the mutt by the trustees and managers and that by the usage and custom in this case as disclosed by the evidence the ownership of the village was in the defendants *Ram Parkash Das* v *Anand Das (1916) I L R 43 Cal 707 (P C) L R 45 I A 73 Sethuramaswamiar* v *Meruswamiar (1918) I L R 41 Mad 296 (P C) L R 45 I A 1* and *Sammantha Pandara* v *Sellappa Chetti (1879) I L R 2 Mad 175* approved *Held* further that the possession of the defendants therefore in their own right was adverse to the plaintiff and the suit was consequently barred by limitation *Palanant*

HINDU LAW—ENDOWMENT—*concld*

Rao v Puran Mal (1883) I L R 6 All 1 I L R 10 I A [illegible] referred to As to the surplus income it is the duty of a trustee to refrain from personal enjoyment of it and to add it to the capital of the estate administered and this law applies also to the property of a mutt or asthal whether the title is in the gurukkal as spiritual head or in the trustees according to the custom and usage of the institution ARUNACHELLAM CHETTY *v* VENKATACHALAPATHI GURUSWAMIGAL (1920)

I L R 43 Mad 253

22 ——— **Right of Trustee of Hindu Religious endowment to possession**—*Of endowed property—Madras Regulation VII of 1817 s 12—Religious Endowments Act (XX of 1863) ss 3 and 4—Limitation Act (IX of 1908) Sch I Art 144—Possession adverse to Trustee* The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property which is in the possession of persons who have the right and the duty to manage the property collect the revenue and hand it over when collected to be used in the proper manner for the purposes of the endowment Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over But in such a case the general trustee would not be entitled to the possession of the properties out of which this portion of the revenue comes His rights do not commence until after the collection of the revenues by and under the management of those who hold possession Possession would be in the hands of those entitled to manage those special properties and their possession would be adverse to his The appellant in this case claimed to be *huldar* or *trustee* of the Thanappa Mudali Kattalai an endowment for the performance of certain ceremonies in a temple at Madura and to be entitled to the possession of four villages forming part of the endowment The villages came into the possession of the East India Company in 1801 and remained in their possession until 1849 when the general manager of the temple was placed by the Company in possession Since 1849 the villages were in the hands of the said manager and his successors the respondents the whole of the revenue had been used for the purposes of the endowment (including the expenses of the temple) according to the directions of the temple manager and the temple committee *Held* in a suit brought in 1908 by the appellant for possession of the villages that the possession of those who had held the villages from 1849 was possession adverse to the appellant and his predecessors in title and that the suit was barred by limitation AMBALAVANA PANDARA SANNIDHI *v* MEENAKSHI SUNDARESWARAL DEVASTANAM OF MADURA (1920

I L R 43 Mad 665

HINDU LAW—EXECUTION OF DECREE—*concld*

——— *Daughters in possession of their father's estate—Payment made by one daughter out of income of property—Decree obtained for recovery of money so paid—Death of decree holder before execution—Who entitled to execute the decree* While two sisters daughters of a separated Hindu were in possession of their father's property one of them made certain payments out of the income of that property in order to save from sale for arrears of Government revenue other property which belonged to the sons of the other sister and to certain cousins of theirs Subsequently she obtained a decree against the persons on whose behalf she had made the payments above mentioned but died before she executed it *Held* that the person entitled to execute this decree was not the surviving sister but the legal representative (or representatives) of the decree holder *Isri Dut Koer v Hansbutti Koerain I L R 10 Calc 324* referred to SITA RAM *v* DULAM KUNWAR (1918) **I L R 41 All 350**

HINDU LAW—FAMILY SETTLEMENTS

See FAMILY SETTLEMENT

——— One *D P* on the death of his wife laid claim to certain property formerly the property of his wife's father and which had been given to the wife by her mother The mother and surviving sister in order to avoid litigation relinquished a substantial portion of the property to *D P* *Held*, on a suit by the Reversioners entitled to succeed on the death of the survivor of the two ladies that there had been no valid family settlement HIMMAT BAHADUR *v* DHANPAT RAI

I. L. R. 38 All 335

HINDU LAW—GIFT

See HINDU LAW—ALIENATION

1 ——— **Gift by Hindu widow to daughter**—*Gift of immoveable property to daughter at gowna or dviragaman ceremony—Post nuptial gifts—Reversionary heirs* It is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immoveable property of her husband to her daughter on the occasion of the daughter's *gowna* ceremony and such a gift is binding upon the reversionary heirs of her husband CHURAMAN SAHU *v* GOPI SAHU(1909) **I L R 37 Calc 1**

2. ——— *Gift made by Hindu widow with consent of next reversioners—Suit by more remote reversioners to set aside the gift*—A gift by Hindu widow who succeeded to the separate estate of her deceased husband of such estate is not valid and does not create a title which cannot be impeached by the remoter reversioner because it has been made with the consent of the next reversioner *Ramphal v Tula Kuari I L R 6 All 116* followed *Bajrangi v Manokarnika Bukh h Singh I L R 30 All 1* distinguished *Rani Anund Koer v The Court of Wards I L R 8 I A 14* referred to BAKHTAWAR *v* BHAGAWANA (1910) **I L R 32 All** [illegible]

3 ——— *Hindu widow's estate—Gift by a female to her daughter—Death of daughter's heir—Acceleration of estate* The widow of a sonless separated Hindu in possession as such of her husband's property made a gift thereof in favour of her daughter The donee predeceased the donor and the donor remained in possession of the property the subject of the gift *Held* that no action by the donee's heir to recover possession would lie during the donor's life time *Bhagat Ram v Lachma Kuar I L R* [illegible] *All 253* referred to. IRP RAM *v* PEWATI (19?0)

I L P 32 All 582

4 ——— **Gift of land by daughter for deceased father's spiritual benefit**—*Held valid*

HINDU LAW—GIFT—*contd*

A Hindu widow who succeeded to the property of her deceased father made a gift of a very small portion of that property at the time of performing her father's sraddha ceremony on the occasion of a peculiarly holy event among Hindus. *Held* that the gift was in accordance with Hindu ideas as regards the daughter's duty in connection with the performance of a father's sraddha on such an occasion and cannot be impeached by the reversioners. It cannot be laid down as a rule that to justify the alienation the expenditure should be for a spiritual necessity. It is sufficient if the gift or expenditure have reference to the spiritual needs of the father or husband whose property is taken. VENKATARATNAYYA *v.* ... (1910)

I L R 34 Mad 288

5 ———— Gift to daughter by father—*Gift valid whether made at or after marriage*. There is a moral obligation on a Hindu father to make a gift to his daughter on the occasion of her marriage. A gift by a father to his daughter of a small portion of ancestral immoveable property is binding on the undivided family whether such gift is made at or after the daughter's marriage. SUNDARAMAYYA *v.* SITAMMA (1912)

I L R 35 Mad 628

6 ———— Gift by widow to sister's son—*Mitakshara—Hindu widow—Gift—Consent of next reversioner not sufficient to validate gift in favour of sister's son*. *Held* that a gift of her deceased husband's estate made by a Hindu widow in possession thereof as such widow to her sister's son was invalid and could not be rendered operative by the consent of the next reversioner. *Lajrangi Singh v Manokarnika Bakhsh Singh I L R 30 All 1* discussed. ABDULLA *v.* RAM LAL (1911)

I L R 34 All 129

7 ———— Gift to the illegitimate son of an undivided collateral co parcener—*Not ancestral property as between the donee and his son*. Property given for maintenance to the illegitimate son of an undivided deceased collateral coparcener is not ancestral property of the illegitimate son in which the son of that illegitimate son gets a right by birth. *Nagalingam Pillai v Ramachandra Tevan I L R 24 Mad 429* and *Hazari Mal Babu v Abaninath 17 C L J 58* distinguished. KRISHNASWAMI NAIDU *v.* SEETHALAKSHMI AMMAL

I L R 39 Mad 1029

8 ———— Gift to unborn person—*Validity of—Settlement deed in 1889—Gift to daughter for life then to her unborn children effect of—Alienation by daughter—Suit by adopted son of settlor—Right of reversioner to sue—Hindu Transfers and Bequests Act (Mad Act I of 1914)—Suit decided before the Act—Act passed pending appeal—Act if applicable to the appeal—Power of Appellate Court in passing decrees on appeal—Civil Procedure Code (Act V of 1908) O XLI r 33—Declaratory decree nature of—Discretion of the Court in such cases*. A Hindu executed a deed of settlement in 1889 by which he demised some properties to his daughter in order that she may enjoy them during her lifetime and that after her they should be enjoyed *with all rights* by her sons and daughters who may be alive the daughter alienated some of the properties in 1907 the plaintiff the adopted son of the settlor claiming to be the nearest reversioner filed a suit in 1912 for a declaration that the alienations were without necessity and not binding on the reversioners. He impleaded the settlor's daughter as the first defendant and her daughter born in 1889 as the second defendant and the alienees as the other defendants. The Hindu Transfers and Bequests Act (Madras Act I of 1914) came into operation during the pendency of the appeal in the lower Appellate Court. Both the Lower Courts dismissed the suit. *Held* on second appeal (i) that the Hindu Transfers and Bequests Act (I of 1914) was retrospective in its operation and was applicable to this case (ii) that the gift in favour of unborn children of the daughter of the settlor was valid (iii) that consequently the plaintiff was not the nearest reversioner entitled to maintain the suit (iv) that the rule that a remote reversioner can sue if the nearest reversioner is a female is inapplicable when the latter is entitled to an absolute estate (v) that there was no collusion between the first and the second defendant by reason of the fact that the latter's guardian put forward an alternative contention on a point of law setting up an absolute title in favour of the first defendant (vi) that the authority of an Appellate Court is not limited to determining the question whether the original Court was right according to the law in force at the date of its judgment but was entitled to pass such decree or order as was in accordance with any later enactment which came into operation subsequent to such date. *Kanakayya v Janardhana Padhi I L R 36 Mad 439* and *Govinda Parama Guru v Dasi v Prulland 20 Mad L J 529* referred to and (vii) that a declaratory decree is a matter of discretion and when there was already one and there might be more than one preferential heir before the plaintiff the discretionary relief could be properly refused. MUTHUSWAMI AYYAR *v.* KALYANI AMMAL (1916)

I L R 40 Mad 818

9 ———— Gift for religious purposes by Hindu widow—*Civil Procedure Code (Act V of 1908) O XXVI r 1—Commission to examine witnesses*. It is not competent to a Hindu widow to make a religious gift of the whole or practically the whole of her husband's property for the religious benefit of her husband. The Courts should not allow witnesses to be examined on commission without adequate reasons. *Per* SHAH J —In view of the accepted doctrine that the widow's powers to dispose tion are restricted as regards the property particularly immoveable property inherited from the husband in cases governed by the Mitakshara I do not think that Vijnaneshvara's silence on this point can be properly used as an argument in favour of the unlimited powers of the widow to make a gift of the immoveable property of her husband for a religious or a spiritual purpose. The rule of this point is not a special rule of any particular school of Hindu Law but is one of general application and must be accepted as applicable to cases under the Vyavahara Mayukha.

PANACHAND CHHOTALAL *v.* MANOHARLAL NANDLAL (1917)

I L R 42 Bom 136

10 ———— Gift to Hindu female—*Construction of document—Malik mustaqil*. A Hindu being the full owner of certain property made a gift thereof to his widowed daughter in law ... scribing the donee in the deed as *malik* ... There was no circumstance to ... that the donor intended that the d...

HINDU LAW—GIFT—*contd*

take less than the full estate in the property comprised in the deed *Held* that the donee took all the estate of the donor *Surajmani* v *Rabi Nath Ojha I L R 30 All 84* referred to NAULAKHI KUNWAR v JAI KISHAN SINGH

I L R 40 All 575

11 ———— **Gift of lands to an idol**—*By a Hindu for pious purposes without a deed validity of—Binding nature of the gift on members of a joint Hindu family* A dedication of a small portion of the joint Hindu family lands to an idol of a temple by the father or manager of the family on the occasion of the funeral of a deceased member is not by the law of India required to be in writing and is valid and binding on the other members of the family as a gift ordained for pious purposes PAMALINGA CHETTY v SIVACHIDAMBARA CHETTY (1918)

I L R 42 Mad 440

12 ———— **Gift to Agradani Brahmins**—*position of—Gift to—Title to offerings to the dead at a sradh when vests in Agradani Brahmin—Acceptor of such gifts if liable for damages* Agradanis are a class of degraded Brahmins who accept gifts of certain prohibited things at *sradh* ceremonies *Held* on a consideration of the texts that Agradani Brahmins have no vested interest in things given away at a *sradh ceremony* *Before* they acquire any title the things must be given and accepted Where an Agradani Brahmin was invited to a *sradh* and accepted the offerings of food meant for disembodied spirits but at the time of the distribution of valuable offerings a third party interfered and under his advice the things were made over to the defendants who were other Agradani Brahmins who had not officiated as such at the *sradh* but who were not themselves alleged to have interfered in the distribution *Held* that the defendants acquired a valid title in the things by the gifts of the person performing the *sradh* and the plaintiff had no legally enforcible claim against him Assuming that the plaintiff had any *claim for remuneration on account of the religious services performed by him as against the* person inviting him they had no cause of action against defendants HARI CHURN AGRADANI v SASTI CHURN AGRADANI (1910)

14 C W N 1005

13 ———————— **Agrahar gift**—*Private religious gift to Brahmins—Condition necessitating residence treated as recommendatory and not enforceable at law—Alienation by a donee not residing in the village—Validity of the alienation—Transfer of Property Act (IV of 1882) ss 10 and 11* An Agrahar gift of certain lands and a house was made to a donee and his descendants entitling him to enjoy the lands reside in the house and perform the six fold religious duties It was further enjoined that the donee should not abandon his house and go to another place and enjoy his Vritti given to him in connection with the Agrahar from that place *If the donee acted in contravention of the above provision,* his conduct should be considered an act of irreligiousness and the gift should be revoked and granted to another fit person The donee complied with the above conditions *for some years* but eventually went to another village to live and sold the lands and the house In a suit by the alienee to recover arrears of rent for the lands, a question having arisen whether the alienation was valid *Held* that the Agrahar gift was a private gift to the donee and an absolute gift according to law that the further provision as regards residence in the same village was only a recommendation and an appeal to the religious conscience of the donee and his descendants and that as a condition it was not valid and enforceable in law *Held* accordingly that the alienation was valid *Anantha Tirtha Chariar* v *Nagamuthu Ambalagaren (1881) 4 Mad 200* referred to RUKHMINIBAI v LAXMIBAI (1919)

I L R 44 Bom 304

14 ———— **Deed of gift by widow and next reversioner**—*Transfer of a spes successionis—Gift challenged by the reversioner after widow s death—Invalidity of gift so far as reversioner s interest concerned—Transfer of Property Act (IV of 1882) s 6* One K died leaving a widow G a son B and two daughters P and J On B s death G became his heir In 1891 G and one of the daughters P gifted away two properties to defendants Nos 1 to 4 sons of the deceased daughter J purporting to convey these properties by G as the life tenant and by P as the next reversioner In 1911 G having died P filed a suit to recover the property from the donees under the gift of 1891 on the ground that the deed against her was invalid as it conveyed her chance of surviving G and succeeding to the property as reversioner Both the lower Courts dismissed the suit On appeal to the High Court *Held* that the deed of gift to defendants Nos 1 to 4 was good only as regards the life interest of G and was bad as regards the transfer of P s chance of succession under s 6 of the Transfer of Property Act 1882 BAI PARVATI v DAYABHAI MANCHHARAM (1919)

I L R 44 Bom 488

15.———— **"Appointed daughter"**—*Description of daughter as putrika in deed of gift by father whether amounts to appointment—Liability of appointed daughter for father s debts* Where by a deed of gift *inter vivos* a sonless Hindu father conveyed an absolute interest in his property to one of his daughters and the donee was described in the deed as *putrika* and her descendants as *putrika putra* *held* that the deed did not operate as an appointment of the donee as a son to the donor *Held also* that even if the *Mitakshara* Law did apply to the donee as *putrika* she would only become joint with the father during his lifetime if the property was ancestral and then only would the joint property be available to discharge his debts The custom of appointing a daughter to raise issue to a sonless *father is obsolete* Even though such a custom should be established it is doubtful whether all the duties and obligations imposed on a Hindu son under the *Mitakshara* Law to discharge the debts of his father would apply or attach to a daughter appointed as *putrika* *Quære* whether she would have been liable has she acquired other property from her father BABUI LITA KUAR v BABU PURAN

1 Pat L J 581

16 ———— **Joint ancestral property**—*Mitakshara ch I ss 27 28 and 29—Gift of portion by one member for pious purposes—Circumstances in which such gift is valid* The second and third of the circumstances stated in para 28 of Ch I of the Mitakshara as justifying a transfer of joint ancestral property by one member of the family are not governed by the preceding words in a time of distress but there are three separate and distinct exceptions Thus the gift of a portion of the joint ancestral property made by one member of the family for pious purposes is valid though

——————— *Grants made of properties for non religious and for religious and charitable purposes by Raja of Tanjore to his guru the ancestor of the parties—Suit for partition—Dispute whether granted to the guru personally or to the office of head of a mutt held by him—Perpetual feeding of food chatram and building of choultry—Private charities management of—Non religious properties liable to partition—Charities not liable*—Grants of the property in suit had been made by the Raja of Tanjore from time to time to the ancestor of the parties a holy man whom the Raja brought to Tanjore as his *guru* Some of the grants were for non religious purposes and others for religious and charitable purposes in connexion with a trust founded when the *guru* came to Tanjore and the properties descended to a joint family the adult members of which consisted of three brothers the eldest of whom (the appellant) was the manager of the joint family and the head of the mutt In a suit by the second brother (the first respondent) to have partition of the non religious properties and as to the religious and charitable properties for a scheme of management in which he claimed a share to be settled by the Court the other brothers were made defendants the youngest brother (as second defendant respondent) supporting the plaintiff appellant *Held* as to the non religious properties (upholding the decision of the Courts in India), that there was nothing in the

natural guardian—King's rights paramount—Recourse to Court necessary if no natural guardian alive—Alienation by de facto guardian—Setting aside if necessary—Suit for possession—Limitation Act (IX of 1908) Art 44 or 144 applicability of Under the Hindu law nobody other than the father and the mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors) is entitled as a matter of natural right to be and to act as a guardian of a minor's person and property consequently a paternal aunt is not a natural guardian of a minor Where there is no natural guardian alive recourse must be had to the Court as representing the rights of the King which are paramount to even the rights of the parents for the appointment of a guardian Alienations without necessity made by a *de facto* guardian need not be set aside Art 44 of the Limitation Act (IX of 1908) does not apply to alienations by unauthorised guardians THAYAMMAL *v* KUPPANNA KOUNDAN (1914) **I L R 38 Mad 1125**

2 ——————— *Mother of infants intending to become and make her boys Christian—Fitness to be Guardian—Bad character not proved—Undertaking not to baptise children—Associating Hindu uncle in guardianship*—D the uncle of two fatherless Hindu boys aged 7 and 5 years respectively applied to be appointed their guar

HINDU LAW—GUARDIAN—*contd*

than alleging that their Mother S was a woman of bad moral character and had made up her mind to adopt the Christian religion and to get her sons baptised The first allegation was not established *Held* that the charge of immorality though not proved made it impossible for S to live with the family who made the charge must be taken into consideration in passing orders on the petition That S s expressing a desire to be come a Christian or even becoming one would in itself be no ground for removing her from the guardianship provided she was in a position to satisfy the Court that she was able to carry out the obligations which the law imposed upon her of bringing up her children in the faith of her husband whatever the faith she herself might adopt It was proved that she had expressed her intention to convert her sons to Christianity but her counsel having given an undertaking that she would not baptise her children the Court passed order appointing her guardian of the minors person and property associating in the guardianship the uncle D who would as such guardian be in a position to see that S s undertaking to bring up the children in the Hindu faith was properly carried out The older boy was ordered to be placed at once as a boarder in a Hindu hostel which though attached to the Church Missionary Society was conducted in conformity with Hindu religious views, the younger boy being also ordered to be similarly placed when he should attain the age of 7 years until which time he was to live with S liberty being given to D to apply to the District Judge whenever a breach of the undertaking was apprehended DWIJAPADA KARMAKAR *v* MISS BAILEAL (1915)
20 C W N 608

3 ——————— *Guardian and minor—Alienation by guardian not compelled by necessity but dictated by prudence if binding* The guardian of a minor is not limited only to making such disposition of the latter s property as he is compelled to make by necessity Whether what he did was or was not for the benefit of the minor and as such binding on the latter was determined in this case by asking what would have been the probable result if the guardian had not taken the steps he did take and as it appeared that bigger sacrifices would have become inevitable if *the steps in question had not been taken* the transaction was upheld as that of a prudent administrator I HANI DASI *v* CANDRA CHANDRA BAKSHIT (1918)
23 C W N 653

4 ——————— *Person to be appointed* No person other than the father or mother has an absolute right to the guardianship of a Hindu minor In the absence of father and mother the relation who is nearer in the view of the Hindu Law should be preferred. LACHMI NARAIN *v* BALARAM SAHAI
2 Pat L J 190

5 ——————— *Will—Father s power to appoint guardian by will* A Hindu father can by word or writing nominate a guardian for his children the nomination taking effect after his death He is unrestricted in the choice of a guardian and may exclude even the mother from the guardianship *Sookh Deonah Lal Jha v Raja Neelanand Singh* ... and *Alecki v Luthee Jellimma* ... referred to. DEBA NAND *v* ANANDMANI
I. L. R. 43 All. 213

HINDU LAW—HEREDITARY PRIEST

——————— *Office of hereditary priest—Yajman vritti—Nibandha—Caste can appoint a priest—Grant from King not necessary—Removal of priest not allowed except on valid ground—Caste—Caste question—Bombay Regulation II of 1827—Civil Court—Jurisdiction* Under Hindu Law the office of hereditary priest (*yajman vritti*) is a *nibandha* and is ranked among the hereditary rights of immoveable property The office of hereditary priest where it is held in relation to a family owes its origin continuance and binding character to custom and not to a grant from the King or agreement between the parties Where the office is one of hereditary family priest the mere fact that in any individual case it has been created originally by the caste for the purposes of families belonging to it cannot affect it because the office carries with it a hereditary right in the nature of property and the incumbent cannot be deprived of it by anyone unless he has become a *patit* (outcaste) or has declined to officiate The caste in such a case makes the selection for the families of its members and when any family accepts the officiator as its hereditary family priest custom annexes to the office certain incidents in the nature of civil rights as against the family which neither the family nor the caste has power to annul except on the ground of some offence under the Hindu Law committed by the officiator or of refusal by the officiator to discharge his duty as family priest Where a caste has appointed a man to a mere priestly office there is doubtless no right of property conferred His continuance or removal is exclusively within the competence of the caste and it is a caste question But it is difficult where the office of hereditary priest is created for the performance of religious ceremonies in certain families provided according to Hindu Law either the caste or the families have power to create such an office and give it the character of immoveable property CHELABHAI GAVRISHANKAR *v* HARGOWAN KAMJI (1911)
I L R 36 Bom 94

HINDU LAW—HUSBAND AND WIFE

——————— *Acquisition of property by husband and wife—Joint trade—Property joint—Wife s interest—Stridhanam—Power of disposition—Death of wife—No survivorship to husband—Devolution on her heirs—Suit in ejectment—Decree for joint possession if can be given* Where certain properties were acquired with the profits earned by a husband and his wife (who were Hindus) in a trade which was carried on by both of them *Held* that the properties were under the Hindu law the joint properties of the husband and the wife and her interest therein was her stridhanam which on her death did not survive to her husband but devolved on the heirs to her stridhanam property Property acquired by a woman by her own exertions during coverture is her own property which she is entitled to hold independently of her husband and it devolves on her heirs on her death Though the suit be one in ejectment a decree for joint possession may be passed in favour of the plaintiff MUTHU RAMAKRISHNA NAICKEN *v* MARIMUTHU GOUNDAN (1914)
I. L. R 38 Mad 1036

HINDU LAW—ILLEGITIMACY

See HINDU LAW—INHERITANCE.

——————— *Illegitimate son Maluk*

HINDU LAW—ILLEGITIMACY—*contd.*

shara Chap. I s 12—Dasi putra meaning of—Illegitimate son of a Sudra share taken by him in father's property The word *dasi putra* as used in Mitakshara, Chap I s. 12 which provides for the illegitimate son of a *Sudra* getting half of the share of a legitimate son in father's property has a much wider meaning than a son begotten on a female slave and if a *Sudra* governed by the Mitakshara law has a permanent continuous and exclusive concubine who lives as a member of his family she is a *dasi* and his illegitimate son by her who is himself brought up as a member of the family is a *dasi putra* within the meaning of the rule laid down in the Mitakshara *Jogendra Bhupati v Nityananda Man Singh, I L R 17 A 1 S I L R 18 Calc. 151 Pahi v Gomali I L R 1 Bom 9 Sadu v Baiza I L R 4 Bom 37 Krishnayyan v Muttusami I L R 7 Mad 407 Har Govinda v Dharam I L R 6 All 329 Karuppannan v Bulokam I L R 23 Mad 16 Sesharin v Girewa I L R 14 Bom 282 Kamlabai v Jamba I L R 30 All 508 Sarasuti v Mannu I L R 2 All 134 Inderan v Ramasami 3 B L R P C 1 13 Moo I A 141 Meenakshi v Appakutti I L R 33 Mad 226 Annayyan v Chinnan I L R 33 Mad 366* referred to *Ram Saran v Tek Chand I L R 28 Cal 194* distinguished CHATTURBHUJ PATNAIK *v* KRISHNA CHANDRA PATNAIK (1912) **17 C W N 442**

———————— The illegitimate son of a Kshatriya by a Sudra woman is not a Sudra but a higher caste called *Bara* Brindarana v *Radhamani I L R 12 Mad 72* followed JWALA SINGH *v* SARDAR **I L R 41 All. 631**

———————— Among Sudras illegitimate sons divide the property with legitimate sons and the mother is entitled to a share MANCHHARAM BHIKU PATIL *v* DATTU **I L R 44 Bom 166**

HINDU LAW—IMPARTIBLE ESTATE

See CUSTOM **1 Pat L J 109**

See IMPARTIBLE ZAMINDARI

See HINDU LAW—INHERITANCE

1 ———————— *Hindu Law—Impartible estate—Question whether an estate alleged to be a raj was partible or impartible—Question of fact whether estate was a raj—Concurrent decisions of Courts in India—Privy Council practice of—adoption—joint power to two widows to adopt—Power exercised by surviving widow—Construction of will—No provision for the death of one or two joint donees—No power in Court construing will to make by its interpretation any addition to testamentary dispositions* In the absence of a sanad under Madras Regulation XXV of 1802 the regulations of that year do not affect the title to any land *Collector of Trichinopoly v Lekkamani L R 1 I A 282 306* followed The acceptance of a sanad in common form under Madras Regulation XXV of 1802 does not of itself and apart from other circumstances avail to alter the succession to an hereditary estate *The Udayarpalayam Case I L R 28 Mad 508 515 s c L R 32 I A 261 266* followed Unless there be an existing estate with other incidents which a sanad in common form under Madras Regulation XXV of 1802 can operate to confirm such sanad will confer on or confirm in the grantee an estate descendible according to the ordinary rules of inheritance of the Hindu Law *Raja Venkata Rao v Court of Wards I L R 2 Mad 128 s c L R 7 I A 38* followed In order to establish that any estate is descendible otherwise than in accordance with the ordinary rules of inheritance of the Hindu Law it must be proved either that it is from its nature impartible and descendible to a single heir or that it is so impartible and descendible by virtue of a special family custom *Baboo Ganesh Dutt Singh v Maharajah Moheshur Singh 6 Moo I A 164 187* followed The nature of the estate and existence or otherwise of a special family custom are questions of fact to be determined on the evidence in each case *Mallikarjuna v Durga I L R 13 Mad 406 s c L R 17 I A 134* followed In a case in which the question was whether the estate of Nidadavole in the Kistna district of the Madras Presidency which was the subject of a sanad in common form under Madras Regulation XXV of 1802 was partible or impartible the appellant contended that the grantee had at and prior to the date of the sanad an estate of the nature of a raj or principality and therefore impartible but he did not rely on any special family custom *Held* (on the above principles) that the question whether the prior estate was of the nature of a raj or not was a question of fact to be determined on the evidence and that where both Courts in India had concurrently found it was not a raj but was partible those findings ought not according to the practice of the Board to be disturbed unless they were shown to be not justified by the evidence *Allen v Quebec Warehouse Company L R 11 A C 101 104* followed Their Lordships after considering the evidence so far from being so satisfied were not prepared to say that they should not have come to the same conclusion on that point The appeal was therefore dismissed A Hindu of the Sudra caste by his will made the day before his death in 1864 after bequeathing his estates to his two widows gave them the following power of adoption You should adopt a boy who is our sannihita (one closely related) whenever it strikes that our samastanam (family) should continue This power was not exercised whilst both widows were alive but by the survivor of the two widows in 1890 *Held* without deciding the question of the validity or otherwise under the Hindu law of a joint power of adoption (for the proper determination of which their Lordships were of opinion that the materials in this case were insufficient) that the will gave to the widows jointly the power to adopt a son should occasion arise which in their opinion made it desirable to do so but only one of the widows could receive the boy in adoption so as to step into the position of being his adoptive mother On a consideration of the surrounding circumstances there was nothing which required or justified their Lordships in interpreting the provisions of the will with regard to the adoption in any special way arising from the fact that the testator was a Hindu and they must adhere to the plain meaning of the language used The exercise of the power was vested in the discretion of the joint donees and it was clearly the law that in such a case the death of one of the donees put an end to the joint power not by virtue of any peculiar doctrine of English law or series of English decisions but flowing from the nature of a joint power The case was different when the power vested not in specific persons but in the occupants for the time being of a specified office such as executors

HINDU LAW—IMPARTIBLE ESTATE—contd

The words of the will when properly construed related to choice and adoption by the two widows acting jointly Hence the words referred only to the period of time when both widows were living To hold that one of the widows could adopt a son after the death of the other widow would be providing for a period of time which the testator left unprovided for and would be making an addition to his testamentary dispositions which no Court construing a will was entitled to do NARASIMHA v PARTHASARATHY (1914)

I L R 37 Mad 199

2 ——————— *Impartible estate—Succession—Primogeniture—Estate once in the possession of a family regranted after loss of possession to one member of the same family—Construction of grant* The question whether a certain estate is impartible or not is one of fact in each case Where an impartible estate is lost to a certain family and on the representation of a member of that family the Government puts him into possession making a grant in his favour without any special term or condition in the grant the property so restored would be joint family property in the hands of the member of the family to whom the grant is made When the Government makes a grant of an estate it can determine the nature of the grant but in the absence of specific terms in the grant the surrounding circumstances must not be ignored The normal constitution of Hindu family is union And it is the very essence of an impartible estate that there is no legal right to insist on partition The estate is enjoyed by the whole family through the occupant of the *gaddi* *Held* that when an impartible estate passes by survivorship from one line of descent to another it devolves not on the co parcener nearest in blood but on the nearest co parcener of the senior line *Held* further that if the descendants of a junior member of an impartible estate partition the property given to their ancestor for maintenance it is not conclusive on the point as to whether the estate has ceased to be joint for the purpose of finding out a successor to the *gaddi* *Kachi Yuva Ranjappa Kalakka Thola Udayar v Kachi Kalayana Rangappa Kalakka Thola Udayar I L R 28 Mad 508 Katama Natchiar v The Raja of Shivagunga 9 Moo I A 543 Doorga Persad Singh v Doorga Konwari I L R 4 Calc 190 Stree Rajah Yanumula Venkayamah v Stree Rajah Yanumula Boochia Venkondora 13 Moo I A 333 Sartaj Kuari v Deoraj Kuari I L R 10 All 272 Tara Kumari v Chaturbhuj Narayan Singh I L R 42 Calc 1179 Baboo Harkisondas v Manlorbai I L R 29 Bom 51 Raja Rup Singh v Rani Baisni I L R 7 All 1* and *Raja gani Achammajaru v Venkatachalapati Navanivaru I L R 4 Mad 250* referred to *Sri Raja Satrucharla Jagannadha Raju v Sri Raja Satrucharla Ramabhadra Raju I L R 14 Mad 237 Venkataraja lu v Venkataramayya I L R 15 Mad 281 Venkata Narasimha Appa Row v Parthasarathy Appa Row L R 41 I A 51* and *Brij Indar Bahadur Singh v Ranee Jankee Koer L R 5 I A 1* distinguished BAIJNATH PRASAD SINGH v TEJ BALI SINGH (1910)

I L R 33 All 590

3 ——————— The interest of the holder of an impartible estate is liable for his debts in the hands of his heir For the purposes of ascertaining the person entitled to succeed resource must be had to the rule which would have governed the succession if the estate had remained partible SHYAM LAL SINGH v RAJA BIJOY N KUNDA BAHADUR

2 Pat L J 136

4 ——————— Where a family is governed by the rule under which succession to an impartible estate does not go to the females so long as the family remains united the burden of proving that the family has ceased to be united lies on the person who alleges separation *Per Chapman J*—The departure of a member of such a family to reside in a village which has been granted to him for maintenance is not sufficient to indicate separation *Per Roe J*—Where the plaintiff had asserted and was acknowledged to have a right to take part as a member of the family in the family worship and during visits which were frequent and of long duration had conducted himself as subservient to the elder branch of the family and received from the elder branch assistance for himself for his son and for his wife consistent with such subservience *held* that he must be taken to be joint with the elder branch RANI JAGADAMBA KUMARI v THAKUR WAZIR N SINGH

2 Pat L J 239

HINDU LAW—INHERITANCE

See HINDU LAW—SUCCESSION

1 ——————— **Illegitimate son**—*Sudras—Mitakshara—Legitimate son—Vatan—Collateral succession—Suit by reversioner for declaration as nearest heir—Widow of the last male holder—Vested right—Limitation Act (XV of 1877) Art 120* Amongst Sudras governed by the Mitakshara an illegitimate son cannot inherit a vatan collaterally in preference to legitimate heirs The right to sue for a declaration of heirship to a vatan does not accrue until the death of the widow of the last male holder of the vatan the widow having a vested interest in it as the nearest heir RANJI VALAD MAHADU v SAKUJI VALAD KALOJI (1909)

I L R 34 Bom 321

2 ———————**Daughters**—*Mitakshara—Daughters inheriting property from their father—Shares separate and absolute—Tenants in common* In the Bombay Presidency a daughter taking property from her father inherits it as *stridhan* and daughters take their shares separately and absolutely When the property so inherited is not physically divided it is held by the daughters as tenants in-common and not as joint tenants and there is no survivorship between them In cases affecting inheritance the rule is to adhere to the decisions of the Court to which the district from which the case arose is subject VITHAPPA v SAVITRI (1910)

I L R 34 Bom 510

3 ——————— **Kamathis**—*Mitakshara—Mayukha—Law governing Kamathis who live in Bombay—Succession—Ayautaka Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form* The Kamathis settled in Bombay are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha where they agree but where they differ the Mayukha law must prevail The *stridhan* of a female devolves on her death upon her husband in preference to the son born of her by adulterous intercourse The law will even among Shudras presume the marriage to have been according to the approved forms if the parties belonged to a respectable family JAGANNATH RAGHUNATH v NARAYAN (1910)

I L R 34 Bom 553

HINDU LAW—INHERITANCE—contd

4 ———— **Jains**—*Inheritance—Jain mother preferred to maternal uncle's son*—Under Hindu Law a mother's ... is entitled to succeed to the estate of a deceased Hindu in preference to a maternal uncle's son ANANDAI VAITHIYAR v BAGUBATI ... (1910) I L R 33 Mad 439

5 ———— **Scheme of devolution contrary to Hindu Law**—*Inheritance—Document ... to alter the mode of succession—... direct ... for an indefinite period ... gift to any person—Succession on failure of direct male ... of female heirs—Dayabhaga Law* Two brothers *I* and ... subject to the Dayabhaga School of Hindu Law executed on 28th March 1806 a document wherein after reciting that "Whereas body is mortal it is impossible to say what may befall at what time and as ruin may ensue from disputes relating to the shares among in future among sons daughters daughters's sons and children's widow unless some rules are regularly framed and it has accordingly become necessary to provide a set of rules in that behalf and hence the rules mentioned below are laid down these shall become operative and come into force on our death they purported to provide for the permanent devolution of their respective properties in the direct male line including adopted sons with the condition that in case of failure of lineal male heirs in one branch the properties belonging to that branch should go to the other subject to the same rule and only in the absence of male descendants in the direct line in either branch were the properties to go to female heirs and their descendants *A* died in 1818 leaving a son ... a daughter *D* his brother ... and their mother *C* ... died in 18.. without any issue and *C* in March 1901 The plaintiffs (appellants) who were the sons of *D* instituted this suit on ..th July 1901 against ... claiming as next reversioners to *A* their maternal uncle the properties which originally belonged to *A* and which had since come into the possession of ... the defendant ... died shortly after the suit was brought his sons (the respondents) being substituted for him on the record Their contention was that under the instrument of 1806 the properties in dispute passed on the death of ... to ... and on his death to them The High Court (reversing the decision of the Subordinate Judge) was of opinion that in the circumstances that had actually happened ... under the document of 1806 had in the properties in suit an absolute estate defeasible in case of death without male issue and as he died without male issue the heirs of *A* (the respondents) would succeed *Held* (reversing that decision) that the clear intention of the instrument of 1806 was to vary the rules of Hindu Law and to control the devolution of the properties until the indefinite failure at some remote period of the male line of *I* and ... and that such an attempt to alter the mode of succession was on the principles laid down in the case of *Jatindra Mohan Tagore* v *Ganendra Mohan Tagore 9 B L R 377 L R I A Sup Vol 47* illegal and void Throughout the instrument there was no indication of an intention to make a gift to any person and there was no warrant for the contention that there was a devise in favour of *A* with a gift over to ... his uncle The question was not whether the gift over was good in the event which happened but whether it was good in its creation PURNA SHASHI BHATTACHARJEE v KALIDHAN RAI CHOWDHURY (1911) I L R 38 Calc 603

6 ———— **Paternal uncle's grandson**—*Mitakshara—Inheritance—Paternal uncle's widow* Among Hindus in the Bombay Presidency governed by the law of the Mitakshara a paternal uncle's grandson is to be preferred as an heir to a paternal uncle's widow KASHIBAI v MORESHWAR RAGHUNATH (1911) I L R 35 Bom 389

7 ———— **Impartible estate governed by rule of primogeniture**—*Inheritance—Estate devised to widow of owner—Suit by reversioner—Compromise of suit by widow and reversioner—Descent of estate governed by the compromise and not by will* The owner of an impartible estate governed by the rule of primogeniture died leaving a will by which he gave an absolute estate to his widow against whom *S* the next reversioner brought a suit on the ground that the will was invalid and that he was entitled to possession of the estate In that suit the parties came to a compromise by the terms of which it was ... that the widow should hold for her life the ... of ... *gaddi* ... paying *S* a monthly allowance and that after her death *S* or any representative of his who may be living at that time will be the absolute owner of all the moveable and immoveable properties and will occupy the *gaddi* *S* predeceased the widow leaving no male issue and without having made any disposition by will or otherwise of his interest in the estate On the death of the widow in possession the widow of *S* sued to recover the estate from members of her husband's family who had possession of it *Held* by the Judicial Committee (affirming the decision of the High Court) that the rights of the parties depended not on the will but on the compromise the terms of which gave *S* a vested interest in the estate which retained its character of impartibility and on the death of *S* descended not to his widow (the appellant) but to the respondent his heir according to the rule of primogeniture LEKHRAJ KUNWAR v HARPAL SINGH (1911) I L R 34 All 65

8 ———— **Maintenance**—*Mitakshara—Joint Hindu family—Mother's share on partition of joint family property between her and her sons after father's death—Stridhan* According to the Mitakshara there is no substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition *Held* therefore reversing the decision of the courts in India) that the share which the mother in a joint Hindu family obtains after the death of the father on partition of the joint family property between the mother and the sons is not her *stridhan* but is given for her maintenance and on her death it devolves upon the heirs of her husband and not upon her own heirs *Debi Mangal Prasad Singh* ... *I L R 3* ... and *Chhiddu* ... overruled DEBI MANGAL PRASAD SINGH v MAHADEO PRASAD SINGH (1912) I L R 34 All 234

9 ———— **Unchastity**—*Inheritance—Widow—Unchastity during coverture—Condonation by husband—Husband and wife* Under Hindu ... a widow is not disqualified from i... ing husband on the ground of her ... coverture if it is condoned

HINDU LAW—INHERITANCE—*contd*

Where the husband and wife have lived together without any open breach of marital relations up to the husband's death it would be a dangerous principle to allow mere outsiders to come in and impute acts of unchastity to the wife during the period of her coverture GANGADHAR PARAPPA *v* YELLU (1911) **I L R 36 Bom 138**

10 ———— Paternal grandmother—*Inheritance—Estate taken by her is limited estate—Women entering family by marriage take limited estate* Under Hindu Law the paternal grandmother inheriting to her grandson takes a limited estate for life All the women who belong to a family by marriage not by birth take a limited estate in the property which they inherit from any male member of that family DHONDI *v* RADHABAI (1912) **I L R 36 Bom 546**

11 ———— Widow's right to inherit—*Inheritance— Malignant hostility to husband if disqualifies a widow from inheriting —Hostility meaning of* The only qualification necessary for a widow to entitle her to succeed to her husband is physical chastity Where a wife refused to come to her husband's house when sent for after he had married for a second time *Held* that such conduct was not evidence of such hostility to her husband as dis entitled her to her inheritance where there was no evidence of any mis conduct KHETTLEMONI DASSI *v* KADAMBINI DASSI (1912) **16 C W N 964**

12 ———— Ascetics—Sudras—*Rules relating to ascetic persons of the Sudra caste* A Sudra cannot enter the order of *yati* or *sannyasi* and therefore a *Sudra* who becomes an ascetic is not excluded from inheritance to his family estate unless some usage is proved to the contrary *Dharampuram* v *Virapandiyam I L R 22 Mad 302* followed HARISH CHANDRA ROY *v* ATIR MAHMUD (1913) **I L R 40 Calc 545**

13 ———— Succession to stridhanam—*Preference of co wife's daughter to sapindas of husband* Under the Mitakshara law of inheritance the daughter of a co wife of a deceased woman married in one of the approved forms is entitled to succeed to her stridhanam property in preference to the sapindas of her husband such as his father's brother's son *Placitum 11* of s XI of Chap II Mitakshara, applied Colebrooke's translation of *sapinda* in that *placitum* as kinsmen allied by funeral oblations is incorrect the correct meaning being kinsmen allied by affinity or persons allied to each other by possession of particles of the same body According to the above text the stridhanam property of a woman married according to an orthodox form who has left no issue will devolve on her husband and on failure of the husband the property will go to his sapindas in the order laid down in the Mitakshara with reference to the succession to the property of a male *Venkatasubramaniam Chetti* v *Thayaramma I L R 21 Mad 263 Gojabai* v *Shrimant Shahajirao Maloji Raje Bhosle I L R 17 Bom 114 Jagannath Prasad Gupta* v *Ranjit Singh I L R 25 Calc 354 Krishnaswami Iyer I L R 20 Bom 333 Bai Kesserbai* v *Hunsraj Morarji I L R 30 Bom 431 Sumrat Thakur* v *Dyhee* v *Ram Buk Ram 11 Moo I A 139* and *Champat* v *Shiba I L R 8 All 23*, applied. West and Buhler p 14 T Krishnaswami Iyer's Translation of Smriti Chandrika Chap. IX s III verse 63 Golab Chandra Sircar Sastri's Hindu Law 4th edition p 461 and Bhattacharya's Hindu Law p 580 referred to NANJA PILLAI *v* SIVABAGYATHACHI (1913) **I L R 36 Mad 116**

14. ———— Exclusion from Dayabhaga—Murder—*Transportation—Partition suit by heir of excluded co parcener—Claim for maintenance not put forward—Claim for maintenance after sentence served out—Claim by his wife and after born son—Res judicata—Separate causes of action—Multifariousness—Civil Procedure Code (Act V of 1908) O I r 1* Where a son who was excluded from inheritance by reason of his murdering his father has served out the punishment inflicted upon him and claims maintenance from his son the person who has excluded him from inheritance *Held*, that under the Hindu Law he is entitled to maintenance on the principle that property in the hands of the co parcener who has executed another from inheritance is liable to a claim or charge for the maintenance of the disqualified co parcener His wife also if chaste is similarly entitled to maintenance out of the property An after born son of the disqualified co parcener is also entitled to maintenance as a dependent member of the family A single suit by all three is maintainable under O I r 1 Civil Procedure Code NILMADHAB MITTER *v* JOTINDRA NATH MITTER (1913) **17 C W N 341**

15 ———— Dayabhaga — Great-grandfather's great grandson and father's brother's daughter's son—*Preferential heir who is—Stare decisis doctrine of* As between the great grandson of the great grandfather of a deceased owner and the latter's father's brother's daughter's son the latter is upon the authority of the Full Bench decisions in *Gooroo Gobind* v *Anund Lal 5 B L R 15 13 W R (F B) 49 Digumber Roy* v *Moti Lal I L R 9 Calc 563* the preferential heir To re open the question of succession settled by these decisions would not be proper *Young* v *Robertson 4 Macqueen H L 314 345* and *Sri Raja Rao Venkata* v *Court of Wards L R 26 I A 83 3 C W N 715* referred to KEDAR NATH RAY *v* AMRITA LAL MUKERJEE (1911) **17 C W N 492**

16 ———— Babuana and sohag grants—*Kulachar—Exclusion of widows—Application of custom after partition* In an impartible raj descending according to primogeniture *babuana* and *sohag* grants were by custom made to younger sons and to their wives respectively These grants were subject to a *kulachar* by which they enured for the benefit of the grantees and their heirs-male in the male line with reversion to the *Raj reasat* The evidence established that the *kulachar* excluded widows from succession to properties so granted but there was no evidence of the exclusion of a widow after a partition between members of the family jointly holding properties originally the subject of *babuana* and *sohag* grants *Held* (i) that the custom excluding widows applied notwithstanding a partition (ii) that the words *aurasputra pautradi* in sanads for *babuana* grants must be construed as subject to the custom excluding widows and not as general words of inheritance *Durga Dutt Singh* v *Rameshwar Singh I L R 36 Calc 943* explained *Ram Lal Mookerji* v *Secretary of State for India L R 8 I A 46* distinguished RAMESHWAR SINGH *v* JANESHWARI BAHUASIN (1914) **I L R 42 Calc 582**
L R 41 I A 275

HINDU LAW—INHERITANCE—*contd*

17 ———— Mitakshara—Bandhus—*Limit of Heritable Bandhus—Bhinna gotra sapindas* The word *bandhu* has in the system of Mitakshara a distinct and technical meaning and signifies the *bhinna-gotra sapindas* The *sapinda* relationship, upon which the heritable right of collaterals is founded, ceases in the case of *bhinna-gotra sapindas* with the fifth degree from the common ancestor further in order to entitle a *bandhu* to inherit he must be so related to the deceased person that they are mutually *sapindas* of one another The right of inheritance consequently does not extend to a deceased person's paternal grandfather's son's son's daughter's daughter's sons since they are *bhinna-gotras* beyond the fifth degree and the element of mutuality of *sapinda ship* is wanting RAM CHANDRA MARTAND WAIKAR v VINAYAK VENKATESH KOTHEKAR (1914)
I L R 42 Calc 384
L R 41 I A 290

18 ———— Illegitimate children—*Right of to—Prostitution not destroying kinship by blood—Mitakshara—Daughters meaning legitimate daughters* Except in the case of Sudras among whom illegitimate sons have a right of succession illegitimate children are not heirs under the Hindu law especially under the Mitakshara system to succeed to the property of any kind left by either of their parents. Hence a legitimate son of a Sudra woman born in lawful wedlock succeeds to the property acquired by his mother by prostitution after the death of his father and her illegitimate daughter born in prostitution is not an heir to such property Prostitution does not sever the tie of kinship by blood and does not bring the prostitute within the category of dancing girls whose children are allowed by custom and precedent in Southern India the right of succession to the property acquired by their mothers The word daughters in the rule of the Mitakshara which allows daughters to succeed to their parents property in certain cases means only legitimate daughters MEENAKSHI v MUNIANDI PANIKKAN (1914) I L R 38 Mad 1144

19 ———— Leprosy—*Anæsthetic not a ground of exclusion from—Incurability not a safe test—Grounds of exclusion in texts some obsolete* Under the Hindu Law a person suffering from the anæsthetic form of leprosy though considered incurable by medical men is not disentitled to inherit *Obiter*—Both the tests of Hindu Law texts and the decided cases fully establish that it is only the agonizing sanious or ulcerous type of leprosy that is a disqualification to disinherit Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory test Most of the decisions which have excluded lepers deal only with right to partition *Janardhan Pandurang* v *Gopal Pandurang 5 Bom H C R (A C J) 145 Ananta* v *Ramabai I L R 1 Bom 554 Rangayya Chetti* v *Thanikachalla Mudali I L R 19 Mad 74* and *Ittan Dasi* v *Durga Das Mandal 4 C L J 203* distinguished *Ranchod* v *Ajoobai 9 Bom L R 1119* referred to Many of the grounds of exclusion referred to in the texts would not now be enforced by the Courts and are practically obsolete KAYAROHANA PATHAN v SUBBARAYA THEVAN (1913) I L R 38 Mad 250

20 ———— Benares school of law—*Great grandson of grandfather of deceased male owner—Grandson of great-grandfather of deceased—Putra interpretation of—Lineal and collateral descendants—Blood relationship or propinquity among gotrajas—Test is capacity to offer oblations—Introducing into the decision the opinion of another Judge not a party to the judgment—Practice not approved* On this appeal in which the question for decision related to the order of succession under the Mitakshara as expounded in the Benares school of Hindu law among the collateral kindred belonging to the same parental stock as the last male owner who died leaving no male issue *Held* (affirming the decisions of the Courts in India) that the respondent (defendant) as the great grand on of the grand father of the deceased and the grandson of his paternal uncle was the preferential heir as against the appellant (plaintiff) who was the grandson of the deceased's great grandfather The word *putra* which when used in relation to the last owner signifies and includes son grandson and great grandson thus including three degrees in the direct line of descent is not to be construed in a literal and restricted sense when used in connexion with collateral relatives such as brother uncle or grand uncle The following cases were referred to and discussed —*Rutcheputty Dutt Jha* v *Rajunder Narain Rae 2 Moo I A 132 153 Bhyah Ram Singh* v *Bhyah Ugur Singh 13 Moo I A 373 Kureem Chand Gurain* v *Oodung Gurain 6 W R 158 Kalian Rai* v *Ram Chandar I L R 24 All 128 Pachaiappa* v *Kalingapa I L R 16 Bom 716 Parasara Bhattar* v *Rangaraja Bhattar I L R 2 Mad 202 Suraya Bhukta* v *Lakshminarasamma, I L R 5 Mad 291* and *Chinnasami Pillai* v *Kunju Pillai I L R 35 Mad 152* and the last two cases were dissented from the respondent was also entitled to succeed on the ground that he admittedly conferred greater benefit on the deceased by the offerings he was capable of making to the manes of the common ancestor In judging of the nearness of blood relationship or propinquity among the *gotrajas* the test to discover the preferential heir is the capacity to offer the oblations *Bhayah Ram Singh* v *Bhyah Ugur Singh* and the principle laid down in the *Viramitrodaya* Golap Chandra Shastri's Translation page 91 ch II part I s 23(a) and by Dr Sarvadhikari Tagore Law Lectures (1880) page 629 followed It is an undesirable course and one not approved by their Lordships of the Judicial Committee to introduce the opinion of another Judge not a party to the judgment for the purpose of enforcing the conclusion arrived at BUDDHA SINGH v LALTU SINGH (1915) I L R 37 All 604

21 ———— Impartible Estate governed by rule of primogeniture—*Where no custom excluding females existed—Widow of holder who died without male issue—Evidence of separation in joint family—Junior members leaving family house and living in separate residence after obtaining grant for maintenance* The succession, on the death of a holder without male issue to an impartible estate which descended by the rule of primogeniture the junior members of the family being entitled to grant for maintenance and where no custom excluding females existed depended on whether there had been a separation between two brothers the father and predecessors in title of the deceased holder and the father of the next contingent reversioner On that question the Courts in India

HINDU LAW—INHERITANCE—*contd*

differed the Subordinate Judge finding that a separation had taken place and the High Court being of opinion that what had occurred did not in intention and fact amount to a complete separation *Held* (reversing the decision of the High Court) that the evidence clearly proved that there had been a complete separation and that the widow of the last holder was therefore entitled to succeed to the estate for a Hindu widow s interest in priority to the next male reversioner TARA KUMARI *v* CHATURBHUJ NARAYAN SINGH (1915)
I L R 42 Calc 1179

22 ———— **Bandhus**—*Atma bandhus—Preferential heir—Atma bandhus ex parte paterna preferential to Atma bandhus ex parte materna—Father s sister s son s son preferable to mother s brother* Under the Mitaksara Law among Atma bandhus of a deceased male owner those that are related to him *ex parte paterna* are preferential heirs to those that are related to him *ex parte materna* The son of the father s sister s son of the deceased male owner is a preferential heir to his mother s brother *Sundrammal* v *Rangasami Mudaliar* (1895) *I L R 18 Mad 193* *Balusami Pandithar* v *Narayana Rau* (1897) *I L R 20 Mad 349* followed SUBRAMANIA MUDALIAR *v* RANGANATHAN CHETTIAR (1921)
I L R 44 Mad 114

22(a) ———— *Inheritance—Sudra ascetic—Right of sishya (disciple) to inherit—Texts of Hindu Law whether obsolete—Yajnavalkya—Mitakshara—Escheat to Government—Religious instruction to Sudras—Disciple meaning of—Spiritual relationship proof of* The disciple of a *Sudra* ascetic who dies without leaving any blood relations is an heir of the latter under the Hindu Law and succeeds to his estate so as to prevent its escheat to the Government The texts relating to succession by preceptors disciples and fellow students enunciated in Yajnavalkya Smriti Chapter II verse 137 and in the Mitakshara section VII are not obsolete In determining who is a preceptor a pupil or a fellow student under the above texts we have only to consider the imparting of purely religious instruction Religious instruction and training are not confined to Brahmans *Gnyana Sambandha Pandara Sannadhi* v *Kandasami Tambiran* (1887) *I L R 10 Mad 375* *Dharmapuram Pandara Sannadhi* v *Virapandiyam Pillai* (1899) *I L R 22 Mad 302* distinguished Strict proof is required to be given by the claimant regarding his alleged spiritual relationship to the deceased SAMBASIVAM PILLAI *v* SECRETARY OF STATE FOR INDIA (1921)
I L R 44 Mad 704

22(b) ———— **Illegitimate son of a Sudra** by a dancing woman kept in continuous and exclusive concubinage is entitled to get his appropriate share in the joint family property after his father s death provided his parents connection was not incestuous or adulterous SOUNDARARAJAN *v* ARUNACHALAM CHETTY
I L R 39 Mad 136

23 ———— **Succession of sapindas of same and different degrees**—*Uncle of half blood opposed as heir to son of uncle of whole blood—Civil Procedure Code (1882) ss 317 and 231—Execution of mortgage decree by one of several decree holders—Suit by heirs of the other decree holders against decree holder who after a sale subject to rights of heirs of the others claimed and obtained sole possession* *Held* (affirming the decision of the High Court) that under the Mitakshara law the preference of heirs of the whole blood to those of the half blood confined to sapindas of the same degrees of descent from the common ancestor Where therefore the choice of heirs lay between sapindas of different degrees an uncle of the half blood as being less remote from the common ancestor is a preferential heir to the sons of an uncle of the whole blood *Suba Singh* v *Sarfara Kunwar I L R 19 All 215* distinguished The provisions of s 317 of the Code of Civil Procedure 1882 were designed to create some check on the practice of making so called benami purchases at execution sales for the benefit of judgment debtors and in no way affect the title of persons otherwise beneficially interested in the purchase One of three joint decree holders of a mortgage decree alone took out execution under s 231 of the Code stating that the other decree holders had died and praying that execution might be subject to the rights of their heirs and representatives He obtained leave to bid at the sale purchased the property in his own name and furnished with a certificate of sale got possession of the property *Held* in a suit by the heirs of the other decree holders for the shares they were entitled to under the decree that s 317 of the Code was not applicable as a defence to the suit and that the plaintiffs were entitled to recover their shares of the mortgaged property *Bodh Singh Doodhoria* v *Gunesh Chunder Sen 12 B L R 317* followed GANGA SAHAI *v* KESHRI (1915) **I L R 37 All 545**

24 ———— **Sudras**—*Extent of share* Among Sudras an illegitimate son of a concubine stands on the same level as to inheritance as the *dasi putra* and the extent of his share in competition with a legitimate daughter would be one half of the share taken by the daughter that is, one third of the whole estate GANGABAI PEERAPPA *v* BANDHU (1915) **I L R 40 Bom 369**

25 ———— **"Samanodaka"**—*Meaning of—Reversioner claim by—Onus of proof* According to Mitakshara and the view prevalent in Southern India *samanodaka* relationship is confined to such of the *gottrajas* as are within fourteen degrees from the common ancestor It is incumbent on a plaintiff seeking to succeed to property as an heir affirmatively to establish the particular relationship which he puts forward. He is also bound to satisfy the Court that to the best of his knowledge there are no nearer heirs It is for those who claim that their kinship is nearer than that of the plaintiff to prove that relationship *Secretary of State for India* v *Subraya Karantha (1915) Mad W N 967* followed A *gottraja* who is unable to trace his descent from a common ancestor cannot be preferred to a *bandhu* RAMA Pow *v* KUTTIYA GOUNDAN (1916)
I L R 40 Mad 654

26 ———— **Blindness**—*Not a disqualification unless congenital* The appellant as his only child and heir sued for the property of her father a Hindu who had become blind in the early years of his life and remained so until his death and had taken his separate share of the family property under a decree made on a compromise of a suit for partition brought against him by his younger brother they having lived together as members of a joint family governed by the law of the Mitakshara. The defence by his brother

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against whom the suit was brought was that there had been no partition and that on his brother's death he became entitled to the whole family property by survivorship. He contended that his brother's blindness was congenital which excluded him from inheritance but that even assuming he was not born blind but became so after birth he was, according to the Mitakshara law of the Benares school, excluded from participation of a share inasmuch as the blindness occurred before the alleged partition. *Held* that blindness to cause exclusion from inheritance must be congenital. Mere loss of sight which has supervened after birth is not a ground for disqualification. Incurable blindness if not congenital is not such an affliction as under the Hindu Law excludes a person from inheriting. Sarvadhicari's Hindu Law of Inheritance page 908 referred to. *Mohesh Chunder Roy v. Chunder Mohun Roy* 14 B L R 273; *Suth W R* ... and *Murarji Gokuldas v. Parvatibai I L R 1 Bom 1...* approved and followed. GUNJESWAR KUNWAR v. DURGA PRASHAD SINGH (1917) I L R 45 Calc 17

27 ———— **Taluqa in Oudh**—*Oudh Estates Act (I of 1869) ss 7 8 10 ...—Sanad granting descent by primogeniture—Properties subsequently acquired—Accretions and property appurtenant to taluqa—Property purchased by taluqdar—Intention to vary descent—Substitution of villages by Government—Crown Grants Act (XV of 189) s ...—Power of Crown to alter order of descent—No such power in subject*. In British India the Crown has power to grant or transfer lands and by its grant or on the transfer to limit in any way the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent applicable to the particular lands or property so dealt with. The present appeal related to a taluqa granted in 1861 by the Crown to a Hindu, the grant containing a condition that "in the event of your dying intestate or of your successor dying intestate the estate should descend to the nearest male heir according to the rule of primogeniture." On the death of one of the holders of the taluqa a suit was brought which in 190 came on appeal to the Privy Council for decision as to the succession to the deceased taluqdar's estate and an Order in Council was made which declared that the taluqa as constituted at the date of the sanad with accretions (if any) or properties (if any) appurtenant to the taluqa passed to the appellant as the next male heir according to the rule of primogeniture but that the residue of the property passed to the respondent and the suit was remitted to India for determination under the Order in Council. There was no allegation of any family custom of primogeniture. On appeal from the final decrees of the Judicial Commissioner: *Held* that under the Order in Council villages substituted by the Government for some of those held under the sanad and a house granted by the Government after 1861 to the taluqdar for his use as taluqdar passed to the appellant as taluqdari property but that villages purchased after 1861 by the deceased taluqdar passed to the respondent as non-taluqdari property and it was immaterial whether it was or was not the intention of the deceased taluqdar to incorporate them with the taluqa. RAJENDRA BAHADUR SINGH v. RAGHUBANS KUNWAR (1918) I L R 40 All 470

HINDU LAW—INHERITANCE—*contd*

28 ———— **Illegitimate son of a Sudra—by a continuous and exclusive concubine—Dayabhaga**— *Dasi — Dasyah udrdputra — Aparinecta*. *Held* (CHATTERJEA J dissentiente) that under the Bengal School of Hindu law correctly interpreted an illegitimate son of a Sudra is entitled as a *dasiputra* to a share of the inheritance provided that his mother was in the continuous and exclusive keeping of his father and he was not the fruit of an adulterous or an incestuous intercourse. This right is not subject either to the condition that his mother was a slave woman in the technical sense of the term or to the condition that a marriage could have taken place between his father and his mother. *Narain Dhara v. Rakhal Gain I L R 1 Calc 1*, *Kirpal Narain Tewari v. Sukurmoni I L R 19 Calc 91* and *Puran Charan v. Tek Chand Charan I L R 28 Calc 191* overruled on this point. The term *dasi* is not exclusively applicable to a female slave but includes a Sudra woman kept as a concubine. According to the correct interpretation of para 29 Chap IX of the Dayabhaga the term *dasyadsudrdputra* includes the son of a *dasi* or the like and it is not restricted only to the son of a *dasi* or the *dasi* (slave woman or wife) of a *dasa*. In the same text the term *aparinecta* means not a maiden but not married (to the Sudra to whom she bears a son). *Per* CHATTERJEA J. Having regard to the fact that for more than a century the right of an illegitimate son of a Sudra by a kept woman has not been recognised in Bengal and having regard to the opinion of writers of Hindu law in Bengal the right which is opposed to the usage and sentiments of the people of Bengal should not be revived even if it is deducible from the texts of Jimutávahana or any other authority. Cases on the subject reviewed. RAJANI NATH DAS v. NITAI CHANDRA DEY (1920) I L R 48 Calc 643

28a ———— **Unchaste female**—The rule as it obtains in the Bengal School of Hindu Law is that any female who was unchaste before the succession opened out is excluded from the inheritance. RAJABALA DASI v. SHAYAMA CHARAN BANERJEE (1917) 22 C W N 566

29 ———— **Illegitimate son**—*Right of putative to succeed as heir*. *Held* by the Full Bench—Where an illegitimate son who if he had survived his putative father would have inherited his estate either alone or along with others dies leaving no issue widow or mother his putative father is entitled to succeed as his heir. *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing I L R 18 Calc 151* and *Sadu v. Baiza and Genu I L R 4 Bom 3* applied. SUBRAMANIA AYYAR v. RATHNAVELU CHETTY (191) I L R 41 Mad 44

29a ———— **Unchastity effect of**—*Dayabhaga—Application to Assam Kochez—Unchaste daughter marrying paramour after succession opened out if may inherit*. The daughter of a Koch (in Assam) eloped in her father's lifetime with a Koch and lived with the latter as man and wife but later on the father's death married her paramour and sued to recover her father's properties from the illegitimate daughters of her father who were in possession. *Held* ... absence of evidence of local custom and the ...bhaga law applying)—That the Plaintiff ...qualified when the succession opened ...

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differed the Subordinate Judge finding that a separation had taken place and the High Court being of opinion that what had occurred d d not in intention and fact amount to a complete separation *Held* (reversing the decision of the High Court) that the evidence clearly proved that there had been a complete separation and that the widow of the last holder was therefore entitled to succeed to the estate for a Hindu widow s interest in priority to the next male reversioner TARA KUMARI v CHATURBHUJ NARAYAN SINGH (1915)
I L R 42 Calc 1179

22 ———— Bandhus—*Atma bandhus—Preferential heir—Atma bandhus* ex parte paterna *preferential to Atma bandhus* ex parte materna—*Father s sister s son s son preferable to mother s brother* Under the Mitaksara Law among Atma bandhus of a deceased male owner those that are related to him *ex parte paterna* are preferential heirs to those that are related to him *ex parte materna* The son of the father s si ter s on of the deceased male owner is a preferential heir to his mother s brother *Sundrammal* v *Rangasami Mudaliar* (1895) *I L R* 18 *Mad* 193 *Balusami Pandithar* v *Narayana Rau* (1897) *I L R* 20 *Mad* 342 followed SUBRAMANIA MUDALIAR v RANGA NATHAN CHETTIAR (1921)
I L R 44 Mad. 114

22(a) ———— *Inheritance—Sudra ascetic—Right of sishya (disciple) to inherit—Texts of Hindu Law whether obsolete—Yajnavalkya—Mitakshara—Escheat to Government—Religious instruction to Sudras—Disciple meaning of—Spiritual relationship proof of* The disciple of a Sudra ascetic who dies without leaving any blood relations is an heir of the latter unde the Hindu Law and succeeds to his estate so as to prevent its escheat to the Government The texts relating to succes ion by pre eptors dis iples and fellow students enunciated in Yajnavalkya Smriti Chapter II verse 137 and in the Mitakshara se tion VII are not obsolete In determining who is a preceptor a pupil or a fellow student under the above texts we have only to consider the imparting of purely religious instruction Religious instruction and training are not confined to Brahman *Giyana Sambandha Pandara Sannadhi* v *Kandasami Tambiran* (1887) *I L R* 10 *Mad* 375 *Dharmapuram Pandara Sannadhi* v *Virapandiyam Pillai* (1899) *I L R* 22 *Mad* 302 distinguished Strict proof is required to be given by the claimant regarding his alleged spiritual relationship to the deceased SAMBASIVAM PILLAI v SECRETARY OF STATE FOR INDIA (1921)
I L R 44 Mad 704

22(b) ———— Illegitimate son of a Sudra by a dancing woman kept in continuous and exclusive concubinage is entitled to get his appropriate share in the joint family property after his father s death provided his parents connection was not incestuous or adulterous SOUNDARARAJAN v ARUNACHALAM CHETTY
I L R 39 Mad 136

23 ———— Succession of sapindas of same and different degrees—*Uncle of half blood preferred as heir to son of uncle of whole blood—Civil Procedure Code (1882) ss 317 and 231—Execution of mortgage decree by one of several decree holders—Suit by heirs of the other decree holders against decree holder who after a sale subject to rights of heirs of the others claimed and obtained sole possession* *Held* (affirming the decision of the High Court) that under the Mitakshara law the preference of heirs of the whole blood to those of the half blood confined to sapindas of the same degrees of descent from the common ancestor Where therefore the choice of heirs lay between sapindas of different degrees an uncle of the half blood as being less remote from the common ancestor is a preferential heir to the sons of an uncle of the whole blood *Suba Singh* v *Sarfaraz Kunwar I L R 19 All 215* distinguished The provisions of s 317 of the Code of Civil Procedure 1882 were designed to create some check on the practice of making so called benami purchases at execution sales for the benefit of judgment debtors and in no way affect the title of persons otherwise beneficially interested in the purchase One of three joint decree holders of a mortgage decree alone took out execution under s 231 of the Code stating that the other decree holders had died and praying that execution might be subject to the rights of their heirs and representatives He obtained leave to bid at the sale purchased the property in his own name and, furnished with a certificate of sale got possession of the property *Held* in a suit by the heirs of the other decree holders for the shares they were entitled to under the decree that s 317 of the Code was not applicable as a defence to the suit and that the plaintiffs were entitled to recover their shares of the mortgaged property *Bodh Singh Doodhoria* v *Gunesh Chunder Sen 12 B L R 317* followed GANGA SAHAI v KESHRI (1915) I L R 37 All 545

24 ———— Sudras—*Extent of share Among Sudras an illegitimate son of a concubine* stands on the same level as to inheritance as the *dasi putra* and the extent of his share in competition with a legitimate daughter would be one half of the share taken by the daughter that is one third of the whole estate GANGABAI PEERAPPA v BANDHU (1915) I L R 40 Bom 369

25 ———— "Samanodaka"—*Meaning of—Reversioner claim by—Onus of proof* According to Mitakshara and the view prevalent in Southern India *samanodaka relationship is confined to such* of the *gotrajas* as are within fourteen degrees from the common ancestor It is incumbent on a plaintiff seeking to succeed to property as an heir affirmatively to establish the particular relationship which he puts forward He is also bound to satisfy the Court that to the best of his knowledge there are no nearer heirs It is for those who claim that their kinship is nearer than that of the plaintiff to prove that relationship *Secretary of State for India* v *Subraya Karantha* (1915) *Mad W N 969* followed *A gotraja who* is unable to trace his descent from a common ance tor cannot be preferred to a *bandhu* RAMA ROW v KUTTIYA GOUNDAN (1916)
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26 ———— Blindness—*Not a disqualification unless congenital* The appellant as his only child and heir sued for the property of her father a Hindu who had become blind in the early years of his life and remained so until his death and had taken his separate share of the family property under a decree made on a compromise of a suit for partition brought against him by his younger brother they having lived together as members of a joint family governed by the law of the Mitakshara The d fence by his brother

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against whom the suit was brought was that there had been no partition and that on his brother's death he became entitled to the whole family property by survivorship He contended that his brother's blindness was congenital which excluded him from inheritance but that even assuming he was not born blind but became so after birth he was, according to the Mitakshara law of the Benares school, excluded from participation of a share inasmuch as the blindness occurred before the alleged partition *Held* that blindness to cause exclusion from inheritance must be congenital Mere loss of sight which has supervened after birth is not a ground for disqualification Incurable blindness if not congenital is not such an affliction as under Hindu Law excludes a person from inheriting Sarvadhicari's Hindu Law of Inheritance page 9 0 referred to *Mohesh Chunder Roy v Chunder Mohan Roy 14 B L R 273* *Suth W R 78* and *Murarji Gokuldas v Parvatibai I L R 1 Bom 177* approved and followed GUNJESWAR KUNWAR v DURGA PRASHAD SINGH (1917) I L R 45 Calc 17

27 ———— Taluqa in Oudh—*Oudh Estates Act (I of 1869) ss 7 8 10 22—Sanad granting descent by primogeniture—Properties subsequently acquired— Accretions and properties appurtenant to taluqa —Property purchased by taluqdar —Intention to vary descent—Substitution of villages by Government—Crown Grants Act (XV of 1895) s 2—Power of Crown to alter or limit descent—No such power in subject* In British India the Crown has power to grant or transfer land and by its grant or on the transfer to limit in any way the descent of such lands But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent applicable to the particular lands or property so dealt with The present appeal related to a taluqa granted in 1861 by the Crown to a Hindu the grant containing a condition that in the event of your dying intestate or of your successor dying intestate the estate should descend to the nearest male heir according to the rule of primogeniture On the death of one of the holders of the taluqa a suit was brought which in 190 came on appeal to the Privy Council for decision as to the succession to the deceased taluqdar's estate and an Order in Council was made which declared that the taluqa as constituted at the date of the sanad with accretions (if any) or properties (if any) appurtenant to the taluqa passed to the appellant as the next male heir according to the rule of primogeniture but that the residue of the property passed to the respondent and the suit was remitted to India for determination under the Order in Council There was no allegation of any family custom of primogeniture On appeal from the final decrees of the Judicial Commissioner *Held* that under the Order in Council villages substituted by the Government for some of those held under the sanad and a house granted by the Government after 1861 to the taluqdar for his use as taluqdar passed to the appellant as taluqdari property but that villages purchased after 1861 by the deceased taluqdar passed to the respondent as non taluqdari property and it was immaterial whether it was or was not the intention of the deceased taluqdar to incorporate them with the taluqa RAJENDRA BAHADUR SINGH v RAGHUBANS KUNWAR (1918) I L R 40 All 470

28 ———— Illegitimate son of a Sudra—by a continuous and exclusive concubine—Dayabhaga— *Dasi* — *Dasiyudrasudraputra* — *Aparinecta* *Held* (CHATTERJEA J dissentiente) that under the Bengal School of Hindu law correctly interpreted an illegitimate son of a Sudra is entitled as a *dasiputra* to a share of the inheritance provided that his mother was in the continuous and exclusive keeping of his father and he was not the fruit of an adulterous or an incestuous intercourse This right is not subject either to the condition that his mother was a slave woman in the technical sense of the term or to the condition that a marriage could have taken place between his father and his mother *Narain Dhara v Rakhal Gain I L R 1 Calc 1* *Kirpal Narain Tewari v Sukurmoni I L R 19 Calc 91* and *Ramsaran Garain v Tek Chand Garain I L R 28 Calc 194* overruled on this point The term *dasi* is not exclusively applicable to a female slave but includes a Sudra woman kept as a concubine According to the correct interpretation of para 29 Chap IX of the Dayabhaga the term *dasiyadsudraputra* includes the son of a *dasi* or the like and it is not restricted only to the son of a *dasi* or the *dasi* (slave woman or wife) of a *dasa* In the same text the term *aparinecta* means not a maiden but not married (to the Sudra to whom she bears a son) *Per* CHATTERJEA J Having regard to the fact that for more than a century the right of an illegitimate son of a Sudra by a kept woman has not been recognised in Bengal and having regard to the opinion of writers of Hindu law in Bengal the right which is opposed to the usage and sentiments of the people of Bengal should not be revived even if it is deducible from the texts of Jimutavahana or any other authority Cases on the subject reviewed RAJANI NATH DAS v NITAI CHANDRA DEY (1920) I L R 48 Calc 643

28a ———— Unchaste female—The rule as it obtains in the Bengal School of Hindu Law is that any female who was unchaste before the succession opened out is excluded from the inheritance RAJABALA DASI v SHAYAMA CHARAN BANERJEE (1917) 22 C W N 566

29 ———— Illegitimate son—*Right of putative to succeed as heir* *Held* by the Full Bench —Where an illegitimate son who if he had survived his putative father would have inherited his estate either alone or along with others dies leaving no issue widow or mother his putative father is entitled to succeed as his heir *Jogendro Bhupati Hurrochundra Mahapatra v Nityanand Man Sing I L R 18 Calc 151* and *Sadu v Baiza and Genu I L R 4 Bom 37* applied SUBRAMANIA AYYAR v RATHINAVELU CHETTY (1917) I L R 41 Mad 44

29a ———— Unchastity effect of—*Dayabhaga—Application to Assam Koches—Unchaste daughter marrying paramour after succession opened out if may inherit* The daughter of a Koch (in Assam) eloped in her father's lifetime with a Koch and lived with the latter as man and wife but later on the father's death married her paramour and sued to recover her father's properties from the illegitimate daughters of her father who were in possession *Held* (in the absence of evidence of local custom and the Dayabhaga law applying)—That the plaintiff was disqualified when the succession opened out from

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inheriting her father s properties by reason of her unchastity and the disability was *not removed by* subsequent marriage That failing to prove her title the Plaintiff could not recover the property even though the Defendants were in possession without title *Quære* —Whether Plaintiff could have inherited her father s estate if she had married her paramour before the succession opened out AITA KOCHUNNI *v* AIDEW KOCHUNNI

24 C W N 173

30 ——— **Persons born blind**—*Exclusion from inheritance and joint ownership—Rule of exclusion whether obsolete—Texts—Competency of Courts to declare rule obsolete—Reversioners—Right of suit for declaration—Widow setting up absolute title to husband s properties under a will of another—Right of reversioner to sue for mere declaration—Specific Relief Act (I of 1877) s 42 Ills (e) and (f) whether exhaustive* The rule of Hindu Law which prevents a person *born blind* from claiming an interest along with his brothers as a co owner in ancestral properties has become obsolete A reversioner under the Hindu Law is entitled to sue for a mere declaration as to the limited nature of the title of a widow to certain properties alleged by him to belong to her husband but to which she sets up an absolute title under the will of another person Illustrations (e) and (f) to s 42 of the Specific Relief Act are not exhaustive of the classes of cases in which a reversioner can sue for a declaration under the section SURAYYA *v* SUBBAMMA (1920) **I L R 43 Mad 4**

31 ——— **By daughter**—*Benares School claim of daughter of deceased Hindu to inherit against person who claimed and proved his title as next agnate in Settlement Court if res judicata Settlement Court proceedings in in which claim of the daughter of deceased Hindu to inherit was established as against person who claimed and proved his title as next agnate—Alienation of estate by daughter—Suit by same agnate to declare alienation invalid—Res judicata—Court s discretion to grant declaratory decree—Specific Relief Act (I of 1877) s 42* In certain proceedings before the Settlement Court which took place in 1867 1868 concerning the right to succession to the estate of *J* who had died in 1862 questions were raised amongst the several claimants to the estate *inter alia* as to whether *I* the daughter of *J* was not excluded from inheritance under a family custom and whether *B* who claimed to be the agnatic heir of *J* was in fact what he alleged to be *i.e.* the son of the adopted son of *Z* the father s brother of *J* The Settlement Court decided that *I* was entitled to hold the estate in the limited interest of a Hindu daughter as provided by the Benares School of Hindu law and that *B* at the date of the decision was the reversioner expectant his relationship to *J* as alleged by him being established In 19[illegible] *I* entered into a compromise with her deceased son s widow under which it was agreed that *I* should hold the estate for her life and that on her death her son s widow was to be the owner *B* then brought the present suit as reversionary heir to *J* on *I* s death for a declaration that the agreement between *I* and her son s widow was invalid *Held* that the status of *B* as reversionary heir having been established in the Settlement Court proceedings that question was *res judicata* as also was the question of the title under which (*e g* in the limited interest of a Hindu daughter) *I* was to hold the estate and that in the circumstance it *was a fit case for the grant of a declaratory decree* as prayed for in the plaint RANI INDAR KUAR *v* THAKUR BALDEO BAKSH SINGH (P C)

25 C W N 170

32 ——— **Impartible zamindari**—*Rule of succession—Heirs of the same degree but of different branches—Preference of senior line—Right of zamindar to incorporate self acquisitions and income from zamin with zamin—Rule of descent thereto when not incorporated* The devolution of an impartible estate held by a single person depends upon whether the last holder was undivided or divided from the other members of the family If he was undivided then for the purposes of succession the property must be treated as if it had been partible and the successor found among those who would have been in that event his co parceners If he was separated the estate devolves in the absence of any *special custom on* the next of kin who is nearest in blood to the deceased as for instance his mother and if there be several collaterals of the same degree but of different branches the senior representative of the senior line takes *Tara Kumari* v *Chathurbhuj Narayan Singh (1915) I L R 42 Calc 1179 (P C)* and *Babu Narindar Bahadur Singh* v *Achal Ram (1893) I L R 20 Calc 649 (P C)* followed It is open to the holder of an impartible zamindari to incorporate with his zamin his self acquisitions *such as those made from the income of the zamin* or to keep them distinct If incorporated the devolution thereof follows that of the zamin if not his own heirs succeed to them *Murtaza Husain Khan* v *Muhammad Yasin Ali Khan (1916) I L R 38 All 552 (P C) at 557* and *Janki Prasad Singh* v *Dwarka Prasad Singh (1913) I L R 35 All 391 (P C) at 401* followed *Rajindra Bahadur Singh* v *Raghubans Kunwar (1918) I L R 40 All 470 (P C)* distinguished GURUSAMI PANDIYAN *v* PANDIA CHINNA THAMBIAR (1921) **I L R 44 Mad 1**

33 ——— **Bandhus**—*Heritability test of—Sapinda relationship—Mutuality—Paternal grand father s sister great grand son whether heritable bandhu* Under the Mitakshara Law the great grandson of the paternal grand aunt of the last male owner is not a heritable bandhu of the latter *Umaid Bahadur* v *Udoi Chand (1881) I L R 6 Calc 119 (F B)* and *Babu Lal* v *Nanku Ram (1895) I L R 22 Calc 339* followed *Budha Singh* v *Laltu Singh (1915) I L R 37 All 604 (P C)* distinguished *Subramania Mudaliar* v *Ranganathan Chettiar (1921) I L R 44 Mad 114* referred to CHINNA PICHU IYENGAR *v* PADMANABHA IYENGAR (1921)

I L R 44 Mad 121

34 ——— **Non congenital insanity**—*Whether a ground of deprivation of right of survivorship* Insanity as a ground of exclusion from inheritance under Hindu Law need not be congenital *Deo Kishen* v *Budh Prakash (1883) I L R 5 All 509 (F B)* and *Muraji Gokuldas* v *Parvatibai (1876) I L R 1 Bom 177* followed *Sanku* v *Puttamma (1891) I L R 14 Mad 289* dissented from The right of a member of a Hindu joint family to share in ancestral property comes into existence at birth and is not lost but is only in abeyance by reason of a disqualification It subsists all through although it is incapable of enforcement at the time of partition if the disqualification

HINDU LAW—INHERITANCE—*contd*

then exists. Hence if on the death of all the other members the disqualified member becomes the sole surviving member of the family he takes the whole property by survivorship MUTHUSWAMI GURUKKAL v MEENAMMAL (1920)

I L R 43 Mad 464

35 ———— Father's Immovable Property —*Different law in different Provinces of India—Quality of estate taken whether absolute or limited—Mahratta Brahmin in Central Provinces—Bombay school of law—Family emigrating taking law of original domicile with it* The quality of the right which is taken by a daughter who inherits immovable property from her father has been differently determined in different parts of India In accordance with the view of the High Court of Bombay the Courts of Western India have decided that she takes an absolute right in other parts of India the Courts have held that she takes only a limited interest such as is taken by a Hindu widow see *Pranjivandas Tulsidas v Devkuvarbai 1 Bom H C 130 9 Moo I A 433 (note)* and *Bhaskar Trimbak Acharya v Mahadeo Ramji I L R 6 Bom 1* and the cases and authorities there cited It is established that the law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question *Prima facie* any Hindu residing in a particular province of India is held to be subject to the particular doctrines of Hindu Law recognised in that province But this law is not merely a local law it becomes the personal law and part of the status of every family which is governed by it consequently where any such family migrates to another province governed by another law it carries its own law with it Mayne s Hindu Law 8th Ed para 48 On migration there may be renunciation of the law of the province migrated from in favour of that of the province migrated to but unless such renunciation is proved (and the mere change of domicile is not of itself sufficient to prove it) original law continues to govern the migrating family But the law must be the family law as it was when they left A judgment declaratory of law as having always been would be binding on the migrated family but subsequent customs introduced into the law would not affect them *Surendra Nath Roy v Heeramonee Burmoneah 12 Moo I A 81* and *Parbati Kumari Debi v Jagadis Chunder Dhabal I L R 29 Calc 433 L R 29 I A 82* followed A Maharashtra Brahmin whose ancestors and afterwards himself were domiciled in the Bombay Presidency died in 1868 while on a pilgrimage leaving immovable property in the Wardha District of the Central Provinces On his death his daughter succeeded to that property She died in 1889 leaving three sons who on her death sued to set aside alienation of portions of the property made by her during her possession of it The question arose whether she took an absolute or a limited estate in the property which depended on what was the law of succession by which her father and his ancestors were governed The Judicial Commissioner (reversing the decision of the first Court to the effect that he and his ancestors were originally domiciled at Berar in the Bombay Presidency and therefore the law gave the daughter an absolute estate) held that the father had no exclusive domicile either in Berar or in the Central Provinces and that the succession was governed by the law of the latter where the property was situated and the daughter had taken only a limited estate *Held* that the family of her father and his ancestors were domiciled in Berar and there was no renunciation of the law of that province when they or he migrated from it and that the daughter took an absolute estate under the law of the Bombay Presidency BALWANT RAO v BAJI RAO (1920)

I L R 48 Calc. 30

36 ———— Division amongst sons by Patnibhag—*Agreeable as custom—Custom proved as prevailing amongst Chettis of certain villages is open to objection as unreasonable as a local custom—Chettis if Sudras* Though division of the inheritance amongst sons by putrabhag (i e according to the number of sons) is now the recognised rule of Hindu law there are traces of division by patnibhag (i e according to wives) Therefore though the prevailing law is putrabhag patnibhag may be proved to exist as a territorial family or caste custom specially in Southern India where it is possible that the matriarchal theories of the earlier inhabitants may have led to the prevalence of this custom and caused difficulties in the way of its being extirpated by the Brahmins when they introduced the law of the Smritis in Southern India The Chettis are generally deemed to be Sudras *Held* on the evidence that the custom of patnibhag proved in the case was one of the particular class of Chettis who happened to dwell in and probably were at the moment the only dwellers in an area of seven villages and such a custom could not rightly be described as a local custom which it would be unreasonable to impose upon all persons dwelling in the area RAMANAPPA CHETTIAR v ALAGAN CHETTI

26 C W N 417

HINDU LAW—JOINT FAMILY—*See* BENGAL TENANCY ACT 1885 s 48

3 Pat L J 576

See CENTRAL PROVINCES GOVERNMENT WARDS ACT s 18

I L R 40 Calc 784

See CIVIL PROCEDURE CODE (ACT V OF 1908) O I R 3 I L R 40 Mad 365

See HINDU LAW—ALIENATION

See HINDU LAW—JOINT FAMILY

See HINDU LAW—LEGAL NECESSITY

See HINDU LAW—MINOR

See HINDU LAW—MITAKSHARA

See HINDU LAW—PARTITION

See MORTGAGE 23 C W N 634

See SPECIFIC RELIEF ACT 1887 s 42

2 Pat L J 221

———— Elder brother selling as Manager—

See LIMITATION ACT 1908 s 7

I L R 45 Bom 446

———— Status of Females in—

See CIVIL PROCEDURE CODE 1908 s 66

I L R 43 All 711

———— Joint acts of Insolvency—

See INSOLVENCY ACT 1907 s 5

I L R 44 Mad 810

HINDU LAW—JOINT FAMILY—contd

1 ——— Effect of partition—*Profits from investment of joint family property of joint family property—Suit against karta for partition and accounts —Limitation—Limitation Act (XV of 1877) Sch II Arts 62 127* A family may be joint with reference to certain properties though divided in respect of others *Gauri Shankar Parabhuram v Atmaram Rajaram I L R 18 Bom 611 Purushottam v Atmaram I L R 23 Bom 597 601* referred to Where plaintiff sued for partition and account of profits of joint family property in the hands of the *karta* Art 127 and not Art 62 of Sch II of the Limitation Act (XV of 1877) applied. *Mathusami Mudaliar v Nallakulantha Mudaliar I L R 18 Mad 418* followed *Banoo Tewary v Dooma Tewary I L R 24 Calc 309 Thakur Prasad v Partab I L R 6 All 442* distinguished Profits derived from the investment of joint family capital in business or from immoveable properties belonging to the joint family are joint family property A suit for account in respect of such money being incidental to the suit for ascertainment of share on partition comes under Art 127 of the Limitation Act *Pirthi Pal v Jowahir Singh I L R 14 Calc 493* referred to AJODHYA PERSHAD v MAHADEO PERSHAD (1909)
14 C W N 221

2 ——— Order Restoring Member—*Mitakshara joint family—Civil Procedure Code (Act V of 1908) O XXI r 101—Order restoring member of joint Mitakshara family to a share—Validity—Suit brought after claim case dismissed for default—Decision of binding—Civil Procedure Code (Act XIV of 1882) ss 278 102 103—Dismissal of suit for default—Effect—Res judicata or not—Mitakshara son's right to resist execution against family property of decree against father and after suit for injunction dismissed for non prosecution* A member of a joint Mitakshara family has no definable share in the joint property previous to partition An order under O XXI r 101 Civil Procedure Code 1908 restoring such member to a specific share of such property on the ground that he is in possession of such property is therefore bad Where a suit for injunction to restrain the sale of joint Mitakshara family property in execution of a decree against the father on the ground that the debts of the father did not bind the son's interest in the property was dismissed for non prosecution *Held* that the son was no longer entitled to contend in execution proceedings that the entire property was not liable to be sold *Cooverjee v Dewsey I L R 17 Bom 718* followed A decree holder against Mitakshara father can proceed against the entire joint property *Muddun Thakur v Kantoolall L R 1 I A 321 Nanomi Babasin v Modun Mohan L R 13 I A 1 s c I L R 13 Calc 21 Jutur Mal v Eknath I L R 24 Bom 343 s c 2 Bom L R 392* followed. *Kallappa v Venkatesh Vinayak I L R 2 Bom* [illegible] *Durgappa v Venkatramnaya I L R* [illegible] *Bom 493 Patil Hari v Hakim Chand I L R 18 Bom 565* distinguished SANKAR NATH PUNDIT v MADAN MOHAN DAS (1909) **14 C W N 298**

3 ——— Mortgage—*Joint family property mortgage of share in by co parcener—Procedure for enforcement* Where a member of a joint Mitakshara family represented to mortgagees of a portion of that property that he had the power to charge the property he was bound to make good his representation by exercising such proprietary right over it as he possessed viz by partition *Mohabeer Pershad v Ramyad Singh 20 W R 192 12 B L R 90* followed *Madho Pershad v Mehrban Singh I L R 18 Calc 157 Jamuna Prasad v Ganga Prasad I L R 19 Calc 401 Bunwari Lal v Daya Sankar 13 C W N 815* referred to Such mortgage so far as the specific shares of the mortgagors were concerned was void but the Court may direct that the joint property be held in specified shares and in such case the lien of the mortgage will be fixed to the share of the mortgagors thus specified MAHANATH RAM SUNDAR DAS v NATHUNI SINGH (1909)
14 C W N 552

4 ——— Joint family business—*Mitakshara—Agreement entered into with one member of the family—Such member competent to sue without joining other members* Where a contract is entered into on behalf of a joint family business by a member of the family in his own name it is not necessary that any members of the joint family other than those who entered into the contract should be parties to the suit brought thereon *Gopal Das v Badri Nath I L R 27 All 361* followed *Agacio v Forbes 14 Moo P C 160 Bungsee Singh v Soodist Lall I L R 7 Calc 739* and *Hari Vasudeo Kamat v Mahadu Dal Gavda I L R 20 Bom 435* referred to *Shamrathi Singh v Kishan Prasad I L R 29 All 311* distinguished DURGA PRASAD v DAMODAR DAS (1909)
I L R 37 All. 183

5 ——— Mother's share on partition—*Mitakshara—Joint Hindu family—Stridhan—Succession* *Held* that according to the Mitakshara the share which the mother in a joint Hindu family obtains after the death of the father on partition of the joint family property between the mother and the sons becomes the mother's *stridhan* which devolves on her death upon her own heirs and not upon the heirs of her husband *Chhiddu v Naubat I L R 24 All 67* and *Gambhir Singh v Makraddhuj All L J 613* followed *Sheo Shankar v Debi Sahai I L R 25 All 468* distinguished DEBI MANGAL PRASAD SINGH v MAHADEO PRASAD SINGH (1909)
I L R 32 All 253

6 ——— Grant by Government—*Family joint before annexation of Oudh—Confiscation of and grant by Government to person who had been a member of joint family—Whether subject of grant is self-acquired or joint—Separation by one member effect of—Burden of proof* Before the annexation of Oudh two estates Bohra and Sherpur (the latter being about one third of the two together) belonged to an undivided Hindu family consisting of three brothers The estates were confiscated on the annexation of the province but shortly afterwards the Sherpur estate was granted by the Government to the eldest of the three brothers (the other two being minors) who was the head and manager of the family the grant being expressed to be by way of favour and award and not in consideration of proprietary right In this appeal the appellant's (plaintiffs) case in a suit for a half share of the self acquired property held by the eldest brother at his death whether it was two thirds or one third of Sherpur depended on whether the estate granted was the self acquired property of the grantee or the joint property of the three brothers The appellants represented the second of the three brothers (who had separated himself in 1865 after a quarrel with his elder bro

HINDU LAW—JOINT FAMILY—*contd*

brother taking a third share of the property) and the respondent was the third brother. The Court of the Judicial Commissioner (reversing the decision of the Subordinate Judge) held on the evidence and circumstances of the case and the inferences to be drawn as to the intention of the Government in making the grant and from its terms and the conduct of the parties that the estate granted was the joint property of the three brothers up to the time when the second brother separated, that the other two brothers remained joint until the death of the eldest brother in 1863 when the respondent became entitled by survivorship to two-thirds of the property and that the appellant had altogether failed to prove that the eldest brother died entitled to either two-thirds or one third of the Sherpur estate as separate property. That court consequently dismissed the suit and the Judicial Committee on appeal affirmed that decision. KEDAR NATH *v.* RATAN SINGH (1910)

I L R 32 All 415

7 ———— Son's liabilities for father's debts—*Mortgage—Suit for sale—Transfer of Property Act (IV of 1882) s 85—Property sold in execution of decree for sale—Purchase by mortgagee decree holder* In execution of a decree for sale upon a mortgage of joint family property executed by the head of a Hindu joint family certain property was brought to sale and purchased by the mortgagees. A member of the family (great grandson of the original mortgagor) sued the mortgagees for redemption upon the ground that the mortgagees at the date of the suit had been aware of his existence and had not impleaded him. *Held* that the plaintiff's suit would not lie on this ground alone and that his position was not affected by the fact that the mortgagee had himself purchased the mortgaged property. *Debi Singh* v *Jia Ram I L R 25 All 214* followed. *Ram Prasad* v *Man Mohan I L R 30 All 256* dissented from. *Lal Singh* v *Pulandar Singh I L R 28 All 182* referred to. BALWANT SINGH *v.* AMAN SINGH (1910)

I L R 33 All 7

8 ———— Joint family manager of——*For what purposes managing member may contract debts binding on co parceners—Family necessity—Marriage of son a necessary purpose for which manager may bind joint family* The marriage of a member of the co parcenary is a family purpose and where it is reasonably necessary on the part of a prudent manager to borrow money for such purpose the transaction will bind the co parceners whether they are Sudras or belong to the twice born classes. Marriage is one of the necessary *samskaras* or religious rites in the case of Sudras as well as the twice born classes. The necessity which will justify an alienation by the manager is not to be understood in the sense of what is absolutely indispensable but what according to the notions of a Hindu family would be regarded as reasonable and proper. *Govindarazulu Narasimham* v *Devara Bhotla Venkata Narasayya I L R 27 Mad 206* dissented from. The ceremonies for the performance of which immoveable properties can be alienated by the manager do not include only those for the mere performance of which forfeiture of caste is the penalty. KAMESWARA SASTRI *v.* VEERACHARLU (1910)

I L R 34 Mad 422

9 ———— Joint family property—Mortgage by father alone—*Subsequent sale by father to a third party—Suit by mortgagees for sale—Competence of purchaser to plead invalidity of mortgage* The head of a joint Hindu family mortgaged in 1883 property belonging to the joint family but neither for legal necessity nor to pay an antecedent debt. In 1888 the mortgagor sold the same property to a third person. The purchaser remained in possession for more than twelve years when the mortgagees instituted a suit for sale on their mortgage. *Held* by RICHARDS *C J* and BANERJI *J* that in view of the fact that the purchaser had acquired a title to the property by adverse possession as against all the members of the family it was open to him notwithstanding that his title was originally acquired from the mortgagor alone to set up as a defence the invalidity of the mortgage. *Per* CHAMIER *J* that according to the ruling of the majority of the Full Bench in *Chandradeo* v *Mata Prasad I L R 31 All 176* the mortgage made by the father alone was void and this being so it was open to the purchaser who was in possession of the property to rely upon its invalidity whatever the weakness of his own title might be. *Chandradeo* v *Mata Prasad I L R 31 All 176*, *Balgobind Das* v *Narain Lal I L R 15 All 339*, *Brijbasi Lal* v *Gopal Das All Weekly Notes (1908) 200*, *Kali Shankar* v *Nawab Singh I L R 31 All 507* and *Bhagirathi Misr* v *Sheobhik I L R 20 All 325* referred to. MUHAMMAD MUZAMIL ULLAH *v.* MITHU LAL (1911)

I L R 33 All 783

10 ———— Mortgage by managing member—*Suit by other members for redemption—Transfer of Property Act (IV of 1882) s 85—Parties—Representative capacity of managing member* Although the manager of a Joint Hindu family is not as a rule entitled to sue or liable to be sued on behalf of the family—*Padmakar Vinayak Joshi* v *Mahadev Krishna Joshi I L R 10 Bom 21* and *Kashi Nath Chimnaji* v *Chimnaji Sadashiv I L R 30 Bom 477*—nevertheless in certain circumstances the whole family may be bound by the result of suits brought by or against the manager notwithstanding that some members of the family were not made parties thereto. *Balwant Singh* v *Aman Singh I L R 33 All 71*, *Debi Singh* v *Jia Ram I L R 25 All 214*, *Sundar Lal* v *Chhitar Mal 3 All L J 644*, *4 All L J 17*, *Dhurm Dass Pandey* v *Mussamat Shama Soondri Dibiah 3 Moo I A 229*, *Hari Saran Moitra* v *Bhubaneswari Debi I L R 16 Calc 40*, *Narayan Gop Habbu* v *Pandurang Ganu I L R 5 Bom 685*, *Jogendro Deb Roy Kut* v *Funindro Deb Roy Kut 14 Moo I A 367*, *Bissessur Lal Sahoo* v *Maharajah Luchmessur Singh L R 6 I A 233*, *5 C L R 477*, *Ram Krishna Narayan* v *Vinayak Narayan 12 Bom L R 919* and *Gan Savant Bal Savant* v *Narayan Dhond Savant I L R 7 Bom 467* referred to. JADDO KUNWAR *v.* SHEO SHANKAR RAM (1910)

I L R 33 All 71

11 ———— Mortgage by father—*Sons not made parties to suit for sale on mortgage—Sale under decree—Suit by sons to redeem their interests* Where ancestral property belonging to a joint Hindu family has been sold in execution of a decree for sale on a mortgage executed by the father the sons cannot maintain a suit for redemption of their interests in the property sold upon the ground solely that they had not been made parties to the suit of the mortgagee nor is their position affected by the fact that the auction purchaser is the mortgagee. *Debi Singh* v *Jia Ram I L R 25 All 214*, *Lal Singh* v *Pulandar Singh I L R*

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28 All 182 and *Balvant Singh v Aman Singh, I L R 33 All 7* followed *Ram Prasad v Man Mohan I L R 30 All 256* dissented from *Ram Nath Rai v Lachman Rai All Weekly Notes (1899) 27* referred to KEHRI SINGH v CHUNNI LAL (1911) I L R 33 All 436

12 ———— Alienation of family property—Right of subsequently born member of family to object—*Held* that a member of a joint Hindu family who was born after the alienation of the family property by another member of that family cannot question the validity of that alienation *Chattarpal Singh v Natha All Weekly Notes (1906) 26* followed *Hurodoo Narain Singh v Beer Narain Singh 11 W R 480* and *Bunwari Lal v Daya Shunkar, 13 C W N 815* distinguished CHUTTAN LAL v KALLU (1910) I L R 33 All 283

13 ———— Burden of proof—*Nucleus—Presumption* It is necessary to establish the existence of a nucleus of joint family property before the property in the possession of any one member can be presumed to be joint family property There is no presumption that a Hindu family has any joint property *Taruck Chunder Totaddar v Joodhe ster Chunder Koondoo 19 W R C R 178* dissented from *Moolji Lila v Gokuldas Vulla I L R 8 Bom 154 Toolseydas Ludha v Premji Tricumda I L R 13 Bom 61 Dwarka Prasad v Jamna Das 15 Bom L R 153* followed *Lal Bahadur v Kanhaiya Lal I L R 29 All 244* referred to RAM KISHAN DAS v TUNDA MAL (1911) I L R 33 All 677

14 ———— Legal necessity—*Mitakshara—Joint Hindu family—Father committed to the Court of Session—Loan taken for his defence Held* that the necessity of raising money to pay for the defence of the head of a joint Hindu family committed to the Court of Session on a serious criminal charge was a valid legal necessity such as would support a mortgage of the family property executed by the father and one of his sons for such purpose *Thandradeo v Mata Prasad I L R 31 All 176 Luchmun Koour v Mudaree Lall 5 S D 4 N W P 3* and *Duleep Singh v Sree Kishoon Panday 4 N W P H C R p 83* referred to BENI RAM v MAN SINGH (1911) I L R 34 All 4

15 ———————— *Money borrowed by father at a high rate of interest—Legal necessity—Burden of proof* When money is borrowed by the father of a joint Hindu family on the security of the family property at a very high rate of interest it is for the lender seeking to enforce his claim to prove not only that there was necessity for borrowing the money but also that there was necessity for borrowing it at an exorbitant rate of interest *Chandradeo v Mata Prasad I L R 31 All 176 Hurro Nath Rai Chaudhuri v Randhir Singh I L R 18 Calc 311* and *Kameswar Pershad v Run Bahadur Singh I L R 6 Calc 843* referred to NAND RAM v BHUPAL SINGH (1911) I L R 34 All 126

16 ———————— *Debt incurred by managing member of family—Presumption as to family benefit—Burden of proof* There is no presumption that a debt contracted by the manager of a Hindu firm or family is contracted for the benefit of the firm or family and the plaintiff who seeks to bind the other members of the joint family will have to prove that it was a debt contracted for their benefit or with their consent, or that there was an urgent family necessity therefor *Sotru Padmanabh Rangappa v Naryanrao bin Vithalrao I L R 18 Bom 520 Sunkar Pershad v Goury Pershad I L R 5 Calc 321 Nagendra Chandra Dey v Amar Chandra Kundu 7 C W N 725* and *Krishna Ramaya Naik v Vasudeo Venkatesh Pai I L R 21 Bom 1808* referred to *Sheo Pershad Singh v Saheb Lal I L R 20 Calc 453* distinguished GANPAT RAI v MUNNI LAL (1911) I L R 34 All 135

17 ———— Purchase of mortgaged property by managing members—*Suit for sale against managing members only—Civil Procedure Code (1908) O XXXIV r 1* Where in a suit for sale on a mortgage the defendants mortgagors were the managing members of a joint Hindu family who in that capacity had purchased the mortgaged property it was *held* that the family was sufficiently represented by the managing members and that the suit would not fail by reason of the non joinder of the other members of the family HORI LAL v MUNMAN KUNWAR (1912) I L R 34 All 549

18 ———— Mortgage for the benefit of joint family—*Suit for sale by managing member alone—Parties—Civil Procedure Code 1908 Order XXXIV r 1* Where in a suit for sale on a mortgage executed in favour of the manager of a joint Hindu family the plaintiff was the then managing member of the family it was *held* that he was entitled in that capacity to maintain the suit and that it would not fail by reason of the non joinder of the plaintiff's son, who was joint with him *Hori Lal v Munman Kunwar I L R 34 All 549* referred to MADAN LAL v KISHAN SINGH (1912) I L R 34 All 572

19 ———— Mortgage of property given to father and son—*Subsequent purchase of portion of property by grandson who was separate in mess and business out of his self acquisition—Adverse possession—Purchase as of remaining share by mortgagee at execution sale had by another creditor—Extinction of mortgagor's title* Some time after a mortgage had been executed of immoveable properties in favour of *R* and *S* father and son members of a joint Hindu family governed by the Mitakshara, a widow of the mortgagor sold such right and title if any as she had in half of the property of the mortgagor to *B* son of *S* who was joint with *R* and *S* at the time of the mortgage, but who prior to his purchase had ceased to be joint in food and business with *S* though there was no partition and having received a present of a considerable sum of money from his grand mother had been carrying on money lending business on his own account and had found the purchase money out of his separate self acquired property *R* got possession after his purchase and continued in possession for considerably over 12 years *Held* that the possession of the property by *B* was not that of a mortgagee but adverse to that of the mortgagee and the title of the mortgagor's representatives to redeem was lost by adverse possession The remaining half share was sold in execution of a decree obtained by another creditor of the mortgagor in a suit brought against his representatives and purchased by *S* and passed by succession to *B*'s heirs *Held* that the plaintiffs who claimed through the mortgagee had failed to establish any title by way of redemption or otherwise to any interest in the mortgaged property and

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his suit should be dismissed PARBATI *v* SAIYID MUHAMMAD MUZAFFAR ALI KHAN (1912)
16 C W N 913

20 ———— Payment to one member of joint family effect of—*Joint family—Right of manager of undivided family to sue on behalf of the family* Payment to one member of an undivided Hindu family or to one of several joint creditors will not operate as a payment to all the members or creditors if the payment is fraudulently made to one and not for the benefit of all The manager of a joint family has as such manager the right to represent the family in suits A suit by him as such manager on behalf of the joint family will be maintainable without making the other members parties to the suits *Kishen Prasad v Har Narain Singh 15 C W N 321* followed SHEIK IBRAHIM THARAGAN *v* RAMA AIYAR (1912)
I L R 35 Mad 685

21 ———— Partition—*Mitakshara—Joint family property—Acquisition by joint labour of coparceners—Exclusion of a member—Suit for partition—Limitation* Where plaintiff sued as a coparcener for partition of his share in joint family property and the defence was that the plaintiff's father was expelled from the family for misconduct and that his share in the family property was given to him in 1874 and it was proved that the plaintiff who in 1874 was a child and left the family with his father and mother reappeared in the village in 1889 on his father's death and was then recognised as a member of the family and was not excluded till within five or six years of the suit when there was exclusion from commensality but no partition of the family property *Held* that the defence failed and the plaintiff's suit should succeed JEOLAL MAHTON *v* LOKE NARAYAN MAHTON (1912) 16 C W N 466

22 ———— Rights to well and water —*Indivisible rights—Presumption—Partition of property which is joint* Under Hindu Law rights to water and wells belonging to a joint family are indivisible if they are numerically unequal and after partition these must be enjoyed by the separated coparceners by turns GOVIND ANNAJI *v* TRIMBAK GOVIND (1910)
I L R 36 Bom 275

23 ———— Copartnership—*Presumption as to law governing family settling in province other than that of its origin—Transfer of the ancestral property—Liability of sons to pay the debts of their father—Conversion of some of the sons to Christianity effect of—Status—Limitation—Removal of Caste Disabilities Act (XXI of 1850)* The plaintiffs and the defendants Nos 5 to 7 and the husbands of the defendants Nos 8 and 9 were the sons of one Amrita Lal Pandey whose father a Hindu governed by the Mitakshara law was originally a resident of Oudh but subsequently migrated to and settled in the district of Bankura where he acquired properties and continued to live jointly with his family The defendants Nos 1 to 4 were the transferees of the ancestral property which formed the subject matter of this suit On the 19th March 1900 Amrita Lal Pandey executed a deed of conveyance, whereby he transferred his ancestral property to the defendants Nos 1 to 4 in satisfaction of certain debts incurred by him in 1892 and 1895 He was joined in this conveyance by the defendants Nos 5 to 7 On the 26th December 1900 Amrita Lal Pandey died leaving him surviving six sons, viz the plaintiffs and the defendants Nos 5 to 7 as also the widows of his two sons who had predeceased him in 1880 and 1883 respectively Of the six sons, the plaintiffs Nos 1 and 2 had been converted to Christianity in 1890 and 1896 respectively the defendant No 5 became a convert to the same faith in 1901 and the plaintiff No 3 attained his majority in 1902 On the 19th March 1907 the plaintiffs filed their suit against the defendants Nos 1 to 4 for a declaration of the plaintiffs title to a three seventh share of the ancestral property and for recovery of *khas* possession and mesne profits and made the defendants Nos 5 to 9 *pro formâ* defendants *Held* that when the grandfather of the plaintiffs migrated from Oudh to Bengal the presumption was that he carried with him the laws and customs as to succession and family relations prevailing in the province from which he came Such a presumption might however have been rebutted by proof that the family had adopted the law and usages of the place to which he had migrated *Held* also that in 1890 by reason of his conversion to Christianity the first plaintiff ceased to be a member of the joint Hindu family but that thenceforward he continued to hold the ancestral property as joint owner and was entitled to recover possession of one seventh share of the property on the basis that in 1890 upon the dissolution of the family he became entitled to such share *Jalbhai Ardeshir Shet v Louis Manoel I L R 19 Bom 680* and *Lastings v Gonasalves I L R 23 Bom 539* distinguished *Held* further that the second plaintiff upon his conversion to Christianity in 1896 ceased to be a member of the joint family and was not bound by the conveyance of the 19th March 1900 but that he was liable to satisfy the debts of his father incurred and charged upon the ancestral property prior to the date of his conversion *Ram Prasad Singh v Lakhpati Koer I L R 30 Calc 231 Balabux v Rukhmabai I L R 30 Calc 725* and *Balkishen Das v Ram Narain Sahu I L R 30 Cal 738* distinguished *Held* further that Amrita Lal Pandey was competent in 1900 to alienate the ancestral property in his hands not merely in respect of his own interest but also that of the third plaintiff KULADA PRASAD PANDEY *v* HARIPADA CHATTERJEE (1912)
I L R 40 Calc 407

24 ———— Allegation of separation in suit by some members for separate share—*Expression of intention to hold share separately not proved—Right to mesne profits on separation—Exclusion from joint family allegation—of Non receipt of share of profits of joint property—Voluntary residence not with joint family—Refusal of allowance as being inadequate* The appellant a member of a joint undivided Hindu family brought a suit in 1905 against the respondents the other members of the family alleging a separation by him in 1901 when he had expressed his intention to hold his share separately and claiming possession of his share with mesne profits *Held* that what may amount to a separation or what conduct on the part of some of the members may lead to separation of a joint undivided Hindu family and convert a joint tenancy into a tenancy in common must depend on the facts of each case A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation but to have effect the intention must be unequivocal

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and clearly expressed Separation from commensality does not as a necessary consequence effect a division (*Rewun Persad* v *Radha Beeby* 4 *Moo I A 137*) A separation in mess and worship may be due to various casuses and yet the family may continue joint in estate In this appeal it was *held* (affirming the decision of the Court of the Judicial Commissioner) that on the evidence in and under the circumstances of the case and the conduct of the party alleging division of the family there had been no separation in 1001 and the appellant was consequently not entitled to mesne profits on that ground He also claimed mesne profits on the ground of exclusion from the joint family as he had not since 1001 received any share of the profits of the joint property *Held* that although he had not received any of the profits of the joint estate the evidence was clear that the appellant was offered an allowance from the profits of the joint property which he refused to accept as being inadequate and that would not amount to exclusion SURAJ NARAIN v IQBAL NARAIN (1912) I L R 35 All 80

25 ———— **Father no power to revive time barred debt** *Held* that the father and manager of a joint Hindu family cannot legally revive a time barred debt and bind the family property to secure its payment *Chandra Deo* v *Mata Prasad I L R 31 All 176* and *Indar Singh* v *Surja Singh 8 All L J 1009* followed DALIP SINGH v KUNDAN LAL (1913)
I L R 35 All 207

26 ———— **Liability of sons in respect of a mortgage executed by father**—*Exemption of sons interests—Subsequent suit against the sons—What plaintiffs are entitled to recover* In 1892 a decree was passed on appeal for sale on a mortgage of joint family property against the father of the family In 1836 the sons who were not made parties to the original suit obtained a decree exempting their shares in the family property In 1897 the share of the father was sold and realized less than half the amount of the decree In 1910 the mortgagees brought a suit against the sons to recover the balance of the mortgage debt after giving credit for the amount realized by sale in execution of the decree of 1892 *Held* that the suit was not barred, but that the plaintiffs could only recover the unsatisfied portion of the decree of 1892 together with future interest as allowed by that decree They could not treat the suit as an ordinary mortgage suit merely giving credit for the amount realized under the decree of 1892 nor could they claim interest at the contractual rate on the unpaid amount of the decree *Lachman Das* v *Dalu All Weekly Notes (1890) 125* followed *Dharam Singh* v *Angan Lal I L R 21 All 301* and *Ram Singh* v *Sobha Ram I L R 29 All 544* referred to JALESHAR RAI v AMRUT RAI (1913) I L R 35 All 302

27 ———— **Execution of decree**—*Power of managing member to enter up satisfaction of decree on behalf of the family* *Held* that the managing member of a joint Hindu family can execute decrees on behalf of the family and can receive payment and give good receipts on behalf of the family which will be binding on the family *Hori Lal* v *Munman Kunwar I L R 34 All 549* followed *Ganga Dayal* v *Mani Ram I L R 31 All 156* distinguished ACHHAIBAR SINGH v RAM SARUP SAHU (1913) I L R 35 All 380

28 ———— **Compromise Mortgage**—*Suit for cancellation of mortgage executed by managing member—Compromise—Liability of sons* One K as head of a joint Hindu family executed in 1905 a usufructuary mortgage of the family property in which the widow of his deceased brother joined as a co mortgagor In 1907 the mortgagors sued for cancellation of this deed but entered into a compromise with the mortgagee upon which a decree was passed maintaining the mortgage but in a modified form The mortgagee thereafter instituted a suit for enforcement of the mortgage as settled by the compromise decree *Held* that in view of the fact that the courts below found that the compromise was genuine and for the benefit of the family it was not open to the defendants to raise the question of the genuineness of the original mortgage and that whether or not the original mortgage was a genuine transaction the compromise decree gave rise to a debt which was binding on the descendants of the original mortgagor K *Madan Lal* v *Kishen Singh I L R 34 All 572* referred to RAM KUBER PANDE v RAM DASI (1913) I L R 35 All 428

29 ———— **Mortgage by two brothers of undivided shares each assenting—Partition**—*Entire mortgaged property falling to the share of one brother—Effect of partition on rights of mortgagee* Two brothers constituting a joint Hindu family jointly mortgaged in *1819* a ten biswa share in village Chauwar In 1881 in substitution for this mortgage each brother mortgaged to the same mortgagee a five biswa undivided share in Chauwar and each brother also signed the mortgage executed by the other In 1888 the family property was *partitioned* and the whole ten *biswa* of Chauwar fell to the share of one brother *Held* on suit by the son of the mortgagee for sale that the plaintiff was entitled to bring to sale a five biswa share in Chauwar under the mortgage executed by the brother who had lost possession of the village and not merely to have recourse against such portion of the family property as he had taken in exchange therefor *Byjnath Lall* v *Ramoodeen Choudry L R 1 I A 106* distinguished SUNDAR LAL v BRIJ LALL (1913)
I L R 35 All 543

30 ———— **Presumptions as to property in the possession of** Property in the possession of a joint Hindu family should be presumed to be joint family property until the contrary is shown even though it may have been acquired in the name of a particular member of the family The fact that property stands in the individual name of one or other member of a joint Hindu family does not of itself give rise to the presumption that it is the separate property of that member *Gurumurthi Reddi* v *Gurummal I L R 32 Mad 88* *Shiv Gulam Singh* v *Baran Singh 1 B L R 161* and *Taruck Chandra Totadar* v *Joodheshteer Chunder Koondoo 19 W R 178* referred to *Ram Kishen Das* v *Tunda Mal I L R 33 All 677* discussed KUNDAN LAL v SHANKAR LAL (1913)
I L R 35 All 564

31 ———— **Mortgage—Guardian** ad litem—*Suit on mortgage executed by father prior to birth of son—Father appointed son's guardian* ad litem *Held* that inasmuch as an after born son cannot in a suit on a mortgage made by his father set up the defence of the immoral nature of the debt on account of which mortgage was executed it cannot be said that the appointment of the father

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as guardian *ad litem* in such suit would be necessarily prejudicial to the interests of the son NARAIN DAS v HAR DAYAL (1913)
I L R 35 All 571

32 ———— **Position of an infant member with regard to business contracts**—*Joinder of parties—Necessary parties to a suit on a business contract entered into by certain members of a joint Hindu family carrying on an ancestral business on behalf of all the members of the family* A trade like other personal property is descendible amongst Hindus but it does not follow that a Hindu infant who by birth or inheritance becomes entitled to an interest in a joint family business becomes at the same time a member of the trading corporation which carries on the business Accordingly it is not necessary in the case of a Hindu family to join in a suit upon a business contract minor members of the family who in fact take no share in the business which is carried on on behalf of the family Those who actually were the contracting parties with the defendant must in the case of a suit by members of a Hindu family all be joined but minor members of the family who take no part in the family business should not be joined in suing for business debts LALJI NENSEY v KEROWJI PUNJA (1912) **I L R 37 Bom 340**

33 ———— **Co owners treating near relations as joint owners of property**—*Title if passes without registered document* Transfer by way of gift is not under Hindu Law the only means of creating title apart from inheritance and succession If the persons actually entitled to a property agree to treat a near relation as a co sharer out of affection and abandon their claim to an exclusive right they may do so without a registered deed Where therefore upon the death of a Hindu widow the actual reversionary heirs of her husband treated two other relations one degree lower in descent as co sharers for a shorter period than that which would give them title by adverse possession *Held* that the purchasers in execution of the interest of one of these persons became entitled by their purchase to the share which he had been enjoying jointly with the actual reversioners CHHIT LANI MISRANI v CHANDRA LAL KANTH (1912) **17 C W N 62**

34 ———— **Father s debt**—*Sons liability to pay Mitakshara—Proof of immoral habits if enough* A sale of joint family property for a father s debt cannot under the Mitakshara school of Hindu Law be avoided by the sons merely proving that the father was a man of immoral habits They must prove that the particular debt was incurred for an immoral purpose SRI NARAIN v LALA RAGHUBANS RAI (1912)
17 C W N 124

35 ———— **Fathers alienation**—*After born son if precluded from questioning alienation—Mortgage if distinguishable from sale* It is well settled that where a Mitakshara father has made an alienation without necessity and without the consent of sons then living it would not only be invalid against them but also against any son born before they had ratified the transaction and no consent given by them after his birth would render it binding upon him *Hrodoot* v *Beer Narayan 11 W R 48 Bunwari Lal* v *Daya Sunkar 13 C W N 815* relied on The rule applies with greater force in the case of a mortgage than in the case of an absolute alienation *Kissen Prasad* v *Tippan Prasad I L R 31 Calc 735* referred to HAZARI MALL BABU v ABANINATH ADHURJYA (1912) **17 C W N 280**

36 ———— **Joint or self acquired property**—*Self acquisition of co parcener thrown into common stock if may be disposed of by will—Consent of other co-parcener if necessary* Where the head of a joint Mitakshara Hindu family kept one account of the income of his ancestral and self acquired property and used to treat the income of both kinds of property as one amalgamated fund *Held* that the property which had been acquired by him as his self acquired property became the property of the joint family which he was not competent to dispose of by will without the consent of his co parceners INDAR SAHAI v SHAM BAHADUR (1912)
17 C W N 509

37 ———— **Father's mortgage** *of immoveable property by—Mitakshara—Suit against sons—Limitation—Limitation Act (XV of 1877) Sch I Art 13* A suit to enforce a mortgage of ancestral property executed by a Mitakshara father against his sons is a suit to enforce payment of money charged upon immoveable property and is governed by Art 132 of Sch II of the Limitation Act of 1877 *Maheshur Dutt* v *Kishen Singh I L R 31 Calc 181 11 C W N 294 followed Lachmun* v *Girdhar I L R 5 Calc 855* and *Surja Prasad* v *Golab Chand I L R 27 Calc 76* not followed *Bhagabat Prasad* v *Suba Lal 7 C L J 195* referred to SHEO NARAIN RAI v MOKSHODA DAS MITTRA (1913)
17 C W N 1022 & 1025

38 ———— **Antecedent debt**—*Mortgage executed by father to complete purchase of immoveable property at an execution sale but executed after expiry of time for paying in the balance of the price—Property nevertheless remaining with the purchaser* An auction purchaser of immoveable property paid in the amount required by law as a preliminary deposit but being unable to find the remainder of the auction price borrowed it on the security of a mortgage comprising the property purchased at the auction sale and also some property of the joint family of which the auction purchaser was the head This mortgage was however executed after the expiry of the time fixed by law for payment of the balance of the auction price The executing Court refused to accept payment of the balance but the property remained with the purchaser apparently in virtue of some arrangements with the judgment debtor by whom ostensibly the decree was satisfied *Held* in the circumstances above described that the mortgagee was entitled to recover on his mortgage and that the sons of the mortgagor could not be heard to plead that the mortgage money was not borrowed to pay an antecedent debt within the meaning of the Hindu law KAPILDEO v THAKUR PRASAD (1913) **I L R 36 All 17**

39 ———— **Sale of family property by managing member**—*For the benefit of the family—Sale binding on minor members of the family* The managing member of a joint Hindu family sold certain joint family property for the purpose of providing funds for the marriage of one of the female members of the family and partly of carrying on a shop in which the family was interested *Held* that sale was valid and binding on the members of the family although the

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not in the circumstances of the case their natural guardian *Hunoomanpersaud Panday* v *Munraj Koonweree 6 Moo I A 393 412* and *Mohanund Mondul* v *Nafur Mondul I L R 26 Calc 820* referred to RAM CHARAN v MIHIN LAL (1914) I L R 36 All 158

40 ———— Parties to suits on mortgages —*Members of Joint Hindu family represented by managing members of the family—Suit by members not made parties to suit to redeem property sold in execution of mortgage executed by managing members—Transfer of Property Act (IV of 1882) s 85* In this appeal their Lordships of the Judicial Committee affirmed the decision of the High Court in *Jaddo Kunwar* v *Sheo Shankar Ram I L R 33 All 71* on the ground that the plaintiffs (appellants) who sued to redeem a mortgage after foreclosure on the plea that they had not been parties to the mortgage suit were properly and effectively represented in the suit by the managing members of the Hindu joint family of which the plaintiffs were also members and that in such a case the Court was not bound to set aside the execution proceedings where substantial Justice had been done merely because every existing member of the family was not formally a party to the suit Their Lordships saw no reason to dissent from the Indian decisions which showed that there were occasions including foreclosure actions when the managers of a Hindu joint family so effectively represented all the other members that the family as whole was bound and were of opinion that it was clear on the facts of this case and on the findings of the Court upon them that it was a case where that principle ought to be applied There was not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself and no question arose under s 85 of the Transfer of Property Act (IV of 1882) because the mortgagee had no notice of the plaintiff's interests SHEO SHANKAR RAM v JADDO KUNWAR (1914) I L R 36 All 383

41 ———— Twice born caste—Debt—Marriage expenses of male member—*Binding on the family* Marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a Sanayasi and debt reasonably incurred for the marriage of a twice born Hindu male are binding on the joint family properties *Govindarazulu Narasimham* v *Devara bhotla Venkatanarasayya I L R 27 Mad 206* overruled *Kameswara Sastri* v *Veeracharlu I L R 34 Mad 422* approved GOPALAKRISHNAM v VENKATANARASA (1914) I L R 37 Mad 273

42 ———— *Alienation by managing member in part for necessity—Co parcener s suit to set it aside—Form of decree—Practice* Where the managing member of a joint Hindu family consisting of himself and his nephew sold family property for a consideration of which part was found to be binding on the family and the nephew sued to recover his share of the property from the alienee *Held* that according to equitable principles in the absence of anything appearing to the contrary the whole of the consideration for the sale the valid as well as the invalid portion thereof must be distributed over the whole of the property sold in proportion to the value of each part *Marappa Gaundan* v *Rangasami Gaundan I L R 23 Mad 89* dissented from The proper decree in such a case is to decree to the plaintiff his share of the property sold after division by metes and bounds on condition that he pays to the defendant a proportionate share of the consideration found binding together with mesne profits from the day that he deposits the amount into Court and give notice thereof to the defendant VADIVELAM v NATESAM (1914) I L R 37 Mad 435

43 ———— Purchase from a co parcener *Its effect on family co parcenary—Alienee not a tenant in common —One member becoming out caste excluded from the family—Limitation Act (IX of 1908) Art 142* When a co parcener alienates his share in certain specific family property the alienee does not acquire any interest in that property but only an equity to enforce his rights in a suit for partition and to have the property alienated set apart for the alienor s share if possible *Hem Chunder Ghose* v *Thako Moni Debi I L R 20 Calc 533 Amolak Ram* v *Chandan Singh I L R 24 All 483 Narayan bin Babaji* v *Nathaji Durgaji I L R 28 Bom 201 Pandurang* v *Bhasker 11 Bom H C R 72* and *Udaram* v *Ranu 11 Bom H C R 76* approved The alienee cannot therefore sue for partition and allotment to him of his share of the property alienated *Venkatarama* v *Meera Labai I L R 13 Mad 275 Palani Konan* v *Masakonan I L R 20 Mad 243* and *Ramkishore Kedarnath* v *Jainarayan Ramrachhpal 14 Mad L T 163* referred to Such an alienee has no right to possession and no status as a tenant in common, although he might have obtained possession of the property in execution of the decree against one of the co parceners *Deendyal Lal* v *Jugdeep Narain Singh L R 4 I A 247 Suraj Bunsi Koer* v *Sheo Persad Singh I L R 5 Calc 148 Hardi Narain Sahu* v *Ruder Perkash Misser I L R 10 Calc 626* followed When a co parcenor became an out caste and was driven out of the family and did not enjoy family property for over 12 years it amounted to exclusion and the right to recover his share is barred Per BAKEWELL, J —The transferee only acquires an equity and it is only a right *in personam* and not a right *in rem* and the transferor remains a member of the co parcenary until partition is effected The question whether a general or partial partition will lie is not one relating to the law of procedure but must be decided according to the principles of Hindu Law *Subba Row* v *Ananthanarayana Aiyar 23 Mad L J 64 70* and *Iburamsa Routhan* v *Theruvangadasami Naick I L R 34 Mad 269* at p 270 dissented from A purchaser of the interest of a co parcener must sue for a general partition of the entire family property *Iburamsa Routhan* v *Thiruvengadasami Naick I L R 34 Mad 69 74* applied When such purchaser fails to apply for amendment of his plaint after an issue is raised questioning the frame of the suit his suit is liable to be dismissed *Subba Row* v *Ananthanarayana Aiyar 23 Mad L J 64 70* referred to MANJAYA v SHANMUGA (1913) I L R 38 Mad 684

44 ———— Father's alienation—*Son conceived but not born at the date of the alienation Held* that a Hindu son is competent to contest an alienation made by the father at a time when the son was in his mother s womb *Sidapalli* v *Somasundram I L R 16 Mad 76* followed *Mussamut Coura Chowdhrain* v *Chummun Chowdry W R Gap No 340* not followed *Kalidas*

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... v Kri lan Chandra D ... B L P 103 F ... Harmant Pamelan lra v Plimacharya I L P ... 2 P m 10 ... Minal ... v Virappa I L P 8 Mal ... referred to DEO NARAIN SINGH v GANGA ...NGH (1914) I L R 37 All 162

45 ———— Suit against father—*Sons ... tion ... in execution proceedings* A creditor who has obtained a decree against the father of a joint Hindu family is entitled to put to sale the family property The son whose interests are threatened is entitled to an opportunity of contesting both the factum and the nature of the debt and there is nothing in law to prevent him from coming into court in the execution department and preventing if possible on those two grounds the passing of his interest to the auction purchaser If the points are decided against him the Court in execution can put the property to sale *Sham Lal v Conesh Lal I L ... 25 All 255* and *Chennu Tewari v Dwarka ... All L J 433* followed *Nanomi Libuasin v Modhun Mohun I L P 13 Calc 1* referred to Per PIGGOTT J—A creditor who at first made the sons of his debtor parties to a suit against the latter but subsequently withdrew the suit as against them would be in no worse position as regards the execution of his decree than he would have occupied if the sons had been impleaded ...NDAR PAL v THE IMPERIAL BANK (1915)
I L R 37 All 114

46 ———— Liability of the joint family for contracts entered into by managing members A joint Hindu family firm must be regarded like any other joint family asset if it in fact belongs to the joint family If a business be carried on by the members of a joint Hindu family for the benefit of the entire family and there are members of the family who do not actively participate in the conduct of the business particularly if such business has been originally established to the detriment of the family property and handed down hereditarily then the resultant liability of all the members of the family would be referable to the notion of managership by one or more members for the benefit of the rest in the usual sense in which the relations of the manager and other members of the family have often been accepted and defined in all the Courts and the liability of those members of the family not actively engaged in the conduct of the business would probably be restricted to the share of each such member in the joint Hindu family property In a case where one or more members of a joint Hindu family start a business of their own not at the expense of the joint Hindu family nor with the intention of sharing its profits and losses with the other member the position of the member so carrying on a joint family business and their liabilities to the other members have to be regulated to the extent to which the conduct of such a firm and the resulting profits fall within the legal notion of self acquisition JOHARMAL LADHCORAM v CHET...RAM HARSING (1914) I L R 39 Bom 715

47 ———— Alienation of a share of a member of a joint Hindu family—*No right to alienee for mesne profits from the date of alienation till suit for partition* A purchaser of the undivided share of a member of a joint Hindu family does not thereby become a tenant in common with the other members and hence he is not entitled to any mesne profits in respect of his share for the period between the date of his purchase and the date of his suit for partition *Nanjaya Mudali v Shanmuga Mudali 26 Mad L J 516* followed The obiter dicta in *Ayyagari Venkataramayya v Ayyagari Ramayya I L P 25 Mad 690 Chinnu Pillai v Kalimuthu Chetti I L R 35 Mad 47* and *Sudha Iou v Ananthakarajana Ayyar 23 Mad L J 61* disapproved and not followed MAHARAJA OF BOBBILI v VENKATARAMANJULU NAIDU (1914) I L R 39 Mad 265

48 ———— Father's debts—*Liability of son to pay—Mortgage by father not proved immoral—Decree against father and son form of—Consideration proved—Lender if bound to prove application of money as stated in bond* If the consideration for the mortgage was received by the mortgagor the mortgage cannot be held inoperative merely because the mortgagee has failed to prove that the money was applied as stated in the mortgage bond *Kishun Pershad Choudhury v Tipan Pershad Singh I L P 34 Calc 735 s c 11 C W N 613* followed The mortgage being one executed by a Mitakshara father and the sons having failed to show that the loan was taken for immoral purpose a decree was passed in the form it was made in *Kishun Pershad v Tipan Pershad I L P 34 Calc 735 s c 11 C W N 613 e g* mortgage decree against the share of the father and if the sale of that share was insufficient to satisfy the debt interest and costs balance to be realised by sale of the sons share and interest in the ancestral property so far as necessary—six months time being allowed for redemption KRISHNA PRASAD v RAMPERSHAD SINGH (1916) 20 C W N 508

49 ———— Partition suit for by one member—*Whether effects separation* A member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition *Suraj Narain v Iqbal Narain I L P 35 All 80 8* followed SOUNDARARAJAN v ARUNACHALAM CHETTY (1915) I L R 39 Mad 159

50 ———— Father's debt—*Sons liability to pay—Mortgage by Mitakshara father—Son though of age not a party to the deed—His liability—Moral obligation to pay father's debts unless incurred for immoral purposes—Legal proof of immoral purposes* Liability on the part of a son to pay a father's debt arises from moral and religious duty and obligation and this is so even though the debt is not incurred for the benefit of the individual or for the estate A son can only exempt himself from liability if he can establish that the father was guilty of applying the money for some immoral purpose Although there need not be any direct proof that the money was raised to be spent on any particular person yet one must be reasonably satisfied that the father was a man of vicious, extravagant and lustful habits and that he raised the money for the purpose of applying it for the immoral purpose In some way by reasonable legal proof it must be shewn that there is a connection with the debt and the immoral purpose *Chintaman rao Mehendale v Kashinath I L P 14 Bom 320* and *Dattatraya Vishnu v Vishnu Narayan I L R 36 Bom 68* referred to To be liable on a mortgage executed by the father for a purpose not proved to be immoral it is not necessary for the adults sons to be parties to the bond The case of *Upooroop Tewary v Lalla Bandhjee Sahay I L P 6 Calc 749* seems to have been overruled if not distinctly qualified by the latter case *Lazo*

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Appovier v. Rama Subba Aiyan, I. L. R. 9 Calc. 495; Bhagat Mal Sahu v. Abdul Karim (1916)

20 C. W. N. 797

61. ————— Separation—*Expression of member of joint family—Expression of intention to hold his separate share and by suit for partition—Unequivocal and clearly expressed intention—Separation as distinct from division of shares of property.* In this case their Lordships of the Judicial Committee *held* on the facts, that the conduct of the plaintiff, a member of a joint Hindu family governed by the Mitakshara law, in indicating by a notice in a registered letter his intention to separate himself and enjoy his share in severalty, coupled with a suit for partition, was as unequivocal and clearly expressed an intention as could be made and that it amounted to a separation with all its legal consequences. The rule of law applicable to cases of separation from the joint undivided family laid down in *Suraj Narain v. Iqbal Narain, I. L. R. 35 All. 80; L. R. 40 I. A. 40* followed. Nowhere in the Mitakshara is it stated that agreement between all the coparceners is essential to the disruption of the joint status, or that the severance of rights can only be brought about by the actual division and distribution of the property held jointly. On the other hand, numerous authorities on the subject leave no room for doubt that separation, which means the severance of the status of jointness, is a matter of individual volition. Separation from the joint family involving the severance of the joint status so far as the separating member is concerned with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy the hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well-founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others. *Soorjo Pershad v. Krishan Singh, I. L. R. 15 Calc. ... L. R. 3 I. A. 1...; Dwo Jaun v. Kooer Dowlut ... W. R. ...; Appovier v. Rama Subba Aiyan, 11 Moo. I. A. 75; Jogendro Nath Garuk Chunder Dutt, I. L. R. 4 Calc. 451; L. R. ... I. A. ...;* and *Indar Kooer v. Jowlan Singh, ... W. R. ...,* referred to. Girja Bai v. Sadashiv Dhundiraj (1916)

I. L. R. 43 Calc. 1031

52. ————— Separate entries in revenue records with names of brother or brothers ... evidence of ... of ... property ... Separate entries in the revenue records of names of members of a Mitakshara joint Hindu family in regard to specified areas standing by themselves may be inconclusive to rebut the presumption of Hindu law relating to jointness or to prove separate possession when in its inception the family was admittedly joint; but where half brothers claimed a deceased brother's share in certain villages and lands against his widow whose name as also those of the half brothers had been separately recorded in the revenue records and it was in evidence that the half brothers had executed separate mortgages in respect of their respective shares, and they did not come into the witness box to show that these transactions, although separate, were consistent with jointness: *Held,* that the acts of the brothers were only consistent with the hypothesis of separation. Lal Singh v. Tulsa Kunwar (1913)

17 C. W. N. 1085

53. ————— Will by father—*Bequest of ... by ... with consent of ... son ... to his ... Validity of disposition.* A father in a joint Hindu family can with the consent of his adult sons and with the consent of his relations who are interested in a minor son of his, bequeath a portion of his property to his daughter provided the portion is reasonable in extent. *Frum Sir ... v. Shewan ... I. L. R. 35 All. 30; Kadirvel ... v. ... Marudasi ... 1 Mad. L. J. 5..; Amritlal Sundara ... v. Chelliah ... 21 Mad. L. J. 605* and *... Pillai v. ... 2 Mad. L. J. 4..* applied. Pattra Charyar v. Srinivasa Chariar (1917)

I. L. R. 40 Mad. 1122

54. ————— Alienation by father—*Suit by sons to set aside alienation—Onus of proof ... of consideration—Whether his interest bound—Time-barred debt ... by registered deed—Knowledge ... Father's interest bound by the deed—Time when the share is ascertained.* The plaintiffs A and B and defendant No. 2, their father, constituted a joint Hindu family. On September 1901 defendant No. 2 sold certain family land to defendant No. 1. Plaintiff B was born subsequently to the date of the alienation and was a minor when the suit was filed. The plaintiffs sued to set aside the sale deed on the ground that it was taken from defendant No. 2 by undue influence and for no consideration. The Subordinate Judge dismissed the plaintiffs' suit holding that the consideration for the deed was an antecedent debt which though barred by time was acknowledged by defendant No. 2 by a registered deed which was binding on the plaintiffs. The lower appellate Court reversed the decree and directed that plaintiffs and defendant No. 2 be restored to possession. On appeal to the High Court by defendant No. 1 the question was raised whether the time-barred debt acknowledged by the registered deed was no good consideration for the alienation of the defendant No. 2's interest in the property. *Held,* that defendant No. 2's interest was bound by the deed. *Held,* also, that defendant No. 1 acquired the half share in the alienated property to which defendant No. 2 was entitled at the date of the alienation owing to the fact that the minor plaintiff B was not then born. Narayan ... v. Panachayya (1916)

I. L. R. 41 Bom. 347

55. ————— Mortgage—*Mitakshara—Joint Hindu family—Mortgage ... of joint Hindu family property by father ... ...*

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time of loan—Liability of sons in suit to enforce mortgage—Antecedent debt—Burden of proof The exception relating to antecedent debts which covers the case of a mortgage or sale by the father of a joint family governed by the Mitakshara law being an exception from a general and sound principle that if a debt contracted by the father is not for the benefit of the joint family estate he should have no power either of mortgage or sale of the estate to meet such debt, is one which should not be extended and should be very carefully guarded A loan made to the father on the occasion of a grant by him of a mortgage on the family estate is not an antecedent debt to hold otherwise would be to extend unduly and improperly the whole scope of the exception provided by the Mitakshara law The decision of the majority of a Full Bench in the case of *Chandradeo Singh* v *Mata Prasad I L R 31 All 176* approved The statement of the law in *Nanomi Babuasin* v *Modhun Mohun I L R 13 Calc 21 35 L R 13 I A 1 14* by Lord HOBHOUSE as to the establishment by the Courts in India of the principle that the sons cannot set up their rights against their father s alienation of an antecedent debt or against his creditors remedies for their debts if not tainted with immorality does not give any countenance to the idea that the joint family estate can be effectively sold or charged in such manner as to bind the issue of the father except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by the joint estate The exception applied only to the case where the father s debts have been incurred irrespective of the credit obtainable from immoveable assets which did not personally belong to him but were joint family property If it were extended further the exception would be made so wide as in effect to extinguish the sound and wholesome principle that no manager guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge To permit him to do so would enable him to sacrifice those rights which he was *bound to conserve This would be equivalent to* sanctioning a plain, and it might be a deliberate breach of trust The Mitakshara law does not warrant or legalize any such transaction The limits of the exception thus set forth from a guide to the settlement of the conflict of authority in India on the subject of antecedent debt In their Lordships opinion the mortgage in suit was not granted in respect of an antecedent debt and was invalid *Chandradeo Singh* v *Mata Prasad I L R 31 All 176 189 196 per* SIR JOHN STANLEY C J referred to SAHU RAM CHANDRA v BHUP SINGH (1917) I L R 39 All 437

56 ———— **Blending accounts of self-acquired and joint property**—*Mutual exchanges on deorh partition of joint property for self acquired property—Deeds of gift of joint ancestral property set aside* Three brothers were members of a Mitakshara joint family *D* being the managing member and guardian of *K* who was a minor The family property consisted partly of joint property and partly of property which came to them from the estate of a deceased brother Only one account book was kept for the joint shares of the latter property and that system of book keeping which began in October 1868 was continued till February 1880 when K came of age No separate book was thereafter kept by or for *D* in respect of the property which had come to them from their brothers estate but there was one account for all *D* s receipts from all sources whether it was income from the joint family property or from that which had been acquired from the brother s estate or any other sort of revenue and similarly for all his expenditure of whatsoever kind. Further on a deorh partition that is an actual partition of the several properties constituting their estates mutual exchanges were made whereby *D* gave up his share in some ancestral family property for the share of *K* in the property acquired from the brother s estate In a suit by *D* s son and grand sons (the appellants) after the death of *D* to set aside deeds of gift made by *D* in favour of the respondent on the ground that they had been made out of the joint ancestral property and were therefore invalid *Held* (reversing the decision of the High Court) that the property coming from the brother s estate to the members of the family as collateral heirs was self acquired property that by blending that property with the joint property in the accounts and by the mutual exchanges made on the partition *D* had thrown it into the common stock and thereby converted it into ancestral family estate All the properties purporting to be conveyed to the respondents by the deeds of gift were joint family properties over which *D* had no power of disposition and the appellants were entitled to recover them *Suraj Narain* v *Ratan Lal I L R 40 All 159 L R 44 I A 201* followed RADHAKANT LAL v NAZMA BEGUM (1917) I L R 45 Calc 733

57 ———— **Gains obtained by member's individual effort** There is no authority in the Mitakshara for the contention that the gains made personally and without the aid of the joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged should in law be regarded as partible and not as his self acquired property The author of the Mitakshara must have been writing of education— learning —such as he knew it to be and when he laid down that the gains obtained by one of the members of a joint family from an education received at the family expense should be partible he could not have intended that such gains should include gains which were the result not of the education received at the expense of the joint family but of the peculiar skill mental abilities and individual effort in applying and improving such education exercised by the member who had been so educated The question of whether a member of a joint family carried on his business personally for his own personal benefit without detriment to the joint family funds or carried on such business as a member of the joint family for the benefit of the joint family is a question of fact to be determined on the evidence METHARAM PAMRAKHIOMAL v PEWACHAND PAMRAKHIOMAL (1917) I L R 45 Cal 666

58 ———— **Impartible zemindari**—*Right of junior members of family to maintenance—Custom of impartibility—No co parcenary in impartible estate —Exceptions are subjects of special texts in Mitakshara—Custom or usage brought so repeatedly before the Courts as to be recognised becoming law without necessity of proof* In the absence of special custom the grandsons of a deceased zemindar are not

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entitled to maintenance out of the impartible estate in the hands of his successor This follows from the fact that in an impartible zemindari there is no co-parcenary *Sartaj Kuari v Deoraj Kuari* I L R 10 All 272 L R 15 I A 51 and *Venkata Surya Mahipati Rama Krishna Rao v Court of Wards* I L R 22 Mad 383 L R 26 I A 83 followed *Bachoo v Mankorebai* I L R 29 Bom 51 58 approved. The view taken in the Madras Courts prior to the case above cited that there was joint property in an impartible zemindari which only fell short of co-parcenary because by custom there was no right to partition is no longer tenable The right of sons to maintenance in an impartible zemindari had been so often recognized that it is not necessary in each case to prove a custom There are other persons entitled to maintenance either by reason of their exclusion from the succession owing to personal disqualification or by reason of personal relationship to one of the line of zemindars, but the latter class does not include grandsons. *Yarlagadda Mallikarjuna Prasada Nayudu v Yarlagadda Durga Prasada Nayudu* I L R 24 Mad 147 (155) L R 27 I A 151 15 and *Nilmony Singh Deo v Hingoo Lall Singh Deo*, I L R 5 Calc 256 259 approved In the present case no special custom had been proved or even alleged and the claim was not based on personal relationship. RAMA RAO v RAJAH OF PITTAPUR (1918)

I L R 41 Mad 778

59 ———— Partition in ignorance of rights by the widows *of the family—Gift by one widow with the consent of the widow of the last male holder—Suit by the latter to reverse gift for breach of conditions—Subsequent suit by reversioner to recover possession of the property gifted away—Whether the suit barred by res judicata—Widow's power of representation extent of—Adverse possession—The Indian Limitation Act (IX of 1908)* Sch I *Arts 141 142 144* Three brothers S P and M constituted a joint Hindu family M survived S and P and died in the year 1875 Each of the brothers left a widow The widows of S and P persuaded T the widow of M to make a partition of the entire property although each widow were entitled of her own right to one third. This having been done in the year 1880, the widow of S acting as the agent of T and with her consent made a gift of the property in suit to the defendants. The widow of P was also joined in that gift. In 1904 T brought a suit to recover property gifted away alleging that she had consented to and approved of the gift upon certain conditions which were not complied with by the donees. The defendants resisted the suit on the ground that they were not donees of T that they had received the property from the widow of S and held it adversely to T and to any estate she represented. The suit was dismissed as barred by limitation. In 1911 T died and a suit was instituted by the plaintiff her daughter as heir and reversioner of the estate of her father M A question having arisen whether the suit was barred by *res judicata* *Held* that the suit was not barred by *res judicata* as T did not fully represent the estate in her suit of 1904 The decision in that suit was not a decision on the merits nor was it a decision in rem and moreover the ground of T's claim in that suit had nothing in common with the plaintiff's suit. The plaintiff also claimed not through T but in her own right as the reversioner of her father *M* *Katama Natchiar v The Rajah of Shivagunga* 9 Moo I A 539 discussed. During the continuance of a widow's life estate adverse possession which begins in and runs its course before that life estate terminates, will be no bar to reversioners. Nor will litigation by the widow in the enjoyment of such a life estate whether she be plaintiff or defendant represent the estate fully so as to give rise to a bar of *res judicata* against reversioners if such litigation is qualified and personal to the widow or has arisen out of acts of her own affecting the estate during her own life estate therein SUBBI v RAMKRISHNA BHATTA (1917) I L R 42 Bom 69

60 ———— Blending accounts by managing member joint funds and of his own self-acquired property *in same account book—Entries in such book evidence of intention to make self-acquired property joint—Purchases made in name of son in-law out of funds so blended to provide for son in-law—Statement to that effect made by manager admissible being against his own interest—Evidence Act—Civil Procedure Code (1882)*

31? With respect to a Hindu joint family the law is that while it is possible that a member of the joint family can make separate acquisitions, and keep moneys and property so acquired as his separate property yet the question whether he has done so is to be judged by all the circumstances of the case Where a member of a joint Hindu family at Lucknow who had made considerable savings from his earnings as a pleader at Hardoi where he was entrusted with the management of the joint family property at that place eventually became managing member of the joint family at Lucknow kept the accounts of the joint property and of his own separate earnings in one account book and had purchased properties in the name of his son in law out of the sums entered in the account book. *Held* that by so blending his private savings with receipts and payments on joint account he showed an intention to make them joint property and they must be presumed to be joint But it did not follow that all purchases entered in the book were made for the joint family As regarded the purchases in the name of his son in law his statement that they were made to provide for the son in law was a statement against his own interest and therefore was admissible in evidence Such a statement together with the other evidence in the case was sufficient to give the son in law a title to the subject of such purchases as against the claim of the joint family SURAJ NARAIN v PATAN LAL (1917)

I L R 40 All 159

61 ———— Liability of grandsons to discharge debts of grandfather as a matter of pious obligation The head of a joint Hindu family consisting of himself, two sons and three grandsons, executed a usufructuary mortgage of the family property for Rs 8,000 Some three years later he sold the mortgaged property to the mortgagees for Rs 15,500 Rs 8,000 being the amount of the mortgage and Rs 3,500 being paid in cash As regards the consideration for the mortgage there was no evidence that any more than Rs 1,000 could be said to have been borrowed to pay an antecedent debt within the ruling of the Judicial Committee of the Privy Council in *Sahu Ram Chandra v Bhup Singh* 44 I A 126 I L R 39 All 437 After the death of their grandfather their fathers being still alive the

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grand on ued to set a ide the sale so far as their shares in the property were concerned *Held* that they we e entitled to get the sale set aside on re payment of the sum of Rs. 1 000 above mentioned with interest But they were not liable to refund that part of the con ideration which was paid in ca h, ins much a so long as their fathers were alive the pious duty to pay the debts of their grandfather did not devolve upon them RAM SINGH v CHET RAM (1919) I L R 41 All. 529

62. ———— Father debts—*Father debt — Ex cut n agains t joint property—Whether sons interest pa e —Auction sal of two only of the joint family properties—Suit by son for partial partition of properties sold at auction—Such a suit not including all the family propertie whether bad in law* The plaintiff was the son of defendant No 5 They con tituted an undivided Hindu family Defendants Nos 6 and 7 obtained a money decree against the 5th defendant and in execution of the decree the defendants No 1 to 4 became purchasers at the Court sale of two of the properties belonging to the joint family Th plaintiff a minor thereupon brought a suit again t his father (defendant No 5) and the decree holders a well as the auction purcha ers for a declaration that the plaintiff's half share in the two properties did not pa s to the auction purcha ers and for pos e ion of his half share on equitable partition The lower Court decreed the plaintiff's claim On appeal to the High Court it was contended (i) that the son s interest in the property did pass at the Court sale and (ii) that the suit for a partial partition of the family properties was bad *Held* that the son s interest did not pass to the purchasers at the Court sale *Timmappa* v *Narsinha Timaya I L R 5 Bom 631* followed *Held* al o that when a coparcener was suing an auction purchaser it was not a valid objection to the suit that the co parcener claimed only a partial partition *Subramanya Chetty* v *Padmanabha Chettyar I L R 19 Mad 267* and *Hari Charan* v *Ajudhia Prasad I L R 28 All 50* followed *Held* further that the auction purchasers should be allowed to file a suit against the plaintiff for a general partition of the entire family properties *Deendyal Lal* v *Jugdeep Narain Singh L R 4 I A 1* and *Baboo Hurdey Narain Sahu* v *Pundit Baboo Rooder Perkash Missr L R 11 I A 26* followed HANSMANDAS RAMDAYAL v VALABHDAS (1918) I L R 43 Bom 17

62(*a*) ———— Sale—To pay off an antecedent debt of her father a daughter of a separate Hindu sold a hou e which had been the property of her father in his life time and had been previously mortgaged by her and her mother jointly as security for the same debt The debt at the time of the sale amounted to Rs 7 775 and the house was sold for Rs 10 ,00 It was found that the hou e was not one that had b n divided and sold piecemeal *Held* that the reversioner of the last male owner was not in the circumstances entitled to recover the house from the vendees BAL KRISHNA DASS v HIRA LAL I L R 41 All 338

63 ———— Division in status of members of a family—*Enjoyment by each of some portion of family propertie whether exclusion in law as to other portions* Where a member of a Hindu family who is divided in status from other is in enjoyment of some portion of the family pro pertie while others enjoy other portions he is not in law excluded or ousted from those other portions so as to disentitle him to his share of tho e portions however long their enjoyment by others *Vishnu Ramachandra* v *Ganesh I L R 21 Bom 325* not followed *Lakshman Dada Naik* v *Ramachandra Dada Naik I L R 5 Bom 48* followed KUMARAPPA CHETTIAR v SAMINATHA CHETTIAR (1918) I L R 42 Mad 431

64 ———— Trading family Loan by manager—*Onus as to binding nature of loan—Account books not produced—Presumption against party—Onus of proof in cases of joint family business* Where the members of a devastanam com mittee sued the members of a Hindu joint trading family to recover a debt borrowed from the plain tiffs by the managing member of the family and the defendants failed to produce their account books though summoned by the plaintiffs *Held* that assuming that the onus of proving the bind ing nature of the debt lay on the plaintiffs even in the case of a trade carried on as joint family bu iness it was shifted to the defendants on account of the presumption arising against them by their omis ion to produce their accounts called for by the plaintiffs a presumption which arises against them whether the plaintiffs have any evidence or not *Murugesam Pillai* v *Manickavasaka Desika Gnana Sambanda Pandara Sannadhi I L R 40 Mad 40* applied *Quære* Whether in a joint trading family the onus of proof as to the nature of the debt is not on the family *Raghunathji Tarachand* v *The Bank of Bombay I L R 34 Bom 72* referred to GURUSWAMI NADAR v GOPALASAMI ODAYAR (1919) I L R 42 Mad 629

65 ———— Karta—If can start new business so as to make minor member liable—*Karta as certificated guardian powers of—Minor receiving benefit of such business and not re pudiating on being major liability of—Guardians and Wards Act (VIII of 1890) s 27—Contract Act (IX of 1872) ss 217 248* The powers of the *karta* of a joint Hindu family in respect of a trade started after the death of the ancestor are not the same as those in respect of a trade started by the ancestor and carried on after his death by the *karta* and the minor mem bers of the family are not liable for the debts in curred by the *karta* in respect of such business A *karta* of a joint Hindu family who chooses to apply under Act VIII of 1890 for appointment as a guardian of a minor and is so appointed comes under the control of the Court and can no longer exerci e the powers of a *karta* A certificated guardian cannot start a new trade for the benefit of his ward at any rate without the sanction of the Court S 27 of the Act deals with the power of a guardian with respect to the property of a minor of which he assumes charge and it cannot be said that the starting of a new trade is reason able and proper for the benefit of the property within the meaning of the section As to the liability of a minor who received properties ac quired from the funds of such business on parti tion with the other members of the family and did not repudiate the act of the guardian on being major *Held* that s 247 of the Contract Act provides that a minor may be admitted to the benefit of a partnership and though he cannot be made personally liable for obligation of the

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firm the share of such minor in the property of the firm is liable for the obligations of the firm The liability under s 247 does not depend on the powers of the *karta* or guardian but on the question whether the minor was admitted to the benefits of the partnership and his liability is limited to his share of the properties The liability under s 248 depends upon the fact of his not having repudiated the partnership on attaining the age of majority The question of the minor s personal responsibility depends on his having retained the properties with the knowledge that it was on account of the new business and not the ancestral one and in the absence of a finding on this point it was inequitable to hold that the minor made himself personally liable for all the obligations of the firm merely because on attaining majority he retained some property acquired out of it KRISH NADHAN BANERJI v SANYASI CHARAN MANDAL (1919) 23 C W N 500

66 ———Separation of one member only —*The rest of the family remaining joint—Reunion* The filing of a suit by a member of a joint Hindu family in which the plaintiff declares that he wishes for partition and specifies his share amounts to a separation But from this it does not follow that where, without any suit one member of a family separates himself from the others and relinquishes his rights in the family estate taking either no share in the family estate or perhaps a less share of a greater share the surviving members cannot remain united Where such a separation of one member of a joint family takes place it is not the necessary result in law that the other members must be taken to have separated *inter se* and then to have reunited *Balabux* v *Rukhmabai I L R 30 Calc 725* and *Kawal Nain* v *Parbhu Lal L R 44 I A 159 I L R 39 All 496* distinguished PARSOTAM DAS v JAGAN NATH (1919) I L R 41 All 361

67 ——— Father's debt—*Mitakshara—Joint Hindu family—Money borrowed by father at high rate of interest—Legal necessity—Burden of proof—Indian Contract Act (IX of 1872) s 16* When money is borrowed by the father of a joint Hindu family on the security of the family property at a very high rate of interest it is for the lender seeking to enforce his claim to prove not only that there was necessity for borrowing the money but that there was necessity for borrowing it at an exorbitant rate of interest *Nand Ram* v *Bhupal Singh I L R 34 All 126 Girja Prosad Tewari* v *Ram Piyal Misir 13 A L J 46* and *Rao Raghunath Singh* v *Nazar Begam 19 Indian Cases 639* followed The argument that a Court has no power to reduce the contract rate of interest otherwise than in cases which fall within the provisions of s 16 of the Contract Act applies to cases where the parties to the suit are the parties to the contract BHIKHI SAHU v KODAI PANDE (1919) I L R 41 All 523

68 ——— Legal necessity—*Mitakshara —Joint Hindu family—Money borrowed by manager at high rate of interest—Burden of proof* When money is borrowed by the manager of a joint Hindu family on the security of the family property at a very high rate of interest it is for the lender seeking to enforce his claim to prove not only that there was necessity for borrowing the money but also that there was necessity for borrowing it at an exorbitant rate of interest

Failing such proof as regards the rate of interest it is competent to the Court to reduce the rate *Nazir Begam* v *Rao Raghunath Singh I L R 41 All 571 Hurro Nath Rai Chowdhri* v *Randhir Singh I L R 18 Calc 311 L R 18 I A 1* and *Nand Ram* v *Bhupal Singh I L R 34 All 126* referred to RAM KHELAWAN KASAUNDHAN v RAM NARESH SINGH (1919) I L R 41 All 609

69 ——— Antecedent debt—*Mortgage of joint family property—Liability of sons—Family necessity—Burden of proof—Disputed mortgage executed to pay off earlier mortgages* The joint ancestral estate of a Hindu family cannot be effectively sold or charged in such a manner as to bind the issue of the father except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate Hence where it was sought by the sons to invalidate a decree for sale obtained by the mortgagee upon a mortgage of joint family property executed by the father and it appeared that the mortgage in question had been executed to pay off two earlier mortgages of joint family property also executed by the father it was *held* that it was for the defendant mortgagee to show that these earlier mortgages fell within the exception recognized by the Judicial Committee of the Privy Council in the case of *Sahu Ram Chandra* v *Bhup Singh I L R 39 All 437* BRIJ NARAIN RAI v MANGAL PRASAD (1918)
I L R 41 All 235

70 ———Legal necessity —The father of a joint family mortgaged some of the joint property He then died having two sons Then one of the sons died leaving 2 sons Their uncle then sold the property as managing member The purchasers brought a suit for redemption. *Held* that it was not open to mortgagee in that suit to set up a defence that there was no legal necessity for the sale DURGA PRASAD v PHAJAN
I L R 43 All 50

70(a)——— Father's Simple Money debt—[*Sons not liable during father s life time*] The pious obligation of a Hindu son to pay his father s debts can only be enforced after the death of the father

Hence where on a promissory note executed by the father a simple money decree was obtained against him and in execution thereof a part of the family property was attached and the sons brought a suit for a declaration that their shares in the property were not liable to satisfy the decree against their father who was alive it was *held* that the sons were entitled to the declaration sought *Sahu Ram Chandra* v *Bhup Singh I L R 39 All 437 L R 44 I A 126* and *Bharath Singh* v *Prag Singh 13 Indian Cases 291* referred to SHEODAN SINGH v BHAGWAN SINGH I L R 43 All 496

71 ——— Mortgage by Father—Representation in proceedings—When a Hindu father the head of a joint family consisting of himself or minor son executed a mortgage of the entire ancestral estate in order to secure a loan for the purpose of preventing the property being sold for arrears of Government Revenue and the mortgagees obtained a decree on the mortgage without making the son (who was still a minor) a party to the suit and purchased the property in execution of that decree *Held* that the son

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was not entitled to redeem whether the mortgagees had notice of his interest or not. In such a suit the interest of the son is sufficiently represented by the father unless it can be shewn he was omitted from the mortgage suit for the purpose of defeating his right to redeem. RAGHUNANDAN SINGH v. PERMESHWAR DAYAL SINGH
2 Pat L J 306

71 ———— **Partnership**—*Manager entering into partnership with a firm—Joint family not necessarily responsible as partner* Other members of a joint Hindu family must not be treated as necessarily or *ipso facto* partners in any partnership into which a member of the family, or even the manager of the joint family may see fit to enter *Gangayya* v. *Venkataramiah* I L R 41 Mad. 454 and *Ramanathan Chetty* v. *Yegappa Chetty* 30 M L J 241 referred to *Sarun Das* v. *Pallu Brothers* 31 Indian Cases 455 doubted KHATIDAR KAPRA COMPANY LIMITED v. DAYA KISHAN
I L R 43 All 116

72 ———— **Will by a father bequeathing some family properties for maintenance of his wife** A will made by a Hindu father who is joint with his infant son, bequeathing certain family properties to his widow for her maintenance is invalid and inoperative as against the son although it would have been a proper provision if made by the father during his lifetime *Patra Charar* v. *Srinivasa Chariar (1914) I L R 40 Mad 1107* and *Kudutamma* v. *Narasimha Charyulu (1908) 17 M L J 528* distinguished SUBBARAMI REDDI v. RAMAMMA (1920)
I L R 43 Mad 824

73 ———— **Charge created by one member**—*Whether it binds the family property—whether share of member born subsequently to creation of charge is bound* A member of a joint Hindu family governed by the *Mitakshara* cannot deal with his share in the property of the joint family so as to create a charge which will survive him *Held further* that a suit by the holder of the bond to enforce his security against the sons of the surety (he having died and the principal debtor having defaulted) was governed by Art 120 of the Limitation Act 1908 and not by Art 132 JWALA PRASAD v. MAHARAJAH PROTAP UDAINATH SAHI DEO
1 Pat L J 497

74 ———— **Money borrowed by manager**—*Duty of lender* A person who lends money to the manager of a joint Hindu family is bound to satisfy himself by enquiry honestly made that the advance is required by the manager as borrower for a valid family necessity and for the benefit of the estate It is for him to show that the borrowing was the act of a prudent manager or that enquiry into the prudence of the act was made It is not enough merely to show that the manager stated that the money was required for certain specified purposes MANDIL DAS v. MEGH NARAIN DUBEY
1 Pat L J 39

75 ———— **Primogeniture**—*Partition suit by younger sons compromised presumption from* The fact that the younger sons have in various contested suits invariably failed to establish that they were entitled to a share by partition and that in each case they compromised their claim by accepting a mere grant by way of maintenance is some evidence of the right of the eldest son to take the entire property by primogeniture CHOUDHARY BALVADRU SAMANT SINGH v. BIMBADHAR ROY
1 Pat L J 509

75(a) ———— **Manager's contract**—A contract entered into by the manager of a Hindu joint family can be specifically enforced even though some of the members of the joint family were minors HARI CHARAN KUAR v. KAMLA RAI
2 Pat L J 513

76 ———— **Loan to make good Relatives misappropriation**—*Held* that a loan by a father to enable a relative to replace some misappropriations was binding on the sons BENARES BANK v. JAGDIP NARAYAN PANDEY
6 Pat L J 198

77 ———— *Separation though property not divided by metes and bounds—Profits divided in specific shares—Suit by one Member for joint possession to the extent of his specific share* Although a member of a joint Hindu family may not, so long as the family remains joint be able to say what his share in the joint family property is the situation is altered as soon as the family separates though the property is not actually divided by metes and bounds In such case there is nothing to prevent a member of the family whose share in the family property has been defined from suing the other members for joint possession of it SHEODAN KURMI v. BALKARAN KURMI
I L R 43 All 193

78 ———— **Suit by son for a declaration that sales by his father shall not affect his rights as a co parceners**—*whether decree should be made conditional on plaintiff refunding his share of the purchase money to the vendees* Plaintiff the son of a Hindu sued for a declaration that three sales of joint family property effected by his father should not affect his (plaintiff's) rights as a co parcener The lower Courts decreed plaintiff's claim The defendants vendees presented a second appeal to the High Court and urged that the decree should be made conditional on plaintiff refunding to the vendees his share of the purchase money *Held* that it would be opposed to principles to observe in the majority of the rulings cited to make the decree conditional on plaintiff refunding his share in the purchase money *Koer Hasmat Rai* v. *Sundar Das (I L R 11 Cal 396)* not followed BADAM v. MADHO RAM
I L R 2 Lah 333

79 ———— **Karta position of if that of Trustee in strict sense**—*Misapplication of money by—Adoption by Sudra—Partition—Dattaka Chandrika authority of* The manager of a joint Hindu family is not in the exact position of a trustee in England In the absence of proof of direct misappropriation he is liable to account for which he received not what he ought to have received had the money been profitably dealt with The rule of Dattaka Chandrika that on a partition of joint family property of a Sudra family an adopted son is entitled to share equally with the legitimate son born to the adopted father subsequently is applicable in Madras *Karuturi Gopalam* v. *Karuturi Venkataraghavalu* I L R 40 Mad 632 overruled ABAMILLI PERRAZU & ORS v. APUMILLI SUBBARAYADU & ORS
26 C W N 1

HINDU LAW—JOINT FAMILY—*contd*

80 ———— **Mortgages executed by father**—*Antecedent debt —Civil Procedure Code 1908 order XXI, rule 66—Sale proclamation not mentioning existence of decree holder's mortgage—Whether mortgage enforceable against auction purchaser——Estoppel* The father of a joint Hindu family first borrowed Rs 500 on a promissory note It was stated in the note that the money was borrowed in order that it might form part of a mortgage thereafter to be executed He then having borrowed some more money from the mortgagee executed a mortgage of the joint family property for Rs 1 000 There was no satisfactory evidence that any of the money purporting to be secured by this mortgage was borrowed for family necessities or that any part of the debt was incurred apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate Subsequently the mortgagor borrowed more money on promissory notes and executed a second mortgage for Rs 5 000 consolidating all the previous debts *Held* on suit by the mortgagee for sale on the basis of the second mortgage that it was not proved that any of the money purporting to be secured by this mortgage was an antecedent debt within the meaning of the ruling in *Sahu Ram Chandra v Bhup Singh I L R 39 All 437* *Held* also that where the plaintiff mortgagees who also held a simple money decree against the mortgagors applied for the sale of certain property of the judgment debtor expressly mentioning that it was subject to their mortgage but for some reason, unconnected with any action or statement of the plaintiff the mortgage was not notified in the sale proclamation the plaintiffs were not thereby precluded from subsequently enforcing their mortgage against the auction purchasers RAM SARUP *v* BHARAT SINGH

I L R 43 All 703

81 ———— **Partition**—*In a joint Hindu family consisting of five brothers two of the brothers sold their shares to the plaintiff The plaintiff sued for partition of his two fifth share* in the family property and for three years mesne profits Both the lower courts decreed partition and allowed the plaintiff Rs 63 for past profits The defendants having objected to the part of the decree awarding past mesne profits *Held* that the past mesne profits were wrongly awarded TRIMBAK GANESH *v* PANDURANG GHABOJI (1920)

I L R 44 Bom 621

82 ———— **Money decree against father** *whether enforceable against co parcenary of property*—Onus probandi—*bond executed by a major in settlement of previous bonds executed by him during minority—Whether a promise without consideration —Ind an Contract Act IX of 1872 section 25 (2)* A P and his minor son R P The present plaintiff constituted a joint Hindu family On 4th August 1914 A R having attained majority entered into 2 bonds for Rs 1 000 in settlement of 6 earlier bonds executed by him and his mother while he was a minor On the 3rd May 1917 the defendan B obtained a simple money decree on the basis of the two bonds for Rs 1 000 and in execution thereof attached certain houses of A P which were joint family property Objections were made by R P and when these were rejected by the executing Court the present suit was filed praying for a declaration that the property in question was not liable to attachment and sale in execution of the decree against A I The lower Appellate Court held that plaintiff had failed to prove that the debt was incurred for an illegal or immoral purpose and that the question of illegality of the debt by reason of the fact that the original bonds had been executed by A P while he was a minor was immaterial, as A R had ratified them after attaining majority by executing fresh bonds *Held* by the High Court (1) that a money decree against a Hindu father for a debt which was neither illegal nor immoral whether incurred for family purposes or not may be enforced in his life time by the execution sale of the entire co parcenary property and is binding on the sons and (2) that in order to absolve a Hindu son from liability for his father's debts it is not enough to prove that the father was a man of extravagant and vicious habits but there must be some definite connection established between the debt and the expenditure *Held* also that having regard to the provisions of clause (2) of s 25 of the Indian Contract Act the bonds of 4th August 1914 executed by A R could not be held to be promises without consideration as although a promise by an infant is in law a mere nullity and void it is otherwise where the agreement is made by a person of full age to compensate a promisee who has already voluntarily done something for the promisor even at a time when the promisor was a minor and unable to contract *Karam Chand v Mussammat Basant Kaur* ((31 P R 1911) and *Mussammat Kundan Bibi v Sree Narayan* (11 Cal W N 135) followed *Held further* that the *onus* of proving that the debt was non existent or illegal and that he was in consequence relieved from his pious obligations to discharge it was clearly upon the plaintiff the son and he having failed to discharge it the joint property was liable *Natasayyan v Ponnusami* (*I L R 16 Mad 99*) followed RAM RATTAN *v* BASANT RAI

I L R 3 Lah 263

83 ———— *Alienation of occupancy* **rights by father** *whether binding on minor sons—Central Provinces Tenancy Act (XI of 1898) s 46 (1) —Occupancy right acquisition of by joint family* An alienation by the father of a Hindu joint family of his interest in an occupancy holding appertaining to the ancestral property of the family is not binding on a minor except in those cases in which an alienation of the family property would ordinarily bind the son. An occupancy right may be acquired by an individual a firm a body corporate or a joint family SUKURU MALI *v* SRI BRAHMAPURAI BALBHADRA MAHAPRABHU

4 Pat L J 354

83(a) ———— Necessity is not the sole test for validity of an alienation by a manager of a joint family The mere fact that members of a family have enjoyed the benefit of property purchased does not amount to assent nor is the question as to whether they have benefited so specially within the knowledge of the family as to shift the onus of proof RAM BILAS SINGH *v* RAMYAD SINGH

5 Pat L J 623

84 ———— **Mortgage by one Member**—*Horoscope*—A mortgage by an individual member of a Mitakshara family of the whole or share of the family property where no necessity or antecedent debt proved is void and give mortgagee

HINDU LAW—JOINT FAMILY—contd

no right even against the undivided share of the individual When however there has been actual partition or attachment of the individual's share it may become available for the mortgage debt. A horoscope drawn up by a person since deceased is admissible to prove the age of the person therein mentioned but is not conclusive proof AMAR DAYAL SINGH v HAR LAL HAD SAHU

5 Pat L J 605

85 ———— **Partition**—A suit for partition under Hindu law was filed in 1909 At the actual division of the property the lower court allowed the plaintiffs their share of the mesne profit of certain family land cultivated by the defendant manager personally for the years 1905 to 1909 The defendant having raised objection to this part of the decree *Held* upholding the defendant's objection that he was not liable to account for the mesne profits of the joint family lands A manager of a joint Hindu family is not obliged to keep accounts while the *family remains joint* and when a partition is asked for partition takes place of the property as it exists in the hands of the manager Under Hindu Law as far as the joint family is concerned it is considered as one entity until the moment comes for division and then each party gets his actual share In the meantime if there are any expenses which should properly be incurred by the joint family purse these expenses are taken out of the family property and they cannot be debited to a particular coparcener CHATURAM v COTURAM LADHARAM (1910) I L R 44 Bom 179

HINDU LAW—JOINT FAMILY PROPERTY

See HINDU LAW JOINT FAMILY

1 ———— **Alienation by father**—*During minority of son—Suit by son for cancellation of sale—Limitation—Limitation Act (XV of 1877) Sch II Art 126* A Hindu who at the time had a minor son sold certain joint property in 1887 The sale was pre empted and part of the property was subsequently transferred by one of the pre emptors The vendor's son attained majority in 189 More than three years after 1895 three sons were born to him and in 1913 the father and the sons sued for cancellation of the sale deed of 1881 *Held* that the suit was barred by limitation inasmuch as the title of the son of the original vendor became barred in 1898 The property ceased to be joint family property and the subsequently born grandsons were not in a position to dispute the sale LACHMI NARAIN v KISHAN KISHORE CHAND (1915) I L R 38 All 126

2 ———— **Self acquisition property**—*In name of coparcener—Benami—Test source of purchase money* Where there is a dispute whether a property standing in the name of a junior member of a Hindu family is his self acquisition the criterion is from what source the money comes with which the purchase money is paid *Dharm Das Pandey v Shama Soondri Dibiah 3 Moo I A 229 Gopi Krist Gosain v Gungapersaud Gosain 6 Moo I A 53* followed Where there was no evidence that the son in whose name the property was purchased had any separate fund or that the properties in dispute were purchased with money belonging to him *Held* that the presumption was clear and decisive that the property was acquired by the father in the name of the son and it was not the latter's self acquired property

HINDU LAW—JOINT FAMILY PROPERTY —contd

PARBATI DASI v RAJA BAIKUNTHA NATH DEY (1913) 18 C W N 428

3 ———— **Gift by Karta**—*Statement against interest—Evidence Act (I of 1872) s 32 sub s (3)—Civil Procedure Code (XIV of 1882) s 317* Where the *Karta* of a Mitakshara joint family has habitually mixed his professional earnings in account with receipts from the joint property and the circumstances are such that purchases by him in the name of himself or his brother are to be regarded as joint family property it is still competent to him to make a gift out of his earnings, though they have been brought into the account A statement made by the *Karta* since deceased in a former suit that he bought property as a provision for his son in law is admissible in evidence under s 32 sub s (3) of the Evidence Act 1872, as a statement made against his interest and coupled with other evidence of intention defeats a claim that properties bought *in the* name of his son in law were bought *benami for* the joint family With regard to properties bought at sales in execution and as to which the son in law was the certified purchaser the claim by the joint family was *held* to be barred *by s 317 of* the Code of Civil Procedure 1882 SURAJ NARAIN v RATAN LAL (1917) L R 44 I A 201 I L R 40 All 159

4 ———— **Mortgage by Karta**—*No rights against Karta* A mortgage of the joint family property of a Mitakshara family by its *Karta* unless necessity or an antecedent debt is proved is void the transaction itself gives to the mortgagee no rights against the *Karta's* interest in the joint family property *Madho Parshad v Mehrban Singh I L R 17 I A 194* applied *Mahabeer Persad v Ramyad Singh 12 B L R 90* discussed NARAIN PRASAD v SARNAM SINGH (1917) L R 44 I A 163 I L R 39 All 500

5 ———— **Sale of entire property by one co parcener**—*Sale operates only upon the co parcener's share in the property—Purchaser not g t joint possession of the share but is only entitled to declaration of his rights* Under the Mitakshara as interpreted in the Bombay Presidency a coparcener can sell his own interest in joint family property provided there is valuable consideration for the sale The sale is valid even though the sale deed takes the *form not of a sale of his* interest but of a sale of the whole property In such a case joint possession cannot be given to the purchaser but merely a declaration that he has acquired the interest of the vendor whatever that may be in the particular property and a direction that he be left to recover that interest by separate suit for partition in which all necessary parties and properties should be joined PANDU VITHOJI v GOMA RAMJI (1918) I L R 43 Bom 472

6 ———— **Co sharers—Minor reversioner**—*Suit for recovery of possession by on attaining majority—Limitation—Limitation Act (IX of 1908) Sch I Art 141* Where a Hindu plaintiff within 3 years of attaining majority sued to recover possession of a two annas share in an alleged joint family property claiming through his mother and grandfather *Held* that the first thing the Court had to decide was whether the joint and whether the plaintiff's

HINDU LAW—JOINT FAMILY PROPERTY —*contd*

mother had been in possession as a co sharer Art 141 of the Limitation Act would apply only if the plaintiff s mother was dispossessed in that case the plaintiff as the reversioner would have, 12 years from the date of the death of his mother and the question whether the suit was brought within 3 years of his attaining majority would then arise If the property as stated was a joint property it would be a case between co sharers and in such a case it must be shown that there was exclusion or ouster of the plaintiff s grand father or mother more than 12 years before the suit In order to establish adverse posses ion by one tenant in common against his co tenants there must be exclusion or ouster and the posses sion subsequent to that must be for the statutory period What is sufficient evidence of exclusion must depend upon the cir cumstances of each case Mere non participation in rents and profits would not necessarily of itself amount to an adver e possession but such non participation or non possession may in the cir cumstances of a particular case amount to an adverse pos ession Regard must be had to all the circumstances and a most important element is the length of time *Ayenenussa Bibi* v *Sheikh Isuf 16 C W N 849* followed GOBINDA CHANDRA BHATTACHARJEE v UPENDRA CHANDRA BHATTACHARJEE (1919) I L R 47 Calc 274

7 ———— Antecedent debts binding on the sons—*Debts must be antecedent to the transaction—Joint family property—Alienation of his share for consideration by a co parcener* The defendant s father passed a mortgage of ancestral property to plaintiffs father for Rs 1 499 out of which Rs 700 were due by the mortgagor to the mortgagee and the sum of Rs 799 was received in cash by the former to pay off debts which he owed to others The mortgagee having sued to recover the mort gage amount the defendants contended that the debt not having been an antecedent debt of their father they were not bound under Hindu law to pay it *Held* that the defendants were liable to pay the mortgage debt contracted by their father ina much as the object of the mortgage was to pay off the antecedent debts created by him prior to the mortgage There is nothing in the judgment of *Sahu Ramchandra* v *Bhup Singh (1917) L R 44 I A 126* which supports the contention that the antecedent debts must be due to the mortgagee himself and that the object of the alienation must be to satisfy the antecedent debts due to the alienee In the Bombay Presi dency the rule is well established that a co parcener can alienate his share in the joint family property for consideration PANDURANG NARAYAN v BHAGWANDAS ATMARAMSHET (1919) I L R 44 Bom 341

8 ———— Contract fo sale of his interest by a co parcener—Death of before completion of the sale—*Suit for specific performance against sons—Specific Relief Act (I of 1877) s 27 cl (c) and illustration* One B and his three sons jointly owned one anna share in a Khoti village B agreed to sell his three pies share to the plaintiff Before the sale could be completed B d ed and a suit for specific performance was brought against his sons *Held* that the plaintiff could enforce the contract for sale of *B s* interest by a suit for specific performance against *B s* sons The second illustration to cl (c) of s 27 of the Spe ific Reli f Act applies to the case of all joint tenants whether members of a joint Hindu family o not BHAGWAN BHAU v KRISHNAJI JANOJI (1920) I L R 44 Bom 967

9 ———— Sale by managing member—*Of family of property subject to a mortgage executed by his father since deceased—Suit by purchaser for redemption—Mortgagee not competent to set up manager s alleged incapacity to sell* The father of a joint Hindu family mortgaged some of the joint family property He then died leaving two sons. Subsequently one of the sons died and the family then consisted of the surviving brother and his nephews sons of the deceased brother The uncle then as managing member sold the mortgaged property and the purchasers of it brought a suit for redemption of the mortgage *Held* that it was not open to the mortgagee in that suit to set up as a defence that there was no legal necessity for the sale and therefore the uncle was not competent to convey a good title to the plaintiff DURGA PRASAD v BHAJAN I L R 42 All 50

10 ———— Sale of ancestral property under decree on promissory note executed by father —*Sale of ancestral property by Civil Court instead of by Collector* The holder of a decree in a suit on a promissory note executed by the father of a joint Hindu family caused the ancestral pro perty of the family to be sold The sons sued to have the sale set aside as to two thirds of the property upon the ground that the debt in respect of which the note in suit had been given was tainted with immorality This however they failed to prove *Held* that the sale was valid *Sripat Singh Dugar* v *Prodyot Kumar Tagore I L R 44 Calc 521* followed *Held* also that the fact that a sale of ancestral property has been conducted by a Civil Court when it ought to have been conducted by the Collector does not render the sale invalid *Behari Singh* v *Mukat Singh I L R 21 All 273* referred to *Fatmat ul Kubra* v *Achchi Begam I L R 36 All 33* distinguished DALIP NARAIN SINGH v PARMAOTI BIBI I L R 42 All 58

11 ———— Right of residence—Unmarried sister's right—*Decree against mother of last male owner on her personal debt—Sale of house in execu tion—Auction purchasers right to oust unmarried sisters in possession—Right of residence of other females against purchasers* An auction purchaser of an ancestral house, sold in execution of a money decree passed on a personal debt of the mother who inherited the property as heir to her son, is not entitled to oust the unmarried sisters of the latter who reside in the house P SURIYANARAYANA RAO NAIDU v P BALASUBRAMANIA MUDALI (1920) I L R 43 Mad 635

12 ———— Loan by Manager to meet expenses of criminal charge—*Liability of family property hypothecated for* The Manager of a Hindu joint family is not entitled to spend the family funds in his own defence to a criminal charge nor is he entitled to hypothecate the family property in order to rai e money to meet the expenses of such a defence except upon the ground of consent of the members of the joint family or upon the ground that from the circumstances it could be inferred that the other members of the family had consented NATHU RAI v DINDAYAL RAI 2 Pat L J 166

13 ———— Mortgage by father—*Right of minor son to redeem* Where a Hindu father the

HINDU LAW—JOINT FAMILY PROPERTY—*contd*

head of a joint family consisting of himself and his minor son executed a mortgage of the entire ancestral property in order to secure a loan for the purpose of preventing the property from being sold for arrears of Government revenue and the mortgagees obtained a decree on the mortgage without making the son (who was still a minor when the suit was instituted) a party to the suit and purchased the property in execution of that decree *Held* that the son was not entitled to redeem whether the mortgagees had notice of his interest or not In such a case the interest of the son is sufficiently represented by his father unless it can be shown that he was omitted from the mortgage suit for the purpose of defeating his right to redeem RAGHUNANDAN SINGH v LACHMESHWAR DAYAL SINGH 2 Pat L J 306

14 ——— **Agreement to sell family property—Specific performance** *whether can be granted when some of the members of the family are minors* A contract entered into by the manager of a Hindu joint family can be specifically enforced even though some of the members of the joint family were minors at the time when the contract was entered into Where a person entered into an agreement for the purchase of certain land of a part of which he was in actual possession as mortgagee *held* in the circumstances of the case that possession did not amount to constructive notice to a subsequent purchasers of the contract for sale between the vendor and the mortgagee HARI CHARAN KUAR v PATLA RAI 2 Pat L J 513

15 ——— *Mitakshara father's debt for legitimate family purpose not repaid owing to reckless ness of father—Entire coparcenary interest if liable under decree obtained against father personally —Security bond executed to get stay of execution of such decree if enforceable against entire property—Self-acquired property of Mitakshara father devised by will if ancestral property in the hands of the son —Permission of District Judge sanctioning loan for family purpose how far affords protection to creditor — Tankhas granted by the Maharaja of Burdwan if assignable* B a Hindu governed by the Mitakshara law devised his properties which were self acquired by a Will whereby he provided that each of his sons was to live in joint mess with his brothers up to the age of twenty five when the share of each would fully belong to him in title after vesting absolutely in his sons and grand sons etc During the minority of his brothers J the eldest son of B borrowed from his brothers represented by the guardian a sum of money with the permission of the District Judge for purchasing a residential house Subsequently a decree was obtained against J for the money and in order to get a stay of the execution of the decree in terms of the order of the High Court J executed a security bond charging his properties including his share of Tankhas granted by the Maharaja of Burdwan *Held (per* RICHARDSON J SHAMSUL HUDA J *dubitante)* That the money was lent and borrowed for a legitimate family purpose and the decree could be executed against the entire co parcenary interest in the property *Held (per* CURIAM*)* — That if the order of the District Judge was not conclusive to show that the money was required for a legitimate family purpose it at least entitled the lenders to the consideration due to *bona fide* creditors They were not affected directly or indirectly by the antecedent or subsequent mismanagement of his estate by J That when the creditor lends his money on a representation made by the father that the course which he proposes to take a course not unreasonable or irrational in itself is calculated in the circumstances to promote the interests of his family the creditor ought not to suffer because owing to the subsequent misconduct of the father things in fact turn out badly That the decision of the Judicial Committee in *Sahu Ram Chandra's* case *L R 44 I A 126 s c 21 C W N 698 (1917)* does not prevent a creditor levying execution on the family property to satisfy a decree for money against the father personally That the decree against J being for an antecedent debt not incurred for an illegal or immoral purpose there was nothing to prevent the security bond from being enforced against the whole co parcenary interest That it is open to a Mitakshara father to devise self acquired property to a son so that it will be ancestral in the hands of the son That the testator intended each of his sons to take his share as ancestral property and the properties in the present case must be regarded as ancestral properties in the hands of J That Tankhas are heritable allowances in the nature of property and therefore assignable LALA MUKTI PROKASH NANDE v SRIMATI ISWARI DEI DEBI I L R 33 All 64

16 ——— **Money decree against father if can be executed against the entire joint property**— *Antecedent debt meaning of* The decision of the Privy Council in *Sahu Ram Chandra's* case *L R 44 I A 126 s c 21 C W N 698 (1917)* has not overruled the long line of cases according to which a creditor who has obtained a personal decree for money against a Mitakshara father is entitled to levy execution against the entirety of the joint family property Antecedent debt does not mean a debt incurred by the father before the birth of a son MADHUSUDAN DAS MOHANT v ISWARI DAYI DEBI 24 C W N 949

17 ——— **Family arrangement** *Arrangement between a widow and daughters and daughters sons to divide the property widow claiming absolute title—Rights in doubt—Sole surviving daughter on death of her sisters if can recover property alienated by another daughter* N a Hindu died leaving a widow and three daughters some of whom had sons The widow claiming absolute title to certain properties which the evidence pointed to as belonging to N entered into an arrangement with her daughters and grandsons for dividing up the properties between them in absolute right and one of the daughters M conveyed one item of property which fell to her share to a predecessor of the Defendant The Plaintiff another daughter after the death of her other sisters sued to recover this property *Held* that the Plaintiff who was a party to the arrangement made to divide the property at a time when the rights of the widow and the daughters were in doubt could not be allowed to repudiate the same and to impeach a sale made on the faith of it MUSAMMAT HARDEI v BHAGWAN SINGH 24 C W N 105

18 ——— **Mortgage to meet criminal charge**—*Whether binding on sons* The sons of a Hindu are liable on a mortgage executed by their father the karta of the family to meet the expenses of defending himself against a charge

HINDU LAW—LEGAL NECESSITY—*contd*

which might be offered *Held* further that in order to justify legal necessity it must be shown that the expenses could not have been met from the income of the property in the widow s hands and that they were reasonable *Held* lastly that payment of full value for the property did not of itself justify a sale by a Hindu widow in the absence of legal necessity PAVANESHWAR PRASAD SINGH v CHANDI PRASAD SINGH

I L R 38 Calc 721

———— Duty of lender to make inquiries Where a mortgagee advanced money on a mortgage of joint Hindu family property the ostensible reason for the loan being to pay for certain zamindari property which the family was purchasing and it was found that the purchase of the zamindari was beneficial to the family and that the mortgagee when he advanced the money had made such inquiries as he could and believed that the money was in fact required for the purpose aforesaid it was *held* that the fact that unknown to the mortgagee the purchase money for the zamindari property had already been paid from some other source would not invalidate the mortgage *Hunoomanpersaud Panday* v *Mussumat Babooee Moonraj Koonweree 6 Moo I A 393* referred to TULA RAM v TULSI RAM

I L R 42 All 559

———— *Joint family—loan by member of one branch whether binding in the whole family* Where a Hindu joint family consisted of two branches and a member of one of such branches borrowed money on a mortgage for the purposes of the family *held* that the presumption was that such member had authority to borrow the money for the joint family necessity and that the mortgage was therefore binding on the joint family INDER CHAND v BIDYADHAR PANDEY

5 Pat L J 745

———— *liability of son and grand sons—agreement to maintain son in law whether binds ancestral property* Where a Hindu agrees to make an allowance to his son in law for the latter s maintenance the sons and grand sons of the grantor are liable to discharge the debt out of the ancestral property which devolves on them MADHUSUDAN PRASAD SINGH v RAMJI DAS

5 Pat L J 516

———— Under Hindu Law the illegitimate daughter of a Sudra succeeds to her mother in the absence of a nearer heir DUNDAPPA v BHIMAWA I L R 45 Bom 559

———— —*Held* that there is a presumption in favour of marriage and against concubinage but such presumption may be rebutted INDAR SINGH v THAKAR SINGH

I L R 2 Lah 207

HINDU LAW—LEPROSY

See HINDU LAW—INHERITANCE

I L R 38 Mad 250

———— *Development of leprosy not a disqualification as regards capacity to deal with property* There is no principle of Hindu Law under which a person who contracts the disease of leprosy is thereby disqualified from dealing with his own property or from dealing with joint family property so as to bind his sons provided the alienation is made for legal necessity MAN SINGH v MUSAMMAT GAINI (1917 I L R 40 All 77

HINDU LAW—LIMITED OWNER

See HINDU LAW—WIDOW

———— An alienation by way of compromise entered into between a limited owner and persons who had no *bonâfide* claim to the property at the time of the compromise is not binding on Reversioners ANUP NARAYAN SINGH v MAHABIR PRASAD SINGH

3 Pat L J 83

HINDU LAW MAINTENANCE

1 ———— Wife's maintenance—*Maintenance allowed by will of husband to wife—Unchastity of wife after husband s death—Maintenance not affected—Widow—Unchastity—Starving maintenance* A Hindu widow was entitled to maintenance at the rate of Rs 24 a year under her husband s will After the husband s death the widow led for some time an unchaste life and gave birth to a child but since then she remained chaste She sued to recover maintenance allowed to her under her husband s will It was contended in reply that the plaintiff on account of the unchaste life which she had led for some time after her husband s death, had forfeited her right even to bare or starving maintenance *Held* negativing the contentions that though the annuity was granted by the will as maintenance that word could not be understood as imposing any condition or restriction so as to cut down or extinguish the right to Rs 24 a year given by the will The rule that the will of a Hindu must be construed with due regard to Hindu habits and notions applies only where there is ambiguity Caution must be used in applying that rule and it must be adopted only where a suggested construction of doubtful language leads to manifest absurdity or hardship The general rule to be gathered from the texts is that a Hindu wife cannot be absolutely abandoned by her husband If she is living an unchaste life he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life she is not entitled to any other right If, however she repents returns to purity and performs expiratory rights she becomes entitled to all conjugal and social right unless her adultery was with a man of a lower caste in which case after expiation she can claim no more than bare maintenance and residence *Honamma* v *Timannabhat I L R 1 Bom 559 Valu* v *Ganga I L R 7 Bom 84* and *Vishnu Shambhog* v *Manjamma I L R 9 Bom 108* discussed PARAMI v MAHADEVI (1909)

I L R 34 Bom 278

2 ———— Gharjamai if may claim maintenance—*Separate maintenance when may be allowed—Implied agreement to maintain son in law—Pleadings and proof difference between if fatal—Express contract set up and circumstances stated and only implied contract proved—Cross objections if may be received out of time—Civil Procedure Code (Act V of 1908) O XLI r 2—Limitation Act (IX of 1908) s 5* Where a plaintiff claimed maintenance as a *gharjamai* stating the circumstances under which the claim arose and also set up an express contract the Court below while disbelieving the story of express contract gave a decree on the ground of implied contract inferred from facts proved —*Held* that there was no such variance between pleading and proof as to contravene the rule that the plaintiff shall not succeed on a case not made in his plaint The institution of

HINDU LAW MAINTENANCE—*contd*

gharjamai is of recent origin and may have owed its origin to the system of putrika putra and the mere fact that there is no provision in the texts of Hindu Law relating thereto does not imply that the *gharjamai* is not entitled to maintenance Although an ante nuptial agreement on the part of the husband not to remove his wife from her father's house may not be enforceable as opposed to the rules of Hindu Law and to public policy if the son in law is willing to abide by the arrangement there is nothing in Hindu Law or in public policy to render an agreement on the part of the father in law to maintain him unenforceable *Semble* A *gharjamai* may be included in the term poor dependent declared by Manu to be entitled to maintenance *Held* that in the circumstances of the case where it was evident that an order directing the son in law to reside as a member of the mother in law's family might lead to constant disputes and prove a source of unhappiness to all parties the Court properly decreed separate maintenance to the son in law GOVIND KANT DAS *v* RADHA BALLABH DAS (1910)

15 C W N 205

3 ———— **Of widow in undivided family** —*Enforceable against the whole family and not only against the branch to which the husband belonged* Where a member of an undivided family comprising several branches dies his widow's rights to maintenance is enforceable against the whole family and not only against the branch to which her husband belonged and which took by survivorship his undivided share A suit for partition subsequent to the widow's suit for maintenance will not affect her right as aforesaid SUBBARAYALU CHETTI *v* KAMALAVALLITHAYARAMMA (1911)

I L R 35 Mad 147

4 ———— **Of Widow rate of**—*Possession by widow of other property yielding income—Right to get maintenance from husband's estate* The fact that a Hindu widow is able to maintain herself out of other property is no ground for not giving her some maintenance out of her husband's estate but it is a factor to be taken into account in determining the quantum of maintenance to be decreed her The right of a widow of a co parcener in a Hindu family to maintenance is an absolute right due to her membership in the family and does not depend on any necessity arising from her want of other means to support herself *Pamavati Koer v Manjlari Koer 4 C L J 74* dissented from LINGAYYA *v* KANAKAMMA (1913)

I L R 38 Mad 153

5 ———— **Of Daughter in law**—*Whether entitled to be maintained in the absence of ancestral property—Rules of Hindu Law when binding on Courts—Rule of equity justice and good conscience* A Hindu is under no legal obligation to maintain his widowed daughter in law when he has no ancestral assets in his hands The rules on Hindu Law are binding on the Court only where it is necessary to decide any question regarding succession, inheritance marriage or caste or any religious usage or institution Where maintenance is claimed against a person not on the ground that the property coming by inheritance to him is burdened with the maintenance of the person claiming it but on the ground that the Hindu Law givers have placed such a duty on him the Hindu Law as such has no obligatory force and the Court would have to decide the question in accordance with equity justice and good conscience Though the rules and precepts of Hindu Law givers might often be entitled to great respect in deciding the rule of justice in such cases the weight due to them would depend upon the circumstances of each case including the conditions of modern society and the conceptions of equity and justice which the Court considers it right to give effect to *Semble* There may be special circumstances which may make it equitable and just in a particular case to uphold the claim for maintenance in the absence of ancestral property *Khetramani Dasi v Kashinath Das 2 B L R (A C J) 15* applied *Rangammal v Echammal I L R 22 Mad 304* explained MEENAKSHI AMMAL *v* RAMA AIYAR (1914)

I L R 37 Mad 396

6 ———— **Impartible zamindari—Maintenance of junior members**—*Basis of the right—Coparcenary right or community of interest by birth not the basis—Relationship to holder of the zamindari necessary—Provision for maintenance—Agreement with junior member construction of—Adoption by zamindar—Subsequent bequest of zamindari—Suit for maintenance against legatee—Denial of relationship with legatee—Suit not maintainable* The plaintiff's father was adopted by the zamindar of Pittapur who died in 1890 leaving a will bequeathing all his properties including the zamindari which is an impartible estate to the defendant who claimed also to be the natural son of the testator The late zamindar had entered into an agreement with the plaintiff's father in 1882 whereby he agreed to pay him Rs. 1 500 a month and a lump sum of Rs 6 000 a year The will confirmed that arrangement The plaintiff's father sued to recover the zamindari from the defendant denying that the latter was the natural son of the late zamindar and also impugning the validity of the will The suit was finally dismissed by the Privy Council on the ground that the will was valid. The plaintiff brought the present suit to recover maintenance from the defendant from 1902 when he ceased to be maintained by his father The plaintiff did not admit that the defendant was the natural son of the late zamindar or that he and the defendant were members of an undivided family The defendant contended that a junior member of the family of the holder of an impartible zamindari was not entitled to claim maintenance from the holder and that the suit was not maintainable by reason of the agreement with plaintiff's father and the will of the late zamindar and on the ground that the plaintiff did not claim any maintenance as a member of the defendant's family *Held* that the arrangement made by the late zamindar with the plaintiff's father was not a provision for the maintenance of the latter and all his descendants, and did not operate to bar the plaintiff's claim. A junior member of the family of the holder of an impartible zamindari is entitled to maintenance only on account of his relationship to the holder and not on account of any co parcenary interest in the property or community of interest therein acquired by birth *Held* (on the facts of the case) that as the plaintiff did not advance any claim based on relationship but refused to admit any relationship with the defendant his claim for maintenance could not be sustained That as there was no community of interest in the property it was not burdened with his claims in the hands of the

HINDU LAW—MARRIAGE—*contd*

ful i ue of the injunction and the postponement of the wedding *Held* that under the circumstances of the ca o the maternal uncle was competent to enter into a contract of marriage on behalf of the girl and a suit for damages lay *Kasturi v Chiranji Lal I L R 35 All 265* referred to KASTURI v IANNA LAL (1916)

I L R 38 All 520

7 ———————— *Marriage between a Telugu Sudra and his wife's sister's daughter legality of* The marriage of a Hindu with his wife's sister's daughter is valid as well among Sudras as among Brahmans and among the Telugus of the north as among the Tamils of the south RAMAKRISHNA ROW v SUBBAMMA ROW (1920)

I L R 43 Mad 830

8 ——— **Kanets Sudras**—*Legitimacy of son by wife of another man who is alive at the time*—Res Judicata—*previous decision by Mandi Court not dealing with the question of legitimacy of plaintiff or his claim of succession under Hindu Law—whether conclusive adjudication on the matter of plaintiff's legitimacy under Hindu Law* Plaintiff claimed his half share in property left by his father U S in British India He had previously made a similar claim in regard to his father's property in the Mandi State and this was decreed in his favour but the question of plaintiff's legitimacy although raised was not decided by the Mandi Court nor was his title of succession under Hindu Law The facts found by the High Court on appeal were that when plaintiff's father U S took Mst M (plaintiff's mother) into his house her husband was alive and was still alive when the plaintiff was born and that it had not been shown that her husband divorced her or turned her out or acquiesced in her leaving him *Held* that there is in law a presumption in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years and this presumption of law can be repelled only by strong distinct and conclusive evidence The mere fact that the direct evidence of the marriage which took place many years ago is unsatisfactory cannot displace this presumption *Imambandi v Mutsaddi 13 Indian Cases 678 Bepin Behari v Atul Krishna 15 Indian Cases 3 8 Ibrahim Ali v Mst Mubarak Begum 20 P W R 1920 Sastry Velaidar v Sembecutty I R 6 Ap C 361 Piers v Piers 8 I L R 180 De Thoren v Attorney General 1 A C 686 Mouji Lal v Chandarbati Kumari I L R 38 Calc 700 P C Dularey Singh v Suraj Bali Singh 45 Indian Cases 1 9 and Har Dial v Fali Ram 65 P R 1911* followed *Held further* that marriage is not constituted but evidenced by habit and repute Though the presumption in cases of cohabitation is in favour of marriage it is otherwise if the connection is known to have been in its origin illicit *Campbell v Campbell* (The Breadalbane case) *L R 1 H L Scotch and Divorce 4 C 182* followed *Held consequently* that J the husband of Mst M being alive when she was enticed away by U S the connection between U S and Mst M the plaintiff's parents was adulterous not only in its origin but continued to be so up to the time of J's death when alone a valid marriage was possible and that plaintiff was therefore not a legitimate son of U S *Campbell v Campbell* (The Breadalbane case) *L R 1 H L Scotch and Divorce A C 182* followed *Virasami gappa v Rudrappa I L R 8 Mad 440* distinguished Cour's Hindu Code page 211 and West and Bühler's Hindu Law pages 391 401 referred to *Held further* that the question which was raised in this Court i e that the plaintiff was illegitimate because he was the issue of an adulterous connection was never considered and never adjudicated upon in the Mandi Court although it was raised by the defendant's pleas The decision moreover proceeded on the ground of custom and no adjudication as to the plaintiff's right to succeed to the property of his father under Hindu Law was come to A marriage may be valid in one country and at the same time void in another Similarly a man may be entitled to inherit land in one country and yet not be entitled to inherit land in another The judgment of the Mandi Court was therefore not a conclusive adjudication on the matter of plaintiff's legitimacy or on his title to succeed to his father's property under Hindu Law Halsbury's Laws of England Volume 6 page 297 *Vallentyne v Mackinnon 2 Q B 55 C A Hay v Northcote L R 2 Ch 52* Dicey's Conflict of Laws page 486 and *Birtwhistle v Vardill 2 Cl and F 571* followed *Sinaraman Chetti v Ibuiram 19 L R 18 Mad 327 Jiwardha v Keymer I L R 39 Mad 95 Keymer v Visvanatham I L R 40 Mad 11 P C Sreelurree Bulshe v Gopal Chunder 10 W R 500 Kirthi Singh v Bhola 29 P R 1885 Inder v Jina 49 P R 1890 Dina v Karam Chand 52 P R 1899 Rahi v Govinda I L R 1 Bom 97* and *Narayan v Laving I L R 2 Bom 140* referred to INDRA SINGH v THAKAR SINGH

I L R 2 Lah 207

9 ———————— *Breach of contract of marriage—Out of pocket expenses incurred during betrothal liability to pay* Plaintiffs who were father and son sued to recover a certain amount as damages for a breach of contract of betrothal Defendants contended that the retraction was necessitated on account of ill health of the bridegroom Both the plaintiffs having died during the pendency of the proceedings their representatives in interest sought to recover from the defendants the out of pocket expenses which the plaintiffs had incurred while the betrothal was in existence The Subordinate Judge held that there being a sufficient reason for retracting the engagement the out of pocket expenses could not be recovered from the defendants On appeal to the High Court *Held* that though the defendants could not be fined if there was a good cause for retraction yet they were liable to pay expenses incurred by the bridegroom or his father during the betrothal BALUBHAI HIRALAL v NANABHAI BHAGUBHAI (1919) **I L R 44 Bom 446**

10 ———————— *Legitimacy—Castes—Inter marriage between sub castes* J a Rajput married C a Tanti B a son of that marriage sued *inter alia* for a declaration that he was entitled to his father's property *Held* that the marriage between J and C was valid under the Hindu Law and B was entitled to the declaration BISWANATH DAS GHOSE v SHORASHIBALA DASI (1921) **I L R 48 Calc 926**

See HINDU LAW—CUSTOM

See HINDU LAW—JOINT FAMILY

I L R 40 Calc 407

HINDU LAW—MIGRATION

——— *Mithila or Mithila law presumption as to applicability of* Where a person governed by the Mitakshara law removed to a district governed by the Mithila law the presumption was that he took his personal law with him and where he inherited property from his maternal grandfather who was governed by the Mithila law this property equally with his paternal property would be governed by the Mitakshara law and not by Mithila law BHAJABATI KOER v SARUPRA KOER (1911) 16 C W N 831

——— *From one province to another—Onus to prove adherence to law of place of origin—Proof of adherence to religious and social rites of the place of origin effect of* In the matter of succession the contest was between the sister's son (plaintiff) and the great great grandfather's great great grandson (defendant) the former alleging that the family was governed by the Dayabhaga School and the latter that it migrated from Behar and adhered to the Mitakshara law prevailing there *Held* that it is well settled that a Hindu family residing in a particular province of India is presumed to be governed by the law of the place where it resides but where a Hindu family is shown to have migrated from one place to another the presumption is that it carried with it the laws and customs as to succession and family relation prevailing in the province from which it came This presumption however is rebuttable by proof that the family has adopted the law and usages of the place to which it has migrated That it is a historical fact that the Brahmins and Kayasthas of Bengal migrated from Kanauj and originally brought with them the Mithila law it was after their settlement in this province that the Dayabhaga School of Hindu Law was founded by Jimutavahana about the 14th century and that is the law which now governs the Hindu population of this Presidency even though they may have originally migrated from North Behar and the defendant would have to establish not merely that the family migrated from Behar but that the migration took place after the foundation of the Bengal School of Hindu Law by the author of the Dayabhaga This fundamental fact which if proved would have shifted the burden of proof from the defendant remained unestablished and the burden consequently lay upon the defendant to prove that the family was governed in matters of succession by the Mitakshara law This burden might be discharged by proof of instances of succession consistent with the Mitakshara and inconsistent with the Dayabhaga law and to that end evidence might also be given that the family had conformed to religious and social rites and usages consistent with the Mitakshara and inconsistent with the Dayabhaga law A Hindu family which has migrated into Bengal and has retained some of its former religious rites and ceremonies may yet be shown to have acquired a course of devolution of property in accordance with the Dayabhaga law PITTAMBAR CHANDRA SAHA v NISHIKANTO SAHA 24 C W N 215

——— *Succession to immovable property from father—Different law in different Provinces of India—Quality of estate taken whether absolute or limited—Mahratta Brahmin in Central Provinces—Bombay school of law—Family*

HINDU LAW—MIGRATION—*contd*

emigrating taking law of original domicile with it The quality of the right which is taken by a daughter who inherits immovable property from her father has been differently determined in different parts of India In accordance with the view of the High Court of Bombay the Courts of Western India have decided that she takes an absolute right in other parts of India the Courts have held that she takes only a limited interest such as is taken by a Hindu widow see *Pranjivandas Tulsidas* v *Devkuarbhai* 1 Bom H C 130 9 Moo I A 533 (note) and *Bhaiya Raghunath* I L R 30 Bom 229 and the cases and authorities there cited It is established that the law of succession in any given case is to be determined according to the personal law of the individual whose succession is in question *Prima facie* any Hindu residing in a particular province of India is held to be subject to the particular doctrines of Hindu Law recognised in that province But this law is not merely a local law it becomes the personal law and part of the status of every family which is governed by it consequently where any such family migrates to another province governed by another law it carries its own law with it Mayne's Hindu Law 8th Ed para 18 On migration there may be renunciation of the law of the province migrated from in favour of that of the province migrated to but unless such renunciation is proved (and the mere change of domicile is not of itself sufficient to prove it) original law continues to govern the migrating family But the law must be the family law as it was when they left A judgment declaratory of law as having always been would be binding on the migrated family but subsequent customs introduced into the law would not affect them *Surendra Nath Roy* v *Heeramonee Burmoneah* 12 Moo I A 81 and *Parbati Kumari Debi* v *Jagadis Chunder Dhabal* I L R 29 Calc 433 L R 29 I A 82 followed A Maharashtra Brahmin whose ancestors and afterwards himself were domiciled in the Bombay Presidency died in 1858 while on a pilgrimage leaving immovable property in the Wardha District of the Central Provinces On his death his daughter succeeded to that property She died in 1859 leaving three sons who on her death sued to set aside alienation of portions of the property made by her during her possessions of it The question arose whether she took an absolute or a limited estate in the property which depended on what was the law of succession by which her father and his ancestors were governed The Judicial Commissioner (reversing the decision of the first Court to the effect that he and his ancestors were originally domiciled at Berar in the Bombay Presidency and therefore the Law gave the daughter an absolute estate) *held* that the father had no exclusive domicile either in Berar or in the Central Provinces and that the succession was governed by the law of the latter where the property was situated and the daughter had taken only a limited estate *Held* that the family of her father and his ancestors were domiciled in Berar and there was no renunciation of the law of that province when they or he migrated from it and that the daughter took an absolute estate under the law of the Bombay Presidency BALWANT RAO v BAJI RAO (1920)

I L R 48 Calc 30

HINDU LAW—PARTITION—*contd*

it shall be considered to be false in every Court By virtue of this agreement no person shall be competent to bring any claim in any Court in respect of any portion of the property other than the property detailed below Then followed a specification of the villages belonging to the family and the shares in which those villages were thereafter to be held From that time the property had been entered in the register in accordance with the arrangement *contained in the agreement* and the agreement had been acted upon up to the time of suit *Held* by the Judicial Committee (affirming the decision of the High Court) that on the evidence and circumstances of the case the agreement was one which operated as a partition of shares and the family thenceforth ceased to be joint in accordance with the principle laid down in *Appovier v Rama Subba Aiyan 11 Moo I A 75 Balkishen Das v Ram Narain Sahu I L R 30 Calc 738 L R 30 I A 139* and *Parbati v Naunihal Singh I L R 31 All 412 L R 36 I A 71* There was no re union That was a question of fact and there was no evidence to show that any of the members of the family re united or even contemplated re union RAGHUBIR SINGH v MOTI KUNWAR (1912)

I L R 35 All 41

13 ———————— *Requisites for partition—Partition created by so called will in life time of father dividing family property among his sons and taking no share himself—Double share to eldest son—Unequal partition under alleged custom —Provision for forfeiture on mismanagement or bad behaviour—Conduct of parties after execution of document of partition* By a document called a Will dated the 26th of November 1895 the father and head of a Hindu joint family governed by the Mitakshara law recorded a division of the ancestral *family property amongst his three sons* (giving himself no share but allotting a double share to his eldest son) The document recited that my three sons are at present fully qualified to conduct the business Therefore in order to avoid a dispute after my death I have at present while in a sound state of body and mind and of my own free will and accord divided the property among my sons heirs as follows Then followed the details of the division There was provision that If I at any time come back from pilgrimage and find mismanagement or character of any one bad then I shall have power to cancel this will which shall be enforced from the date of its execution and the document concluded as follows —

All the three sons were put in separate possession of the estate in the beginning of the year 1303 Fasli (September 1895) I have no other heir having a right besides those mentioned in this will I have therefore executed this will in order that it may serve as evidence Mutations of the various shares were subsequently made into the names of those to whom they were separately allotted and the evidence showed that the division had been assented to acquiesced in and acted upon by the sons up to 1905 In a suit brought in September 1905 four years after the father s death by the two younger sons for partition of the property which they alleged to be joint and undivided, and of which they claimed to be entitled to two one third shares *Held* (reversing the decision of the High Court) that the document of the 26th of November 1895 was not a will but was intended to operate from its date and was in fact a family arrangement contemporaneously made and acted upon by all parties the effect of which was under the circumstances of the case to create a partition of the joint ancestral property There was nothing in the fact that the document was called a will doubtedly made in fact and which was acted upon for ten years without any dispute or misunderstanding as to the respective rights of the parties under it *Held also* that the *provision in the will* giving the father power to cancel it in certain events evidenced a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property and viewed thus the contractual acceptance of a power of forfeiture in case of bad behaviour would not be sufficient to prevent the partition operating *in praesenti* BRIJRAJ SINGH v SHEODAN SINGH (1913)

I L R 35 All 337

14 ———— Res judicata—*Estoppel—Civil Procedure Code (Act VIII of 1882) s 13* A decree for partition made in a suit instituted by a member of a joint Hindu family is *res judicata* as between all co sharers who are parties to the suit Where therefore in a series of suits all the co sharers except one have obtained decrees partitioning *to them their respective shares by metes* and bounds a co sharer who was a party to the suits is estopped from alleging that the property left unpartitioned is less than the share to which he is entitled NAVIVI KANTA LAHIRI v SARNAMOYI DEBYA 1914) I L R 41 I A 247

15 ———— Partition by grandsons—*Paternal step grand mother entitled to a share* According to the Mitakshara the paternal step grandmother is entitled to a share in the family estate when it is partitioned among her grand sons VITHAL RAMKRISHNA v PRAHLAD RAMKRISHNA (1915) I L R 39 Bom 373

16 ————Property to be partitioned should be taken as existing at the date of the suit—*Shares taken away by some of the co parceners before the suit not to be taken into account* The plaintiff as representing one branch of the family sued the defendants who represented other two branches to recover by partition his share in the property which he alleged was one third The plaintiff had two brothers one of whom had separated *from the family by receiving* his share (which then was 1 12th) some years before the suit The defendants contended that the 1 12th share should go in reduction of the plaintiff s share at the partition that *is he was entitled to 1 3rd* minus 1 12th ¼th share The lower Court having awarded a ⅓rd share to the plaintiff some of the defendants appealed —*Held* that the share to which the plaintiff *was entitled in the family* property was ⅓rd and not ¼th for partition should be made *rebus sic stantibus* as on the date of the suit PRANJIVANDAS SHIVLAL v ICHHARAM (1915)

I L R 39 Bom 734

17 ———— By a minor co parcener—*Right to mesne profits—No exclusion—Separate living of minor co parcener—Same rule as in the case of major co parceners suit for account—Principle different—Provision for expenses of Upanayanam and marriage of co parceners in a partition suit—Setting apart of funds—Whether Upanayana and marriage of male co parceners are obligatory ceremonies—Provision for marriage of unmarried sisters*

HINDU LAW—PARTITION—*contd*

[illegible] y—Whether expenses of marriage of [illegible] [illegible] paper—[illegible] [illegible] [illegible] [illegible] [illegible]—Decree of [illegible] as to [illegible] by both examined—Civil Procedure Code (Act V of 1908) O XLI r 33 In a suit for partition by a minor coparcener against his [illegible] was [illegible] the plaintiff [illegible] entitled to recover [illegible] the absence of proof of [illegible] The question of [illegible] account from the [illegible] and [illegible] a different principle and [illegible] whether a minor is entitled [illegible] Mad [illegible] and [illegible] *v* [illegible] Mohan [illegible] I L R 561 referred to and explained Where the mother of the plaintiff was joined as a defendant in the suit for partition but a separate provision for maintenance was refused by the Court of First Instance on the ground that her maintenance should come out of the plaintiff's own share only and she had appealed to the lower Appellate Court but preferred no Second Appeal to the High Court but was made a respondent in the Second Appeal preferred by the first defendant it was held that the plaintiff who was a respondent in the Second Appeal was competent to prefer a memorandum of objections in the High Court objecting to the lower court's refusal to make a provision for her maintenance as he is affected by the judgment and interested in disputing its correctness The High Court has power under O XLI r 33 of the Civil Procedure Code to pass such decree as it thinks proper dealing with the rights of all parties before it *Per* SUNDARA AYYAR *J*—In a suit for partitions provision must be made in the decree for expenses of the Upanayanam and marriage of male coparceners as well as for the expenses of the marriage of the unmarried sisters out of the family property whether it is ancestral or separate or self acquired property of the father of the parties Marriage is a proper ceremony for a Brahmin and an obligatory ceremony for all Hindus with extremely few exceptions Modern custom is undoubtedly in favour of allowing the provision In deciding what ceremonies are regarded as proper and necessary regard should be had to the sentiments of the community especially when there is a difference of opinion among the text writers A brother who has had his own marriage performed at the family expense is not entitled to object to a similar provision being made for the other brothers The mother of a Co parcener is entitled to have a provision made for her maintenance out of the entire family property including the share of her step son as well as the share of her own son *Zamindar of Ourcaud v Meenakshi Ammal 5 Mad H C R 377 Kumaravelu v Virana Goundan I L R 5 Mad 29 Subbarayalu Chetti v Kamalavalli Thayramma I L R 35 Mad 147* referred to and followed *Hemangini Dasi v Kedarnath Kundu Chowdhury I L R 16 Calc 758* distinguished *Per* SADASIVA AYYAR *J*—Initiated brothers must set apart from the paternal estate the expenses of the initiation of the uninitiated brothers and sisters before dividing the paternal property whether it is ancestral or self acquired property of the father Upanayana or the ceremony of investiture of thread in the case of a male member of a coparcenary and marriage in the case of a female are obligatory *samskaras* which the initiated brothers are bound to perform for their uninitiated brothers and sisters and the initiated brothers are bound to make a provision for the expenses of performing the same out of the paternal estate before it is divided Marriage in the case of a male member of a coparcenary is not an obligatory *samskara* for the performance of which the initiated brother is bound to make a provision out of the paternal property at the partition *Kameswarasastri v Veerracharlu I L R 34 Mad 422* referred to *Per* SPENCER *J* on reference—Marriage is an obligatory ceremony on Hindus who do not desire to adopt the life of a Sanyasi and a fund for the expenses of the marriage of unmarried co sharers should be set apart at the partition of the paternal estate SRINIVASA IYENGAR *v* THIRUVENGADATHA AIYANGAR (1914)

I L R 38 Mad 556

18 ——— Karta—*Form of account to be directed against the karta on a partition* In an ordinary suit for partition of joint family property in the absence of fraud or other improper conduct the only account the *karta* is liable for is as to the existing state of the property divisible and the enquiry directed by the Court must be in the manner usually adopted to discover what in fact the property now consists of *Chuckun Lall Singh v Pooran Chunder Singh 9 W R 483 Konerrav v Gurrav I L R 5 Bom 589 Raja Setrucherla Ramabhadra v Raja Setrucherla Virabhadra Suryanarayana I L R 22 Mad 470 L R 26 I A 167 Narayan bin Babaji v Nathaji Durgaji Marwadi I L R 28 Bom 201 Bala krishna Iyer v Muthusami Iyer I L R 32 Mad 271 and Shookmoy Chandra Das v Monoharri Dassi I L R 11 Calc 684 L R 12 I A 103* referred to *Obhoy Chundra Roy Chowdhury v Pearee Mohun Gooho 13 W R (F B) 75 5 B L R 347* and *Damodardas Maneklal v Uttamram Maneklal I L R 17 Bom 271* explained PARMESHWAR DUBE *v* GOBIND DUBE (1916)

I L R 43 Calc 459

18 (a) ——— Separation—*Suit by one member*—A member of a joint family become separated from the others by the fact of suing them for partition SOUNDARARAJAN *v* ARUNACHALAM CHETTY I L R 39 Mad 159

19 ——— Partition between co owners—Reversionary interest—*Administrator's power to transfer property—Permanent leases—Probate and Administration Act (V of 1881) s 90* Where plaintiffs in a suit for partition were in joint possession of certain property with the defendants as co sharers under leases which purported to be permanent leases granted to them under an arrangement sanctioned by the Court and where the only person at the time of the suit interested in challenging the plaintiffs right was a party to the suit and did not contest the suit —*Held* that the plaintiffs were entitled to partition and the fact that the partition would have to be set aside if the reversioner on coming into possession of the property succeeded in a suit for setting aside the leases was not sufficient ground for refusing the plaintiffs the right to partition *Sundar v Parbati I L R 12 All 51 L R 16 I A 186* and *Bhagwat Sahai v Bipin Behari Mitter I L R 37 Calc*

HINDU LAW—PARTITION—*contd*

ger of a joint Hindu family is not obliged to keep accounts while the family remains joint and when a partition is asked for partition takes place of the property as it exists in the hands of the manager Under Hindu law as far as the joint family is concerned it is considered as one entity until the moment comes for division and then each party gets his actual share In the meantime if there are any expenses which should properly be incurred by the joint family purse those expenses are taken out of the family property and they cannot be debited to a particular co parcener PAMNATH CHHOTURAM v GOTURAM RADHAKISAN (1919) I L R 44 Bom 179

32 ———— **Sale of his share by a co parcener —Suit by purchaser for partition**—*and for past mesne profits—Past profits cannot be allowed* In a joint Hindu family consisting of five brothers two of the brothers sold their shares to the plaintiff The plaintiff sued for partition of his two fifths share in the family property and for three years mesne profits Both the lower Courts decreed partition and allowed the plaintiff Rs 63 for past profits The defendants having objected to the part of the decree awarding past mesne profits *Held* that the past mesne profits were wrongly awarded TRIMBAK GANESH v PANDURANG GHAROJEE (1919) I L R 44 Bom 621

33 ———— **By a brother against mother and seven brothers referred to arbitrator** Ganesh died in 1885 leaving his widow and eight sons in 1885 his second son Gour brought a suit for partition It was referred to arbitration and in 1887 award was given by which estate was divided into nine equal parts and allotted to the mother and eight sons As the five infant sons desired to live with their mother jointly the arbitrator declared their shares to be Rs 9 890 each but did not divide by metes and bounds On the mother s death the question having arisen as to the nature of the right of persons to take her share among them at her decease *Held* that the share in question was an interest in lieu of the mother s right to maintenance which upon partition amongst the sons was carried out of the sons shares and at the death of the mother went back to and became part of the shares out of which it came SASHI BHUSAN SHAW v HARI NARAYAN SHAW 25 C W N 993

33a ———— **Evidence of—Revenue and village records**—*Decree made at Regular Settlement—Decree for widows of superior proprietary right —Rights subjects to those of the other share holders* In this case the plaintiffs (respondents) sued for possession of a village by cancellation of a sale deed of it executed on the 30th of December 1871 in favour of the predecessor in title of the defendant appellant by three Hindu *pardanashin* ladies whose husbands had been lineal descendants of the proprietor The main question raised by the defendant was whether the property (joint ancestral and undivided property) was or was not joint and undivided at the date of the sale The appellant alleged that a partition of it had been made there was no evidence of any deed for the purpose but he founded his contention chiefly on the terms of the khewat and wajib ul arz and of a settlement decree of the 6th of December 1869 which was for superior rights in favour of the widows subject to the rights of the other share holders *Held* that a definition of shares in revenue and village papers affords by itself but a very slight indication of an actual separation in a Hindu family and certainly in no case that has come before us could we have regarded such a definition of shares standing alone as sufficient evidence on which to find contrary to the presumption of Hindu law that the family to which such definition referred had separated Their Lordships adopted with approval the above citation from the decision of EDGE C J in *Gajendar Singh v Sardar Singh I L R 18 All 176* as being a correct decision of the law *Held* as to the decree when on the one hand it declared for superior proprietary rights in favour of the widows, and on the other that these are to be given subject to the rights of the other share holders it completely conserved such reversioners and other ownership rights as are inherent in the succession to a joint family property and negatived the idea that partition or separation had been effectuated by law in such a manner as to extinguish other proprietary rights The decree was not equivalent to an affirmation of a partition or separation having taken place but was entirely consistent with the existence of the property as joint and undivided and therefore with no prejudice being effected to the right of the reversioner therein, in this case represented by the respondent (plaintiff) The presumption therefore against partition of this ancestral property had not been over come and the property remained joint NAGESHAR BAKHSH SINGH v GANESHA I L R 42 All 368

34 ———— **Competence of member of a joint family to bind himself not to claim partition** The members of a joint undivided Hindu family can bind themselves for their own life time not to claim partition of the joint family property *A fortiori* a similar agreement can be entered into by the remaining members of the family after one member has demanded a partition and separated his share whether such remaining members be considered as still joint or as tenants in common. And what may be effected by an agreement may be effected equally by means of a submission to arbitration followed by an award RUP SINGH v BHABHUTI SINGH I L R 42 All 30

35 ———— **Suit instituted by minor member of family**—*Difference in effect of as compared with suit instituted by adult members—Power of manager to dedicate family property for religious purposes* *Held* that the institution of a suit by a minor member through his next friend for partition of joint family property has not the same effect as the institution of a similar suit by an adult member of the family that is to say the mere institution of the suit does not effect a separation of the family but separation only takes place when the suit is decreed *Girja Bai v Sadashiv Dhundiraj I L R 43 Calc 1031* distinguished *Chelimi Chetty v Subbamma I L R 41 Mad 442* followed *Held* also that although the managing member of a joint Hindu family may be competent to dedicate some portion of the family property to religious uses during his life time he cannot make such a dedication by will *Vitla Butten v Yamenamma 8 Mad H C Rep 6 Suraj Bunsi Koer v Sheo Persad Singh I L R 5 Calc 148 Rathnam v Sivasubramania I L R 16 Mad 353* and *Lakshman Dada Naik v Ramchandra Dada Naik I L R 5 Bom 48* followed LALTA PRASAD v SRI MAHADEOJI BIRAJMAN TEMPLE

I L R 42 All 461

HINDU LAW—PARTITION—*contd*

36 ———— Part of property omitted from plaint— *Amendment of plaint* In a suit for partition of the property of a joint Hindu family all the properties which are known at the time of the institution of the suit to be joint family properties must be included in the suit If however by inadvertence or mistake or by fraud of any of the parties some of the joint family properties are not included in the suit further proceedings may be taken to obtain a partition of them But it is the duty of the Court to allow an amendment of the plaint so that all the properties belonging to the family might be included in the suit Under s 153 of the Code of Civil Procedure 1908 either the original or the appellate Court may make such amendments as are necessary for the purpose of determining the real question or issues raised in the suit MUKUNDA LAL CHAKRABARTY v JOGESH CHANDRA CHAKRABARTI **1 Pat L J 393**

37 ———— Mithila—*joint family—Suit for partition between father and son whether father s mother son s mother and son s step mother entitled to share* Under the *Mithila* school of Hindu law in a partition between a father and son at the instance of the son both the latter s mother and his paternal grandmother are entitled to share equally with him and his father The share taken by the grandmother is not her *stridhan* and on her death does not devolve upon the heirs to her *stridhan* but goes back to the estate from which it came Such a share is in lieu of maintenance and does not cease to be ancestral property The institution of a suit for partition is an unequivocal declaration on the part of the plaintiff (even though he be a minor) of his intention to separate himself from the defendants and his share cannot be diminished by the birth of another member of the family subsequent to such date (in this case subsequent to the date of the preliminary decree) KRISHNA LAL JHA v NANDESWAR JHA **4 Pat L J 38**

37a ———— Clear expression of intention to separate its effects—*After notice expressing intention to separate joint family if liable for marriage expenses of members—Father s right to give money to daughter* Under the Hindu law it is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family Under the law of the Mitakshara an unambiguous and definite intimation of intention on the part of one member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which until then he had held in jointness No obligation therefore lay on the joint family to provide for the expenses of the marriage of sons of the Plaintiffs which took place after the latter had given to their co parceners a notice clearly expressing such an intention but before a decree for partition was made in their suit in the Court of first instance The father has undoubtedly the power under the Hindu law of making within reasonable limits gifts of moveable property to a daughter and in one case the Judicial Committee upheld the gift of a small share of immoveable property on the ground that it was not shown to be unreasonable K KAMALINGA ANNARI v NARAYANA ANARI P C) **26 C W N 929**

HINDU LAW—PARTITION—*contd*

38 ———— Bengal School—Award—*Widow s share with minor sons—Second partition—Compromise petition—Consent order—Jurisdiction – Civil Procedure Code (Act V of 1908) O XXIII r — Registration Act (XVI of 1908) s 17 (1)—Estoppel—Res Judicata—Widow share right to release—Succession at death* In an award in a partition suit brought by an adult son the minor sons shares were declared and allotted collectively with the widowed mother s share Subsequently on one of the minors attaining age and instituting a partition suit for dividing his share from the others and the mother s share there was a consent decree incorporating therein that the mother and the adult brothers had released or relinquished her share (obtained by the award and as heiress of one of the deceased minor sons) in favour of the minor sons whose shares had been declared and allotted collectively as aforesaid This was supported by a petition and an affidavit in the suit which was signed by the adult brothers agreeing to the arrangement but they had not been made parties to the suit In the present partition suit by an adult brother claiming a right to the mother s share on her death the question arose (i) whether the consent order operated as an estoppel by record or *res judicata* and (ii) as to the nature of the sons rights to take their mother s share during her lifetime *Held* that the decree was outside the scope of O XXXIII r 2 of the Civil Procedure Code and was beyond jurisdiction The adult brothers were not estopped from claiming their share on the death of their widowed mother The decree did not operate as *res judicata* inasmuch as the second partition suit was for purposes of dividing up a given collective share left undivided by the award in the first partition On her death the widow s share which was in lieu of maintenance went back to the share out of which it was carved out and the adult sons were entitled to a share The mother s share as heiress of the deceased minor son went back to the heir of the last male owner *Bindesri Naik v Ganga Ram Shahu I L R 20 All* ... *Pranal Anni v Lakshmi Anni I L R 22 Mad 508 Birbhadra Path v Kalpatara Panda 1 C L J 388 Curdeo Singh v Chandrika Singh I L R 36 Calc 193 Gobinda Chandra Pal v Dwarka Nath Pal I L R 5 Calc 837 Sorolah Dassee v Bhooban Mohan Neogi I L R 15 Calc 9* and *Balabux v Rukhmabai I L R 30 Calc 725* referred to SHASHI BHUSAN SHAW v HARI NARAIN SHAW (1921) **I L R 48 Calc 1059**

39 ———— Property left undivided—*At the time of partition—Presumption that there has been a complete partition both as to parties and property—Members hold the family property as tenants in common—Fact that a portion of family property is held by them as joint tenants must be proved like any other fact* When once anything has occurred which effects a separation of the members of a joint Hindu family they are to be considered as holding the joint family property as tenants in common and if it is sought to show that any portion of the family property is to be held by the members of the family as joint tenants and not tenants in common that fact must be proved like any other fact *Gavri Shankar Piraбhuram v Atmaram Pajaram (1893) 18 Bom 611* discussed *Anandibai v Hari Suba Pai (1911) 35 Bom 93 Lilabux Ladhuram v Pullman as*

HINDU LAW—PARTITION—*contd*

(1903) *I F 30 I A 130* relied on RAMCHANDRA v TUKARAM **I L R 45 Bom 914**

40 ———— Service inam lands—*Enfranchisement subsequent to partition in name of a member—Right of a divided member to share in enfranchised lands—Onus of proof* If a divided member of a Hindu family claims to share in service inam lands which belonged to the family but were subsequent to a partition in the family enfranchised in the name of a member who was the office holder at the time of the enfranchisement the onus lies on the claimant of proving not only that he is a member of the original service family but also that the inam was excluded from the partition as undivided property in which the sharers retained their joint rights *Lyrappa v Syama Rao (1918) M W N 849* considered VENKATA SUBBA RAO v SATYANARAYANAMURTI (1921) **I L R 44 Mad 179**

41 ————Customs—Patnibhaga—Moopu A custom was found to exist among the Nattukottai Chetties inhabiting seven villages in the Madura district of the Madras Presidency whereby when a Chetti during the life of his wife married another wife he appropriated out of his property a portion called moopu for the first wife's maintenance that portion descending to her son if she had one and the rest of the property was notionally divided one moiety going to the son or sons by the first wife and the other moiety to the son or sons by the second wife In a suit for partition brought by the only son of a first wife against his father and the sons by the second wife the Judicial Committee applied the custom without however determining what the father's share would be in the circumstances as the question did not arise before their Lordships The authorities as to the custom of patnibhaga or the division according to wives considered [*Judgment of the High Court reversed*] PALANIAPPA CHETTIAR v ALAGAN CHETTI (1921)

I L R 44 Mad (P C) 740

42 ———————— *Suit by son for partition against father and father's alienee—Alienation held not binding on son—Form of decree to be given to the son* If in a suit for partition by a son against his father and an alienee from the father the Court holds the alienation not to be binding on the son the son is entitled to get a decree for his share in the family properties without any condition being imposed on him to refund the consideration paid by the alienee to the father *Sahu Ram Chandar v Bhup Singh (1917) I L R 39 All 37 (P C) L R 44 I A 126* applied The dictum of MITTER J in *Koer Hasmat Bai v Sunder Das (1885) I L R 11 Calc 396* not followed *Held* further by SESHAGIRI AYYAR J a son is bound to pay only such debts of his father as exist while they are joint and a son getting a decree for partition becomes divided from his father as from the date of suit for partition Any liability of the father to refund the consideration to the alienee arising as the result of the decree for partition is a liability for unliquidated damages and not *debt* and even if it becomes a judgment debt it is not a *debt existing on the* date of suit for partition SRINIVASA AIYANGAR v KUPPUSWAMI AIYANGAR (1921)

I L R 44 Mad 801

HINDU LAW—PROSTITUTE'S PROPERTY

———————— *Stridhan—Prostitute's property succession to* The mere fact that a Hindu woman has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood and consequently her *stridhan* property passes upon her death in the absence of nearer heirs to her brother's son as an heir under the Bengal school of Hindu law *Tara Munnee Dossea v Motee Buneanee 7 Mac Sel Rep 325 S I D (O S) 217 Pannath Tolapattro v Durga Sundri Debi I L R 4 Calc 590 In the goods of Kamineymoney Bewah I L R 21 Calc 697 Ramananda v Raikishori Barmani I L R 22 Calc 347 Sarna Moyee Pewa v Secretary of State for India I L R 25 Calc 254* and *Sundari Letani v Pitambari Letani I L R 32 Calc 871* overruled so far as they hold that tie of blood is destroyed by unchastity or in the case of a Hindu woman by her adopting the life of a prostitute *Bisheshur v Mata Cholim 2 All H C 300 Musammat Ganga Jati v Ghasita I L R 1 All 46 Adiyapa v Rudrava I L R 4 Bom 104 Kojiyadu v Lakhshmi I L R 5 Mad 149 Subbaraya Pillai v Ramasami Pillai I L R 23 Mad 171 Bhutnath Mondol v Secretary of State for India 10 C W N 1085 Sundari Dosee v Nemye Charan Daw 6 C L J 572* and *Tripura Charan Banerjee v Harimati Dasi I L R 38 Calc 493* approved *Sivasangu v Minal I L R 12 Mad 277* and *Narasanna v Gangu I L R 13 Mad 133* distinguished and dissented from HIRALAL SINGHA v TRIPURA CHARAN RAY (1913)

I L R 40 Calc 650

HINDU LAW—RELIGIOUS ENDOWMENT

See HINDU LAW—ENDOWMENT

1 ———————— *Mourashi Muth succession to—Onus of proof—Indian Succession Act (X of 1865) s 187—Will not probated if can be used in evidence and for what purpose—Indian Evidence Act (I of 1872) s 32 (5)—Relationship between Mohunt and Chela if relationship by adoption—Existence of relationship statement relating to* One *R* was the Mohunt of a *muth* known as the Khumbakul Muth He was succeeded by his *chela S* After the death of *S* the plaintiff claimed to be his lawful successor as his *gurubhai* The defendant resisted the claim on the allegation that he had been adopted by *S* as a *chela* The *muth* in question was admittedly a *maurasi muth* and the Court found that in *maurasi muth* the *chela* succeeds and in default of a *chela* the *gurubhai* succeeds and when there are more *chelas* than one the eldest generally succeeds but a junior *chela* may succeed if he be found more capable and if he be selected by the last Mohunt as his successor *Held* that it was for the plaintiff to prove that he was the *chela* of *R* and that the defendant was not the *chela* of *S* as he must succeed on the strength of his own title and not on the infirmity if any in the title of the defendant In the course of the evidence in the case two wills alleged to have been executed by *R* and *S* respectively neither of which was proved in the Probate Court were produced the former of which only was found to be genuine *Held* that notwithstanding s 187 of the Indian Succession Act which is incorporated in the Hindu Wills Act a will not proved in the Probate Court may be used in evidence for a purpose other than the establishment of a right as executor or legatee and in the present case the recital in the will of *R*

HINDU LAW—RELIGIOUS ENDOWMENT—contd

which was found to be genuine that he had no one else as his chela except S was admissible in evidence under s 32 cl (5) of the Evidence Act Inasmuch as the relationship between a Mohunt and his chela is a relationship by adoption and a statement that A has one chela B and has no other chela is a statement relating to the existence of a relationship ACHYUTANANDA DAS v JAGANNATH DAS (1914) 20 C W N 122

2. ———————— Proof that property has been endowed as debutter—Permanent image of the idol not essential to valid dedication A permanent image is not absolutely essential for dedication to a Thakur Where the intention of the donor appeared to have been to dedicate the property absolutely to deva sheva the fact that the income of the property exceeded the expenses of the sheba and the shebaits frequently dealt with the property or the income as personal property would not make the property secular subject to a charge for the deva sheva ASIRA MOHON GHOSE MOULIK v NIRODE MOHON GHOSE MOULIK (1916) 20 C W N 901

3. ———————— Shebaitship devolution of to heirs in the absence of directions by founder on the death of last shebait duly appointed by him—Will giving estate to idol and appointing successive executors—De facto appointment of shebait—Well established principle of —Shebaitship office and rights nature of A Hindu testator had two sons by his first wife and four sons by his second wife In his will he provided that all his properties would devolve on his family Deity and his second wife and two of her sons J and B would successively be executrix and executors and that his two sons by his first wife would not be appointed executors After the death of the second wife and her sons J and B her other two sons died one leaving a widow defendant No. 1 Of the two sons of the testator by his first wife one (defendant No 2) was living and the other had died leaving a son the plaintiff who brought the present action for a declaration that he had a four annas share in the shebaitship of the Deity Held that the effect of the will was to constitute the second wife and her sons J and B successive shebaits of the endowments though they were described as executors in respect of the endowed property That the testator did not prescribe how the shebaitship would devolve after the death of his son B In the circumstances the devolution of the office of shebait follows the line of inheritance from the founder in other words it passes to his heirs unless there has been some usage or course of dealing which points to a different mode of devolution That on the death of B the last shebait named by the founder the office vested in the four sons of the founder then alive namely the two uterine brothers of B and the two sons of the founder by his first wife and this notwithstanding the fact that the founder intended to exclude his sons by his first wife for the heir at law though in terms excluded from benefit under the will cannot be excluded from his general right of inheritance without a valid devise to some other person Tagore v Tagore L R I A (Sup Vol) 47 66 That the plaintiff had a four annas share in the shebaitship That the principle of vested interest while the actual enjoyment of the expected interest is postponed till the termination of the life estate has no application to cases of the present description That a shebait holds his office for life but this does not signify that he has a life interest in the office with the remainder presently vested in the next taker The entire office is vested in him though his powers of alienation are qualified and restricted The position of a shebait is analogous to that of a Hindu female in possession of the estate of the last full owner rather than to that of the holder of a life estate and when a founder has given valid directions as to the devolution of the shebaitship as in the present case upon the death of the last shebait the office vests in persons who at the time constituted the heirs of the founder provided the last shebait has not taken it absolutely when the office has so vested in them upon the death of each member of the group it passes by succession to his heir subject to the important qualification that the rule—that when a worship of this sort has been found the shebaitship is vested in the heirs of the founder in default of evidence that he has disposed of it otherwise or of there being some evidence of usage, course of dealing or some circumstances to show a different mode of devolution—cannot be applied so as to vest the shebaitship in persons who according to the usages of the worship cannot perform the rights of the office KUNJAMANI DASSI v NIKUNJA BIHARI DAS (1915) 20 C W N 314

4 ———————— Tests for establishing whether an endowment is real and substantial or merely illusory—Attempt to establish a perpetuity in favour of the descendants of the settlor By a deed of endowment so called executed not long prior to his death a Hindu professed to dedicate practically the whole of his property in favour of an idol It was provided in this deed that the settlor should apply for mutation of names in favour of the idol and that he should use the income of the property for the expenses puja and rajbhog and for the repair of the temple and that he should keep regular accounts of the income and expenditure The settlor himself was to be the first manager after him his wife and thereafter his daughter's sons and their descendants Some sixteen months after the execution of this deed the settlor died and was succeeded as manager by his wife The widow brought a suit for a declaration that the property was endowed property in the course of which it came to light that no attempt had been made to obtain mutation of names in favour of the manager that no accounts were forthcoming relating to the administration of the property by the settlor that the expenditure on the idol did not amount to more than one tenth of the income and that the widow was unable to account for her own dealings with property the subject matter of the suit Held that in these circumstances there had been no real dedication of the property to religious purposes but only an attempt to create a perpetuity in favour of the descendants of the settlor's daughter SRI THAKURJI v SUKHDEO SINGH

I L R 42 All 395

5 ———————— Public charitable trust management of—Devolution—right of female heirs The right of management of a public charity possessed by the members of a Hindu family descends in the absence of a custom to the contrary to all the heirs including female heirs in the same manner as ordinary family property A claim that the most senior male member alone ... the

HINDU LAW—RELIGIOUS ENDOWMENT—concld

heirs is entitled to manage or that female heirs are excluded from management should be proved as a special custom *Ramanathan Chetti v Murugappa Chetti (1906) I L R 29 Mad 283 (P C)* followed *Thirappavanelingam Chetti v Nulluswan Chetti (1863) 1 M H C R 415* and *Chenna Kesavaraya v Vaidelinga (1877) I L R 1 Mad 343* not followed MEENAKSHI ACHI v SOMASUNDARAM PILLAI (1921)
I L R 44 Mad 205

6 ——— **Requirements for the completion of a valid Gift**—*Registered deed alone not sufficient without delivery of possession* The mere execution of a deed of endowment is not sufficient under the Hindu law to create a valid endowment but to complete the gift there must be a transfer of the apparent evidences of ownership from the donor to the donee *Dagai Dabee v Mathura Nath Chattopadhya I L R 9 Calc 854 Kalidas Mullick v Kanhaya Lal Pandit I L R 11 Calc 121* and *Watson and Company v Ram Chand Dutt I L R 18 Calc 10* referred to RAM DHAN v PRAYAG NARAIN
I L R 43 All 503

7 ——— In the construction of ancient grants and deeds evidence is admissible as to the manner in which the thing granted has always been possessed and used for so the parties thereto must be supposed to have intended but the principle does not apply unless there is an ambiguity KULADA PROSAD DEGHORIA v KALI DAS NAIK **I L R 42 Calc 536**

8 ——— The manager of a public temple has no right to remove the image from the old temple and instal it in a new one especially when the removal is objected to by the majority of the worshippers HARI RAGHUNATH v ANANTJI BHIKAJI **I L R 44 Bom 46**

HINDU LAW—RELIGIOUS OFFICE

——— *Religious office and emoluments—Hindu females right of to inherit* *Held* by the Full Bench (SADASIVA AYYAR, J *dissenting*) that according to the practice and precedents obtaining in the Madras Presidency a Hindu female is not incompetent by reason of her sex to succeed to the office of archaka in a temple and to the emoluments attached thereto *Sundarambal Ammal v Yogavana Gurukkal I L R 38 Mad 850* overruled *Mohan Lalji v Gordhan Lalji Maharaj I L R 35 All 283* distinguished ANNAYA TANTRI v AMMAKKA HENGSU (1918)
I L R 41 Mad 886

——— *Held* that the office of hereditary Priest is a Nibandha and ranked among the hereditary rights of immovable property but where a caste has appointed Priest no right of property is conferred GHELABHAI GOURISHANKAR v HARGOWAN RAMJI
I L R 37 Bom 95

——— *Shebait agreement with pujari of thakur that latter to forfeit office on misconduct to be determined by tribunal of private person Pujaris of thakur—Condition that Pujaris should forfeit office upon misconduct or neglect to be found by tribunal of private persons if valid and enforceable by Civil Court—Condition if valid on ground of remoteness—Rule of perpetuities if applies to personal contracts—Private tribunal decision of*

HINDU LAW—RELIGIOUS OFFICE—contd

when valid By an agreement between the *shebaits* of a *thakur* and a family of Chatterjees the latter were appointed *pujaris* and some land was placed in their possession in order that the income might be applied for the purpose of worship and maintenance of the *sheba* and it was stipulated that the Chatterjees should be *pujaris* from generation to generation but in case they were found guilty of misconduct or neglect by a tribunal constituted by the agreement they were to forfeit their office of *pujaris* *Held*—That personal contracts like that in the present case were not affected by the rule against perpetuities That the conditions of forfeiture annexed to the office were lawful and as soon as the Defendants were disqualified for the religious office by reason of their misconduct they became disentitled to retain possession of the land which was intended to be applied by the *pujaris* for the maintenance and worship of the *thakur* That the decision of the tribunal constituted by the agreement was operative if their proceedings were as they were in this case regularly conducted There is nothing wrong in principle that the holder of a spiritual office should be subject to discipline and should be liable to deprivation for what may be called misconduct from an ecclesiastical point of view or for flagrant and continued neglect of duty So far as Hindus are concerned there is now no State church and no Ecclesiastical Court and there is nothing to prevent Civil Courts from determining questions such as those raised in the present case and from holding that a *pujari* has been removed from his office on valid grounds NAFAR CHANDRA CHATTERJEE v KAILASH CHANDRA MONDOL **25 C W N 201**

HINDU LAW—REVERSIONER

See HINDU LAW—SURRENDER
See HINDU LAW—WIDOW
See RES JUDICATA **I L R 41 Calc 69**
See SPECIFIC RELIEF ACT S 42 **I L R 42 Mad 219**

1 ——— **Alienation by female heir—** *Reversioner suit by—Suit by next male reversioner maintainable without proof of collusion of nearer female reversioner* The rule that suits to set aside alienations by a female heir having a limited interest should be brought by the next reversioner and that a remote reversioner cannot sue without showing collusion between the female heir and the next reversioner does not apply where the next reversioner is a female and the suit is brought by the nearest male reversioner Where a widow having daughters makes an alienation the nearest male reversioner may sue without proving collusion between the widow and daughter CHIDAMBARA REDDIAR v NALLAMMAL (1909)
I L R 33 Mad 410

2 ——— **Legal representative**—*Hindu Widow Reversionary heirs—Civil Procedure Code 1908 s 2 (11)—Agra Tenancy Act (Local II of 1901) s 202* One *S K* filed a suit for possession of certain lands and for cancellation of a perpetual lease executed by her mother but died during the pendency of the suit *Held* that the reversionary heir of the last male owner of the property in suit was the proper legal representative of the plaintiff *Held* also that where the

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det nlan simply alleged that he was in po ion of the land in suit a a tenant but did not allege tha h was a tenant of the plaintiff the Civil C urt need not require the defendant to institu e a uit in the Revenue C urt as directed by s 202 of the Agra Tenancy Act 1910 Likhai Lal v Shed Pujan Singh (1910)

I L R 33 All 15

3 ———————— *Suit for declaration only reversion that deed of gift by holder of life interest inoperative and for possession and other reliefs—Frame in appeal confined to deed of gift only—Propriety of declaration—Court fee stamp* The plaintiff claimed to be the reversionary heirs expectant of one *D* after the deaths of his widow and dau hter toge ther with one S It appeared that *D*s widow and dau hter had executed a deed of *tamliknamah* in favour of S who on his part claimed to be the sole immediate reversioner In the plaint the prayer was for a d claration that the deed of gift was in ffective again t the plaintiff for that poss ion of the property in suit for the appointment of a Receiver for a declaration that the plaintiffs were the reversionary heirs after the death of *D*s widow and daughter Court fees were paid upon th se prayers in the lower Court which dismi ed the suit as premature but in the High Court the plaintiffs only sought for a d cla ation as to the deed of gift and for the appointm nt of a Receiver At the h aring of the appeal the latt r prayer also was given up Rupee 1 twenty only in court fees was paid on the appeal *Held* that the appeal was sufficiently stamped That the plaintiffs who on the evidence appeared to be some of the immediate reversioners were entitled to have the deed of gift declared inoperative as against themselves That the fact that such a d clara ion must b founded on reasons that could support a declaration that they were heirs to *D* could not shut them out of their right to a declaration as to the invalidity of the document in question Jagdeep Narain Singh v Jaibasi Koer (1914) **19 C W N 1191**

4 ———— *Right of presumptive reversionary heir to declaration of his right—Suit against widow in possession of her husband s estate for waste and wrong dealing with property—Failure to prove charges—Right of reversioner to sue for protection of the husband's estate* A plaintiff who brought a suit as presumptive reversionary heir against a widow in possession of her husband s estate in order to protect the property and made charges against the widow of waste misappropriation and other wrong dealing with the property none of which charges were established was held not entitled to a declaration of his right as reversionary heir even though his title had been disputed in the suit It is not legitimate to give such a plaintiff under cover of a prayer for further relief and after the substantial heads of his claim have failed any greater right to obtain such a declaration than he would have had if it had been asked for directly and unaccompanied by other and unfounded claims *Jaipal Kunwar* v *Indar Bahadur Singh* *I L R 26 All 238 L R 31 I A 67* and *Venkatanarayana Pillai* v *Subbammal* *I L R 38 Mad 406 L R 42 I A 125* distinguished Janaki Ammal v Narayanasami Aiyar (1916) **I L R 39 Mad 634**

5 ———————— *Reversioner consenting party to sale by widow and inducing purchaser to believe and act on false recitals in deed of sale purporting to show legal necessity—Subsequent suit by such reversioner challenging sale on account of absence of legal necessity—Estoppel by conduct* The plaintiffs reversioners on the death of a Hindu widow sued to recover certain lands which had been purchased from the widow by the defendants It was found that the recitals in the deed of sale were not true and there was no legal necessity but that the plaintiffs who were consenting parties to the sale induced the defendants to believe the recitals to be true and to act on them and themselves supervised the erection of buildings on the land at defendants cost *Held* that it was a clear case of estoppel by conduct No person who is a party to the putting forward of a recital in a deed and induces another to act on it can afterwards be heard to say that the recitals are not accurate and the plaintiffs suit must fail Bhubaneswari Debi v Haradhan Bhattacharya (1916)

21 C W N 728

6 ———————— *Reversioners—Widow s estate—Estate taken under the management of the Court of Wards—Alienations by the Court of Wards—Power of Court of Wards as to alienations if absolute or limited like that of the limited owner—Court of Wards Act (Mad Act I of 1902) s 35—Suit by reversioners for declaration—Alienations held good—Declaration as to title of plaintiff as reversioner if can be given—Conversion of rent in kind into money rent—Power of widow to commute—Evidence Act (I of 1872) s 35—Copies of Takids etc made in official registers if admissible* Where the plaintiff claiming to be the nearest reversioner to the last male owner of a zamindari sued for a declaration that certain alienations made by the Court of Wards during their management of the estate on behalf of the adoptive mother of the late zamindar on her succeeding to the estate as his heiress on his death were not binding on the estate beyond her lifetime *Held* that the power of the Court of Wards under s 35 of the Madras Court of Wards Act (I of 1902) is in terms absolute and not governed by the restrictions in the latter part of the section that the Court of Wards had absolute powers of alienation in respect of the property taken under its charge although the person on whose behalf the management was taken up was only a limited owner of the property like a widow that consequently the alienations in the case were valid without proof of necessity such as would support an alienation by a Hindu widow and that the conversion of rents payable in kind into money rents is within the powers of a limited owner like a widow *Held* further (*a*) that reversioners are not entitled to sue for a declaration that they are the nearest reversioners to an estate unless the decision of that question is incidental to the grant of some other relief to which they may be entitled *Janakiammal* v *Narayanasamier* *I L R 39 Mad 634* applied and (*b*) that copies of actual letters such as Takids from the Collector to the *Mafumdar* and his replies thereto made in registers of official correspondence kept for reference and record are admissible in evidence under s 35 of the Indian Evidence Act and are entitled to great consideration *Rajah Muttu Ramalinga Setupati* v *Perianayagam Pillai* *L R 1 I A 209 229* referred to Navaneetha Krishna Thevar v Ramaswami Pandia Thalavar (1916)

I L R 40 Mad 871

HINDU LAW—REVERSIONER—contd

7 ——————— *Rights of reversioner—Suit to recover property of grandfather alienated during infancy of next reversioner to agnates of deceased—Compromise by female owner and her husband—Awards in terms of compromise—Award made decree of Court under Act VIII of 1859 s 327—Limitation Act 1877 Sch II Art 95 141—Guardian of minor* A Hindu reversioner has no right or interest in *praesenti* in the property which the female owner holds for her life Until it vests in him on her death should he survive her he has nothing to assign or to relinquish or even to transmit to his heirs His right becomes concrete only on her demise until then it is a mere *spes successionis* His guardian if he happens to be a minor cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto On the death without issue of a Hindu governed by the Mitakshara law and admittedly separated from his agnatic relations (respondents) leaving a widow a daughter *K* and the daughter s son a minor (appellant) the widow though opposed by the agnates obtained possession of her husband s property for her life estate On her death in 1864 a dispute arose with the agnates as to *K* s right to succeed in which her husband *R* took part as representing *K* though there was nothing to show that he had any authority to act as her agent The matter was referred to arbitration but before the arbitrators had taken any action a compromise was come to in which *P* purported to act for *K* and her infant son, the effect of which was to completely extinguish the reversionary interest of the appellant in his grandfather s estate The arbitrators made an award in accordance with the terms of the compromise It was not shown that the proceedings before the arbitrators ever came to the knowledge of *K* but it appeared that she did not acquiesce in the award and the agnates had to apply to have it made a decree of Court under s 327 of Act VIII of 1859 the then Code of Civil Procedure and notwithstanding *K* s continued opposition such a decree was made and enforced and the respondents were put into possession of the properties in 1865 *K* died in 1905 and in 1908 the appellant brought a suit to set aside the arbitration proceedings together with the compromise and award as being fraudulent and taken and entered into without knowledge or authority of *K* and for a declaration that he was not bound by them *Held* (reversing the decision of the High Court) that until *K* s death the appellant had no right or interest in the property s which could be the subject of bargain *R* s action in referring to arbitration any matter connected with the appellant s reversionary right was therefore null and void The award was based on the compromise and even if the appellant had had an existing right *P* would have had no power to enter into an arrangement which extinguished his interest practically without consideration The compromise too was not for the benefit of the minor The decree enforcing the award was based on the finding that *K* had by her husband *R* acquiesced in the reference to arbitration and that she had consented to the compromise and was therefore bound by the award the order of the District Judge which was affirmed by the High Court affected *K* s interest and hers only The minor was not a party to the appeal to the High Court and the Civil Courts did not in any way purport to deal with or adjudicate upon his reversionary right The proceedings therefore culminating in the decree by which the appellant was sought to be bound were entirely devoid of the conditions on which alone a reversioner can be shut out from the assertion of his right which comes to him altogether independently of the female owner *Katama Natchiar* v *Rajah of Shivagunga 9 Moo I A 539* distinguished AMRIT NARAYAN SINGH v GAYA SINGH (1917)
I L R 45 Calc 590

8 ——————— *Reversioners —Compromise of disputes between the widow of the last male owner who took the whole estate of a Hindu joint family by survivorship and other widows of family entitled only to maintenance and person who claimed to have been adopted by one of the widows —Division of the property between them—Claims in dispute widow of sole male owner to agree to take less than she is entitled to and alter her position to her detriment—Future claim by alleged adopted son for possession of whole estate—Estoppel of claim as reversioner by compromise proceedings* At the time of his death in 1883 *B* one of three brothers was by survivorship the sole owner of the estate of a Hindu joint family and his widow became entitled to that estate for life Her title was however disputed by the present appellant and by *P* and *K* the widows of the predeceased brothers of *B* The appellant set up a claim to the entire family estate based on the allegation that he had been adopted by *P* to her deceased husband and was entitled as such adopted son to the whole property *P* supported his claim and together with *K* alleged that the three brothers had separated and that their three widows were each entitled to a one third share of the estate To protect her own interest and those of her daughter the widow of *B* brought two suits one of the 20th of January 1891 against the appellant and *P* for a declaration that the appellant s alleged adoption was null and void That suit was dismissed on a technical ground and an appeal against the decree dismissing it was preferred to the High Court at Allahabad The other suit was brought on the 4th of February 1892 against *P* and *K* claiming a declaration that *B* her late husband had been the sole owner and possessor of the entire family property that on his death she was herself in possession of and entitled to that property according to Hindu law and that *P* and *K* had no rights in it except to maintenance Before the second suit came on for hearing *B* s widow her daughter *P* *K* and the appellant had on the 1st of August 1892 entered into a compromise referring their disputes to arbitration the result of which was that *B* s widow her daughter *P* and *K* each obtained possession of a one fourth share of the property in dispute The appellant though allotted no share of the family property obtained the share allotted to his adoptive mother *P* who relinquished it to him by executing a deed on the 22nd of August 1898 in his favour In the award it was stated that the appellant had been adopted by *P* but that he had nothing to do as such adopted son with the shares allotted to the other ladies He obtained in accordance with *P* s deed of relinquishment mutation of names in his favour The appeal in *L* s widow s first suit was not supported and was dismissed and the second suit was withdrawn In suits filed respectively on the 16th of July 1912 and the 28th of August 1913 by the

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appellant for possession as reversioner to the estate of *P* of the properties allotted in January 1883 to *P*'s widow her daughter and *K* respectively *Held* (affirming the decision of the High Court) that the appellant was precluded from claiming as a reversioner by his having been a party to the compromise entered into in 1882 which and the awards made in accordance with it were binding on him He had at that time no right of any kind to any share of the property of the family at best he had the mere expectancy of being reversioner on the death of *P*'s widow *Sumsuddin Goolam Husein v Abdul Husein Kalimuddin I L R 31 Bom 165* distinguished The claim of the appellant influenced *B*'s widow who was induced mainly by that claim but also by the claim of *P* and *K* to consent to a division of the family property in which she only obtained a one fourth share. By those claims she was induced to agree to a compromise against her own interests and those of her daughter and to alter her position greatly to her own detriment The appellant was a party to it and under it he obtained a substantial benefit which he has ever since enjoyed He was consequently bound by the compromise and could not now claim as a reversioner KANHAI LAL *v* BRIJ LAL (1918) I L R 40 All 487

9 ——————— *Reversioners consent of* The consent given by the reversioners would certainly raise a presumption of the existence of legal necessity SHYAMPYARY DASYA *v* EASTERN MORTGAGE CO (1917) 22 C W N 226

10 ——————— *Mortgage by widow —Suit for redemption filed by the widow —Dismissal of the suit on an admission made by the widow in a previous suit—Appeal filed but withdrawn—Subsequent suit by reversioner for redemption—Widow's suit does not involve a trial of the right of reversioner—Fair trial—Res Judicata—Limitation* The plaintiffs sued to redeem a possessory mortgage dated the 22nd December 18.. It was executed by the widow of the last male holder and contained a Gahan Lahan clause that if the money was not paid within a year the mortgagee should become the owner In 18.. a suit was filed by the widow to redeem the mortgage It was dismissed by the Munsiff on the ground that the widow had admitted on 21st October 18.. in proceedings between the mortgagee and the tenant that the mortgagee had under the Gahan Lahan provision become the owner of the property Against the decision an appeal was filed but it was withdrawn The widow died in 190. and in 1911 a suit was filed by the reversioner for the redemption of the mortgage of 18.. The defendants pleaded limitation and contended that the suit was barred by *res judicata* in consequence of the decree against the widow in the suit of 18.. *Held* (i) that the suit was not barred by *res judicata* as the decree in the Munsiff's Court was given against the widow on a ground personal to herself and therefore there was no fair trial of the right of the reversioner (ii) that the suit was not barred either by Art 141 or by Art 148 of the Limitation Act 1908 as it was brought within 12 years of the death of the widow and within 60 years of the mortgage *Per* HAYWARD J The rule laid down in *Katama Natchiar v The Rajah of Shivagunga 9 Moo I A 539* is a special rule applicable to the peculiar position of limited holders under Hindu law and not the general and strict rule of *res judicata* prescribed by s 11 of the Civil Procedure Code 1908 This special rule has to be applied with due regard to the peculiar precautions necessary in this country to prevent the exercise of pressure over limited female holders to the prejudice of the rights of reversioners The rule has therefore not to be interpreted with reference to the strict rules regarding fraud and irregularities required to invalidate decrees otherwise binding under the general law of procedure BAI KANKU *v* BAI JADAV (1919) I L R 43 Bom 869

11 ——————— *Reversioner—Widow's estate—Acceleration—Deed of gift by widow in favour of a daughter—Stipulation for maintenance of the widow for her life time—Nature of the transaction whether acceleration or alienation* One *S* made a gift of her widow's estate to her daughter *L* with a condition attached that *L* was to maintain *S* till her death The lower Court held that the gift amounted to a valid acceleration of *S*'s estate On appeal to the High Court *Held* that there was no acceleration of *S*'s estate for any consideration was sufficient to change the nature of the transaction from an acceleration to an alienation ADIVEPPA *v* TONTAPPA (1919) I L R 44 Bom 255

12 ——————— **Compromise**—*between two persons claiming absolute estate whether binding on reversioners* Where *D* who claimed certain property as the sole survivor of a Hindu joint family and *J* who claimed the property under the Will of her deceased husband settled their dispute by a compromise *held* that the reversionary heirs to the estate of the last male owner were not bound by the compromise because *J* could not be said to have represented the interests of the reversioners JANAK KESHORI KUAR *v* BABU DEBI PRASAD SINGH 2 Pat L J 170

13 ——————— *Reversioner right of to sue during lifetime of intermediate female holders of the estate* A reversioner who is not the immediate reversioner but who is the immediate male reversioner is entitled to sue for a declaration declaring the invalidity of transfers made by the widow of the last male owner notwithstanding that there may be other female lives between him and the estate There is no legal necessity for a widow to mortgage the estate to secure funds for the marriage of a daughter until the marriage has been finally settled RAMAYAI PANDAY *v* RAMBHARAT PANDE 4 Pat L J 774

14 ——————— **Alienation by widow**—*Declaratory suit by the then next reversioner—Subsequent suit by reversioner surviving the death of widow—Res judicata* *Held* that a decree obtained against a Hindu widow by the then next presumptive reversioner declaring that the alienation made by the widow would not be valid after her death will not operate as *res judicata* in respect of a suit preferred by the next reversioner surviving at the time of the widow's death *Bhagwanta v Sukhi I L R 22 All 33 Venkatanarayana Pillai v Subbammal I L R 38 Mad 406* and *Iri Dut Koer v Mussamut Hansbutti Koerain I L R 10 I A 150* referred to DAMBARU LAL *v* GOVIND RAM I L R 41 All 558

15 ——————— *Hereditary—Interest of a reversioner—Property—Transfer of Property (Act IV of 1882) s 6* Held upon an analysis of

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vested in a female heiress the interest of the reversioner is a mere chance of succession and cannot form the subject of any contract surrender or disposal *Sham Sundar v Achhan Kunwar I L R 21 All 71 Nand Kishore Lal v Kanee Ram Tewary I L R 29 Cal 355* followed ANNADA MOHAN ROY *v* GOUR MOHAN MALLIK (1921)

I L R 48 Calc 536

HINDU LAW—SELF ACQUISITION

See HINDU LAW—JOINT FAMILY

See HINDU LAW—PARTITION

I L R 34 Bom 106

I L R 32 All 305

——— Gains of science—*Mitakshara—Partition—Self acquired property—Astrology—Earnings made by unaided efforts without detriment to the family property* In a joint Hindu family governed by the Mitakshara one of the sons obtained certain elementary education in astrology from his father but no money of the family was expended on that education While still quite young this son ceased to live with the rest of the family continued his studies in astrology on his own account and ultimately managed by the exercise of his skill as an astrologer to acquire a considerable sum of money without detriment to the family property *Held* that this money was his self acquisition and could not properly be regarded as belonging to the joint family Katyayana s definition of acquisition through learning which is not participable cited in the Mitakshara [I 4 8] is not exhaustive but illustrative merely *Lachmin Kuar v Debi Prasad I L R 20 All 435* and *Paulem Valoo Chetty v Paulem Sooryah Chetty I L R 1 Mad 252* referred to DURGA DAT JOSHI *v* GANESH DAT JOSHI (1910)

I L R 32 All 305

——— Ancestral or self acquired property —*Mitakshara School—Gift by owner of impartible estate of portion of property to younger son for maintenance of himself and his descendants—Property if ancestral or self acquired in grantee s hands* Where a Hindu instead of allowing his self acquired or separate property to go by descent makes a gift of it to his son or bequeaths it to him by will such property has been treated by the Calcutta High Court as ancestral property in the hands of the son as if he had inherited it from his father *Muddun Gopal v Ram Buksh 6 W R 71* followed Authorities reviewed and the views taken by the other High Courts discussed The decision of the Privy Council in *Sartaj Kuari v Deoraj Kuari L R 15 I A 51 I L R 10 All 272* and *Sri Raja Rao Venkata v Court of Wards L R 26 I A 83 I L R 22 Mad 383* recognise that the holder of an impartible estate has the right to alienate the estate without the consent of the next taker but they do not by necessary implication involve the conclusion that if the holder of the impartible estate by a testamentary disposition or otherwise carves out a portion thereof and grants it to his younger son for the maintenance of the son and his descendants such property becomes the self acquired property of the grantee liable to be capriciously alienated by him to the detriment of the grandsons of the grantor Such property has all the incidents of ancestral property in the grantee s hands. *Durga Dutt v Ganeshwar I L R 36 Calc 943 13 C W N 1013* referred to HAZARI MALL BABU *v* ABANI NATH ACHARJYA (1912) 17 C W N 280

HINDU LAW—SELF ACQUISITION—*contd*

——— **What constitutes an intention to convert self acquired property in a joint property** The mere fact that a Hindu and his adopted son lived together and that the latter assisted in the management of the adoptive father s property is not sufficient to warrant the presumption that the adoptive father had thrown his self acquired property into the common stock for the benefit of both himself and the adopted son MOULVI SYED TAJMUL ALI *v* JAGA MOHAN DASS

1 Pat L J 524

——— **Self acquisition of father—Undivided son**—*Suit on promissory note after death of father—Whether succession certificate necessary* An undivided Hindu son acquires the self acquired properties of his deceased father by inheritance and not by survivorship Observation in *Vanna Tawker v Rama Chandra Tawker (1919) I L R 32 Mad 377* dissented from In a suit by the son for the recovery of money which was the self acquired property of the deceased father a succession certificate must be produced before a decree can be given in his favour *Venkatrama anna v Venkayya (1891) I L R 14 Mad 377* followed VAIRAVAN CHETTIAR *v* SRINIVASA CHARIOR (1921)

I L R 44 (F B) 499

HINDU LAW—SETTLEMENT

——— *Settlement of a portion of joint family properties on foster daughter in consideration of her marriage—Validity of settlement* A settlement of portion of joint family property by a Hindu in favour of his foster daughter in pursuance of a promise made by him in consideration of her marriage with another who offered to marry her on such a condition is not a gift but is valid and binding on the alienor s son to the extent of the alienor s share as an alienation for consideration NANJUNDASWAMI CHETTI *v* KANAGARAJU (1918) I L R 42 Mad 154

HINDU LAW—SHEBAIT

See HINDU LAW—ENDOWMENT —RELIGIOUS ENDOWMENT

——— *Shebait s right to take a share of surplus income from offerings—Hindu widow succeeding to shebaitship—Sale of right to take surplus offerings by creditor of widow in execution and purchase by himself—Suit by widow to set aside decree and sale as fraudulent —Dismissal of suit as barred under s 244 Civil Procedure Code (Act XIV of 1882) if legal—Suit by reversioner for declaration of his right to surplus income—Limitation—Appropriation of income if amounts to dispossession of office or is act of ordinary trespass only—Res judicata* One of several co shebaits of a temple who was entitled to receive a 3½ as share of the daily surplus income from the offerings to the temple having died his widow succeeded to the shebaitship A creditor of the widow G obtained a decree against her and caused the 3½ as share of the surplus daily offerings to be put up for sale and himself purchased it and from 1892 onwards went on appropriating the same The widow s suit to set aside the sale on the ground that both the decree and the sale were fraudulent was dismissed in the view that her remedy was by application under s 244 of Act XIV of 1882 and not by a suit The widow died in 1890 and the plaintiff her husband s reversionary heir

HINDU LAW—SHEBAIT—*contd*

brought this suit in 1910 for a declaration that he was entitled to receive the said 3½ as share of the surplus income The office of the shebait was a hereditary one which could not be held by any one who was not a Brahmin Panda and the purchaser was not a Brahmin Panda but a man of inferior caste who was not competent to hold the shebait s office or to provide for the performance of the duties of that office *Held* that the appropriation from time to time by the purchaser of the income derivable from the 3½ as share did not deprive *G* or the plaintiff of the possession of the office of the shebait although that income was receivable by them in right of the shebaitship and Art 144 of the Limitation Act had no application to the case By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings the purchaser acquired no title and no right to a share of that income On each occasion upon which he appropriated the share of the surplus income he committed a fresh actionable wrong in respect of which a suit could be brought against the shebait The right to the office of the shebait did not arise from or depend upon the receipt of a share of the surplus daily income from the offerings although the right to receive it was attached to and dependent on the possession of the right to the shebaitship *Held* also that the defendant s further plea that the suit was barred by *res judicata* was untenable BHAIAJI THAKUR *v* JHABUTA DAS (1914)

I L R 42 Calc 244
18 C W N 1029

HINDU LAW—STRIDHAN

See HINDU LAW—SUCCESSION

I L R 37 Calc 363
I L R 34 Bom 385
I L R 39 Calc 319

1 ———— Succession—*Executor conveyance by as beneficial owner—Construction—inconsistency between recitals and operative part—All estate clause effect of—Partition—Permanent improvements—Enquiry* A Hindu governed by the Bengal school of Hindu Law died in 1886 leaving a will whereby he devised certain immoveable property to his daughter *A* subject to certain charges by way of maintenance Probate was granted to the executors *B* and others in 1887 *A* died in 1891 intestate leaving her surviving five sons *B* and four others a married daughter and two unmarried daughters the plaintiff and another In 1900 a conveyance of the property was executed by *B* and his surviving brothers in favour of the defendants This deed proceeded on the assumption that *B* and his brothers were absolutely and beneficially entitled to the property they however purported to convey all the estate right title interest claim and demand whatsoever of the vendors unto and upon the said property On a suit instituted by the plaintiff for the declaration of her title to a moiety in the property and for partition —*Held* that inasmuch as on *A* s death the property devolved as her *stridhan* property on her unmarried daughters and as *B* did not purport to sell and convey as executor the plaintiff was entitled to a moiety in the property as against the defendant and that a decree for partition should be passed Inasmuch as by a decree dated the 10th December 1903 the defendants became absolutely entitled to the moiety which had devolved on plaintiff s unmarried sister

HINDU LAW—STRIDHAN—*contd*

and as the defendant had expended moneys in improving the property —*Held* that there must be an account of the money expended by the defendants in permanent improvements since the 10th December 1903 and an enquiry as to the extent to which the pesent value of the property had been increased by the expenditure INDRA SUNDARI DASI *v* BIJRAJ NOPANI (1910)

L R 37 Calc 362

2 ———— *Kamathis—Mitakshara—Mayukha—Law governing Kamathis who live in Bombay—Succession—Anvadheya Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form* The Kamathis settled in Bombay are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha where they agree but where they differ the Mayukha law must prevail The *stridhan* of a female devolves on her death upon her husband in preference to the son born of her by adulterous intercourse The law will even among Shudras presume the marriage to have been according to the approved forms if the parties belonged to a respectable family JAGANNATH RAGHUNATH *v* NARAYAN (1910)

I L R 34 Bom 553

3 ———— *Succession—Stridhan—Property acquired by adverse possession* Where a Hindu female acquires a title to property by means of adverse possession such property becomes her *stridhan* and descends as such to her heirs *Brij Indar Bahadur Singh* v *Ranee Jankir Koer L R 5 I A 1* and *Mohim Chunder Sanyal* v *Kashi Kant Sanyal 2 C W N 161* followed KANHAI RAM *v* MUSAMMAT AMRI (1910)

I L R 32 All 189

4 ———— When certain property was acquired from earnings of husband and wife by trading jointly *Held* her interest therein was her Stridhan MUTHU RAMA KRISHNA NARCHEN *v* MASIMUTHER GOUNDAN

I L R 33 Mad 1036

5 ———— Maiden's stridhan—*Succession—Mitakshara—Father s brother s son—Sister—Sister s son* Under the Mitakshara school of Hindu law a sister (father s daughter) and a sister s son (father s daughter s son) are entitled to succeed to a maiden s *stridhan* in preference to a father s brother s son *Per* N P CHATTERJEA *J* —Under the Mitakshara law in the absence of any rule determining the nearness among relations of the father in case of succession to a maiden s *stridhan* the question should be decided by analogy to the order of succession to the *stridhan* of a childless woman married in a disapproved form so far as it is applicable for in both cases the succession is confined to the father s family The *stridhan* of a childless woman married in a disapproved form devolves after the father in the same manner as if it had belonged to the father himself and the succession follows the order laid down in the text of Yajnavalkya regulating obstructed succession *Quære* Whether the son or grandson of the father in such a case takes before the father or after him and before the other heirs mentioned in the said text DWARKA NATH ROY *v* SARAT CHANDRA SINGH ROY (1911)

I L R 39 Calc 319
15 C W N 1076

HINDU LAW—STRIDHAN—*contd*

6 —————————— *Deceased Hindu maiden—Stridhan—Competing heirs—Father's sister—Father's male gotraja sapindas five or six degrees removed—Preference to father's sister* In the case of a deceased Hindu maiden leaving surviving her father's sister and her father's male *gotraja sapindas* five or six degrees removed her *stridhan* goes to her father's sister in preference to his said male *gotraja sapindas* TUKARAM v NARAYAN RAMCHANDRA (1912) **I L R 36 Bom 339**

7 ———————— **Devolution**—*Mitakshara—Mayukha—Stridhan—Daughter's sons take severally and not jointly—Co parcenary—Basic notion of co parcenary—Obstructed and unobstructed succession—Estate by partition—Estate by birth—Dayada—Pikhta—Interpretation—Self acquired property* Property inherited by sons from their mother is not a joint estate but a tenancy in common according to both the Vyavahara Mayukha and the Mitakshara The basic principle of a joint tenancy or co parcenary under Hindu law explained A joint tenancy is property inherited as an unobstructed succession and is called *rikhta* It devolves on the heirs as a co parcenary A tenancy *in common* is property inherited as an obstruction and is called *samavibhaga* because when the inheritance falls in it devolves on the heirs as a divided estate The terms *self acquired property* as distinguished from *joint property* explained Property originally self acquired because acquired without detriment to joint ancestral estate becomes joint when it has been mixed with and treated as part of the said joint estate by the co parceners BAI PARSON v BAI SOMLI (1912) **I L R 36 Bom 424**

—————————— *Stridhanam—Maiden's property—Sapindas right of inheritance of—Father's sister—Father's paternal uncle's son—Preferential heir—Texts of Baudhayana and Brihaspati—Mitakshara and Smriti Chandrika* Under the Mitakshara Law the heirs to the stridhanam property of a maiden who died leaving neither uterine brothers nor mother nor father are the sapindas of her father and as between her father's paternal uncle's son and her father's sister the former is the preferential heir Text of Brihaspati held inapplicable text of Baudhayana and commentaries of Mitakshara and Smriti Chandrika discussed *Kamala v Bhagirathi (1915) I L R 38 Mad 45* followed SUNDARAM PILLAI v RAMASAMIA PILLAI (1920) **I L R 43 Mad 32**

8 ———————— **Half sister's son of Hindu widow**—*Probate application for—Daughter's son of the great-grandson of the great-great-grandfather of the testatrix husband whether preferential heir to half sister's son* Under the Dayabhaga School of Hindu law a half sister's son of a widow is heir to her *stridhan* property in preference to the daughter's son of the great grandson of the great great grandfather of her husband and that therefore the latter has no *locus standi* to oppose an application for probate by the former of a will alleged to have been executed by the said widow in regard to such property *Dasharathi Kundu v Bipin Behary Kundu I L R 32 Calc 261* and *Bholanath Roy v Rakhal Dass Mukharji I L R 11 Calc 69* referred to *Chaloo Kurmi v Paja ram Tewari 11 C L J 121* distinguished SHASHI BHUSHAN LAHIRI v RAJENDRA NATH JOARDAR (1912) **I L R 40 Calc 82**

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9 ———————— **Prostitute's property**—*Succession to* The mere fact that a Hindu woman has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood and consequently her *stridhan* property passes upon her death in the absence of nearer heirs to her brother's son as an heir under the Bengal school of Hindu law *Tara Munee Dossea v Motee Bunanee 7 Mac Sel Rep 325 8 I D (O S) 547 Ramnath Talapattro v Durga Sundri Devi I L R 4 Calc 550 In the goods of Kaminey money Bewah I L R 21 Calc 697 Ramananda v Railishori Barmani I L R 22 Calc 347 Sarna Moyee Bewa v Secretary of State for India I L R 25 Calc 254* and *Sundari Letani v Pitambari Letani I L R 32 Calc 871* overruled so far as they hold that tie of blood is destroyed by unchastity or in the case of a Hindu woman by her adopting the life of a prostitute *Bishesher v Mala Gholam 2 All H C 300 Musammat Ganga Jati v Ghasita I L R 1 All 46 Adiyapa v Rudrava I L R 4 Bom 104 Kojiyadu v Lakshmi I L R 5 Mad 149 Subbaraya Pillai v Ramasami Pillai I L R 23 Mad 171 Khulnath Mondol v Secretary of State for India 10 C W N 1085 Sundari Dasse v Nemye Charan Das 6 C L J 372* and *Tripura Charan Bannerjee v Harimati Dassi I L R 38 Calc 493* approved *Sivasangu v Minal I L R 12 Mad 277* and *Narasanna v Ganga I L R 13 Mad 133* distinguished and dissented from HIRALAL SINGHA v TRIPURA CHARAN RAY (1913) **I L R 40 Calc 650**

10 ———————— **(Mitakshara)—Preference of co wife's daughter to sapindas of husband** Under the Mitakshara *law of inheritance the* daughter of a co wife of a deceased woman married in one of the approved forms is entitled to succeed to her stridhanam property in preference to the sapindas of her husband such as his *father's* brother's son *Placitum* 11 of section XI of Chapter II Mitakshara applied Colebrooke's translation of sapinda in that *placitum* as kinsmen allied by funeral oblations *is incorrect the* correct meaning being kinsmen allied by affinity or persons allied to each other by possession of particles of the same body According to the above text the stridhanam property of a woman married according to an orthodox form who has left no issue will devolve on her husband and on failure of the husband the property will go to his sapindas in the order laid down in the Mitakshara with reference to the succession to the property of a male *Venkatasubramaniam Chetti v Thayaramma I L R 21 Mad 263 Gojabai v Shrimant Shahajirao Maloji Raje Bhosle I L R 17 Bom 114 117 Jagannath Prosad Gupta v Runjit Singh I L R 25 Calc 354 367 Vrijbhukandas v Sripati I L R 30 Bom 333 Bai Kesserbai v Hunsraj Morarji I L R 30 Bom 31 Thakoor Deyhee v Rai Baluk Ram 11 Moo I A 139 175* and *Champat v Shiba I L R 8 All 393* applied West and Buhler p 518 T Krishnasami Aiyar's translation of Smriti Chandrika Chapter IX section III verse 83 Golab Chandra Sircar Sastri's Hindu Law 4th edition p 401 and Bhattacharya's Hindu Law p 580 *referred to* NANJA PILLAI v SIVARAGAVATHACHI (1913) **I L R 36 Mad 116**

11 ———————— **Widow's estate**—*Alienation—Property acquired by Hindu widow with accumulations of income of husband's estate* Property acquired by a Hindu widow with accumulations of

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the income of her husband's estate does not constitute her *stridhan* but forms part of the *corpus* of the estate and as such as inalienable except for purposes that would justify alienation of the original estate *Bhagbut Deyi* v *Bholanath Thakoor* I L R 1 Cal 10 I L R I 1 and *Isri Dutt Kor* v *Hansbutti Koerain* I L R 10 Calc 324 I L R 10 I A 150 referred to KULA CHANDRA CHAKRAVARTI v BAMA SUNDARI DASEE (1914) I L R 41 Calc 870

12 ——— Mitakshara Brother's widow not an heir—*Burden of proof in suit for possession* The stridhanam property of a Hindu female devolves on her death on her husband and failing the husband on his sapindas in the order laid down in the Mitakshara with reference to the succession to the property of a male *Marya Pillai* v *Sivalogavallachi* 2 Mad H C 168 followed A brother's widow is a *gotraja sapinda* but is not entitled to succeed as an heir under the Madras system of inheritance *Lalamma* v *Pullayya* I L R 18 Mad 168 followed *Mari* v *Chinnammal* I L R 8 Mad 107 and *Venkatasubramaniam Chetti* v *Thayarammah* I L R 21 Mad 263 referred to On failure of the husband's sapindas the blood relations of the *propositus* are entitled to succeed to the exclusion of the Crown A plaintiff seeking to recover possession from a defendant in possession though a trespasser must prove his own title KA AKAMMAL v ANANTHAMATHI AMMAL (1914) I L R 37 Mad 293

13 ——— Promise to give dowry at marriage—*Land given years afterwards if jautuka—Ajautuka properties succession to—Preferential heir—Husband or brother* On the death of a Hindu married woman governed by the Dayabhaga Law her *ajautuka stridhan* properties will always be inherited by the brother in preference to the husband irrespective of the form in which the marriage was celebrated Property given by a brother to his sister 7 years after the latter's marriage in apparent fulfilment of a promise made at the time of marriage to give a quantity of land as dowry is nevertheless *ajautuka* as the promise could not have been specifically enforced in respect of the land given which in fact was given after marriage MAHENDRA NATH MAITY v GIRIS CHANDRA MAITY (1915) 19 C W N 1287

14 ——— Female heir —Stridhan inherited by female heirs does not become the latter's *stridhan* The female heirs take only a Hindu woman's estate in the property *Sheo Shankar Lal* v *Debi Sahai* I L R 25 All 468 L R 30 I A 202 *Prankissen Laha* v *Noyanmoney Dassee* I L R 5 Calc 222 and *Huri Dayal Singh Sarmana* v *Grish Chunder Mukerjee* I L R 17 Calc 911 referred to JOGENDRA CHANDRA BANERJEE v PHANI BHUSAN MOOKERJEE (191) I L R 43 Calc 64

15 ——— Dayabhaga—*Daughter's daughter if may succeed—Daughter's succession to mother's stridhan whether takes it as stridhan* The general principle in Bengal is that women can only inherit under some express text and a daughter's daughter is not included in the text books in the special line of heirs to *stridhan* whether the *stridhan* is of the class known as *yautaka* or *ayautaka* A woman inheriting *stridhan* property takes only the limited estate of a Hindu woman in such property and on her death it passes to the heir of the woman whose *stridhan* it was MADHUMALA DASSI v LAKSHAN CHANDRA PAL (1913) 20 C W N 627

16 ——— Saudayika—*Gift of property by a father to his daughter before her marriage—Power of alienation* A gift of property by a father to his daughter before her marriage is saudayika *stridhanam* which is at her absolute disposal *Per* SESHAGIRI AYYAR J—*Saudayika stridhanam is gifts from affectionate kindred and includes both yautaka and ayautaka* not received from strangers Hindu Law texts examined *Ponnusawmy Moodelly* v *Subbaroya Moodely* (1859) 6 *Selwin's S D* 1 *Pep* 7 referred to *Judoo Nath Sircar* v *Busunt Coomar Roy Choudhry* 19 W R 264 applied *Bhau* v *Raghunath* I L R 30 Bom 229 referred to *Dantuluri Rayappara* v *Mallapudi Rayudu* 2 *Mad H C R* 360 distinguished *Quære* Whether immoveable property received from the husband should be excluded from this species of disposable property MUTHUKARUPPA PILLAI v SELLATHAMMAL (1914) I L R 39 Mad 298

17 ——— Mitakshara Succession—Adoption—*Rights of adopted son—Competition between adopted son and natural son of co wives—Sapindas—Co wife's natural son if son—Texts construction of—Mitakshara Ch II s XI paras 9 11 25—Without issue meaning of—Manu Ch IX verse 183—Yajnavalkya Ch II verses 117 145* S a Hindu governed by the Mitakshara school of Hindu Law married four wives in succession In conjunction with his first wife by whom he had no issue he adopted a son *H* By his second wife *S* had a son *G* born to him S predeceased his fourth wife *M* having had no issue by her *M* died intestate On a suit brought by *H*—*Held* that both *H* and *G* were entitled to succeed to *M's stridhan* property as *sapindas* of *S* and in the absence of any express text curtailing the rights of the adopted son in the circumstances of the present case *H* was entitled to share equally with G on the general principle that the adopted son occupies the same position as a natural son and his rights are in every respect similar to those of a natural son *Joy Kishore Choudhry* v *Panchoo Baboo* 4 C L R 302 *Padmakumari Debi* v *Court of Wards* I L R 8 Cal 302 L R 8 I A 229 followed *Nagindas Bhagwandas* v *Bachoo Hurkissondas* I L R 40 Bom 270 referred to The expression without issue in Mitakshara Chap II s XI, para 9 must be construed in its ordinary sense, and *M* must be deemed to have died without issue *Quære* Whether Manu Chap IX verse 183 has any reference to questions of inheritance *Annapurni Nachiar* v *Forbes* I L R 23 Mad 1 *Bhimacharya* v *Ramacharya* I L R 33 Bom 452 referred to *Per* MOOKERJEE J A special text forming an exception to a general text should be construed strictly and applied only to cases falling clearly within it *Gangu* v *Chandrabhagabai* I L R 32 Bom 275 and *Anandi* v *Hari Suba* I L R 33 Bom 404 referred to GANGADHAR BOGLA v HIRA LAL BOGLA (1916) I L R 43 Calc 944

18 ——— Vyavahara Mayukha—Succession—*Non technical stridhana—Sons take precedence over sons sons* The non technical *stridhana* of a Hindu female governed by the Vyavahara Mayukha descends to her son in priority to her

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son son BAI PAMAN v JAGJIVANDAS KASHIDAS (1917) I L R 41 Bom 618

19 ———— Ajautuka—*Stridhan succession to—Son or married daughter—Property whether yautuka or ajautuka—Onus* The commonly accepted view of ajautuka property of a Dayabhaga Hindu woman is that the sons and the maiden daughters are entitled to it in equal share but the married daughters are postponed to the son DELANNEY v ERAN HARI GUHA (1918) 22 C W N 990

20 ———— Husband s younger brother or son adopted—*By father after mother s death and marrying a second wife—Succession Act (X of 1865) s 111* A a daughter of D by his first wife to whom D by his will had bequeathed an annuity which in the event of her death was to pass to her heirs having died a widow without issue the question was whether her husband s younger brother or a boy adopted by D after the death of his first wife and marriage of a second wife was the preferential heir *Held* that the husband younger brother was entitled to the annuity in preference to the adopted son of D That s 111 of the Succession Act did not apply and A s heirs were not precluded from claiming the annuity by reason of A having survived the testator CHINTAMONI DASI v DEBI PROSANNA ROY (1919) 23 C W N 1038

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See AGRA TENANCY ACT 1901 s 22
I L R 32 All 314
I L R 37 All 558
I L R 41 All 629

See HINDU LAW—Coparcener

See HINDU LAW—CUSTOM
I L R 32 All 363

See HINDU LAW—SURVIVORSHIP
I L R 33 Mad 165

———— grandfather's daughter's son—
See Will 24 C W N 316

1 ———— Stridhan—*Dayabhaga—Ayautuka stridhan—Succession—Property of childless widow—Step-brother—Husband's younger brother* Under the Dayabhaga law the younger brother of the husband of a childless widow is entitled to succeed to her *ayautuka stridhan* property in preference to her step-brother DEBIPRASANNA ROY CHOWDHRY v HARENDRA NATH GHOSE (1910)
I L R 37 Calc 863

2 ———— *Anvadheya stridhan—Sons and daughters succeed equally—Among daughters unmarried have preference—Mayukha* A Hindu female governed by the Mayukha died leaving property which she inherited from her father under a deed of gift subsequent to her marriage She left her surviving three daughters and one son A dispute as to succession having arisen —*Held* that the property being *anvadheya* stridhan should be divided equally among her son and daughters with this difference however as to the latter that the unmarried should have preference over the married *Ishobai v Haji Ayeb Haji Rahimtula I L R 9 Bom 115* and *Sitabai v Wasantrao 3 Bom L R 801* followed. DAYALDAS LALDAS v SAVITRIBAI (1909)
I L R. 34 Bom 385

3 ———— Step mother—*Mitakshara—Father s sister s son—Gotraja sapinda—Letters of Administration* In the Bengal Presidency under the interpretation of the Mitakshara law as accepted in the districts governed by that law a step mother is not entitled to succeed to the estate of her step-son either as a *gotraja sapinda* or in preference to the father s sister s sons *Jog Lal v Durani Kowar B L R Sup Vol 6 Kumaravelu v Virana Goundan I L R 5 Mad 29 Muthammal v Vengalakshmi Ammal I L R 5 Mad 32* and *Punna Nand v Surjiani I L R 16 All 221* referred to *Kesserbai v Valab Raoji I L R 4 Bom 188 Lallubhai Bapubhai v Cassibai I L R 5 Bom 110* and *Rasoobai v Zoolekha I L R 19 Bom 707* not followed having regard to the principle laid down in *Collector of Madura v Moottoo Ramalinga Sathupathy 12 Moo I A 397* TAHALDAI KUMRI v GAYA PERSHAD SAHU (1909)
I L R 37 Calc 214

4 ———— Uncle of half blood—*Mitakshara—Competition between uncle of the half blood and the son of an uncle of the whole blood* *Held* that according to the Hindu law of the Mitakshara school an uncle of the half blood succeeds in preference to the son of an uncle of the whole blood the former being nearer in propinquity than the latter *Sukh Singh v Sirakri Kunwar I L R 19 All 215* distinguished KESRI v GANGA SAHAI (1910) I L R 32 All 541

5 ———— Step brother—*Mitakshara—Ahban Thakurs—Step-brother if may succeed equally with brother of whole blood—Special family custom contrary to Mitakshara—Proof—Wajib ul-arz entries in—Value as evidence of custom* Under the Mitakshara law a brother of the whole blood is entitled to succeed to estate of a deceased brother in preference to a step brother and in the absence of evidence sufficient to establish such a special custom in the family as to rebut the ordinary presumption that the Mitakshara law prevailed the claim of the step-brother to an equal share was properly rejected There is no class of evidence which is more likely to vary in value according to circumstances than that of *Wajib ul arzes Muhammad Imam Ali Khan v Sardar Husain Khan L R 25 I A 161 169 s c 2 C W N 737 Musammat Parbati Kunwar v Rani Chandrapal Kunwar L R 36 I A 125 s c 13 C W N 1073* followed Where from an internal evidence it seemed probable that the entries recorded connoted the views of individuals as to the practice they would wish to see prevailing rather than the ascertained fact of a well established custom *Held* that the Court in India had properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed THAKUR ANANT SINGH v THAKUR DURGA SINGH (1910)
I L R 32 All. 362
14 C W N 770

6 ———— Daughter s daughter s son—*Mitakshara—Bandhus—Alienation by Hindu widow—Legal necessity* *Held* that under the Mitakshara law a daughter s daughter s son is a *bandhu* and in the absence of any other heir is entitled to succeed to the estate of the last owner *Ajudhia v Ram Sumer Misir I L R 31 All 454* followed RAM LHAL THAKUR v LAN MATI LADAIN (1910)
I L R 32 All 640

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7 ———— Samanodakas—*Sakulyas—Succession—Bandhu—Cause of action*. Samanodakas are those who participate in the same oblation of water and include descendants from a common ancestor more remotely related than the thirteenth degree from propositus. A sister's son is only a *bandhu*. A *samanodaka* is a nearer heir to a deceased Hindu than a *bandhu* and will exclude the latter. Where therefore *B* was in the thirteenth degree from the common ancestor *J* and *D* was in the fourteenth degree from him and *B's* widow executed a deed of compromise declaring that after her death *D* would become entitled to the possession of *B's* property. *Held* that this gave no cause of action to *B's* sister's son for a suit for declaration of title and cancellation of the deed. *Las Dellore* v. *Amritram Januatram* *I L R* 19 *Bom* 3, referred to. RAM BARAN PAL *v*. KAMLA PRASAD (1910)
I L R 32 All 594

8 ———— Illegitimate son—*Illegitimate son succeed as a co-heir with the widow*. The illegitimate son of a separated Hindu who dies without legitimate male issue succeeds as a co-heir with the widow daughter or daughter's son. *Parmalinga Muppan* v. *Iradai Coundan* *I L R* 1 *Mad* 319 301 approved. *Chinnammal* v. *Varadarajulu* *I L R* 15 *Mad* 307 followed. MEENAKSHI AMMAL *v*. APPAKUTTI (1909)
I L R 33 Mad 226

9 ———— Illegitimate son—*of a widow whose remarriage is prohibited has no right of succession—Adverse possession—Right of true owner to recover possession by inducing tenant to attorn*. An illegitimate son by a Sudra widow whose remarriage is forbidden has no right of inheritance. *Venkatachella Chetty* v. *Parvatham* 8 *Mad H C* 134 referred to. To entitle the illegitimate son to succeed the connection must not be adulterous or forbidden by law. Where persons holding adversely to the true owner enjoy the lands through a tenant who however has not been let into possession by them or their predecessors in title the true owner is not estopped from recovering possession by inducing such tenant to attorn to him. ANNAYYAN *v*. CHINNAN (1909)
I L R 33 Mad 366

10 ———— Religious endowment—*Pallavacharya Gosain*. *Held* that where there is a dedication of property by a private individual for religious purposes in the absence of any proof of disposal or direction by the dedicator the trusteeship will vest in the latter's heirs. *Held* also that as regards temples belonging to the Ballavacharya Gosain sect the ordinary rule of the Hindu law does not apply but the succession is regulated by special custom. In the present case a custom set up by the plaintiffs by which a daughter's sons were entitled to the succession was held not to have been established. *Gosami Sri Gridhariji* v. *Romanlalji Gosami* *I L R* 17 *Calc* 3, *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* *L R* 1 *I A* 209 and *Srimati Janoki Debi* v. *Sri Gopal Acharji* *L R* 10 *I A* 32, *I L R* 9 *Calc* 766 referred to. MOHAN LALJI *v*. MADHUSUDAN LALA (1910)
I L R 32 All 461

11 ———— Sanyasis—*Property left by—Succession—Dasnami sanyasis—Chela's right to succeed—Biraja Home ceremony if essential to valid appointment of chela—How and at what age performed—Proof of—Recital of—Muth or—Subordinate muth—Nomination of chela or election by members of the sect—Custom the subordinate muth—Lapse of property on death of mohunt—Proof*. The inadequacy or untrue recital of the consideration is a question between the donor and the donee and would not of itself be sufficient to invalidate the transaction. *Lal Achal Ram* v. *Kazim Husain Khan* *I L R* 3 *I A* 111 *ac* 9 *C W N* 477, *Kunwar Ram Lal* v. *Nilkanth* *L R* 20 *I A* 112, *Rajah Mokham Singh* v. *Rajah Rup Singh* *L R* 20 *I A* 127, *Bhagwat Dayal* v. *Debi Dayal* *L R* 35 *I A* 48 *I L R* 35 *Calc* 420 *C W N* 523 followed. *Held* on the evidence that according to the custom of the *dasnami sanyasis* every aspirant for entrance into the order has to pass through a period of probation which may extend to months or even years and during which period it is open to the *chela* to revert to his natural family. It is not till the performance of the final ceremony or the *biraja home* that the aspirant is irrevocably attached to the sect and completely severed from his family. It is therefore essential to entitle a *chela* to claim by inheritance the estate of his *guru* that the *biraja home* should have been duly performed. It is not usual to whisper the *mulmantras* into the ears of the novice at the time of the first initiation when it is still uncertain whether he will or will not return to the enjoyments of worldly life though some *mantras* may be recited on such an occasion. *Quære*. Whether *biraja home* ceremony can be performed when the *chela* is under sixteen years of age but unquestionably the rule is that the *chela* must have reached years of discretion so as to be able to realise for himself the full significance of the final act of the renunciation of the world. *Mahunt Ramji Das* v. *Lachhu Dass* 7 *C W N* 145, *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* *I L R* 10 *Mad* 375, *Pangachariar* v. *Yegna Dikshatur* *I L R* 13 *Mad* 524 referred to. The *chela* of a mohunt cannot claim to be the latter's heir under the rule which allows a virtuous pupil to succeed to a *yati*. The ordinary rule is that among the *sanyasis* generally no *chela* has right as such to succeed to the property of his deceased *guru*; he must be nominated by his *guru*, such nomination being generally confirmed by the mohunts of the order, or in default of such appointment he must be elected by the mohunts and principal persons of the sect in the neighbourhood. But this is not a universal rule and in some cases according to custom the principal *chela* succeeds as of right even without such appointment or formal election but apparently an election or recognition by members of the sect is necessary. *Narunjun Barthee* v. *Padaruth Barthee* *I S D* 1 *N W P* 512, *Mallo Das* v. *Kanhi Das* *I L R* 1 *All* 33, *Jugunnath Pal* v. *Bidya Anund Dutt* 10 *W R* 17, *Chhajju Das* v. *Dharam* *I L R* 9 *All* 109 referred to. When one *muth* is the offshoot of another there is no fixed rule which regulates the relation between the two and it cannot be said that the subordinate *muth* necessarily follows the customs of the parent one. *Kashibashi* v. *Chitumbernath* 0 *W R* 217, *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* *I L R* 10 *Mad* 375, *Prasad Das* v. *Mohunth Kriparam* 8 *C L J* 439 relied on. In order to establish a custom that on the death of the mohunt his properties lapse to the

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math and devolve on the spiritual head thereof it is necessary to show not only that in some instances the properties had so passed to the spiritual head but also that this had taken place in the presence of a *chela* who would otherwise have been competent to take by inheritance GOSSAIN RAMDHAN PURI *v* GOSSAIN DALMIR PURI (1909) 14 C W N 191

12 ———— Unchaste widow—*Unchastity of widow no bar to her right of succession to her son* There is no authority for holding that a Hindu lady who after her husband's death has waited and then gone to live with another man is thereby excluded from inheritance to the estate left by her son DAL SINGH *v* MUSAMMAT DINI (1909) I L R 32 All 155

13 ———— Ayautuka stridhan—*Succession* Under the Dayabhaga the husband's younger brother is entitled to succeed to the *ayautuka stridhan* property of a childless woman in preference to a step brother DEBI PRASANNA ROY *v* HARENDRA NATH GHOSE (1910) 15 C W N 383

14 ———— Mother's unchastity—*Mitakshara—Unchastity of mother no bar to her inheriting son's estate* *Held* that unchastity does not preclude a Hindu mother from succeeding to her son's property *Ganga Jati* v *Ghasita I L R 1 All 46 Dal Singh* v *Dini I L R 32 All 155* and *Vedammal* v *Vedanayaga Mudaliar I L R 31 Mad 100* followed BALDEO SINGH *v* MATHURA KUNWAR (1911) I L R 33 All 702

15 ———— Nambudris in Malabar—*Self acquired property of Nambudri Brahman does not pass to the undivided family but to his heirs under Hindu Law* Nambudri Brahmans are governed by Hindu Law except in so far as it is shown to have been modified by usage or custom having the force of law the probable origin of the special usage being either some doctrine of Hindu Law as it stood at the date of their settlement in Malabar though now obsolete or some Marumakkatayam usage The Hindu Law applicable is that laid down in the Mitakshara The self acquisition of a Nambudri Brahman passes to his heirs under the Mitakshara Law and not to the undivided family to which he belongs No Marumakkatayam usage has influenced the family law of Nambudris in this respect and no doctrine of ancient Hindu Law denied the right of the son to succeed to the separate property of father VISHNU NAMBUDRI *v* AKKAMMA (1910) I L R 34 Mad 496

16 ———— Prostitute's estate—*Stridhan—Severance as effect of degradation—Succession to property of degraded woman* The absolute property of a Hindu prostitute is to be treated as her *stridhan* for the purposes of succession So far as succession is concerned the degradation suffered by prostitution severs a woman from her natural relations at the moment she becomes degraded, but not from her sons or chaste daughters born after degradation *In the goods of Kamineymoney Bewah, I L R 21 Cal 697 Sarnamoyee Bewa* v *Secretary of State for India I L R 25 Calc 254 Bhutnath Mondol* v *Secretary of State for India 10 C W N 1085 Narasanna* v *Gangu I L R 13 Mad 133* followed *Taramunnee Dassee* v *Motee Buneeanee* (1846) *S D A 297 Sivasangu* v *Minal, I L R 12 Mad 277* approved but distinguished *Sundari Dassi* v *Nemye Charan Dhur 6 C L J 372 Subbaraya Pillai* v *Ramasami Pillai I L R 23 Mad 171 Narain Das* v *Trilok Tiwari I L R 29 All 4* not followed TRIPURA CHARAN BANNERJEE *v* HARIMATI DASSI (1911) I L R 38 Calc 493

17 ———— Impartible property—*Mitakshara—Succession—Impartible property governed by the rule of primogeniture nevertheless joint property* Where ancestral property is impartible and is held by a single member of the family all the members of the family must be deemed to be joint in estate and the rule of succession to the property is the same as that which governs the case of partible property so that a junior member of the family who gets maintenance from the person holding the impartible estate succeeds upon his death to the estate by right of survivorship Whatever may be the powers of alienation of the holder of an impartible estate the succession to it is governed not by the rule which applies to separate property but by the rule of survivorship Therefore the person who succeeds to the estate does not do so as the heir or legal representatives of his predecessor and the estate cannot be regarded as the assets of the last previous holder *Harpal Singh* v *Bishan Singh 6 A L J 753* followed *Raja of Kalahasti* v *Achigadu I L R 31 Mad 451* and *Zamindar of Karvetnagar* v *Trustee of Tirumalai I L R 32 Mad 429* dissented from INDAR SEN SINGH *v* HARPAL SINGH (1911) I L R 34 All 79

18 ———— Great grandson of the grandfather—*Mitakshara—Succession—Grand son of the great-grandfather* According to the Mitakshara law the three immediate descendants of the grandfather succeed in preference to the great grandfather and his descendants, and the great grandson of the grandfather is a perferential heir as against the grandson of the great-grandfather The following cases were referred to in the judgments delivered —*Kalian Rai* v *Ram Chander I L R 24 All 128 Rutcheputty Dutt Jha* v *Rajunder Narain Rae, 2 Moo I A 133 Kashibai Ganesh* v *Sitabai Raghunath Shivram 13 Bom L R 552 Pachava* v *Kalingapa I L R 16 Bom 716 Kureem Chand Gurain* v *Oodung Gurain 6 W R 158 Chinnasami Pillai* v *Kunju Pillai I L R 35 Mad 152 Bhyah Ram Singh* v *Bhyah Ugur Singh 13 Moo I A 373* and *Suraya Bhukta* v *Lakshminarasamma I L R 5 Mad 291* BUDDHA SINGH *v* LALTU SINGH (1912) I L R 34 All 663

19 ———— Step sister—*Vyavahara Mayukha—Succession—Paternal uncle—Priority* According to Hindu Law as administered under the Vyavahara Mayukha, the half sister of the *propositus* is entitled to succeed in preference to his paternal uncle TRIKAM PURSHOTTAM *v* NATHA DAJI (1911) I L R 36 Bom 120

20 ———— Maiden's stridhan—*Mitakshara—Stridhan—Father's brother's son—Sister—Sister's son* Under the Mitakshara school of Hindu Law a sister (father's daughter) and a sister's son (father's daughter's son) are entitled to succeed to a maiden's *stridhan* in preference to a father's brother's son. *Per* N R CHATTERJEA J Under the Mitakshara law in the absence of any rule determining the nearness among relations of the father in case of succession to a maiden's

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amilia the question should be decided by analogy to the order of succession to the *stridhan* of a childless woman married in a disapproved form so far as it is applicable for in both cases succession is confined to the father's family. The *stridhan* of a childless woman married in a disapproved form devolves, after the father in the same manner as if it had belonged to the father himself and the succession follows the order laid down in the text of Yajnavalkya regulating obstructed succession. *Quare* Whether the son or grandson of the father in such a case takes before the father or after him and before the other heirs mentioned in the said text. DWARKA NATH ROY *v* SARAT CHANDRA SINGH ROY (1911)

I L R 39 Calc 319
15 C W N 1036

21 ——— Succession among collateral sapindas—*Mitakshara Law—Brother's son in Mitakshara does not include brother's grandson—Under Mitakshara Law test in determining priority among unenumerated heirs is not spiritual efficacy but nearness of relationship—Brother's great grandson succeeds in preference to uncle's grandson* The word sons in the text of the Mitakshara Chap II s. I verse 2 s IV verses 7 and 8 and in s. V verse 1 should not be given an extended meaning so as to include the grandsons In enumerating therefore the heirs in the ascending line or among collaterals in the passages above stated Vignaneswara did not mean to include in the words sons the grandsons as well whether of the brother the paternal uncle or the great uncle Such grandsons cannot claim rights of inheritance as heirs enumerated in the above texts *Lakshmi Narasamma v Jagannadham I L R 5 Mad 291* approved *Kalian Rai v Ramachandra I L R 24 All 128* not followed In the case of competition between sapindas not enumerated in the above texts the nearest sapinda entitled to succeed must be determined not by considerations of superior religious efficacy but by nearness of relationship and preference should be given to the sapinda belonging to the nearer line The great principle pervading the law of inheritance under the Mitakshara system is that the nearer line excludes the more remote The brother's great grandson succeeds in preference to the uncle's grandson CHINNASAMI PILLAI *v* KUNJU PILLAI (1911)

I L R 35 Mad 152

22 ——— Stridhan succession to—*Step sister's son as heir* A step sister's son is a preferential heir to a woman's *stridhan* to the daughter's son of the great grandson of the great grandfather of the woman's husband SASI BHUSAN LAHIRI *v* RAJENDRA NATH JOARDAR (1912)

16 C W N 1094

23 ——— Mitakshara—Succession—Priority—*Full sister—Son of a separated half brother—Civil Procedure Code (Act V of 1908) s 11—Res judicata between co-defendants* Under the Mitakshara the son of a separated half brother is entitled to succeed in preference to a full sister of the *propositus* *Bhagwan v Warubai I L R 32 Bom 300* followed *Per* SHAH, J —In order that any decision between co defendants might operate as *res judicata* in any subsequent suit between them it is necessary to establish that there was a conflict of interests among the defendants, and that there was a judgment defining the real rights and obligations of the defendants *inter se* *Ramchandra Narayan v Narayan Mahadev I L R 11 Bom 216* followed HARI ANNAJI *v* VASUDEV JANARDAN (1914)

I L R 38 Bom 438

24 ——— Step mother cannot inherit under Mitakshara law—*but may inherit according to a special caste custom* A step mother is not to be allowed to inherit to her step son as a *gotraja sapinda* *Mari v Chinnammal I L R 8 Mad 10* explained The *Mitakshara* law (apart from usage) does not recognise a step mother as in the line of heirs at all Property should go to the Crown in preference to her This case was remanded on the following additional issue (*inter alia*) whether according to the usage of the caste to which she and the first defendant belong the step mother is entitled to inherit to her step son? SEETHAI *v* NACHIAR 1914)

I L R 37 Mad 286

25 ——— Custom of primogeniture—*Allegation of family or local custom—What must be proved—Continuity and immemorial user—Onus—Finding that custom proved is finding of fact—Record of rights pending suit—Judgment of revenue officer in settlement proceedings if evidence in suit—Attestation proceeding finding in favour of custom recorded at and based upon hearsay* Whether certain facts found by the lower Appellate Court (and as such binding on the High Court) do or do not establish an alleged custom of primogeniture is a question of law Where a party relies upon a special custom of a family to take the succession out of the ordinary Hindu Law such custom must be proved to be ancient and continuous The alleged custom must be very satisfactorily proved by evidence of particular instances so numerous as to justify the Court in finding in favour of the custom Where subsequently to the institution of the suit and at the attestation stage of proceedings for preparation of record of rights an Assistant Settlement Officer found upon information gathered from the tehsildar of the Raja's estate that the custom of primogeniture prevailed among Kurmi Mahtos in 82 out of 84 of the villages *within the estate and the lower Appellate Court* relying upon this judgment found the custom established in the village in suit the parties being Kurmi Mahtos *Held* that apart from the circumstance that the fact of the record of rights having been completed since the institution of the suit affected the value and importance of the decision of the Settlement Officer his judgment had been used for a purpose for which it was not admissible in law That reliance might possibly have been placed upon it to show that the custom was recognised by the revenue authorities but the finding of the Settlement Officer could not be incorporated into the evidence in the case and treated as practically conclusive between the parties That whether the Assistant Settlement Officer was competent or not to act upon information gathered from the Raja's tehsildar (which was clearly not legal evidence) that statement of the tehsildar was inadmissible in evidence in the Civil Court DURGA CHARAN MAHTO *v* RAGHUNATH MAHTO (1913)

18 C W N 55

26 ——— Succession to a yati (*religious ascetic*)—*Chela or sisya (disciple or pupil) of Hindu religious ascetic or mendicant—Heirs natural and special under rules of Hindu Law* A Brahmin who had left his home in early life and settled in Burrabazar in Calcutta, where he lived the life

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of a Hindu mendicant and practised religious austerities but dressed himself in ordinary cloths and deposited monies with firms in Burrabazar on interest and had also acquired property in the Punjab cannot be taken to have renounced the world and was not a *yati* or a religious ascetic in the sense of the Hindu Law and on his death his natural heirs under the ordinary rules of the Hindu Law are entitled to succeed to his property Nor was the plaintiff who claimed to be the heir of the deceased Brahmin as his *chela* his *sat sisya* or virtuous pupil in the sense of the Hindu Law and was not entitled to succeed against his natural heirs who have proved themselves to be his legal heirs GOURI SUNKER BIAS v NIADER SINGH (1913) 18 C W N 59

27 ———— Dayabhaga School—*Doctrine of spiritual benefit—Paternal great grand father s son s daughter s son and maternal uncle who is preferable* Under the Dayabhaga School of Hindu Law the paternal great grand father s son s daughter s son of a deceased Hindu is preferable to his mother s brother as heir even though the latter is specifically mentioned in the Dayabhaga as an heir and the former is not and his precise position in the category of heirs is not laid down in the case of *Guru Gobind v Ananda Lal 13 B L R 49 c Braja Lal v Jiban Krishna I L R 26 Cal 285* referred to KAILASH CHUNDER ADHIKARI v KARUNA NATH CHOWDHRY (1913) 18 C W N 477

28 ———— Daughters inheriting father s estate jointly—*Death of one—The other if succeeds to deceased s interest as reversionary heir—Adverse possession for more than twelve years during both daughters lifetime—Surviving daughter s right to recover moiety share belonging to deceased if arises from her death—Limitation Act (IX of 1908) Sch I Art 141* Where one of two daughters of a Hindu who inherited his properties died the survivor did not acquire in the interest enjoyed by the deceased a title of the nature described in Art 141 of Sch I of the Limitation Act Where after both daughters had been kept out of possession for more than 12 years one of them died and the other by some means or other got back possession *Held* that she could not maintain her possession against the person who by 12 years adverse possession had acquired title in the entire property including the interest of the deceased daughter to which she succeeded by survivorship and not by inheritance SACHINDRA KISHORE DEB v RAJANI KANT CHUCKERBUTTY (1914) 18 C W N 904

28 (a) ———— *Held* that under the Mitakshara Law the preference of heirs of the whole blood to those of the half blood is confined to Sapindas of the same degree of descent from the common ancestor where therefore the choice of heirs lay between Sapindas of different degrees an uncle of the half blood as being less remote from the common ancestor is a preferential heir to the sons of an uncle of the whole blood The Provisions of s 317 of the Civil Procedure Code 1882 were designed to create some check on the practice of making so called benami purchases at execution sales for the benefit of Judgment debtors and in no way affects the title of persons otherwise beneficially interested in the purchase GANGA SAHAI v KESRI I L R 37 All 545

29 ———— Mitakshara—"Sapindaship" *definition of if governs inheritance or marriage only—Bhinnagotra sapindas or bandhus who may succeed as—Limit of five degrees and mutuality to be satisfied—Classes of bandhus enumerated in Mitakshara if to be extended—Interpretation of rules of Hindu Law—Suit in ejectment—Plaintiff to strictly prove title* Sapinda relationship according to the Mitakshara is based not on the presentation of funeral oblations but on descent from a common ancestor and in the case of females also on marriage with descendants from a common ancestor this relationship ceasing—not merely for purposes of marriage but generally and therefore for purposes of inheritance also—after the seventh degree from the common ancestor on the father s side and fifth on the mother s The word *bandhu* in the system of the Mitakshara bears a distinct and technical meaning signifying the *bhinna-gotra sapindas* and the limitation of the five degrees clearly applies and can only apply to the *bhinna gotra sapindas* Besides being within the fifth degree from the common ancestor a *bandhu* to be entitled to succeed to the inheritance must be so related to the *propositus* that they are *sapindas* to each other *Held* accordingly that the plaintiffs who were the paternal grand father s sons s son s daughter s daughter s sons of the *propositus* were not his heirs both because they were his *bhinna gotra* beyond the fifth degree and also because the element of mutuality was wanting between them and the *propositus* The ruling in *Giridari Lal v The Bengal Government 12 Moo I A 448* that the enumeration of *bandhus* who were entitled to succeed is not exhaustive but merely illustrative hardly warrants the conclusion that the classes specified by Vijnaneswar as *atma bandhus pitri bandhus matri bandhus* can be added to *Lallubhai v Mankuvarbai I L R 2 Bom 388 Umaid Bahadur v Uday Chand, 4 C W N 866 s c I L R 23 Mad 61 Babu Lal v Nanku Ram I L R 22 Calc 339* referred to The Hindu Law contains its own principles of exposition and questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law but must depend for their decisions on the rules and doctrines enunciated by its own law givers and recognised expounders RAMCHANDRA MARTAND WAIKAR v VINAYAK VENKATESH KOTHEKAR (1914) 18 C W N 1154 L R 41 I A 290

30 ———— Mitakshara—*Ch II s 5 pl 4 and 5—Mayukha Ch VIII pl 13—Compact series of heirs—Brother s widow—Sapinda—Uncle s sons—Brother s widow nearer heir* The widow of a brother of the deceased is as a *sapinda* a nearer heir of the deceased than his paternal uncle s sons BASANGAVDA v BASANGAVDA (1914) I L R 39 Bom 87

31 ———— *Mitakshara Chapter II s 8 para 2—Claim by plaintiff as Petrai Chela to recover the property of a deceased Bairagi—Claim not maintainable on the ground of custom and Hindu Law—Bairagis—Sanyasi—Hermit ascetic student in theology—Heirs—Preceptor virtuous pupil and spiritual brother—Reverse order* The plaintiff claiming as Petrai Chela of a deceased Bairagi sued to recover the property of the deceased *Held* dismissing the suit that both on the ground of custom and on the ground of Hindu Law the plaintiff had failed to make out his case The

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declared [illegible] of a Sarvata [illegible] by the Mitakshara is a virtue [illegible] the Mitakshara, Chap. II [illegible] of the property [illegible] in the doctrine are [illegible] applied [illegible] the spiritual benefit [illegible] to the [illegible] militate in the [illegible] Whether [illegible] can be classed [illegible] because [illegible] order of [illegible] not [illegible] to the [illegible] of the [illegible] been cases. [illegible] v [illegible] (1914)

I. L. R. 39 Bom 168

32. ———— Maiden's property—Preferential heir One Sitabai who became entitled to Rs. 3000 under an insurance policy on the death of her father died unmarried and the plaintiff, the sister of her mother sued for a declaration that the defendant who was the step-mother of the deceased Sitabai was not her heir under the Hindu Law and that she as the maternal aunt of the deceased was her lawful heir and entitled to the amount that was held in deposit in Court. *Held* that the plaintiff was not entitled to succeed in preference to the defendant. The sapindas, both of the father and the mother must refer to the same persons as the mother becomes a member of the father's family on her marriage *Tukaram v Narayan Ramchandra I L R 36 Bom 339 Janglubai v Jetha Appaji I L R 32 Bom 409* and *Dwarka Nath Roy v Sarat Chandra Singh Roy I L R 39 Calc 319* followed The rule that female gotraja sapindas do not inherit as agnate relations taking the rank which they would be entitled to if their claims were based on sapinda relationship has been applied to the succession of male's property *Lalamma v Pullayya I L R 18 Mad 168* and *Dayamma v Annamalai Mudali I L R 13 Mad 89* referred to The rule that in the case of succession to stridhanam property a daughter inherits as sapinda where the succession has to be traced through the father or the husband applies also to the case of a wife or widow *Manja Pillai v Sivablagyathachi I Mad L J 601* applied KAMALA v BHAGIRATHI (1914)

I L R 38 Mad 45

33 ———— Dayabhaga School—*Whether great-grandfather's son's daughter's son or maternal uncle preferential heir—Stare decisis* In a Dayabhaga family the great grandfather's son's daughter's son is entitled to succeed as heir in preference to the maternal uncle *Kailash Chandra Adhikari v Karuna Nath Choudhry 18 C W N 477* followed The principle of spiritual benefit regarding the succession in a Dayabhaga family laid down by the Full Bench in *Gooroo Gobind Shaha's Case 13 W R (F B) 49 5 B L R 15* cannot be questioned now KEDAR NATH BANERJEE v HARI DAS GHOSE (1915) I L R 43 Calc 1

34 ———— Illegitimate son—*of a Sudra by a dancing woman kept in continuous and exclusive concubinage—Right to succeed to joint family property* The illegitimate son of a Sudra by a dancing woman who was by profession a prostitute before she came into his keeping but who was kept by him in continuous and exclusive concubinage thereafter is entitled to get his appropriate share in the joint family property after his father's death provided the connection between his father and mother was not incestuous or adulterous This right is not subject to a further condition that a marriage could have taken place between the father and the mother according to the custom of the caste to which the mother belonged SUBRAMANIAN v RATNAVELU CHETTI (1914) I L R 39 Mad 13

35 ———— Lunacy—*Effect on the devolution of immoveable property of lunacy of a Hindu—Suit to recover property from daughters of lunatic—Limitation Act (IX of 1908), Sch I, Art 141* A person is disqualified under the Hindu Law from succeeding to property if he is insane when the succession opens whether his insanity is curable or incurable *Deo Kishen v Budh Prakash I L R 5 All 509* and *Tirbeni Sahai v Muhammad Umar I L R 28 All 247* referred to The daughter therefore of such person would derive no legal title through her father The legitimate wife of a lunatic Hindu took possession during his life time of certain immoveable property which had belonged to her father and subsequently transferred part of it to her daughters and to the husband of one of them She retained a portion herself which after her death came into the possession of one of the daughters *Held* that a suit to recover the property of which possession had been so obtained and held was governed by Art. 141 of the first Schedule to the Indian Limitation Act, 1908 *Jaggi v Ram Baran Singh I L R 30 All* [illegible] distinguished RAM BISHUN v MUSAMMAT BH[illegible] (1916) I L R 38 All [illegible]

36 ———— Bandhu—*Mother's brother's son preferred to mother's sister's son* According to Hindu Law of the Mitakshara School the mother's brother's son takes precedence as an heir over the mother's sister's son *Appasami v Nathiyar Lagubale Mudaliyar I L R 33 Mad 439* dissented from *Bulllu Singh v Lalta Singh I L R 37 All 604* referred to RAM CHARAN LAL v RAHIM BAKSH (1916) I L R 39 All

37 ———— Religious office—*Right of females to succeed and do duty by proxy* A female is not under the Hindu Law or custom disqualified from succeeding to a hereditary religious office (such as the office of *archaka* in a temple) notwithstanding such duties as she may be disqualified by reason of her sex from performing performed by proxy *Ramasundaram Pillai v Savundrathammal 16 Mad L T 433* and *Tangirala Chiranjivi v Raja Manikya Rao 27 Mad L J 179* followed *Sundarambal Ammal v Yogavana Gurukkal I L R 38 Mad 850* not followed RAJA RAJESWARI AMMAL v SUBRAMANIA ARCHAKAR (1916) I L R 40 Mad

38 ———— Unchastity—*in husband's life time—Condonation by husband* Under the Hindu Law a widow is not debarred from inheriting to her husband on the ground that she had been unchaste in her husband's life time if the husband had condoned her unchastity *Gangadhar Ramchandra Alur v Yellu Lom Virasuami Shivaral I L R 36 Bom 138* followed *Mutunjinee Dabee v Jogkallee Dabee 14 W R A O J 23* and *Ma[illegible] ram Kolita v Keri Kolitani I L R 5 Calc* referred to RADHE LAL v BHAWANI RAM (1[illegible]) I L R 40 All

39 ———— Full sister entitled to priority According to the Mitakshara School of Hindu Law a full sister is entitled to succeed in priority to the half sister JANA v RAKHMA (1918) I L R 43 Bom

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40 ———— Sudra—Illegitimate son not allowed collateral succession On the death of a Sudra his property was claimed by two persons one of whom was his divided brother and the other was the illegitimate son of his father —*Held* that the former was entitled to succeed since the illegitimate son was under Hindu Law excluded from all collateral succession *Kaeji valad Mahalu v Kaluji valad Kaloji (1909) 34 Bom 321 Shome Shankar Rajendra Varere v Rajesarswami Jangam (1898) 21 All 99* and *Ramalinga Muppan v Pavadai Goundan (1901) 25 Mad 519* followed DHARMA LAKSHMAN v SAKHARAM PAMJIRAO (1919) I L R 44 Bom 185

41 ———— Sudras—*Leva Kunbis of Changdeo in the East Khandesh District whether Sudras—Illegitimate sons dividing property with legitimate sons mother entitled to a share* Leva Kunbis residing at Changdev in the East Khandesh District are Sudras Under Hindu Law even when among the Sudras, the illegitimate sons divide the property with the legitimate sons the mother is entitled to a share MANCHHARAM BHIKU v DATTU (1919) I L R 44 Bom 166

42 ———— Brahmans of tahsil Kharar District Ambala—*father s sister s sons or village proprietors—Limitation—presumption in favour of continuance of life—onus of proving death* Plaintiffs the father s sister s sons of one Sardha deceased sued for possession of the latter s land which had been taken possession of by the village proprietors on the death of *Mussammat* Atri the widow of Mula father of Sardha The deceased was a Brahman and the village proprietors (defendants) are Rajputs The suit was instituted on the 5th May 1914 and the only evidence as to the date of *Mussammat* Atri s death was a report of the *Patwari* in September 1902 to the effect that she died in May 1902 The Lower Appellate Court held that the plaintiffs were heirs by Hindu Law and that the claim was within time The defendants appealed to the High Court *Held* that by the *Mitakshara* system of Hindu Law the father s sister s sons are heirs *Tohaldas Kumari v Gaya Pershad (I L R 37 Calc 214)* and Mayne s Hindu Law 8th Edition Chap XVI p 704 and Trevelyan s Hindu Law 2nd Edition, p 402 referred to *Held also* that there is a presumption in favour of continuance of life and that in the absence of proof by the defendants that *Mussammat* Atri died before the 4th of May 1902 she must be presumed to have died after that date and the suit was consequently within time AMEER Ali and *Woodroffe s Law of Evidence 5th Edition* p 632 referred to TANI v RIKHI RAM I L R I Lah 554

43 ———— Khatris—*Sister of father s father s son s daughter s son—Adoption not in Dattaka form—whether adopted son entitled to collateral succession—Will by widow—validity of—possessory title* Plaintiff claimed a house and some moveable property as heir to her deceased brother Harnam Das son of Jai Ram Plaintiff alleged also that she had got possession of the property on the death of *Mussammat* Ind Kaur the widow of Harnam Das, and had been forcibly dispossessed by the defendant The latter was the daughter s son of Ram Chand, brother of Jai Ram and was adopted by his maternal grandfather He also claimed under a will made by *Mussammat* Ind Kaur in his favour It was found as a fact that the adoption of defendant was not made in the *Dattaka* form also that the plaintiff never got peaceful and exclusive possession of the property after the death of *Mussammat* Ind Kaur *Held* that the adoption of the defendant not being in accordance with the *Dattaka* form the latter was not entitled under the *Mitakshara* School of Hindu Law to succeed collaterally *Jiwan Mal v Jamna Das (67 I L R 1911)* followed *Held also* that by Hindu Law a widow s powers of alienation are restricted to religious purposes and the fact that there are no heirs capable of taking at her death does not affect these powers and consequently the will of *Mussammat* Ind Kaur conferred no title on defendant *The Collector of Masulipatam v Cavali Vencata Narrainapah (8 Moo I A 529 551 P C)* and *Pandharinath Vishwanath v Govind Shriram (I L R 32 Bom 59 71)* followed *Alla Ditta v Gauhra (3 P R 1914)* distinguished *Held further* that by *Mitakshara* Law the plaintiff as a sister is not entitled to succeed against the defendant who cannot be said to be a total stranger being the daughter s son of the deceased s uncle *Shambu Nath v Mussammat Ralli (52 Indian Cases 591)* and *Mayne s Hindu Law 8th Edition p 744 para 534* followed *Nanak Gir v Mussammat Kishen Kaur (161 P P 1919)* distinguished *Held moreover* that defendant as a father s father s son s daughter s son is a *bandhu* and has a better title than the plaintiff Mulla s Hindu Law 3rd Edition pp 58 and 59 referred to also *Abdul Hamid v Surbuland Khan (78 P R 1902)* *Held finally* that the fact that there was a scramble for possession on the death of the widow *Mussammat* Ind Kaur and plaintiff as well as defendant put a lock on the door of the house is not sufficient to establish plaintiff's peaceful and exclusive possession so as to entitle her to a decree for possession on the basis of her possessory title In a suit on possessory title a plaintiff must prove more than what is necessary for him to do in a suit under the Specific Relief Act *Abdul Hamid v Surbuland Khan (78 P R 1902)* referred to TIRTH RAM v MUSSAMMAT KAHAN DEVI I L R I Lab 588

44 ———— Bengal and Benares Schools—*Succession—brother s daughter—whether a bandhu* The plaintiff the brother s daughter of one Mani Ram *deceased* sued for a declaration that Jagiri Mal had not been adopted by Mani Ram or his widow The Lower Court dismissed the suit on the ground of limitation The plaintiff appealed to the Chief Court and it was contended by the defendants respondents that even if the suit was not barred by limitation the plaintiff not being a *bandhu* with rights of inheritance had no *locus standi* to bring the suit *Held* that by the Bengal and Benares Schools of Hindu Law the only females entitled to inherit are the widow the daughter the mother the father s mother and the father s father s mother and that consequently plaintiff as a brother s daughter had no *locus standi* to bring the present suit *Gauri Sahai v Rukko (I L R 3 All 45)* *Jagat Narain v Sheo Das (I L R 5 All 311)* *Nanhi v Gauri Shankar (I L R 28 All 18)* *Jagan Nath v Champa (I L R 28 All 307)* *Joglamba Koer v Secretary of State (I L R 16 Calc 367 370)* *Mussammat Bibi Sodhan v Harsa Singh (I P R 1916)* and *Shambhu Nath v Mussammat Ralli (Indian Cases 591)* followed Mulla s Hindu Law 3rd Edition p 68 Ghose s principle of Hindu Law Vol I 3rd Ed p 156, Rama Krishna s Hindu Law Vol

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II p. 180 and Mayne's Hindu Law 8th Edition paras. 5 -577 referred to *Raghu Nath v Muna Mar (I L R 20 All 191)* dissented from *Multan Chand v Lala Mal (1S P R 1889)* and *Nanak Chand v Musammat Kaleen Kaur (161 P L R 1919)* distinguished MUSSAMMAT SUJAN DEVI *v* JAGIRI MAL I L R 1 Lah 608

44(a) ———— Mother's Sister's Son's Son—*is to be preferred to mother's paternal aunt's son—Atma bandhu is to be preferred irrespective of question of propinquity and religious efficacy—Son includes son's son — Sapindas who are* Under the Mitakshara law the mother's sister's son's son of the deceased propositus is preferred as heir to his mother's paternal aunt's son In families governed by the law of the Mitakshara the right of succession amongst the three classes of *bandhus* mentioned in the Mitakshara Chap 15 sec 6 is governed by the propinquity of the class and a *pitri bandhus* does not succeed until the class of *atma bandhus* is exhausted and a *matri bandhu* does not succeed until the classes of *atma bandhus* and *pitri-bandhus* are exhausted The rule in preferring the nearer to the more remote class of *bandhus* is not dependent on individual propinquity or on the efficacy of offerings to the deceased person A *bandhu* must in order to be heritable in a female line fall within the fifth degree from the common male ancestor and must be so related to the deceased person that they are mutually *sapindas* of one another that is persons connected by particles of one body The grandson of a mother's sister falls within the general description of an *atma-bandhu* a person related to the propositus himself and is not to be excluded only because he is not mentioned among the illustrations in the text of the Mitakshara *Muttuswami Mudaliyar v Simambedu Muthu Kumaraswami Mudaliyar L R 23 I A 83 s c I L R 19 Mad 405 (1896) Buddha Singh v Lallu Singh L R 42 I A 208 s c 20 C W N 1 (1915) Ramchandra Martand Waikar v Vinayak Venkatesh Kothekar L R 41 I A 290 s c I L R 42 Calc 384 18 C W N 1154 (1914) Krishna Ayyangar v Venkatarama Ayyangar I L R 29 Mad 115 (1905) and Bai Vijia v Bai Prabhalakshmi 9 Bom L R 1129 (1907)* referred to ADIT NARAYAN SINGH *v* MAHABIR PRASAD TEWARI (P C) 25 C W N 842

44(b) ———— Family Law Renounced if Governs succession—*To persons immigrated from another place—Succession to Hindu whose family immigrated from another place—Mahratta Brahmin emigrating and settling in the Central Provinces—No proof that he renounced his old family law—Daughter inherits absolutely under Mayukha the personal law of the individual whose succession is in question—Influence of commentaries upon Hindu Law—Effect of domicile—Judicial decision operates retrospectively* Amongst Hindus the law of succession in any given case is to be determined according to the personal law of the individual whose succession is in question If nothing is known about a man but his place of residence it will be assumed that his personal law is the law which prevails in that place But this is only a presumption and may be rebutted by evidence that the family had migrated from some other place where another system of personal law prevailed in which case the law must be the family law as it was when the family emigrated It is open to proof that he has renounced the law prevailing in his place of origin and accepted that prevailing in his place of domicile The personal law of a Mahratta Brahmin whose ancestors had at one time lived in Maharashtra in the Bombay Presidency is that prevailing in Bombay and accordingly on his death his daughter takes an absolute interest in his property The difference in the law existing in Bombay and the other Courts is due to the dominating influence of the different commentaries But commentaries do not enact They explain and are evidence of the congeries of customs which form the law Bombay Courts relying on the Mayukha has arrived at totally different results in the matter of inheritance from the other Courts which rely on the Mitakshara without the modifications suggested by the *Mayukha Bhau v Raghunath I L R 30 Bom 229 at p 236 (1905)* approved *Narayan Vithal v Govind Narayan 1 Nag L R 104 (1905)*, commented on A decision of a Court of law is not to be regarded as a statute It is declaratory of the law as it has existed BALWANT RAO *v* BAJI RAO (P C) 25 C W N 243

45 ———— Custom of Remarriage—*Whethere a childless widowed daughter of child bearing age free to remarry by custom and heir of her father* In the caste in which widow remarriage is a custom a childless widowed daughter of child bearing age is not entitled to succeed to her father's property along with the married daughter having a son in the absence of any proof of custom entitling her to succeed under such circumstances BINODINI HAZRANI *v* SUSTHEE HAZRANI (1920)

I L R 48 Calc 300

46 ———— Impartible estate—*Mitakshara—Joint ancestral estate—Survivorship* The successor to an impartible estate which is ancestral property of a joint Hindu family governed by the Mitakshara is designated by survivorship subject to the custom of impartibility the eldest member of the senior branch of the family therefore succeeds in preference to the direct lineal senior descendant of the common ancestor if the latter is more remote in degree *Katama Natchiar v The Rajah of Shivagunga 9 Moo I A 543 Naraganti Achammagaru v Venkatachalapati Nayaniuaru I L R 4 Mad 250 Raja Rup Singh v Rani Baisni I L R 7 All 1 L R 11 I A 149* and *The Udayarpalayam Case I L R 28 Mad 508 L R 32 I A 261* approved and followed *Neelkisto Deb Burmono v Beerchunder Thakoor 12 Moo I A 523* and *Sartaj Kuari v Deoraj Kuari I L R 10 All 272 L R 15 I A 51* explained and distinguished The terms co parceners and co parcenary as used in English law are not in all respects applicable to the members of a joint Hindu family and their interest in the joint family property Judgment of the High Court affirmed BAIJNATH PRASAD SINGH *v* TEJ BALI SINGH I L R 43 All 228

47 ———— Primogeniture—*custom of—Custom if ceases to apply on cessation of condition which brought it into existence* A custom of primogeniture found and established becomes the law of the family regulating the succession to the family estate and the ordinary Hindu Law does not apply to it save so far as it was not inconsistent

HINDU LAW—SUCCESSION—*concld*

with the custom Such a custom may if observed and acted upon survive the primitive condition of things out of which it originally from the very necessity of the case sprung and the head of the family for the time being cannot by accepting from the Government of India a *sanad* containing clauses inconsistent with the custom destroy it or render it inoperative RAO KISHORE SINGH v MUSSAMMAT GAHENABAI 24 C W N 601

48 ———— Bhinna gotra sapindas—*Mother s sister s son and mother s paternal aunt s son* Under the *Mitakshara* School of Hindu Law the mother s paternal aunt s son succeeds in preference to the mother s sister s son s son ADIT NARAYAN SINGH v MAHABIR PD TEWARI 1 Pat L J 321

49 ———— Property jointly acquired and thrown into common stock—*Succession to* Under the Hindu Law property jointly acquired and thrown into the common stock is subject to succession by survivorship as between the parties who acquired the property GOBARDHAN SAHU v BULKHAN MAHTON 1 Pat L J 195

49(*a*) ———— Widow's Remarrage—*Right of succession in the family of her first husband—Succession as a gotraja sapinda* Under Hindu Law the father s sister is entitled to succeed in preference to the remarried widow of the paternal uncle *Rasappa* v *Rayava* (1904) *29 Bom 91* distinguished PRANJIVAN HARGOVAN v BAI BHIKHI (1921)
I L R 45 Bom 1247

50 ———— Maternal uncle of last male owner *and sister s daughter s son* *Held* by the Full Bench (DAWSON MILLER *C J* and IMAM *J* dissenting) that in a family governed by the *Mitakshara* the maternal uncle of the last male owner is preferred to the sister s daughter s son as heir to the estate UMASHANKER PRASAD PRASARI v MUSSAMMAT NAGESWARI KOERS
3 Pat L J 663

HINDU LAW—SUDRA

See HINDU LAW LEGITIMACY

1 ———————— *Custom of family—Primogeniture—Rajput family—Evidence—Long continuance of family* In a Rajput family settled for many centuries in the Nimar district (Central Provinces) a custom of succession by primogeniture was alleged the eldest son succeeding to the *gaddi* and the title of Rana and the younger sons being entitled only to maintenance The oral evidence showed that the practice during the last four generations had been in accordance with that custom and the documentary evidence confirmed it showing the existence of a *gaddi* and the title Rana from a very early period Under Mahomedan rule the head of the family was the holder of a hereditary fiscal office The Appellate Court (reversing the trial Judge) held that the custom alleged was not proved as existing as of right The view of the Court was that since the abolition of the fiscal office the subsistence which the younger sons had formerly received as a favour had become a share claimed as of right and increasing in quantity to the equality favoured by ordinary Hindu law from which circumstances had diverted the enjoyment of the family property *Held* that the evidence established the custom the view of the Appellate Court being based on a theory of

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a speculative character and omitting to give weight to the survival of the family as an entity during many centuries which survival could have occurred only with the help of a family custom of the kind alleged Mere cessation of services to which *watan* lands are attached which are by custom impartible does not ordinarily destroy the custom Judgment of the Court of the Judicial Commissioner reversed RANA MAHATAB SINGH v BADAN SINGH (1921)
I L R 48 Calc 997

2 ———— Bandhus—*Male bandhu entitled to preference over a female bandhu though the latter be nearer in degree* Under the Mitakshara Hindu Law a male bandhu is entitled to preference over a female bandhu even though the latter is nearer in degree *Held* accordingly a mother s sister s son is entitled to succeed in preference to a brother s daughter *Rajah Venkata Narasinha* v *Raja Surenani* (1908) *31 Mad 321* followed BALKRISHNA v RAMKRISHNA (1920) I L R 45 Bom 253

3 ———————— *Succession—First cousins take per capita and not per stirpes* Under Hindu Law first cousins of the propositus take *per capita* and not *per stirpes* *Nagesh* v *Gururao* (1892) *17 Bom* ... referred to NARSAPPA v BHARMAPPA (1920)
I L R 45 Bom 296

4 ————Murder as a disqualification—*to inherit—Public policy precluding a person from benefiting by his crime—Succession among Bandhus—Priority between father's sister s son and father s brother s daughter* Among Hindus a murderer is disqualified from inheriting the estate of the person murdered (Applicability to Hindu Law of the rule of public policy which precludes a person from benefiting by his own crime discussed) According to the Bombay School of Hindu Law father s sister s son is entitled to succeed in preference to the father s brother s daughter Under the Mitakshara a male *bandhu* is entitled to preference over a female *bandhu* even though the latter is nearer in degree *Balkrishna* v *Ramkrishna* (1920) *45 Bom 253* and *Rajah Venkata* v *Rajah Surenani* (1908) *31 Mad 321* followed GIRIMALLAPPA CHANNAPPA v KENCHAVA (1920)
I L R 45 Bom 768

5 ———————— *Right of succession of widowed daughter when remarriage permitted* A Hindu was succeeded by his widow and on her death the contest for succession was between a childless widow daughter aged about 11 and a married daughter having a son In the caste to which the parties belonged widow remarriage was permitted *Held* that although widow remarriage is a custom in the caste that does not by itself predicate the further custom that the widow daughter is entitled to succeed equally with the married daughter There must be clear proof of such a custom BINODINI HAZRANI v SOSTHEE HAZRANI
26 C W N 29

6 ———————— Bandhus—*Maternal uncle—Father s sister s grandson—Preference among atma bandhus* Under the Mitakshara law a maternal uncle succeeds in preference to a son of the paternal aunt s son So *held* on the ground that both claimants being

HINDU LAW—SUDRA—*contd*

atma-bandhus the maternal uncle and the dece a ed were *sapindas* to each other whereas the other claimant offered no *pinda* to the ancestors of the decea ed and the maternal uncle was the nearer in degree a contention that the claimant who was *ex parte paterna* should be preferred to the claimant who was *ex parte materna* being rejected. Four propositions as to bandhu s enun ciated by the Madras High Court in *Muthu sami* v *Mu tukumara smi* (1893) *I L R 16 Mad 23 30* approved as furnishing a safe guide in the absence of any express authority varying the rule *Sundarammal* v *Rangasami Mudaliar* (1895) *I L R 18 Mad 193* and *Balu ami Pandithar* v *Narayana Rau* (1897) *I L R 20 Mad 34* so far as they held that among *bandhus* of the same cla s those *ex parte paterna* are to be preferred to tho e *ex parte materna* dis approved Judgment of the High Court reversed VEDACHELA MUDALIAR v SUBRAMANIA MUD LIAR (1921) I L R 44 Mad 753

7 ——————— *Hindu Law—Right of succes ion of young widow d daughter in a caste where widow remarriage is permitted—Necessity of proof of custom entitling the widowed daughter to succeed equally with a married dau ghter* A Hindu was succeeded by his widow and on her death the conte t for succession was between a childless widowed daughter aged 16 or 17 and a married daughter having a son In the caste to which the parties belonged widow remarriage is permitted *Held* that though widow remarriage is a custom in the caste that does not by itself predicate the further custom that the widowed daughter because it is open to her to remarry is entitled to succeed equally with the married daughter There must be clear proof of custom entitling the widowed daughter to succeed equally with the married daughter BINODINI HAZRANI v SUSTHEE HAZ RANI 26 C W N 29

8 ——————— MITAKSHARA (SOUTHERN SCHOOL)—*Succession order of amongst atma bandhus—Division into ex parte paterna and ex parte materna and prefere ce of former to latter if justifiable—Doctr e of spiritual benefit if det r mines preference—Propinquity alone if grou d of pr ference—The rule in Mitakshara if open to question as spurious or as incomplete—Enumera tion of heirs illustrative—Viramitrodaya autho rity of in Southern India—Maternal uncle s place in the order of succession* The passage in the Mitakshara Chap II sec 6 para 1 laying down the order of succession amongst the bandhus has been accepted by a series of Commentators and by eminent Hindu Judges in the British Indian Courts and any doubt at this stage as to its character or authority will lead only to perple xity and confusion The enumeration of bandhus in the passage being intended by way of illustra tion only the rule is not open to objection on the ground of incompleteness The question being wh ther acc rding to the law of the Mitak hara as recognised in the Dravira Country the mat ernal uncle or the son of the paternal aunt s on (both of whom are atma bandhus) should s c eed as the preferential heir *Held* that there is nothing in para 598 of the Sarasvati Vilasa to justify the division of the atma bandhus in two sub classes *ex parte paterna* and *ex parte materna* or the preference of the former to the latter That in the absence of express autho rity varying the rule the propositions enunciat ed in *Muttusami* v *Muttukumarasami* (3) furnish a safe guide and the maternal uncle who was undoubtedly nearer in degree and who offered oblations to the father and grand father of the deceased whilst the son of the paternal aunt s son offered none was the preferen tial heir The place assigned by Sarbadhikary and Mayne to the maternal uncle in their tables of succession questioned Although the Smriti Chandrika in the Southern Presidency is regard ed as the most authoritative commentary on Vijnaneswara s work the Viramitrodaya holds as in Western India a high position V A S VEDECHELLA MUDALIAR v R I RANGANATH CHETTIER 26 C W N 161

HINDU LAW—SURETY

1 ——————— *Father s liability as surety—Whether son is liable to pay debt incurred by father as surety* Under the Hindu Law a son is liable for a debt incurred by his father as a surety *Tukarambhat* v *Gangaram Mulchand Gujar I L R 23 Bom 454* and *Maharaja of Benares* v *Ramkumar Misir I L R 26 All 611* referred to PASIK LAL MANDAL v SINGHESWAR RAI (1912) I L R 39 Calc 843

2 ——————— *Surety—Son s lia bility—Kinds of sureties—Surety for appearance assurance and payment meaning of—Tests of Yajna valkya construction of—Debt contracted prior to surety bond—Effect on son s liability* Where a Hindu executed a surety bond stating that he would make the debtor pay within two months the amount due on a promissory note already executed by the latter and that in default of pay ment by the debtor he would pay *Held* that the surety was one for payment that the sons of the surety were liable under Hindu Law for the payment and that it made no difference that the money had already been lent to the creditor before the surety bond was executed Suretyship according to the texts of Yajnavalkya is of three kinds *viz* for appearance for assurance and for payment in the last case the surety s sons are also liable to pay his surety debts According to the Mitakshara commentary the surety hip by way of assurance con ists of a general warranty of credit but a surety for payment i one who says If he does not pay then I myself will pay *Tukaram Bhat* v *Gangaram I L R 23 Bom 454* *Rasik Lal Mandal* v *Singheswar Rai I L R 39 Calc 843* referred to THANGA THAMMAL v ARUNACHALAM CHETTIAR (1918) I L R 41 Mad 1071

3 ——————— *Surety-debt of father—Son s liability for—Ord r in execution against father as surety—Subsequent partition between father and son—Attachment of property allotted to son s share—Non liability of such property—Claim peti tion by son dismissal of—Subsequent suit by son —Liability of surety if enforceable in execution— Civil Procedure Code (Act XIV of 1882) ss 253 583 and 610—Civil Procedure Code (Act V of 1908) s 53—Inapplicable where father is living* The second defendant obtained a decree for mainte nance against the third defendant Pending an appeal against the decree the former recovered the amount in execution on the first defendant standing surety for the second defendant The

HINDU LAW—SURETY—*contd*

decree was reversed on appeal the third defendant applied in execution proceedings for restitution against the first defendant as surety an order was passed in execution for recovery of the amount against the first defendant and certain lands were attached The plaintiff who was the son of the first defendant filed a claim petition objecting to the attachment on the ground that under a partition between his father and himself made subsequent to the order against the first defendant but before the attachment the properties in question had fallen to his (plaintiff's) share and consequently were not liable to attachment The petition was dismissed The plaintiff thereupon brought the present suit for a declaration that the suit properties were not liable to be attached under the order passed against the first defendant *Held* that *under ss 253 and 583 of the Civil Procedure* Code (Act XIV of 1882) an order can be passed against a surety for recovering in execution proceedings the amount due from him *Held* further that a Hindu son is liable for the surety debt of his father to the extent of the joint family property which came to his hands at partition *Ramachandra Padayachi* v *Kondaiya Chetti I L R 24 Mad 555* followed But a decree for such a debt obtained against the father before partition is not executable after partition against the son and the joint family property allotted to him *Krishnasami Konan* v *Ramasami Ayyar I L R 22 Mad 519* followed S 53 of the Code of Civil Procedure (Act V of 1908) which provides that property in the hands of a son which under the Hindu Law is liable for the payment of a debt of his deceased father in respect of which a decree has been passed shall be deemed to be assets in the hands of the legal representative only applies to the case of a deceased father the principle of the section cannot be extended to a case where the father is living RAMESWARAMMA v VENKATA SUBBA ROW (1914) **I L R 38 Mad 1120**

HINDU LAW—SURRENDER

See HINDU LAW—REVERSIONER—

1 ———————— *Surrender by widow—Essentials of a valid surrender—Provision for maintenance and residence of widow whether invalidates surrender—Surrender to be bona fide of entire interest in whole property and to nearest reversioner* A reasonable provision for maintenance and residence in favour of a Hindu widow does not affect the validity of a surrender by her of her husband's estate to the nearest reversioner provided it is a *bona fide* surrender of the *entire* interest of the widow in the *whole* estate and is not a mere device to divide the estate with the nearest reversioner *Rangasami Goundan* v *Nachiappa Goundan I L R 42 Mad 523* explained *Mussammat Bhagwat Koer* v *Dhanuk dhari Prasad Singh 37 M I J 513* relied on ANGAMUTHU CHETTI v VARATHARAJULU CHETTI (1919) **I L R 42 Mad 854**

2 ———————— *Surrender by widow and daughter in favour of daughter's son—Deed executed by both—Stipulation for maintenance of both for their lives—Surrender whether valid—Title of daughter's son—Title of reversioners* Where the widow and the only daughter of a deceased Hindu surrendered their interests in the estate of the deceased in favour of the daughter's son under a deed executed by them both stipulating therein that he should maintain them during their life time and on the death of them all the reversioners of the deceased sued to recover the estate from the father of the deceased daughter's son *Held* that the surrender was valid under the Hindu Law and operated to vest the estate in the daughter's son and that the reversioners had no title to the property *Sriramulu Naidu* v *Andalammal I L R 30 Mad 145* and *Challa Subbiah Sastry* v *Paluri Pattabhiramayya I L R 31 Mad 446* referred to CHINNASWAMI PILLAI v APPASWAMI PILLAI (1918) **I L R 42 Mad 25**

3 ———————— *Essentials for validity of —Mithila Law*—Two conditions must be fulfilled to make a surrender by a widow with consent of the next heir (necessity being out of the question) valid The first is that the surrender must be total not partial The second is that the surrender must be a *bona fide* surrender not a device to divide the estate with the reversioners To make an arrangement such a device it is not necessary that the lady surrendering should take part of the property directly CHOWDHURY SURESHWAR MISSER v MUSSAMMAT MAHESHRANI MISRAIN **25 C W N 194**

HINDU LAW—SURVIVORSHIP

———————— **Reunited family succession in—** *Mitakshara—Law of survivorship* Succession in a reunited family governed by Mitakshara law is by survivorship This mode of succession is not confined to the members who actually reunited and the son of a reunited member born after the reunion is reunited and takes by survivorship *Krishtraya* v *Venkatramayya Appeal No 170 of 1901 (unreported)* followed *Ramasamy* v *Venkatasan I L R 16 Mad 440* distinguished SAMUDRALA VARAHA NARASIMHA CHARLU v SAMUDRALA VENKATA SINGARAMMA (1909) **I L R 33 Mad. 165**

HINDU LAW—TEMPLE

See HINDU LAW—ALIENATION

See HINDU LAW—RELIGIOUS ENDOWMENT

HINDU LAW—TRUST

———————— **Trust created by will**—*Trust coming into being at a future date—Duty of heirs to carry out the trust—Civil Procedure Code (Act XIV of 1882) s 539—Trust for public religious purpose—Dedication of property as shivarpana—Ejectment of trespassers from the trust property—Court—Jurisdiction* Where a Hindu who had directed a trust of his property for a religious purpose dies before giving effect to it the Hindu Law authorises his heir to take steps for carrying out his directions after recovering the property from a trespasser Where the testator merely directs that his property should be endowed for a certain purpose at a certain time by certain persons after his death then until the arrival of the time and the complete dedication of it in the manner and for the object pointed out by the testator the property must be regarded in the eye of law as part of his estate but impressed with a trust or an obligation on the part of those taking that estate as heirs to carry out his directions at the appointed time. He who succeeds him as heir has the right to do what the owner himself would have done or has directed to be done so as to complete the trust with the sanc-

HINDU LAW—TRUST—contd

tion of the Court if necessary Before he can do that he must first secure the property from the wrong-doer into whose possession it has passed GHELABHAI CAVRISHANKAR v UDERAM ICHARAM (1911) I L R 36 Bom 29

HINDU LAW—WIDOW

See BENGAL TENANCY ACT S 86 4 Pat L J 548

See HINDU LAW—ALIENATION JOINT FAMILY REVERSIONER STRIDHAN

See HINDU WIDOW

See CIVIL PROCEDURE CODE 1908 s 11 I L R 37 Bom 172

———— **nature of possession of—**

See LIMITATION ACT 1877 SCH II ART 144 I L R 42 All 152

1 ———— **Alienation**—*Alienation by Hindu widow for legal necessity—Property sold for more than the amount needed—Reversioner if may recover on paying amount needed* Where a Hindu widow *bonâ fide* executed a permanent lease upon taking a *selami* of Rs. 175 in order to pay off a debt of her husband's amounting to Rs 100 *Held* that this was not a case in which the reversioners should be allowed to recover possession upon payment of the amount actually needed to pay off the loan *Chatra Narayan* v *Uba Kunwari 11 C W N 414* and *Sugeeram* v *Juddoobuns I B L R 201* relied on The Privy Council in *the Deputy Commissioner of Kheri* v *Khanjan Singh 11 C W N 474* did not intend to lay down the rule that a Hindu widow is in every instance bound to sell property for payment of a debt due from her husband for exactly the sum due to the creditor FELARAM ROY v BAGALANAND BANERJEE (1910) 14 C W N 895

2 ———— *Alienation by widow—Consent by the body of reversioners—Transfer for legal necessity—Transaction for consideration—Gift—Partial relinquishment by widow* The general principle which prohibits a Hindu widow's alienation of immoveable property otherwise than for legal necessity is relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained The reason for the relaxation is referred to the principle that the consent of the persons who would be interested in disputing the transfer affords good evidence that the transfer was in fact made for justifying cause that is for legal necessity *Bajrangi Singh* v *Manokarnika Bakh h Singh I L R 30 All 1* and *Vinayak* v *Govind I L R 25 Bom 129* followed The operation of the principle is ordinarily limited to transfers for consideration and cannot be extended to voluntary transfers by way of gift where there is no room for the theory of legal necessity It should not be extended to cases where the widow has made only a partial relinquishment of the estate LILU v BABAJI (1909) I L R 34 Bom 165

3 ———— *Sale by widow to next reversioner of a portion of property—Validity—Conveyance of whole estate to reversioner in consideration of latter conveying back half absolutely—Validity* A Hindu widow can transfer by sale a portion of the property left to her to the then reversioner so as to confer on the latter an absolute estate in such portion *Hem Chunder Sanyal* v *Surnomoyi Debi I L R 22 Calc 354* *Nobo Kishore Sarma Roy* v *Hari Nath Sarma Roy I L R 10 Calc 1102* *Behari Lal* v *Madho Lal Ahir Gayawal I L R 19 Calc 236* referred to Where it was alleged that a lady possessing the limited estate of a Hindu daughter sold the properties back absolutely to the lady and that in pursuance of the agreement the reversioner reconveyed half the properties to the lady *Held* that the conveyances must be shown to have formed parts of one and the same transaction to be open to attack on that ground KANURAM DEB v KASHI CHANDRA SHARMA CHOWDHURI (1909) 14 C W N 226

4 ———— *Hindu widow transfer by without legal necessity whether becomes void on widow's death—Transferee's suit to eject transferee of non transferable occupancy holding* The transfer by a Hindu widow of properties inherited from her husband when neither legal necessity justifying the sale nor consent of the reversioners has been established does not become void on the death of the widow *Bhagwat Doyal Singh* v *Debi Doyal Sahu 12 C W N 393 s c I L R 35 Calc 420* *Bijoy Gopal Mukherjee* v *Krishna Mahishi 1 C W N 424 s c L R 34 I A 87 I L R 34 Calc 329* considered Such a transferee can maintain a suit for ejectment against the transferee of an occupancy holding which is not transferable by custom KISHORI PAL v SHEIKH BHUSAL BHUIYA (1909) 14 C W N 106

5 ———— **Compromise by**—*When such compromise tantamount to alienation—Possession when adverse to reversioner* Where a widow whose right to property is disputed enters into a compromise with the disputant by which she merely undertakes to make no further claim to the property such compromise does not amount to an alienation by the widow and the disputant does not hold the property under any title derived from her *Sheo Narain Sing* v *Khurgo Koery* and *Sheo Narain Singh* v *Bishen Prosad Singh 10 C I R 337* dissented from *Radha Mohan Dhar* v *Ram Das Dey 3 B L R 362* referred to The possession of the disputant under the above circumstances was adverse to the reversioner In considering whether possession is adverse to the reversioner it must be seen whether it is based on a title derived from the widow as representative of the separate estate or on one which leaves no separate estate to be represented KAMBINAYANI TIMMAJI v KAMBINAYANI SUBBARAJU (1910) I L R 33 Mad 473

6 ———— **Debt**—*Debt contracted by widow for necessary purposes binding though no formal charge created* A debt contracted by a widow as representative of the estate for the purposes of the estate will be binding on it in the hands of the reversioners though no formal charge on the estate is created when the creditor looks not to the personal credit of the widow but to her as representative of the estate and relies on the credit of such estate *Ramasamy Mudaliar* v *Sellattammal I L R 4 Mad 375* referred to REGELLA JOGAYYA v NIMUSHAKAVI VENKATA RATNAMMA (1910) I L R 33 Mad 492

7 ———— **Gift**—*Mitakshara—Gift by Hindu widow to daughter—Gift of immoveable property to daughter at gowna or dwiragaman*

HINDU LAW—WIDOW—contd.

ceremony—Post nuptial gifts—Reversionary heirs It is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immoveable property of her husband to her daughter on the occasion of the daughter's gowna ceremony and such a gift is binding upon the reversionary heirs of her husband. CHUNAMAN SAHU v. GOPI SAHU (1909)
I. L. R. 37 Calc. 1

8 ———————— Gift made by Hindu widow with consent of next reversioner—Suit by more remote reversioners to set aside the gift. A gift by Hindu widow who succeeded to the separate estate of her deceased husband of such estate is not valid and does not create a title which cannot be impeached by the remoter reversioner because it has been made with the consent of the next reversioner. Ramphal v. Tula Kuari, I. L. R. 6 All 116 followed. Bijrangi v. Manokarnika Bakhsh Singh, I. L. R. 30 All. 1 distinguished. Ram Anand Koer v. The Court of Wards, L. R. 8 I. A. 14 referred to. PARBHTA-WAR v. PHAGWANA (1910) I. L. R. 32 All. 176

9 ———————— Re-marriage—Hindu Widows Re-marriage Act xv—Hindu widow—Re-marriage permitted by rules of caste—Widow not deprived of property of first husband. Where the rules of her caste recognize the right of a Hindu widow to re-marry, a second marriage has not the result of divesting her of the property of her first husband. MULA v. PARTAB (1910)
I. L. R. 32 All. 489

10 ———————— Unchaste widow—Unchastity of widow no bar to her right of succession to her son. There is no authority for holding that a Hindu lady who after her husband's death has waited and then gone to live with another man, is thereby excluded from inheritance to the estate left by her son. DAL SINGH v. MUSAMMAT DINI (1909) I. L. R. 32 All. 155

11 ———————— Family debt incurred by Hindu widow—Sale of estate in satisfaction of—Legality of sale—Registration Act XVI of 1864—Interest reasonableness of. A simple money decree was passed when the Registration Act XVI of 1864 was in force for a debt incurred by Hindu widow on account of legal necessity:—Held the absolute estate in the properties was liable to be sold in satisfaction of the decree. If the foundation of the decree be a debt of the character for which the widow could have bound the entire interest, it is sufficiently clear from the result of Privy Council decisions, that even if the decree is based on the widow's contract and does not give a charge on the husband's estate and the reversioners had not been made parties to the suit or execution proceedings the decree-holder would be entitled to have the entire estate sold, and if in fact the entire estate was sold and bought by the purchaser the reversioners could not defeat the purchaser's title to the property. It must depend on the circumstances in which a loan is incurred whether a provision for compound interest agreed to be paid by a Hindu widow is reasonable or not. VEERARAGHAVA AIYAR v. MARUDACA NACHIAR (1910)
I. L. R. 34 Mad. 188

12. ———————— Payment by wife of husband's debts during his life-time—Hindu widow—Voluntary payment—Absence of proof of obligation to repay—Burden of proof. In this case which was an appeal from the decision of the High Court in the case of Himmat Bahadur v. Bhawani Kunwar I. L. R. 30 All. 352 the Judicial Committee merely affirmed that decision on the ground that the appellant on whom the onus lay had not proved that there was any obligation on the part of the husband or his estate to pay the moneys which were paid by his wife and dismissed the appeal. BHAWANI KUNWAR v. HIMMAT BAHADUR (1911) I. L. R. 33 All. 342

13 ———————— Power to partition—Hindu widow—Nature of estate held by two widows succeeding jointly. Whatever limitations there may be upon the power of alienation of one of two Hindu widows succeeding as such to a life interest in their husband's estate so long as the property remains undivided, there is nothing to prevent them effecting a partition of such estate. Mussammat Sundar v. Mussammat Parbati, L. R. 16 I. A. 186 I. L. R. 12 All. 51 and Karuppai Ammal v. Ammalunnu Ammal I. L. R. 23 Mad. 534 followed. Ram Piyari v. Mukhand I. L. R. 7 All. 114 distinguished. Bhuwandeen Doobey v. Mana Baee 11 Moo. I. A. 487 and Gajapathi Nilamani v. Gajapathi Radhamani I. L. R. 1 Mad. 291 referred to. DURGA DAT v. GITA (1911)
I. L. R. 33 All. 443

14 ———————— Mesne profits—Mesne profits decree for against Hindu widow—Execution of may be had against estate—Subrogation—Acts necessary or beneficial to estate—Wrongful act. The mere fact that a decree for mesne profits has been obtained against a Hindu widow does not entitle the decree-holder to execute such decree against the estate of her husband. It is not open to a Hindu widow to commit an act of trespass and by that fact alone to impose a liability upon the estate of her husband. That estate cannot be bound by acts of the widow which are not her necessary nor beneficial to the estate. Harmanoni v. Ram Prasad 6 C. L. J. 46 relied on. Pramatha Nath v. Purna Chandra I. L. R. 35 Calc. 691 s.c. 1 C. W. N. 500 doubted. Chunilal v. Srinath 12 C. W. N. 69. Kalu v. Fyzuli I. L. R. 30 All. 394 referred to. SADASI KOER v. RAMGOBIND SINGH (1911)
15 C. W. N. 857

15 ———————— Mesne profits—Decree against Hindu widow for—Husband's estate when bound. Where a Hindu widow in good faith and for the benefit of her husband's estate took possession of property from which she was subsequently ejected, the estate of the husband is liable for mesne profits due by the widow. LALJI SAHAY v. GOBERDHANE JHA (1909) 15 C. W. N. 859

16 ———————— Partition—Widows—Co-widows—Right to enforce partition when joint enjoyment impossible. Although Hindu widows taking a joint interest in the inheritance of their husband have no right to enforce an absolute partition of the joint estate between them, yet where the widows cannot go on peaceably in the enjoyment of the property they can by mutual agreement or otherwise separately hold the property although they have no right to partition in the proper sense of the term, and the share of one will go by right of survivorship to the other notwithstanding the separation. Gajapathi Nilamani v. Gajapathi Radhamani I. L. R. 1 Mad. 290. Kathaperumal v. Venkabai I. L. R. Mad. 194 and Bhugwandeen Doobey v. Myna Baee 11 Moo. I. A. 487 referred to. CHHITTAR KUNWAR v. GAURA KUNWAR (1911) I. L. R. 34 All. 189

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17 ———— **Gift**—*Hindu widow—Suit by remote reversioner to set aside alienation by widow—Immediate reversioner a female having a life estate only—Acceleration of estate* A died leaving a widow B a daughter R D and a daughter's son K S B during the life time of R D made a gift of the property to K S *Held* on suit by other reversioners more remote than K S for a declaration that the gift was not binding on them that the suit would lie The question of acceleration of K S's estate would not arise because at the date of the gift the donee was not the next reversioner *Pal Chand v Ram Kumar I L R 6 All 431 Hanuman Pandit v Jota Kunwar All Weekly Notes 1908 907* and *Bina h Chandra Mazumdar v Harinath Shaha I L R 32 Calc 6* followed *Madari v Malki I L R 6 All 4 5* and *Ishwar Narain v Janki I L R 15 All 132* dissented from *Ram Anand Koer v The Court of Wards I R 8 I A 14 I L R 6 Calc 764* referred to RAJA DEBI UMED SINGH (1912) **I L R 34 All 207**

18 ———— **Reversioners**—*Hindu widow—Decree fairly obtained against widow binding on reversioner although the widow did not contest the suit* A decree in a suit against a Hindu widow respecting property of her husband of which she is in possession as such widow may be binding on the reversioners notwithstanding that the widow did not contest the suit provided that the plaintiff's case was properly and fairly stated and the widow had reasonable opportunities, of which she did not choose to avail herself of defending the suit GUR NANAK PRASAD v JAI NARAIN LAL (1912)

I L R 34 All 385

19 ———— **Maintenance**—*Widow—Arrears of maintenance—Demand and refusal—Residence in deceased husband's family house—Residence elsewhere for improper purpose* Arrears of maintenance cannot be refused to a Hindu widow in consequence of failure to prove demand and refusal A Hindu widow is not bound to reside in her deceased husband's family house and does not forfeit her right to maintenance by residing elsewhere unless she leaves the house for an improper purpose *Ambabai kom Balaji Vinayak Kale v Ramchandra Balaji Kale (189) P J 41* followed *Girianna Murkandi Naik v Honamma I L R 15 Bom 236* referred to BAPWATIBAI v CHATRU LIMBAJI (1911) **I L R 36 Bom 131**

20 ———— **Right to maintenance**—*Grant of arrears—Exigencies of the case* By Hindu Common Law the right of a widow to maintenance is one accruing from time to time according to her wants and exigencies The grant of arrears of maintenance depends on the wants and exigencies of the widow as proved in each particular case PANGUBAI v SUBAJI RAMCHANDRA (1912)

I L R 36 Bom 383

21 ———— **Alienation** by—*Transfer to reversioner—Condition that property should not be transferred during widow's life and maintenance paid out of income—Deed of settlement—Restraint on alienation—Transfer by reversioners valid but subject to widow's right to maintenance—Notice* Where a Hindu widow by a deed of family settlement transferred properties inherited from her husband to the latter's reversionary heirs subject to the conditions (i) that a fixed monthly allowance should be paid to her out of the income of the estate transferred and (ii) that the reversionary heirs should have no right to transfer any immoveable property belonging to the estate during her life time *Held* that the latter condition was void as imposing a restraint on a transferee of an absolute interest in property as to the manner in which such interests was to be applied or enjoyed by him within the meaning of s 11 of the Transfer of Property Act *Quære* Whether the doctrine of English law that a condition or conditional limitation upon alienation limited in time is bad when attached to a vested interest is applicable in view of s 10 of the Transfer of Property Act *Held* as to the other condition, that persons in whose favour the reversionary heirs executed mortgages must be taken to have had notice of all the covenants in the deed of settlement and that the widow was entitled to a declaration that her right to receive maintenance under that deed was in no way affected by the mortgages CHAMARU SAHU v SONA KOER (1911) **16 C W N 99**

22 ———— **Widow's estate**—*Widow agent appointed by—Profits realised but not paid accountability for to reversioner—Widow's savings* An agent appointed by a Hindu widow is bound to account to the reversioner for profits realised by him in the widow's life time and not paid to her Such profits cannot be presumed to be the widow's *stridhan* but must be treated as her savings which not having been disposed of followed the estate *Soorjmoney v Dinobundoo 9 Moo I A 123 Pevett Carnac v Jusbai I L R 10 Bom 428 Pallo Monee v Dwarka Nath 23 W R 335* referred to *Isri Dut v Hansbutti I L R 10 Calc 324* followed SRIDHAR CHATTOPADHYA v KALIPADA CHUCKERBUTTY (1911)

16 C W N 106

23 ———— *Widow's estate—Accumulations rights of a Hindu widow to—Husband's property repurchased out of income of absolute property of the widow—Unrealised rents of absolute estate of the widow and assets liable for her personal debts* The true test to determine whether accumulations in the hands of a Hindu widow were her absolute property or an accretion to the husband's estate is the intention of the widow i e whether she intended to treat them as part of her husband's estate or as temporary savings to be spent by her subsequently Where a towla which was part of the husband's estate had passed into the hands of a stranger and had been recovered by the widow out of the savings of the estate the inference was that she intended to treat it as part of her husband's estate Unrealised rents in the hands of tenants cannot be treated as temporary savings by the widow on her own account but should be looked upon as an accretion to her husband's estate *Pevett Carnac v Jijibai I L R 10 Bom 178* distinguished They were not assets in the hands of her daughter liable for the widow's personal debts BHAGABATI KOER v SAHUDRA KOER (1911)

16 C W N 834

24 ———— *Widow's estate—Rent-decree against Hindu widow and her co sharers paid off by latter—Decree for contribution by latter against widow—Sale in execution of decree if affects reversionary interest—Personal liability notwithstanding charge* Where a suit for arrears of rent of a taluk which accrued due after the death of one of the co sharers therein was brought against

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his widow and other co sharers and the decree obtained in the suit was discharged by the other co sharers *Held* that a sale of the share of the taluk held by the widow in execution of a decree obtained by her co sharers in a contribution suit against her did not affect the title of the reversionary heir The liability of the widow for the rent in question should be regarded as a personal liability which ought not to be held to attach to the reversion unless and until the landlord proceeded to bring the tenure to sale under the special provisions of the rent law *Brojo Lal Sen v Jiban Krishna Roy I L R 26 Calc 200 Baijun Doobey v Brij Bhookun Lall I L R 1 Calc 133 s c 24 W R 306 L R 2 I A 275* relied on MAHOMED SADAT ALI MILKI *v* HARA SUNDARI DEBYA (1912) 16 C W N 1070

25 ———— Mortgage by—*Widow of part of the estate—Legal necessity—Presumption—Reversioner* Alienation by way of mortgage by a Hindu widow as heiress of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable enquiry and honest belief as to its existence but with the consent of the next reversioner for the time being will be valid and binding on the actual reversioner if the presumption of legal necessity or of reasonable enquiry and honest belief raised by such consent is not rebutted by more cogent proof *Nobokishore Sarma Roy v Hari Nath Sarma Roy I L R 10 Calc 1102* considered *Bajrangi Singh v Manokarnika Bakhsh Singh I L R 30 All 1 L R 35 I A 1* referred to DEBI PROSAD CHOWDHURY *v* GOLAP BHAGAT (1913) I L R 40 Calc 721

26 ———— Compromise—*Followed by an award settling disputes as to the property of various members of the family—Effect of such award on reversionary interests* Where the widow of one and the son of the other of two brothers Hindus separated in estate entered into a compromise which was found to be reasonable in its nature concerning the partition of the property of the two brothers and an award was made on the basis of such compromise it was *held* that it was not open to the reversioner to dispute the validity of the compromise and award specially when a considerable time had elapsed and most of the property had changed hands meanwhile *Khunni Lal v Gobind Krishna Narain I L R 33 All 356* and *Mohan Lal v Chuttan Singh 10 All L J 101* followed BIHARI LAL *v* DAUD HUSSAIN (1913) I L R 35 All 240

27 ———— Alienation by—*In respect of the property of her husband—Transfer of debt secured by a mortgage* A Hindu widow in possession as such of property which had been the property of her husband in his life time can always alienate her life interest in such property and a transfer by her of the corpus of the property without legal necessity and not for a pious purpose is not void but only voidable at the instance of the reversioners A Hindu widow without legal necessity transferred a mortgage debt and the security therefore which had been the property of her late husband, to D who thereafter sued to recover the debt by sale of the mortgaged property *Held* that the transferee acquired all the rights which the widow had and could exercise during her life time in respect of the mortgage one of these being to recover the debt *Lyon*

Gopal Mukerji v Krishna Mahishi Debi I L R 34 Calc 329 referred to DURGA KUNWAR *v* MATU MAL (1913) I L R 35 All 311

28 ———— Mortgage by—*Suit for declaration that mortgage by widow did not effect plaintiff s reversionary rights—Plaintiffs not nearest reversioners—Pleadings* Where plaintiffs sued as next reversioners for a declaration that a mortgage executed by a Hindu widow was not binding on *them and it was found that as a matter of fact* even the nearest of the plaintiffs could only succeed to the estate if four males and one female died in his life time *Held* that the plaintiffs ought not to have a decree MEGHU RAI *v* RAM KHELAWAN RAI (1913) I L R 35 All 326

29 ———— Conversion—*Caste Disabilities Removal Act s 1—Hindu Widow s Remarriage Act (XV of 1856) s 2—Hindu widow—subsequent remarriage—Widow s estate not divested—Hindu law* The widow of a separated Hindu became a convert to Mahomedanism and married a Mahomedan *Held* that the widow did not thereby lose her interest in the property of her late husband in view of the provisions of Act XXI of 1850 nor did s 2 of the Act XV of 1856 affect the *situation inasmuch as that section applied* to *Hindu* widows only *Khunni Lal v Gobind Krishna Narain I L R 33 All 356* followed *Matungini Gupta v Ram Rutton Roy I L R 19 Calc 289* dissented from ABDUL AZIZ KHAN *v* NIRMA (1913) I L R 35 All 466

30 ———— Estate—Investments by widow from income of husband s estate—*Whether or not such investments become accretions to the husband s estate* Where immoveable property is purchased by a Hindu widow in possession as such of the estate of her late husband out of the income of that estate such property does not necessarily become an accretion to the husband s estate The widow has full power to dispose of it during her life time and it is only when she manifests during her life time a clear intention to treat it as an accretion to her husband s estate or allows it at her death to remain undisposed of that such property will become part of that estate WAHID ALI KHAN *v* TORI RAM (1913) I L R 35 All 551

31 ———— *Widow s estate—Nature of interest arising out of contract with surviving co parceners* P and C were undivided brothers of a joint Hindu family P died C entered into an agreement with L the widow of P whereby P was to receive a younger son of C (if such should be born) in adoption or in default a *half share in the family properties* No adoption took place C died leaving his widow B B and L effected a partition of the properties in equal shares The plaintiff was a daughter of P by another wife *Held* that the half share taken by L was a widow s interest and that it would pass on her death to her husband s reversioners and the plaintiff being the nearest reversioner was entitled to succeed. A woman s estate can be obtained by a Hindu *female not only by inheritance but* also by contract of parties, by a grant or by prescription VENGAMMA *v* CHELAMAYYA (1913) I L R 36 Mad 484

32 ———— *Alienation by—with consent of reversioner of part of estate—Effect—Presumption of necessity when defeated—Several limited owners arrangement between how long effective—*

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Alienation of her separated share for legal necessity—Legal necessity if to be determined with reference to whole estate or the share The Full Bench in *Debi Prasad Chowdhury v. Golap Bhagat I L R 40 Calc* ... has decided that the doctrine of relinquishment and acceleration cannot apply to partial transfers by a limited owner which can be supported only by legal necessity. The consent of the next reversioner is merely strong presumptive evidence of the necessity. The propriety of an alienation with the consent of the next reversioner may come in question not only with reference to the conduct of the widow whether or not she was justified by necessity but also with reference to the conduct of the next reversioner whether or not his conduct was honest. If in the absence of legal necessity he engineered the transaction to suit his own ends and for his own immediate gain his consent would lose all its virtue. The transaction would stand no higher than a partial alienation in his favour and would have to be judged from that standpoint. Nevertheless whatever might be said of the conduct of the widow or the next reversioner the transferee if he made due enquiry and acted *bona fide* would still be entitled to the benefit of the equitable rule laid down by the Privy Council in *Hunoomanpersaud v. Babooee Munraj 6 Moo I A* 393 and now enacted in s. 38 of the Transfer of Property Act. Nor would the antecedent mismanagement of the estate affect him unless he was in some way a contributory party thereto. If two widows or two daughters taking jointly the estate of their deceased husband or father make an arrangement for separate possession and enjoyment the arrangement will not ordinarily deprive the survivor of the right to the whole estate or enable the ladies to confer a title on a third party which will not terminate at the latest with the life of that survivor. The propriety of an alienation by one of several limited owners of a portion of the property in her separate possession should be determined with reference to the estate as a whole and not with reference to the separated portion in her possession. SHYAMA DAS ROY CHOWDHURY v. RADHIKA PRASAD CHATTERJI (1918) 22 C W N 846

33 ———— Widow's estate—*Relinquishment—Abandonment of claim to estate—Adoption—Authority to adopt—Will—Construction—Exclusion of presumption* (i) Upon the death of a Hindu in 1872 his nephew obtained a certificate under Act XXVII of 1860 as sole survivor of his joint family the widow of the deceased opposed the application and alleged a partition in 1864. By agreements made in 1874 the widow accepted the decision recognized the nephew's title and was granted by him a maintenance allowance which she continued to receive until her death in 1904. The nephew died in 1894 and the estate passed under his will to the first appellant. In 1907 the respondent sued to recover the estate as heir to the holder who died in 1872 upon his widow's death and proved that a partition had taken place in 1864. *Held*—that the widow's agreement of 1874 in conjunction with her acceptance of maintenance till 1904 amounted to a complete relinquishment of the estate to the nephew then the next reversioner and that the respondent's claim accordingly failed. *Rangasami Gounden v Nachiappa Gounden L R 46 I A 72* applied (ii) A Hindu by his will authorized his widow to adopt a son if no male or female child should be born to him. He died without issue but had a posthumous daughter. After the death of the posthumous daughter the testator's widow purported to adopt a son to him. *Held* that in construing the will effect could not be given to a presumption that the testator desired that a son should be adopted to him since authority to adopt in the events which happened was clearly excluded by the language used. BHAGWAT KOER v. DHANUKDHARI PRASHAD SINGH (1919)

L R 46 I A 259

34 ———— Alienation—*Consent of next reversioner—Validity of alienation—Legal necessity need not be proved—Registration Act (XVI of 1908) s 17, cl (d)—Document showing assent—Spes successionis—Registration not compulsory* A Hindu widow who had inherited property from her husband alienated a portion of it. Her only daughter assented to the alienation a few days after by a writing which was not registered. After the death of the widow and the daughter an heir of the daughter sued to set aside the alienation on the ground that it was not made for legal necessity. The Court found the legal necessity not proved and decreed the claim. The defendant having appealed —*Held* that the alienation having been assented to by the next reversioner no question of legal necessity could arise. *Held* also that the assent in writing was not compulsorily registrable under s. 17 cl (d) of the Registration Act for the executant had at its date no more than *spes successionis* as heir. MALLU SAHIB v. MALLIKARJUNAYYA (1913)

I L R 38 Bom 224

35 ———— ———— *Alienation—Settlement of family dispute by compromise—Hindu widow also a party if the alienation of property in excess of her powers* A dispute between the daughters of a deceased Hindu on the one hand and the widow of his alleged adopted son on the other each party claiming to be solely entitled to the estate was settled by a compromise each party getting thereunder a share in the family property. In a suit by a daughter of the alleged adopted son (as one of the reversionary heirs expectant on her mother's death) to set aside the compromise as beyond the competence of a limited owner like her mother *Held* that the compromise was in no sense of the word an alienation by a limited owner of the family property but a family settlement in which each party takes a share of the family property by virtue of the independent title which is to that extent and by way of compromise admitted by the other parties. *Lala Khunni Lal v. Kunwar Gobind Krishna Narain I L R 33 All* ... *15 C W N 545* followed. HIRAN BIBI v. SOHAN BIBI (1914) 18 C W N 929

36 ———— ———— *Alienation by Hindu widow—Suit by vendee to recover property after widow's death from stranger—Proof of legal necessity if necessary* An alienation by a Hindu widow without legal necessity is voidable but not void and until the reversioner (including in that term the Crown if there is no nearer reversioner) decides to avoid it or to treat it as a nullity it stands good and the alienee is entitled to recover possession from a stranger without being required to prove legal necessity. *Bejoy Gopal v. Krishna Mahishi I L R 35 Calc* ... *Madhusudan*,

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v *Rooke 11 C W N 424* referred to DEO NANDAN PERSHAD v UDIT NARAIN SINGH (1914)
18 C W N 940

37 —————— *Alienation—Legal necessity—Pilgrimage to Gaya—Feast given after return from Gaya, whether legal necessity—Reversioner—Suit for declaration that alienation was without legal necessity—No offer to reimburse money spent on legal necessity—Suit whether maintainable* A Hindu widow is competent to alienate her husband's estate for expenses in connection with a feast given to Brahmins etc after return from pilgrimage to Gaya *Makhan Lal v Gyan Singh I L R 33 All 255* not followed *Quære* Whether a declaratory suit can be maintained by a reversioner who does not offer in the plaint to reimburse the purchaser to the extent that the sale was for necessity DINANATH GHOSH v HRISHIKESH PAL (1914) **18 C W N 1303**

38 —————— *Alienation in part for necessity—Reversioner suing for declaration as to invalidity of sale on payment of binding portion of the consideration—Absence of offer to pay if fatal to suit—Conditional declaration—Form of decree* When a reversioner during the life time of the widow sues for a declaration that an alienation in part for necessity is invalid beyond the life time of the widow on payment of the binding portion of the consideration *Held* that the suit should not fail on the mere ground of the absence of an offer in the plaint to pay the amount that was binding on the reversioner *Singham Setti Sanyasi Kondayya v Draupadi Bommayamma I L R 31 Mad 153* not followed *Bhagwat Dayal Singh v Debi Dayal Sahu I L R 35 Calc 420* applied *Held* also that a conditional decree may be passed *Mahomed Shumsool v Shewukram L R 2 I A 7* referred to *Per* SUNDRA AYYAR J—The uncertainty regarding the person who would be entitled to succeed the widow is no ground for refusing a declaration regarding the character of the alienation and a declaration may be made that the alienation is invalid as a whole but that on equitable grounds the alienee should have a charge declared in his favour for the binding portion of the consideration *Jati Dutt Koer v Hansbutti Koerain L R 10 I A 150* applied *Semble* The proper form of the decree in such suits is merely to make a declaration that the alienee has a charge for a certain sum of money PAPARAYUDU v RATTAMMA (1914) **I L R 37 Mad 275**

39 —————— **Right of reversioner to sue**—*Suit to set aside alienation and for possession—Nearest reversionary heir alleged to be precluded from suing* In this case it was *held* (affirming the decision of the High Court at Allahabad that the appellant could not maintain the suit (to set aside an alienation by a widow and for possession) because a nearer reversionary heir was in existence whom he had failed to prove to be precluded from suing. The general rules laid down in *Rani Anund Koer v The Court of Wards I L R 6 Calc 764 L R 8 I A 14* followed JHANDU v TARIF (1914)
I L R 37 All 45

40 —————— **Rights of widow in respect of the property of her deceased husband**—A Hindu widow in possession as such of her husband's estate is not liable to account to anyone but is at liberty to do what she pleased with the property during her life time provided only that she does not injure the reversion PHENKA v BHOLA NATH (1915) **I L R 37 All 177**

41 —————— **Alienation**—*by widow of her husband's estate—Surrender by widow to nearest reversioner subsequent to alienation—Effect of surrender on alienations* A surrender by a Hindu widow of her interest in her husband's estate in favour of the nearest male reversioner cannot affect alienations which were made by her prior to the surrender and which though not binding on the reversioners were binding on her for her life *Sreeramulu v Kristamma I L R 26 Mad 143* followed *Singaram Chetty v Kalianasundaram Pillai (1914) Mad W N 735* referred to *Ramakrishna v Tripura Bai I L R 33 Bom 88* dissented from SUBBAMMA v SUBBRAMANYAM (1915) **I L R 39 Mad 1035**

42 —————— **Decree against for husband's debt**—*Attachment of property—Previous alienation by widow for no justifiable cause—Attachment and sale thereupon effective to convey reversionary interest* A plaintiff who had obtained a decree against a Hindu widow in respect of a debt due by her late husband attached a certain property as belonging to her husband which she had sold to a stranger several years before the attachment for no purpose binding on the reversioner *Held* that the decree holder was entitled to attach and bring to sale the reversionary interest in the property subject to the enjoyment thereof by the alienee during the widow's life time CHIDAMBARAMMA v HUSSAIN NAMMA (1915) **I L R 39 Mad 565**

43 —————— **Compromise**—*Rights of reversioners* A Hindu widow in possession as such of her husband's estate brought a suit for possession of two shops on the allegation that they formed part of her husband's estate The suit was compromised the effect of which was that the widow recognized the defendants as full proprietors and they on the other hand had to pay a certain sum of money To raise this money they mortgaged the two shops The mortgagee brought a suit for sale and the shops were purchased by one H at the auction sale After the death of the widow the reversioners of her deceased husband brought a suit to recover possession of the aforesaid shops *Held* that a compromise entered into by a Hindu widow with a limited estate resulting in the alienation of property forming part of her husband's estate cannot bind the reversioners unless it is shown that it was for such purposes as would justify a sale by a Hindu widow —*Imrit Konwar v Roop Narain Singh 6 C L R 76 Musammat Raj Kunwar* alias *Sheo Murat Koer v Musammat Inderjit Kunwar 5 B L R 585 Rajlakhshmi Dasee v Katyayani Dassee I L R 38 Calc 639 Khunni Lal v Gobind Krishna Narain I L R 33 All 356 Mahadei v Baldeo I L R 30 All 75* and *Behari Lal v Daud Husain I L R 35 All 240* referred to KANHAIYA LAL v KISHORI LAL (1916) **I L R 38 All 679**

44 —————— **Maintenance**—*Secured by deed—Subsequent unchastity—Living chaste at the time of suit effect of* Where in a suit by a Hindu widow against her deceased husband's brother for maintenance at the rate fixed by agreement, it was found that the plaintiff had since lived an immoral life but reformed her ways at the time of the suit *Held* that she lost her right to the rate fixed in the deed but was entitled to a

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starving allowance Texts and case law reviewed SATHIYATHAMA v. KESAVACHARYA (1916) I L R 39 Mad 658

45 ——— Gift by widow in favour of the next presumptive reversioner—*Of entire property of husband* It is competent to the widow of a separated Hindu being in possession as such widow of her husband's property to make a gift of the whole of it in favour of the next presumptive reversioner *Bajrangi Singh v Manokarnika Bakhsh* I L R 30 All 1 and *Bhagwat Ram v Lachmi Kuar* I L R 11 All 263 referred to *Lalti Kuar v Ganga Bishan* I L R 3 All 16 distinguished SHAM LATHI LAL v. JAICHHA KUNWAR (1917) I L R 39 All 520

46 ——— Sale of husband's property by one of two widows—*Right of succession of the other—Purchaser not entitled to refund of money spent on improvement* A Hindu died leaving two widows. The widows as a matter of convenience divided the property of their deceased husband between them One of the widows sold a house which had fallen to her share She then died, and her co widow sued to recover possession of the house *Held* that the purchaser could not claim a refund of money spent in improving the property so purchased NANDI v. SARUP LAL (1917) I L R 39 All 463

47 ——— Transfer by widow to reversioner—*Acceleration of succession* Where a Hindu widow transfers an estate to the nearest reversioner such transfer in order to have the legal effect of accelerating the succession must be of the whole estate which the widow possesses The doctrine does not apply to the transfer of a portion of the estate though it be of the widow's entire interest in that portion *Behari Lal v Madho Lal Ahir Gayawal* I L R 19 Calc 236 *Vithu v Babaji* I L R 34 Bom 165 and *Marudamuthu Nadan v Srinivasa Pillai* I L R 21 Mad 128 referred to The rule laid down by the Privy Council in *Bajrangi Singh v Manokarnika Bakhsh Singh* I L R 30 All 1 that a transfer made by a Hindu widow with the consent of the nearest reversioner will take effect as against the more remote reversioner is applicable to cases of transfer for consideration It has not been extended to a case where a transfer has been made by way of gift If the transfer be with the consent of the nearest reversioner it takes effect because it affords evidence of the propriety of the transaction in other words it justifies the transaction on the ground of legal necessity KHAWANI SINGH v. CHET RAM (1916) I L R 39 All 1

48 ——— Acceleration of estate by the widow to next reversioner—*Entire interest of the widow must be accelerated—Alienation by widow not supported by legal necessity—Subsequently adopted son not bound by the alienation—Divesting of estate by adoption—A man cannot take advantage of his own fraud—Maxim* A Hindu widow who was in possession of her husband's property mortgaged it with defendant No 1 in 1893 The plaintiffs who were next reversioners sued to set aside the alienation on the ground that it was not supported by consideration The suit ended in an award by arbitrators which provided (i) that the plaintiffs were entitled to redeem the mortgage (ii) that defendant No 1 was thereupon to reconvey the property to the plaintiffs (iii) that the widow was to surrender to the plaintiffs her right title and interest in the property and (iv) that out of the property so reconveyed the plaintiffs were to give to the widow a house and eighteen *bighas* of land for her life as maintenance No decree was passed in terms of the award and parties took no action under the award In 1906 defendant No 1 created a sub mortgage on the property and executed a rent note to the sub mortgagee Sometime afterward the plaintiffs took a reconveyance of the property from the defendant No 1 but without making any payment to him they paid off the sub mortgage and they took an assignment from the sub mortgagee of his rights under the sub mortgage In 1909 the widow adopted defendant No 2 who was the natural son of defendant No 1 Defendant No 2 was placed in possession of the property by his natural father The plaintiffs filed the present suit to recover possession of the property *Held* dismissing the suit that the award which was the basis of plaintiffs claim could not be supported either as an acceleration by the widow of her interest which to be valid required the surrender of the whole of her interest in the property or as an alienation which was not for a legal necessity and which therefore was not binding on defendant No 2 *Held* further that defendant No 2 was not precluded from contesting the plaintiffs claim to possession inasmuch as he was not guilty of any fraud at all and as he had not thereby gained any advantage in the special issue to be determined between him and the plaintiffs An acceleration by a Hindu widow enjoying a life estate in favour of the next reversioner is valid only if the acceleration is of the whole of her interest in the property In an alienation by a Hindu widow of her husband's estate the consent of the reversioners is no more than a factor in the proof of legal necessity A true acceleration differs from alienation for legal necessity The two legal notions are not only irreconcilable but virtually antagonistic MOTI RAIJI v. LALDAS JEBHAI (1916) I L R 41 Bom 93

49 ——— Right of residence in joint family house—*Effect of alienation during the life time of widow's husband* When a right of residence or maintenance comes into existence in favour of the widow of a man who was lately a member of a joint Hindu family she takes that right in the property as it stands at the time of her husband's death She cannot set up her right of maintenance or residence as against alienations effected during the life time of her husband *Ajudhia Prasad v Jasoda* 1887 *All Weekly Notes* 279 followed A widowed daughter in law is debarred from setting up the plea of the invalidity of an alienation effected by the father in law during her husband's life time *Sohni v Mohan Kuer* 9 A L J 253 followed RAMZAN v. RAM DAIYA (1917) I L R 40 All 96

50 ——— Gift—*Suit to contest alienation made by widow—Plaintiff not nearest reversioner* In order that a reversioner may be able to maintain a suit to contest an alienation made by a Hindu widow of her husband's property he must either be the next presumptive reversioner or he must show that the nearer reversioners are colluding with the widow *Rani Anand Kunwar v The Court of Wards* I L R 6 Calc 764 and *Meghu Rai v Ram Khelawan Rai* I L R 35

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All 3/6 followed *Raja Dei* v *Umed Singh I L R 34 All 207* distinguished CUMMAN v JAHANGIRA (1918) **I L R 40 All 518**

51 ———— **Transfer by assignee from widow**—*Right of suit of reversioner—Specific Relief Act (I of 1877) s 42—Limitation—Limitation Act (IX of 1908) Sch I Arts 120 and 125* An alienation made by the transferee from a Hindu female in possession with a limited estate or by a stranger in possession holding under her may furnish the nearest reversioner with a cause of action for a declaratory suit equally with an alienation made by the Hindu female herself To such a suit the limitation applicable is not that prescribed by Art 125 but that prescribed by Art 120 of the first schedule to the Indian Limitation Act 1908 BALBHADDAR PRASAD v PRAG DAT (1919)
I L R 41 All 492

52 ———— **Reversioners**—*Whether award or compromise decree against widow binds reversioners* The principle that a decree fairly obtained against a Hindu widow binds the reversioners does not apply to a compromise or an award decree not shown to have been fairly obtained against the Hindu widow as representing the estate *Jeram* v *Veerbai 5 Bom L R 885* followed RAMA BIN SANTU v DAJI BIN NARU (1918) **I L R 43 Bom 249**

53 ———— **Alienation for religious purposes**—For purposes which are supposed to conduce to the spiritual welfare of her husband a widow has a larger power of disposition than she possesses of a purely worldly purposes KUNJ BIHARI LAL v LALTU SINGH
I L R 41 All. 130

53(a) ————————*Whether after born son divests widow s estate*—A sale by a widow was held good notwithstanding the birth of a son after the death of the father as the rights of a son (in Hindu Law) in the estate of his father date from his birth HIRA v BUTA
I L R 1 Lah 128

53 b) ———— **Power to make permanent lease**—*Benefit of estate—Acquisition of tenant s rights—Accretion to husband s estate—Onus on appellant to show error in judgment appealed from* A permanent lease executed by a Hindu widow does not bind the reversioners unless legal necessity and benefit to the estate are proved The mere fact that the rent and purchase price represent the fair market value does not of itself prove necessity Tenant s rights acquired by a Hindu widow are in the absence of proof that they were acquired out of the accumulated savings of her income and were dealt with as her separate property accretions to her husband s estate and as such cannot be sold by her so as to give a title as against the reversioners The burden of showing that the judgment appealed from is wrong lies on the appellant NABAKISHORE MANDAL v UPENDRA KISHORE MANDAL
26 C W N 322

54. ———— **Alienation by**—*With consent of immediate reversioner—Actual reversioners his sons if estopped from recovering—Presumption of legal necessity rebuttal of—Proof of legal necessity—Recitals in deed evidentiary value of—What is legal necessity existence of* ... Where the conveyance by a Hindu widow covers a portion only of the estate left by her husband the transferee can successfully resist the claim only on proof of legal necessity or such *bonâ fide* enquiry as entitles him to protection from a Court of equity In a suit by the reversionary heir to recover the property from the alienee the burden of proving that there was legal necessity or *bonâ fide* inquiry rests in the first instance on the person who claims title from the widow Recitals in deeds as to the existence of such necessity cannot by themselves be relied upon for the purpose of proving the assertion of fact which they contain The existence of necessity must be substantiated by evidence *aliunde* It is not sufficient for the transferee to prove that there were some debts payable by the deceased full owner or his widow The true rule is that the creditor to protect himself where he is not shown to have made a *bonâ fide* enquiry must prove that there was an actual pressure on the estate or danger to be averted, such as a threatened suit on a genuine debt an outstanding decree or an impending sale which the widow had no fund to meet Where however the alienation is made with the concurrence of or jointly with the next reversioner a presumption arises in favour of the validity of the transaction The circumstances under which the consent was given must be carefully scrutinised and if it transpires that the transaction was in essence a device to divide the estate with the reversioner his consent will lose its probative value The actual reversioners are not estopped from suing to recover property alienated by the deceased widow of the full owner by the fact that their father as immediate reversioner had concurred in the alienation and this even when they had after the death of their father and before the death of the widow taken by inheritance land transferred by the widow to their father by way of gift RAMESH CHANDRA CHAKRAVARTY v SASHI BHUSAN UPADHYA (1919)
23 C W N 1025

5) ———————— A widow alienated certain property for a purpose not binding on the inheritance and thereafter adopted a son *Held* that the alienation was not binding on the son and he could sue to have the alienation set aside VAIDYANATHA SASTRI v SAVITHRI AMMAL **I L R 41 Mad 75**

56 ———— **Co widows—Relinquishment by one in favour of the other**—*Predecease of the latter before the former—Male reversioners—Right of inheritance whether accelerated—Limitation Act (IX of 1908) Art 141—Suit by alienee from male reversioners more than twelve years from death of latter widow but within twelve years of the death of surviving widow—Limitation* Where a Hindu widow gave up all her rights in her husband s estate in favour of her co widow and the latter predeceased the former the right of succession of the male reversioners to the estate is not accelerated so as to entitle them to succeed to it immediately on the death of the widow in whose favour the relinquishment was made A suit by the reversioners to set aside an alienation by the latter widow would be within time under Art 141 of the Limitation Act if brought within twelve years from the death of the last surviving widow CHANGAPPA v BURADAGUNTA (1920)
I L R 43 Mad. 855

57 ———— **Will construction of**—*Adoption excluded by language of will—Acceptance by*

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widow for long, and after r... it in effect of the next reversioner. It is settled by long practice and confirmed by a series of decisions that a Hindu widow can renounce the estate of her husband in favour of the nearest reversioner and by a voluntary act of self-effacement from the succession as effectually as if she had then died. This voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights, and it may be effected by any process having that effect, provided that there is a bona fide and total renunciation of the widow's right to hold the property. *Rangasami Gounden v. Nachiappa Gounden*, [illegible] followed. Three Hindu brothers, K, B and J, lived as a joint family governed by Mitakshara law. J died in 18.. without issue leaving a widow A. S died subsequently in 1872 without male issue leaving a widow and two daughters, and B died on 9th February 18.4 leaving a son M. After J's death M applied to the District Court under Act XXVII of 1860 for a certificate to collect his debts alleging that the three brothers had been joint and that he was entitled as survivor to J's estate. J's widow A opposed the application, claiming that a partition between the three brothers had taken place in 1861 and consequently at the date of J's death they were separate and she was entitled to succeed to her husband's estate. The District Judge decided that the partition had not taken place, that the brothers were joint and granted the certificate to M, his father B being then dead. Though not precluded from raising the question of title A accepted the decision and executed an agreement in 1874 that in consideration of the payment of maintenance to her out of the estate she would not further contest the matter and M took possession of the estate. M died on 21st June 1891 leaving no issue, but leaving two widows BK and P and having made a will by which he authorised his widows or the survivor of them to adopt a son only if no male or female child should be borne to him. His widow R on 11th October 1894 gave birth to a posthumous daughter who died in 1895, her mother R in 1899 and A widow of J in 1904 having received maintenance out of the estate up to her death. On 19th February 1906 BK, purporting to act under a power conferred upon her by her husband's will adopted a son to her husband. In suits brought in 1907 by D the present respondent who was the next reversionary heir to the estate of J and M against BK and the adopted son the appellants to recover those estates it was proved that a partition had taken place in 1861. *Held* that there was a complete self-effacement by A in 1874 which precluded her from asserting any further claim to the estate. Her agreement of that date followed by the acceptance for 30 years of maintenance out of the estate under the terms of the agreement amounted to a complete relinquishment by her of her estate in favour of M, the title of whose representatives was established and the suit was barred and should have been dismissed. *Held* also that the will could not be construed as allowing an adoption after the birth of the posthumous daughter, its plain terms excluding such an adoption which was therefore invalid. PHAGWAT KOER v. DHANUKDHARI PRASAD SINGH (1919)

I. L. R. 47 Calc. 466

57(a) ———————— Where it is found as a fact on the evidence that a transfer of her husband's property made by a widow is not one for legal necessity the fact that the next reversioner has joined does not make it binding on remote reversioners. CHHATAWAN LAL v. MUSAMMAT LAJ KUARI

I. L. R. 43 All. 535

58 ———— Gift—*Promise of property of her deceased husband for the spiritual benefit of the deceased.* The question whether the gift of a portion of her husband's property made by a Hindu widow was made for the benefit of his soul is a question of fact in each case. *Khub Lal Singh v. Ajodhya Misser*, I. L. R. 43 Cal. 574, referred to. It is not a necessary condition to the validity of such a gift that the donee should be expected to do something which might be supposed to confer some benefit on the soul of the deceased. CHHOTE UPADHYA v. LAKHRANI

I. L. R. 43 All. 515

59 ———— Surrender of her estate to next reversioners—*Will of deceased husband inoperative when he was a member of a joint family with infant son—Compromise of suit by nearest reversioner—Widow entitled to moveables under Mithila Law—Compromise not a device to divide estate with reversioner.* A Hindu governed by Mithila Law died leaving a widow, four daughters and a son six years of age, who died very soon after his father. The latter left a will under which on the death of the son without issue the daughters succeeded to the immoveable property and they, though opposed by a first cousin of the testator who, if the will was inoperative would be by Hindu Law the nearest reversioner, obtained possession of it. The nearest reversioner thereupon brought a suit for a declaration that the property being joint the will was inoperative, that the son inherited the immoveable property, that on his death his mother became entitled to a woman's estate in it, and that on her death it would devolve on the then next reversioner. The suit was opposed by the daughters and by the mother and came on for trial but before judgment a compromise was come to between the parties in terms of which the suit was decreed. The rights under the will were given up, the moveable property was given absolutely to the widowed mother who by the Mithila Law was entitled to it, and she surrendered all right of succession to the immoveable property to which the plaintiff in the compromised suit became by such surrender entitled as next reversioner and of which he gave a moiety to the daughters and he and the daughters each gave the widow a small portion of the land for her maintenance. In September 1911 the plaintiff in the compromised suit having died the present appellants as next reversioners brought the present suit for a declaration that the compromise was invalid and ineffectual as against them as being only a device to divide the property with the reversioner and therefore not *bonâ fide*, but they abandoned that plea in the Appellate Court. *Held* that as to the moveable property the widowed mother was absolutely entitled to it under the Mithila Law, the compromise only recognised her right to it. As regards the immoveable property her surrender was total not partial inspite of the small portion of land given her as ... only

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for her maintenance The compromise was made for good consideration on both sides and was *bonâ fide* and valid within the principles laid down by the Board in *Ramgasami Gounden v Nachiappa Gounden I L R 42 Mad 523 L P 46 I A 72* SURESHWAR MISSER v MAHESHRANI MISRAIN 1920 I L R 48 Calc 100

60 ———— Alienation for religious or charitable purpose —*Spiritual benefit of husband —Building dharamsala—Succession Atma bandhus* Unless it can be established that the alienation of a portion of her husband s estate by a Hindu widow is for the performance to religious acts supposed or intended to be for the spiritual benefit of the deceased the alienation cannot operate to the prejudice of the reversioners even though the portion of the property alienated be not excessive *Collector of Masulipatam v Cavaly Vencata Narrainapah 8 Moo I A 529 Puran Dai v Jai Narain I L R 4 All, 482 Khub Lal Singh v Ajodhya Misser I L R, 43 Calc 654* and *Kunj Behari Lal v Lallu Singh I L R 41 All 160* referred to Amongst *atma-bandhus* the paternal grand father s son s son is nearer heir than the sister s daughter s son SHAM DEI v BIRBHADRA PRASAD I L R 43 All 463

61 ———— Escheat—*Burden of proof—Crown to prove that property vested in the husband—Stridhan* When the Secretary of State for India in Council seeks to recover possession of property as having escheated to the Crown on the death of a Hindu widow by reason of the failure of the deceased husband s heirs it lies upon him to show that the property in suit had vested in the husband *Diwan Ran Bijai Bahadur Singh v Indurpal Singh (1899) L R 26 I A 226* relied on On the failure of her husband s heirs the *stridhan* of a widow would go to her blood relations in preference to the Crown *Kanakammal v Ananthamathi Ammal (1912) 37 Mad 293* approved of GANPAT RAMA v SECRETARY OF STATE FOR INDIA I L R 45 Bom 1106

62 ———— Right of residence—*Transferee for value not affected by the right* Under Hindu Law a widow cannot assert her right of residence in a house which has been sold by her husband during his life time unless a charge is created in her favour prior to the sale The right which a Hindu wife has during her husband s life time is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property ancestral or self acquired *Mani Lal v Bai Tara (1892) 17 Bom 398* considered *Jayanti Subbiah v Alamelu Mangamma (1902) 27 Mad 45* followed GANGABAI v JANKIBAI I L R 45 Bom 337

63 ———— Competence of widow carrying on her deceased husband s business to sell property—*Acquired by her in the course of such business—Legal necessity* The widow of a separated Hindu succeeded as such to the business of her deceased husband and carried it on for a series of years with reasonable prudence on the same lines as it had been conducted in his life time The business was that of a banker and money lender and involved from time to time the purchase and resale of immoveable property *Held* that as regards immoveable property not inherited from her husband but purchased *in the course of business* by her the widow was competent to sell again outright without proof of any special legal necessity being requisite the legal necessity being that the property was sold in the course of a business which she was entitled if she chose to do so to carry on Neither was it in individual instance a proof of absence of legal necessity that the property was sold for less than the widow had paid for it *Sham Sundar Lal v Achhan Kunwar I L R 21 All 71 Sakrabhai Nathubhai v Maganlal Mulchand I L R 26 Bom 206 Radha Kishan v Janki* Weekly Notes 1907 p 155 referred to PAHALWAN SINGH v JIWAN DAS (1920) I L R 42 All 109

———————— Re marriage effect of A Hindu widow on re marriage forfeits the life interest which she holds as the mother of a deceased son who survived her husband SHEOBARAN MAHTO v MUSSAMMAT BHOGEA 3 Pat L J 639

64 ———————Husband's estate—*Inheritance—Moveable property—Corpus—Waste of corpus—Reversioners right of—Suit by reversioners to prevent waste—Suit against widow and her alienees without consideration—Receiver—Right to place property in hands of Receiver—Liability of alienees to replace moveable corpus in their possession—Accountability of widow as to corpus—Nature of accountability—Duty of widow to replace corpus if in her possession—Right to enjoy income of such property—Limitation Act (IX of 1908) Art 120* A Hindu widow inheriting moveable property of her husband is not entitled to commit waste of the corpus of such property Where she commits waste of the corpus of such property the nearest reversioner is entitled to file a suit praying that such corpus may be reduced into possession and handed over to a receiver appointed in the suit the transferees from the widow without consideration can be directed to replace any part of the corpus of the moveable property which can be traced to their hands and the widow herself made accountable for waste in the sense of making her replace the moveable corpus of her husband s estate which she has made away with if she is in a position to do so allowing her to enjoy the income of the fund so replaced Article 120 of the Limitation Act applies to such a suit *Nobin Chunder Chuckerbutty v Issur Chunder Chuckerbutty (1868) 9 W R 505 (F B)* and *Radha Mohan Dhar v Ram Das Dey (1869) 3 B L R 362* referred to *Sinclair v Brougham (1914) A C 398* applied VENKANNA v NARASIMHAM I L R (1920) 44 Mad 984

65 ———— Acceleration of reversion's interest—*Relinquishment of property with provision for maintenance effect of* A and B two widows of a deceased Hindu compromised a dispute between them as to who was entitled to succeed to their husband on the terms that A should take one fourth of the property absolutely and B three fourth absolutely *Held* that in the circumstances in which the compromise was effected neither widow took an absolute estate in the property One of the widows made over her share in equal shares to her two daughters and with the consent of those daughters to the son

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of a deceased daughter but stipulated that she should receive for life the rents of certain villages on account of an agreed maintenance of Rs 1,200 *per annum* *Held* that the surrender of the estate by the widow was sufficient to accelerate the estate of the daughters One of the daughters (*C*) died after having made a mortgage of her share in the form of an *ijara* and the surviving daughter (*D*) accepted rent (*huqq ajiri*) from the *ijaradar* *Held* that *D* had elected to affirm the *ijara* *Held further* on the evidence, that there had been a valid family arrangement whereby each daughter became entitled to deal with her share as she pleased during the life time of the other MUSSAMMAT DILTOR KUER v HARKHU SINGH **2 Pat L J 678**

66 ———— **Widow alienating her deceased husband's property to save it**—*From being sacrificed at a forced sale—Part of the purchase money being for personal necessities in anticipation* One G D died in 1091 leaving a widow and 2 minor sons and a house at Amritsar of which the widow got possession on behalf of her sons The sons died in 1906 and 1907 respectively The house had been mortgaged by G D in 1892 for Rs 450 and the mortgagee sued in 1909 and obtained a decree for Rs 5 6 and an order for the sale of the house in default of payment In execution of the decree the house was put up to sale by auction and was purchased by one T S the highest bidder on the 10th February 1913 for Rs 1 100 T S however failed to deposit ¼th of the price and a fresh warrant was issued for 14th July 1913 and the sale fixed for 20th August 1913 Meanwhile the plaintiff a son of a brother of G D had put in objections to the attachment of the house but these were eventually disallowed and he took no further action On 12th August 1913 the widow sold this house for Rs 1 544 and paid the decretal amount into Court The consideration included also an item of Rs 800 for maintenance and customary contributions on the marriages etc of her daughter s children It was found that at the time of the sale the widow had practically no income and that she had 3 daughters and eleven grandchildren and that the sale was executed under circumstances which left her no choice and was in reality an act of good management on her part *Held* that a widow is not always bound to sell exactly for the amount for which there is legal necessity and the Courts have to see in each case whether having regard to circumstances the alienation was a proper one *Lala Chatranarayan v Uba Kanuari (1 Beng L R 201)* *Felaram Roy v Bagalaram Banerjee (14 Calc W N 895)* and Trevelyan s Hindu Law 2nd Edition page 512 followed *Gurdit Singh v Mehr Singh (67 P R 1884)* and *Nihal Singh v Must Tajon* (11 P L 188) distinguished *Held also* that the proposition that a widow can not anticipate her personal necessities (Mayne s Hindu Law VI Edition paragraph 633) is not an inflexible rule *Moti Singh v Sohlomal (30 Indian Cases 968)* followed What is to be seen is whether in the particular case the widow has dealt fairly towards the expectant heir *Held further* that as the bulk of the consideration was for legal necessity the sale in question ought to be upheld *Thalagara Ramanne v Kalagare Gangayya (6 Indian Cases 148)* *Kannu Chetty v Amirthammal (26 Indian Cases 418)* and *Padum Singh v Must Badrabai (57 Indian Cases 675)* followed NAMA MAL v HARBHAGWAN **I L R 2 Lah 367**

67 ———— **Husband's Estate— Inheritance**—*Moveable property—Corpus—Waste of corpus—Reversioners right of—Suit by reversioners to prevent waste—Suit against widow and her alienees without consideration—Receiver—Right to place property in hands of Receiver—Liability of alienees to replace moveable corpus in their possession—Accountability of widow as to corpus—Nature of accountability—Duty of widow to replace corpus if in her possession—Right to enjoy income of such property—Limitation Act (IX of 1908) art 120* A Hindu widow inheriting moveable property of her husband is not entitled to commit waste of the *corpus* of such property Where she commits waste of the corpus of such property the nearest reversioner is entitled to file a suit praying that such corpus may be reduced into possession and handed over to a receiver appointed on the suit the transferees from the widow without consideration can be directed to replace any part of the corpus of the moveable property which can be traced to their hands and the widow herself made accountable for waste in the sense of making her replace the moveable corpus of her husband s estate which she has made away with if she is in a position to do so allowing her to enjoy the income of the fund so replaced Article 120 of the Limitation Act applies to such a suit *Nobin Chunder Chuckerbutty v Guru Prosad (1868) B L R Supp Vol 1008 (F B)* *9 W R 505 (F B)* and *Radha Mohan Dhar v Ram Das Dey (1869) 3 B L R 36* referred to *Sinclair v Brougham* (1914) A C 398 applied VENKANNA v NARASIMHAM **I L R 44 Mad 984**

68 ———— *Hindu widow—Widow's estate—Property acquired by widow with out the aid of the husband s estate and without detriment to it—Widow s power of disposition over property so acquired—Widow not trustee for reversioner—Act No II of 1882 (Indian Trusts Act) section 90* A Hindu widow in possession as such of her husband s estate acquired certain property through the exercise of a right of pre emption which she had in that capacity The pre emptive price was not however paid from the husband s estate but was raised by means of a mortgage on part of the pre empted property *Held* that the property thus acquired did not in the absence of evidence of any intention on the part of the widow that it should do so form part of the husband s estate but it remained the separate property of the widow *Held also* that section 90 of the Indian Trusts Act 1882 had no application to the facts of the case SRI RAM JANKIJI BIRAJMAN MANDIR v JAGDAMBA PRASAD **I L R 43 All 374**

69 ———— *Hindu widow—Alienation by widow—Consent of the then nearest reversioner not sufficient to validate the alienation if there is no legal necessity* Where it is found as a fact upon the evidence that a transfer of her husband s property made by a Hindu widow is not a transfer for valid legal necessity the fact that the next reversioner has joined the widow in making the transfer does not render it valid and binding as against the remoter reversioners *Bijrangi Singh v Man*

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of Hindu law S 99 of the Indian Succession Act does not apply to the will of a Hindu and invalidate provisions made in accordance with the principles of the Hindu Law A bequest made by a father to the would be wife of his son may be deemed a bequest to a person described as standing in a particular degree of kindred to his son within the meaning of the exception to s 99 of the said Act Although by s 3 of the Hindu Wills Act the provisions of s 99 of the Indian Succession Act were made applicable to the Hindus the intention of the Legislature was to leave unaffected the rules of Hindu Law According to the principles of Hindu Law a bequest made by a person to his son s would be wife who was in existence at the time of the testator s death is valid notwithstanding the provisions of s 99 of the Indian Succession Act DINESH CHANDRA ROY CHOWDHURY v BIRAJ KAMINI DASSEE (1911)

I L R 39 Calc 87
15 C W N 945

11 ———— **Construction of**—*Bequest to testator s daughter in law after death of wife—Whether it conferred an absolute or only a life estate in the property* The will of a Hindu testator after reciting that he had no male heir and had already provided for his widowed daughter stated —

I have resolved that after my death my wife legatee No 1 shall remain in possession and enjoyment of all my property with all powers or authority like myself and that after the death of my wife my daughter in law widow of Raghu raj Singh legatee No 2 shall remain in possession and enjoyment of all the properties aforesaid like myself and legatee No 1

I therefore execute a will in favour of my daughter in law so that on the demise of myself and my wife the estate and name of my ancestors may continue as before and she in place of Raghu raj Singh shall perform my funeral ceremonies and those of my wife according to the shastras and the custom of the family and then she shall have power to nominate any one whom she may think fit as heir so that the name of the family may continue as formerly and now with honour *Held* (affirming the decision of the Court of the Judicial Commissioner) that on the true construction of the will the word heir meant heir to the testator and the daughter in law took (as did the wife) not an absolute interest but only a life estate in the testator s property which was therefore on her death not liable to attachment and sale under decrees against her representative BRIJ LAL v SURAJ BIKRAM SINGH (1912)

I L R 34 All 405

12 ———— ———— *Construction of will—Period of distribution of property bequeathed—Succession Act (X of 1865) s 111—Hindu Wills Act (XXI of 1870)—Absolute gift to son on attaining majority—Later conting[illegible] son s death which did not happen till after period of distribution* The right of the appellant to succeed to the [illegible] certain [illegible] properties depended on the construction of his grandfather s will and on the nature of the right which his father took in those properties After declaring the properties to be [illegible] for the maintenance of the family [illegible] the testator stated that my present begotten son (the appellant s father) will be [illegible] of the ceremonies And after making provision for his own death during the minority of his son in which case his widow was to be the *shebait* as his son s guardian the testator continued and my son on attaining majority will personally conduct the work of the *sheba* God forbid if during my life or after my death my said son dies then my widow will be the *shebait* and after her my daughters by her (the respondents) will be *shebaits*

Moreover for carrying out the directions under this will until my minor begotten son comes of age my wife (and two male persons named) will be executors and on my said begotten son attaining majority the said executors will be discharged and the said son by continuing in his present faith will go on performing the *sheba* etc of the said idol *Held* (reversing the decision of the High Court) that on the true construction of the will there was an absolute gift of the *shebaitship* to the appellant s father on his attaining his majority and it was not cut down by anything that followed There were provisions in case of his death as a minor but no cutting down of the absolute gift to him The appellant therefore and not the respondents succeeded on the death of the testator s son who had attained his majority and held the *shebaitship* until his death TRILOKHAPI PAL v JAGAT TARINI DASI (1912)

I L R 40 Calc 274

13 ———— *Testator s direction to his brother to get his daughters married—Betrothal by the brother—Marriage of the daughter by her mother and maternal uncle with another person—Suit by the brother to recover damages which he had to pay to the betrothed husband for breach of contract—The right of the testator s brother to give in marriage no more than the right under the Hindu law and subject to the limitations of that law—Right of the mother as legal guardian* A testator in his will directed that his brother should get his minor daughters married with the testator s money The brother accordingly got one of the daughters betrothed to *H* Subsequently the girl s mother and maternal uncle got the girl married to *C* The testator s brother thereupon brought a suit against the mother maternal uncle and *C* to recover damages which he had to pay to *H* for breach of contract *Held* that the suit was not maintainable The plaintiff s right under his brother s will was not absolute and exclusive The right was no more than the right under the Hindu law and subject to the limitations under that law According to the text of *Yajnavalkya* the persons entitled to give a girl in marriage were the father paternal grandfather brother kinsmen (*sakulya*) and mother in the order stated The text only dealt with the bare right to give a girl in marriage It did not deprive the mother of her right of legal guardianship but only specified who could make a gift in marriage The paternal male relations of the girl were placed above the mother for the purpose of the gift, because women were dependent and they could not perform certain ceremonies essential to or usual in a marriage The text did not say that the mother was to have no voice at all and might be altogether set at naught where there were paternal male relations of the girl competent to give her in marriage BAI RAMKORE v JAMNADAS MATHURADAS (1912)

I L R 37 Bom 18

14 ———— **Condition**—*Life-estate to [illegible] remainder to another upon condition to be fulfilled—Sale by widow with consent of latter before condition fulfilled—Condition made impos[illegible]*

HINDU LAW—WILL—*contd*

each of them a half share of his estate not specifically disposed of by the will By clause 9 he made the following bequests I have divided between and given to my two sons the whole of my property as mentioned above But should either of these two sons die without having had (leaving) any male issue the survivor of the said two sons is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue (behind him) after undertaking (to defray) the expenses in connection with the maintenance of his widow and marriage of his minor daughter But under the circumstances the heirs of my deceased son Suraj lal shall not get any right whatever The testator died on 4th July 1901 leaving him surviving his two sons The elder son died on 2nd January 1903 leaving a widow and a daughter In a suit by the surviving son to enforce the provisions of cl 9 of the will the High Court held that the period of distribution contemplated by the testator was the period of his death at which his time half of his estate became vested in each of his sons absolutely and that cl 9 should be read as if the survivorship there provided was limited to survivorship at the death of the testaor *Held* (reversing that decision) that the words of cl 9 were not limited to survivorship during the testator s life but clearly pointed to survivorship whenever it should occur and that the surviving son was as such survivor entitled to the estate conveyed by the clause subject to the obligation imposed upon him of maintaining his brother s widow and daughter CHUNILAL LAPVATI HARKAR *v* BAI SAMRATH (1914)

I L R 38 Bom 399

20 ———————— Absolute gift by will to Hindu widow—*Property acquired after date of will—Rule of law that will speaks from the death of the testator before and after the Hindu Wills Act* A Hindu testator executed a will at Benares in which he provided Upon my death my wife shall get the land jamas cash money Government promissory notes etc and all other immoveable and moveable properties of which I am in possession and enjoyment save and except the lands and buildings mentioned in the schedule and possess and enjoy the same with the right to transfer *by gift or sale and no* one will be entitled to raise any objection regarding any gift or sale to be made by her The testator after the date of the will purchased a house at Benares of which he was in possession and enjoyment at the time of his death *Held* that the widow did not get merely a widow s estate in the property bequeathed but she took it as an absolute heritable estate That the Hindu Wills Act did not apply to the property in Benares That the words upon my death my wife shall get all my properties which I am in possession meant that she was to take all the property which the testator would posess at the time of his death and there was no intestacy so far as the house at Benares was concerned S 77 of the Succession Act which is incorporated in the Hindu Wills Act enacts in other words that the will speaks from the death of the testator The Hindu Wills Act did not vary the mode of construction of wills in this respect nor is it correct to hold that in parts of India, where the Act does not apply the ordinary rule that the will speaks from the death of the testator does not obtain JITENDRA KUMAR CHATTOPADHYA *v* KRITYA GOPAL MUKHOPADHYA (1912)

18 C W N 140

21 ———————— Devise to widow—Gift over—*Life interest—Absolute gift—Power of appointment—Alienation by gift or sale—Administration suit—Cause of action* A Hindu testator by his will provided for the performance of certain religious ceremonies and devised all his moveable and immoveable properties to his wife with power to alienate by gift or sale He also by the same will made a gift over to his daughter in the following terms —

My daughter Hara Kumari shall become entitled to and possessor of whatever property will remain after your death and she shall enjoy the same keeping up and maintaining the aforesaid *sheba* etc The will then went on to say —

the said daughter shall have the same rights as you have and he to whom my said daughter may willingly give away those properties shall while possessing the same and keeping up and maintaining the *sheba* enjoy them At his death on the 11th March 1866 the testator left him surviving his widow and an only daughter Hara Kumari The widow having obtained probate of the testator s will executed on the 19th May 1893 in favour of her two grand daughters Hemangini and Nagendrabala born *some time after the* testator s death a deed of gift of certain properties acquired by her under the said will On the 30th September 1898 the widow died In October 1899 Mahim Chandra Sarkar the testator s nephew dispossessed Hemangini and Nagendrabala of these properties and took possession of the same On the 8th March 1908 Hara Kumari in whose favour the High Court had decided a suit brought by Mahim Chandra Sarkar for the construction of the testator s will and for a declaration of the rights of the parties thereunder (*11 C W N 412 7 C L J 540*) executed a deed of gift in favour of her daughter Hemangini and on the 8th April 1908 she also executed a similar deed in favour of her other daughter, Nagendrabala and a *kobala* in favour of Hemangini In suits brought for administration by Mahim Chandra Sarkar against Hara Kumari who died during its pendency for recovery of arrears of rent and cesses in respect of a certain *darpatni belonging to the estate of the testator* by Mahim Chandra Sarkar against the *darpatnidar* and Hemangini and Nagendrabala and for recovery of possession of certain property acquired by virtue of the deed of gift from the testator s widow by Hemangini and Nagendrabala against Mahim Chandra Sarkar *Held* that Mahim Chandra Sarkar had no cause of action and could not maintain the suit for administration *Held* also that the testator could make an absolute gift to his daughter who was his reversionary heir in absolute estate and that the gift to her under her father s will was an absolute gift *Held* also that there was no power of appointment to the daughter enjoining her to nominate an heir or successor to her father s estate *Held* also that the provision for keeping up the *sheba* was merely a collateral chargeon the property in whosoever s hands it might be and did not affect the absolute character of the gift *Brij Lal v Suraj Bikram Singh I L R 34 All 405* distinguished *Moulvi Mahomed Shum ool Hooda v Shewukram I P 2 I A 7 Radha Prasad Mullick v Rani mani Dasi I L R 35 Calc 896 L R 35 I A 118 Jatindra*

HINDU LAW—WILL—*contd*

Mohan Tagore v Ganendra Mohan Tagore 9 B L R 3 *Musammat Kollany Koer v Luchmee Pershad 24 W R 395* *Thakur Singh v Nokle Singh I L R 13 All 509* and *Ramanama v Lapayya I L R 16 Mad 466* referred to *Held* also that the *patni* was vested in Hemangini and Nagendrabala by alienation during Hara Kumari's life that they were Hara Kumari's heirs the property being *stridhan* and that Mahim Chandra Sarkar had no title whatever to any of the properties left by Hara Kumari *Held* also that the widow had absolute power of alienation in derogation of the rights of the sole reversioner her daughter who was only entitled to the residue that the gift by the widow to Hemangini and Nagendrabala was valid and that Mahim Chandra Sarkar could not plead his right as reversioner against a suit by the heirs of Hara Kumari to eject him as a trespasser even though the gift should fail *Hara Kumari Dasi v Mahim Chandra Sarkar I L R ... 412 7 C L J 516* referred to *Held* further that the power of alienation which though perhaps analogous to what was known as a power of appointment in English law could not be governed by the rules of English law relating to such appointments *Bai Motivahu v Bai Mamubai I L R 21 Bom 709* referred to MAHIM CHANDRA SARKAR v HARA KUMARI DASI (1914) **I L R 42 Calc 561**

22. ———————— *Construction of will—Bequest in favour of two brothers—Legatees to take in equal shares—Tenancy in common or joint tenancy* A Hindu who had been adopted made will authorizing his wife to make an adoption and in case she failed to do so leaving his property to his two own brothers in equal shares *Held* that the brothers took as tenants in common and not as joint tenants *Gopi v Jaldhara I L R 33 All 41* followed *Mankamna Kunwar v Balkishan Das I L R 28 All 38* distinguished *Jogeswar Narain Deo v Ram Chandra Dutt I L R 23 Calc 670* referred to HAR PRASAD v SUKHDEVI KUNWAR (1915) **I L R 37 All 241**

23 ———————— *Construction—Gift-over repugnant to previous gift—S 116 of the Succession Act scope and meaning of—Gift over on the failure of prior bequest when such failure did not occur in manner contemplated by testator* A Hindu testator governed by the *Mitakshara* School of Hindu Law died leaving a will and leaving him surviving his widow two daughters and a minor son The testator also left a brother and the two sons of his brother who were the defendants The son of the testator died having survived his mother by a few days The eldest daughter died in the lifetime of her mother leaving a daughter who died unmarried The plaintiffs were the two surviving sons of the other daughter of the testator The testator by his will had made his minor son the *malik* of all his properties The will provided that he should succeed to and enter upon possession and occupation of the whole of his estate and appointed the widow as the manager and legal guardian of the infant son After providing for the management of the property during the son's minority the will provided— If after my death the said minor son dies the mother of the said son shall in his stead become the *malik* in possession and occupation when like myself the said Musammat shall acquire all the proprietary powers and all kinds of properties moveable and immoveable and after the death of the widow the property was to go to the testator's two daughters in equal shares *Held* that the gift over in favour of the widow in the event of the son dying without having attained majority was not a void gift as being repugnant to the form of the gift that was previously made in favour of the son The provisions of the Indian Succession Act rendered such a gift perfectly good That s 16 of the Succession Act which merely incorporated the rules of the English Law provides clearly that the gift over shall take effect on the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator The mere fact that the testator contemplated that if his son died a minor and the widow survived him she would acquire the property before the two daughters and that that event did not take effect in that order because the widow predeceased the son did not deprive the daughters of the benefit of the legacy given to them by the testator The gift in favour of the daughters was a valid bequest to them and the defendant who claimed as being the next heirs of the testator's son had no interest in the estate of the testator DURGA PERSHAD v RAGHUNANDAN LAL (1914) **19 C W N 439**

24 ———————— *Construction—Indian Succession Act (X of 1865)) s 111 rule of construction in—Legacy with power to sell make a gift etc in respect of properties bequeathed if absolute gift to legatee* A Hindu in his will provided as follows — I bequeath to both of you (the testator's widow and his brother's daughter) the rest of the properties You will become entitled to sell or make a gift or *heba* etc in respect of the said properties and hold and enjoy the same If by the will of God one of you should die before the other whoever will survive will hold and enjoy the whole of the property as *malik* *Held* that the case fell within s 111 of the Indian Succession Act and the widow not having predeceased her husband and having survived the period of distribution took an absolute interest under the will That the ordinary rule of construction when the testator has given an absolute gift to a legatee and then has made a gift over *simpliciter* on a contingency of death is that he was referring to death before the period of distribution This is clearly provided for in s 111 of the Indian Succession Act which applies to Hindu wills The rule in this section is an absolute rule of construction and not a rule of construction which may be contradicted by other evidence appearing on the face of the will NISTARINI DEBYA v BEHARY LAL MUKHERJEE (1914) **19 C W N 52**

25 ———————— *Execution of will by a Hindu widow—Suit for declaration by reversioner—Cause of action—Whether suit maintainable* A Hindu widow executed a will and thereby bequeathed her husband's property in her hands to a certain person purporting to do so under the oral directions of her husband The next reversioner brought this suit for a declaration that the will in question was void and ineffectual as against his interest *Held* that the mere execution of the will did not afford a sufficient reason for granting a declaratory decree *Ram Bhajan v G... charan 1 All L J R 468* followed *Jaipal Kunwar*

HINDU LAW—WILL—*contd*

each of them a half share of his estate not specifically disposed of by the will By clause 9 he made the following bequests I have divided between and given to my two sons the whole of my property as mentioned above But should either of these two sons die without having had (leaving) any male issue the survivor of the said two sons is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue (behind him) after undertaking (to defray) the expenses in connection with the maintenance of his widow and marriage of his minor daughter But under the circumstances the heirs of my deceased son Suraj lal shall not get any right whatever The testator died on 4th July 1901 leaving him surviving his two sons The elder son died on 2nd January 1903 leaving a widow and a daughter In a suit by the surviving son to enforce the provisions of cl 9 of the will the High Court held that the period of distribution contemplated by the testator was the period of his death at which his time half of his estate became vested in each of his sons absolutely and that cl. 9 should be read as if the survivorship there provided was limited to survivorship at the death of the testaor *Held* (reversing that decision) that the words of cl 9 were not limited to survivorship during the testator s life but clearly pointed to survivorship whenever it should occur and that the surviving son was as such survivor entitled to the estate conveyed by the clause subject to the obligation imposed upon him of maintaining his brother s widow and daughter CHUNILAL PARVATISHANKAR *v* BAI SAMRATH (1914)

I L R 38 Bom 399

20 ——————— Absolute gift by will to Hindu widow—*Property acquired after date of will—Rule of law that will speaks from the death of the testator before and after the Hindu Wills Act* A Hindu testator executed a will at Benares in which he provided Upon my death my wife shall get the lands jamas cash money Government promissory notes etc and all other immoveable and moveable properties of which I am in possession and enjoyment save and except the lands and buildings mentioned in the schedule and possess and enjoy the same with the right to transfer by gift or sale and no one will be entitled to raise any objection regarding any gift or sale to be made by her The testator after the date of the will purchased a house at Benares of which he was in possession and enjoyment at the time of his death *Held* that the widow did not get merely a widow s estate in the property bequeathed but she took it as an absolute heritable estate That the Hindu Wills Act did not apply to the property in Benares That the words upon my death my wife shall get all my properties which I am in possession meant that she was to take all the property which the testator would possess at the time of his death and there was no intestacy so far as the house at Benares was concerned S ?? of the Succession Act which is incorporated in the Hindu Wills Act enacts in other words that the will speaks from the death of the testator The Hindu Wills Act did not vary the mode of construction of wills in this respect nor is it correct to hold that in parts of India, where the Act does not apply the ordinary rule that the will speaks from the death of the testator does not obtain JITENDRA KUMAR CHATTOPADHYA *v* NRITYA GOPAL MUKHOPADHYA (1912)

18 C W N 140

21 ——————— Devise to widow—Gift over—*Life interest—Absolute gift—Power of appointment—Alienation by gift or sale—Administration suit—Cause of action* A Hindu testator by his will provided for the performance of certain religious ceremonies and devised all his moveable and immoveable properties to his wife with power to alienate by gift or sale He also by the same will made a gift over to his daughter in the following terms — My daughter Hara Kumari shall become entitled to and possessor of whatever property will remain after your death and she shall enjoy the same keeping up and maintaining the aforesaid *sheba* etc The will then went on to say — the said daughter shall have the same rights as you have and he to whom my said daughter may willingly give away those properties shall while possessing the same and keeping up and maintaining the *sheba* enjoy them At his death on the 11th March 1866 the testator left him surviving his widow and an only daughter Hara Kumari The widow having obtained probate of the testator s will executed on the 10th May 1898 in favour of her two grand daughters Hemangini and Nagendrabala born some time after the testator s death a deed of gift of certain properties acquired by her under the said will On the 30th September 1898 the widow died In October 1899 Mahim Chandra Sarkar the testator s nephew dispossessed Hemangini and Nagendrabala of these properties and took possession of the same On the 8th March 1908 Hara Kumari in whose favour the High Court had decided a suit brought by Mahim Chandra Sarkar for the construction of the testator s will and for a declaration of the rights of the parties thereunder (11 C W N 412 7 C L J 540) executed a deed of gift in favour of her daughter Hemangini and on the 8th April 1908 she also executed a similar deed in favour of her other daughter Nagendrabala and a *kobala* in favour of Hemangini In suits brought for administration by Mahim Chandra Sarkar against Hara Kumari who died during its pendency for recovery of arrears of rent and cesses in respect of a certain *darpatni* belonging to the estate of the testator by Mahim Chandra Sarkar against the *darpatnidar* and Hemangini and Nagendrabala and for recovery of possession of certain property acquired by virtue of the deed of gift from the testator s widow by Hemangini and Nagendrabala against Mahim Chandra Sarkar *Held* that Mahim Chandra Sarkar had no cause of action and could not maintain the suit for administration. *Held* also that the testator could make an absolute gift to his daughter who was his reversionary heir in absolute estate and that the gift to her under her father s will was an absolute gift *Held* also that there was no power of appointment to the daughter enjoining her to nominate an heir or successor to her father s estate *Held* also that the provision for keeping up the *sheba* was merely a collateral charge on the property in whosoever s hands it might be and did not affect the absolute character of the gift *Brij Lal* v *Suraj Bikram Singh I L R 34 All 405* distinguished *Moulvi Mahomed Shumsool Hooda* v *Shewukram L R 2 I A* ... *Radha Prasad Mullick* v *Ranee Mani Dassee I L R 35 Calc 896 L R 35 I A 118* *Jatindra*

HINDU LAW—WILL—*contd*

Mohan Tagore v *Ganendra Mohan Tagore 9 B L R 3* ; *Mussammat Kollany Koer* v *Luchmee Pershad 24 W R 395* ; *Thakur Singh* v *Nokle Singh I L R 23 All 309* and *Ananthayya* v *Papayya I L R 16 Mad 466* referred to *Held* also, that the *patni* was vested in Hemangini and Nagendrabala by alienation during Hara Kumari's life that they were Hara Kumari's heirs the property being *stridhan* and that Mahim Chandra Sarkar had no title whatever to any of the properties left by Hara Kumari *Held* also that the widow had absolute power of alienation in derogation of the rights of the sole reversioner her daughter who was only entitled to the residue that the gift by the widow to Hemangini and Nagendrabala was valid and that Mahim Chandra Sarkar could not plead his right as reversioner against a suit by the heirs of Hara Kumari to eject him as a trespasser even though the gift should fail *Hara Kumari Dasi* v *Mahim Chandra Sarkar 15 C W N 412* *7 C L J 546* referred to *Held* further that the power of alienation which though perhaps analogous to what was known as a power of appointment in English law could not be goverened by the rules of English law relating to such appointments *Lai Motivahu* v *Bai Mamubai I L R 21 Bom 709* referred to MAHIM CHANDRA SARKAR *v* HARA KUMARI DASI (1914) I L R 42 Calc 561

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I L R 37 All 241

23 ——————— *Construction—Gift-over repugnant to previous gift—S 116 of the Succession Act scope and meaning of—Gift over on the failure of prior bequest when such failure did not occur in manner contemplated by testator* A Hindu testator governed by the *Mitakshara* School of Hindu Law died leaving a will and leaving him surviving his widow two daughters and a minor son The testator also left a brother and the two sons of his brother who were the defendants The son of the testator died having survived his mother by a few days The eldest daughter died in the life time of her mother leaving a daughter who died unmarried The plaintiffs were the two surviving sons of the other daughter of the testator The testator by his will had made his minor son the *malik* of all his properties The will provided that he should succeed to and enter upon possession and occupation of the whole of his estate and appointed the widow as the manager and legal guardian of the infant son After providing for the management of the property during the son's minority the will provided— If after my death the said minor son dies the mother of the said son shall in his stead become the *malik* in possession and occupation when like myself the said Musammat shall acquire all the proprietary powers and all kinds of properties moveable and immoveable and after the death of the widow the property was to go to the testator's two daughters in equal shares *Held* that the gift over in favour of the widow in the event of the son dying without having attained majority was not a void gift as being repugnant to the form of the gift that was previously made in favour of the son The provisions of the Indian Succession Act rendered such a gift perfectly good That s 116 of the Succession Act which merely incorporated the rules of the English Law provides clearly that the *gift over shall take effect on the failure of the* prior bequest although the failure may not have occurred in the manner contemplated by the testator The mere fact that the testator contemplated that if his son died a minor and the widow survived him she would acquire the property before the two daughters and that that event did not take effect in that order because the widow predeceased the son did not deprive the daughters *of the benefit of the legacy given to them by the* testator The gift in favour of the daughters was a valid bequest to them and the defendant who claimed as being the next heirs of the testator's son had no interest in the estate of the testator DURGA PERSHAD *v* RAGHUNANDAN LAL (1914)
19 C W N 439

24 ——————— *Construction—Indian Succession Act (X of 1865)) s 111 rule of construction in—Legacy with power to sell make a gift etc in respect of properties bequeathed if absolute gift to legatee* A Hindu in his will provided as follows — I bequeath to both of you (the testator's widow and his brother's daughter) the rest of the properties You will become entitled to sell or make a gift or *leba etc* in respect of the said properties and hold and enjoy the same If by the will of God one of you should die before the other whoever will survive will hold and enjoy the whole of the property as *malik* *Held* that the case fell within s 111 of the Indian Succession Act and the widow not having predeceased her husband and having survived the period of distribution took an *absolute interest* under the will That *the* ordinary rule of construction when the testator has given an absolute gift to a legatee and then has made a gift over *simpliciter* on a contingency of death is that he was *referring to death before* the period of distribution This is clearly provided for in s 111 of the Indian Succession Act which applies to Hindu wills The rule in this section *is an absolute rule of construction* and not a rule of construction which may be contradicted by other evidence appearing on the face of the will NISTARINI DEBYA *v* BEHARY LAL MUKHERJEE (1914) 19 C W N 52

25 ——————— *Execution of a will by a Hindu widow—Suit for declaration by reversioner—Cause of action—Whether suit maintainable* A Hindu widow executed a will and thereby bequeathed her husband's property in her hands to a certain person purporting to do so under the oral directions of her husband The next reversioner brought this suit for a declaration that the will in question was void and ineffectual as against his interest *Held that* the mere execution of the will did not afford a sufficient reason for granting a declaratory decree *Pum Bharin* v *Charan I All L J R 468* followed *Jaipal Kun*

HINDU LAW—WILL—*contd*

v *Indar Bahadur Singh I L R 26 All 238* referred to UMRAO KUNWAR v BADRI (1915)
I L R 37 All 422

26 ——— *Will—Birth of a son subsequent to the execution of the will effect of—Death of the son before the testator—No revocation of the will under the Indian law—Revocation under the old English law prior to Wills Act—Statutory law in India—Indian Succession Act (X of 1865) s 57—Probate and Administration Act (V of 1881) s 4* A will executed by a Hindu testator disposing of his ancestral property is not revoked in law by reason of the birth subsequent to the execution of the will of a son who died before the testator The rule of English law that it was essential to the validity of a devise of freehold lands that the testator should be seized thereof at the making of the will and that he should continue so seized without interruption until his decease is no longer in force in England in consequence of the enactment of the Wills Act The principle applicable in India is that adopted in the English Wills Act that a will has the same effect as if it were executed at the time of the testator s death The statutory law of wills in India has not adopted the principle that a will should be deemed to be revoked in consequence of a change in the circumstances of the testator or a change with respect to his rights to the property disposed of by the will (*See* s 57 of the Indian Succession Act) Survivorship has the effect of rendering a will invalid only with respect to the property which the testator could not dispose of at the time of his death All other dispositions made by him are valid *Shib Sabitri Prasad v The Collector of Meerut I L R 29 All 82* and *Subba Reddi v Doraisami Bathan I L R 30 Mad 369* followed BODI v VENKATASAMI NAIDU (1913)
I L R 38 Mad 369

27 ——— *Ancestral moveable property—Will—Bequest—Bequest by Co parcener* One Pandharinath Ramchandra a Hindu testator made a will by which he directed that Rs 2 001 should be paid to each of his three daughters out of the ancestral moveable property He died leaving a son surviving him In a suit by one of the daughters to recover amount of the legacy from the estate of the testator *Held* that the legacies were directed to be paid by the testator out of property which he had no power to dispose of by will *Vitla Butten v Yamenamma I L R 8 Mad H C R 6* followed *Hanmantapa v Jivubai I L R 24 Bom 547* distinguished and *Lachoo v Mankorbai I L R 29 Bom 51* and *I L R 31 Bom 373* distinguished PARVATIBAI v BHAGWANT VISHWANATH PATHAK (1915)
I L R 39 Bom 593

28 ——— *Will giving power to widow to adopt with consent of trustees where one declines to act* A Hindu testator by his will appointed five trustees of his property and gave power to his widow to adopt a son with their consent and advice and one of the trustees declined to act *Held* that the consent of the declining trustee was not necessary and the adoption made with the consent of the other four trustees was valid BAL GANGADHAR TILAK v SHRINIVAS PANDIT (1915) **I L R 39 Bom 441**

29 ——— *Probate application for—Locus standi to oppose—Mitakshara father will by in favour of widowed daughter—Widow of predeceased son if may contest will when no ancestral property—Right to maintenance against devisee—Provision in will if may be referred to* Where there is no ancestral property a Hindu governed by the Mitakshara law is ordinarily under no legal obligation to maintain his predeceased son s widow His obligation is merely a moral or an imperfect obligation which however ripens into a legal obligation on the part of the heir who gets his estate after his death *Devi Proshad v Gunwanti Koer I L R 22 Calc 410* and *Siddeshury Dassi v Jonardan Sarkar 6 C W N 530 s c I L R 29 Calc 557* referred to *Quære* Whether such a right can be enforced against a devisee of the entire estate under a will executed by the father in law *Held* that as the daughter in law s right to maintenance which could have been enforced in case of intestacy would be taken away by the will she ought to be allowed to appear and oppose the grant of probate of the will Where the right to maintenance is enforceable against the devisee *Quære* Whether the claimant of maintenance has sufficient interest to oppose the grant of probate in all cases *In the goods of Sarat Chunder Patro 2 C W N ccliv (1898)* *Garabini Dassi v Protap Chandra 4 C W N 602* and *In the goods of Gobinda Chandra Pabajee 17 C W N 1141* referred to The provisions of the will may be looked at to see if the will really affects the right to maintenance Where the will of the father in law directed that all the properties should be sold and a certain sum of money paid to the widowed daughter in law and after payment of certain legacies the balance was to be appropriated by his widowed daughter who was not his heir *Held* that in this case the will seriously affected the interest of the daughter in law and she had sufficient interest to oppose the grant of probate *Garabini Dassi v Protap Chandra 4 C W N 602* referred to INDUBALA DASI v PANCHUMANI DASI (1914)
19 C W N 1169

30 ——— *Construction of will—Contingent bequest in future of whole estate—Succession Act (X of 1865) ss 107 111—Event on occurrence of which distribution was to take place specified in will* The will of a Hindu resident in Calcutta and subject to the Dayabhaga School of Law who died on 10th November 1907 stated I appoint my wife Pontoshini Dasi to be the sole executrix of this my will I hereby authorise my said wife to adopt *dattaka putra* In case of death of an adopted son my said wife shall adopt one after another five in sons in succession If my said wife dies without adopting as son or if such adopted son predeceases her without leaving any male issue in such case my estate after the death of my said wife shall pass to the sons of my sister Benodini Dasi who may be living at the time of my death Two sons of his sister were living at the death of the testator On his death his widow as executrix duly obtained probate of the will and in August 1909 in pursuance of the authority given her by her deceased husband she adopted a son who however died on 10th March 1910 an infant unmarried and leaving no male issue and a few days afterwards the widow herself died In a suit by the adoptive mother of the testator now represented by the appellant against the two sons (the present respondents) of his sister for a declaration that

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in the events that had happened the devise to them had failed and that the testator's estate had devolved on her *Held* on the construction of the will (affirming the decisions of the Courts in India) that on the death of the testator the widow took an interest in the estate which by virtue of the probate was not divested on her adoption of a son to her husband and on her death the executory bequest to the sons of the testator's sister took effect and the estate passed to them Section III of the Succession Act (X of 1865) was not applicable because the event on the occurrence of which the distribution was to take place was distinctly mentioned as in the words of the will the death of my wife and the gift to the testator's nephews was therefore not affected by that section BHUPENDRA KRISHNA GHOSE *v* AMARENDRA NATH DEY (1915)

I L R 43 Calc 432

31 ——————— Revocation of Will —*Will disposing of property and nominating boy for adoption to be completed later and giving wife power to complete it if he does not do so—Subsequent completion of adoption by testator—Subsequent will making different disposition of property but not revoking former will—Later will held in former part illegal as disposing of ancestral property which testator had no power to do—Dependent relative revocation* A Hindu testator being the sole coparcener of certain property made a will in 1889 by which he appointed his wife S and his daughter I executrices and in which he nominated as his son one I a son of his daughter but stated that he had not completed the adoption and he directed that if he should die before completing it S should after his death perform the necessary ceremonies and take the grandson in adoption and the will contained the following clause — In case any danger may happen to my grandson I during the lifetime of my wife S who is one of my executrices my wife may according to her wishes take in adoption one of my aforesaid daughter's sons and give my properties to that son The testator completed the adoption of I on 9th February 1890 On 21st March 1890 he executed another will of which a third person was made executor together with S and I and which contained a gift that in case of the death of I his issues should enjoy the property There were in it no words revoking the previous will and it did not refer to the clause in the former will which gave S a contingent power of adoption On 4th April 1890 the testator died The will of 1889 was not admitted to probate but a grant of probate was made of the will of 1890 I died on 4th June 1891 In 1894 the appellant as reversionary heir of I obtained a decree declaring the will of 1890 void and inoperative according to Hindu law as disposing of ancestral property over which the testator had no power of disposal On 13th August 1906 S adopted the respondent I in accordance with the authority given her by the will of 1889 In a suit by the appellant against S and P for a declaration that I's adoption was illegal and invalid *Held* that the document executed by the testator in 1889 was a will and not a mere non testamentary authority to adopt It contained the appointment of executors and was executed by a testator who at his date had power to dispose of the property of which he purported to dispose *Held* also that after the completion of I's adoption and the consequent admission into the joint family of another coparcener the testator had no power to dispose of the property which on his death was ancestral property and to that extent the will of 1889 became ineffectual But there was no such inconsistency between the two wills as that the provisions of the earlier will could not stand with the existence of the later will The will of 1890 no doubt prevailed over the will of 1889 but the contingent power to adopt was unaffected by anything in the later will *Held* further that the question whether the disposition of the property in the later will revoked the provisions as to its disposal in the earlier will turned upon the application of the doctrine of dependant relative revocation which was really a question of intention and that under the circumstances an alternative inconsistent disposition which was not valid or effectual in itself did not revoke an earlier disposition of the same property *Alexander v Kirkpatrik L R 2 H L Sc & Div 397* followed in principle VENKATANARAYANA PILLAY *v* SUBBAMMAL (1915)

I L R 39 Mad 107

32 ——————— *Construction of will—Will of Hindu widow in possession of her husband's estate—Bequest of whole estate to one person on conditions—Conditions containing exception to conveyance of entire estate—Bequest of portion of estate to different legatee—Owner in possession—Malik o qabiz — Absolute or limited estate* A Hindu widow in possession of her husband's estate disposed of it by will as follows — Under the will of my husband I am the sole owner in possession of his entire estate and possess all the proprietary powers I bequeath the entire estate of my husband to Fateh Chand subject to the following conditions (i) So long as I live I shall continue to be the owner in possession of the entire estate and possess all the powers and such as making sales mortgages gift etc (ii) After my death the said person (the legatee) shall become owner in possession of the entire estate of my husband and he too shall possess all the powers of alienation like myself (iii) I have bequeathed mauza Khudda with all the property to Musammat Gomi After my death she shall be the owner in possession of the entire property in mauza Khudda aforesaid *Held* (affirming the decision of the High Court) that on the construction of the will the words owner in possession (*Maliq o qab*) in cl 4 conferred on Musammat Gomi an absolute estate and that completeness of the ownership and possession was not altered by any other expressions in the will *Surajmani v Rabi Nath Ojha I L R 30 All 84 L R 35 I A 17* Taking all the clauses of the will together there was no repugnancy in such a construction for though the entire estate was conveyed in the first place to Fateh Chand it was subject to conditions one of which (cl 4) bequeathed mauza Khudda as an exception to the conveyance of the entire estate FATEH CHAND *v* RUP CHAND (1916)

I L R 38 All 446

33 ——————— *Will—Co executors—Probate obtained by one executor—Subsequent application by the other co executor for joint probate—Compromise between co executors—Mortgage of estate by one executor to the other—Renunciation of executorship—Validity of compromise—Action of executor without probate validity of—Probate and*

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Administration Act (V of 1881) ss 2 4 82 92—Applicability of to all Hindus—Executor trustee of charities under the will—Claims of trustee against trust estate—Charge—Limitation Act Art 130—Suit for account and for sch me against trustee—Right of trustee as defendant to equities in such suit—Decree in favour of trustee as defendant—Civil Procedure Code (Act V of 1908) s 92 It is doubtful if an executor is competent in law to compromise the claims of his co executor against the testator s estate but assuming that he has such a power it is essential that the compromise should be entered into *bonâ fide* and for the benefit of the estate *Per* WALLIS C J—The Probate and Administration Act does not say that s 82 is to apply only to cases of Hindus governed by the Hindu Wills Act, but s 2 provides that chapters II to XIII which include s 82 are to apply to every Hindu *Per* SESHAGIRI AYYAR J—It is not incumbent on an executor of the will of a Hindu to obtain probate before acting as an executor S 82 of the Probate and Administration Act is no bar to an executor acting as a representative of a Hindu testator s estate because a co executor had alone obtained probate of the will in his name S 92 of the said Act should be confined to ca s where probate i compulsory before dealing with the property An executor who was appointed trustee of a charity under a will and who had claims against the estate in respect of his administration has no charge on the estate in respect of such claims but should bring his suit within six years under art 120 of the Limitation Act But when a suit was brought against him for an account if he was under a liability to account to the trust at the date of the suit he would be entitled to all the equities flowing from the taking of the account and a decree could be passed in such suit in her favour for the amount that might be found due to him from the estate though a suit by the trustee for the same might be barred by limitation CHIDAMBARA MUDALIAR v KRISHNASAMI PILLAI (1914) I L R 39 Mad 365

34 ——— Construction—*Absolute gift—Rules of construction approved by Courts—Effect of subsequent clauses in will restricting absolute gift created in previous clauses—will of a Hindu matters which Court may consider in construing—Malik—Nirbyudha malik meaning of* A Hindu testator left a will the material portions of which were as follows The second and third clauses of the will appointed the testator s widow as executrix and authori ed her to meet the expenses and pay the debts by sale if neces ary of a portion of the estate The fourth clau e provided that the widow shall obtain as *nirbyudha malik* whatever moveable and immoveable properties hall be left by the testator and she shall be the absolute owner with the rights of gift sale and all other kinds of transfer In the next three clauses the te tator authorised the widow to adopt a son and prescribed the devolution of the estate in the event of such adoption and in the la t clause he provided that if at the time of the death of his widow there be no adopted son or if no son or wife of the adopted son be alive then the testator s heir according to the Hindu *sha tras* who shall be alive at the time shall g t the properties which shall remain after disposal by the widow by way of gift or sale of the same *Held* that under the fourth clause of the will the widow took an absolute interest in the estate devised and the gift over contained in the last clauses of what might remain undisposed of by her was void and inoperative in law That the provisions of the will relating to adoption and the devolution of the estate in the event of adoption could not qualify the effect of the fourth clause even though they contained provisions repugnant thereto That where an absolute interest is given the Court will not cut it down by subsequent words in the will unless they clearly have an effect to restrict it That where a devisee takes an absolute interest a gift over on his failure to dispose of the property or whatever part of the property he does not dispose of is void That the rule of construction applicable to cases of this description is that not only ought the Court to look to the words of a will alone to determine the operation and effect of the devise but the Court ought to disregard altogether the legal con equences which may follow from the nature and qualities of the estate when such estate is once collected from the words of the will itself *Scarborough v Savile 3 A & E 897 962* The instrument must receive a construction according to the plain meaning of the words and sentences therein contained that is, the words are to be first read in their grammatical and ordinary sense unless the context shows otherwise That in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property namely that a Hindu generally desires that an estate specially an ancestral estate shall be retained in his family and also that a Hindu knows that as a general rule at all events women do not take absolute estates of inheritance which they are enabled to alienate out where the terms are perfectly clear the Court cannot assume contrary to the plain meaning thereof that the testator intended to create estates of a particular des ription and then bend and twist the language in favour of the assumption o made That the use of the term *malik* may not by itself necessarily create an absolute interest but the expre sion *nirbyudha malik* is the strongest and most unequivocal phrase employed in the vernacular to indicate absolute ownership SURES CHANDRA PALIT v LALIT MOHAN DUTTA CHOUDHURI (1915) 20 C W N 463

35 ——— Will construction of—*Bequest of life estate to widow and remainder to grand ons born and to be born—Madras Hindu Transfers and Bequests Act (I of 1914) s ? cl (?) effect of on—Period of distribution to future grandsons happening after the Act—Right of all grandsons born during widow s life to take—Vested interest of grandson existing on the date of will* A Hindu bequeathed by his will dated 1905 a life estate to his widow and an absolute estate thereafter to S a son of his daughter then born and to other sons of the daughter that might be born thereafter The testator died in 1906 and S died in 1903 In a suit by S s widow against the testator s widow and anoth r son of the daughter born during the course of the suit for a declaration that the plaintiff was solely entitled to the estate after the death of testator s widow and for an injunction to restrain the widow from wasting the estate and alienating the same *Held* on a construction of the will (i) that the

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testator by interpo ing a life-estate intended *all* his grandsons to take his estate who might be born before the death of the widow which was the time fixed for distribution (ii) that by s 2 cl (?) of Madras Act I of 1914 the bequest in favour of the unborn grand ons was good as the disposition in their favour was under the will to take effect only after the date of the Act and (iii) that as the plaintiff's d ceased husband had a vested interest under the bequest she was entitled to maintain the suit and to a share in the estate *alo g* with other gran lsons of the te tator who might be born before the death of the testa tor s widow *Blagabati Tirmanya v Kalicharan Singh I L R 38 Calc 468* referred to VEN KAYAMMA v NARSAMMA (1916)

I L R 40 Mad 540

36 ———————— Bequest to widow—*Construct on* Unless a grant expressly gives only a limited estate or unless there is any uncertainty or ambiguity in the grant as to the extent of interest conveyed a grant to a Hindu female conveys an absolute estate and there is no pre sumption of law to the contrary at least in this Presidency On the occa ion of adopting a son a Mahratta Brahman of Tanjore executed a will in 18?3 by which after making some small gift in favour of strangers he made a grant in inam as follows — Out of the remaining property my adopted son shall be entitled to enjoy one half of the property Out of the remaining half my two wives shall take half and half *Held* that the wives took an ab olute e tate un ler the be quest *Suraimani v Rabi Nath Ojha I L R ?0 All 81* applied *Moulvie Mahom d Shumsool Hooda v Shewakram L R I A* explain d RAMCHANDRA RAO v RAMACHANDRA RAO (1918)

I L R 42 Mad 283

37 ———————— Will executed *before the Hindu Wills Act—Gift of l fe tate to gran lsons one of whom onl y in exi tence remain le to brother and nephew—Bequest if bad for remotene or as offending against rule of perpetuitie —Succession Act (X of 1865) s 101* The testator a Hindu who died in 18?8 after giving life estates in uc cession to his wife and two dau hter dire te l that after tl e le th of my dau hters my grand son or grand-sons wl o ver amon tl em may be alive sl all pos e s my propertie l ut not by ri ht of inheritance for enjoyment during their life time and tl at after the leath of my gran l on all my properties will go to my fatl er family tl at is to say to my brother *F* an l my nephew *H* etc etc At the date of l i death he ha l l ut one grand on N and no other gran l on was born during the lives f his ?low an l lau hters *Held* that althoug! N was not ment n d n the will there was a vali l bequ t in h fav ur of a life e tate with a valid remain ler n fav ur f *F* an l *H* and tl e latte bequest was n t aff te l by the rule of remot ne a ai l d in E lan l and it di l not ffen l again t tl law a to per petuitie S 101 of the Succe ion Act lay down a special rule wl ich differ from the E n li h la v *on the ul ject an l th re i no reason why it* shoul l be invoked for th n tructi n of Hin lu Wills ma l before th t ecti n ame int opera tion DAK HAYANI DA I AMRITA LAL CHO H (1919) **23 C W N 826**

37(a) ———————— Gift to idol—*Provision f r h irs—Con truct on* In determin ing whether the Will of a Hindu gives the testator s e tate to an idol subject to a charge in favour of l eirs or makes the gift to the idol a charge upon the e tate there is no fixed rule depending upon the u e of particular terms in the Will It depends on the construction of the Will as a whole *Sonatun Bysack v Sreemutty Juggutsoon lree Dossee 8 Moore s Indian Appeals* followed HAR NARAYAN v SURJA KUNWARI

I L R 43 All 291

38 ———————— **Will bequeathing husband s estate to her three daughters—Oral partition by daughters**—*Share taken absolutely by each —Death of one of the daught rs leaving her daughter as heir—Suit by surviving da ighters to recover deceased's share as heirs of their father—Estoppel—Oral partition whether valid—Survivor ship whether extingui h d—Rights of reversioners* A Hindu widow inheriting her husband s estate *treated it as her absolute property and bequeathed* it ab olutely to her three dau hters who divided it into three equal shares by an oral partition and *took each one share purporting to take it abso* lutely under their mother s will One of the daughters died leaving a dau hter as her heir who took po se ion of the decea ed s share The two surviving daughters sued as heirs of their father to recove the share of the deceased dau hter *from her daughter who wa in po ession H ll* that the plaintiffs were not e topped from claiming to recover the property as heirs of their father *Dalton v Fitzgerald [1?9] 2 Ch* distingui hed ; that a partition of immoveable properties of what ever value can be effected orally and without *a regi tered in trument* that the partition made between the daughter operated to extinguish the right of survivorship as between them although it might not affect the rights of the ultimate reversioners to the e tate and that consequently the plaintiffs were not entitl d to recover the *properties from the deceased daughter s share Gyan issa v Mobarakannessa (1893) I L R Calc ?10* followed and *Pachuiamammal v Pangammal (1911) I L R 34 Mad ??* applied ALAMELU AMMAL v BALU AMMAL (1920)

I L R 43 Mad 849

39 ———————— **In favour of a f male**—*Proper interpretation—whether s me a in ca e of femal beneficiary as i a male* A Hindu executed a will bequeathing his moveable and immoveable property in equal hares to his mother and widow using the words *Kuli ikhtiyar wa mukul* in the document. After his death his mother made a gift of her share to her daughter and daughter s son. The next heir of the testator then brought the present suit for a declaration that the gift houl l not affect his reversionary right. *Held* that a will by a Hindu in favour of a femal *must* be interpreted in the same way as if it was in favour of a male and that the word *mulki at* implies an ab olute estate unless there is something in the context to qualify it. *Surajmani v Rabi Nath Ojha (I L R ?0 All 84 P C)* *Karmuth Singh v Malkhan Singh (61 P R 1911)* *Kaishna Das v Mussammat Deoki (?14 P L R 1905)* *Ne Muhammad v Mapi P (3 Indian Ca 60?)* *Sulochana Debi v Jagattarini Debi (?0 Calc L J ?1)* and *D o no v I ipa (33 I lian Ca 1??)* f lowed *Moti Lal Mulla Lal v The Government of Bombay (I L R 5 Bom 4?)* and *Kal pr N th v Joendra Nath (? I 141)* distinguished. *Pit Ram v* [illegible]

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Lal Kaur (2 Lah 1898) dissented from. MUSSAMMAT WAZIR DEVI *v.* RAM CHAND

I L R 1 Lah 415

40 ———— **Bequest to woman**—*Presumption from* — *Mullick J.* A bequest of the income of the property without disposing of the corpus is void under the Hindu Law as offending against the rule against perpetuities. Under the Hindu Law in the absence of words of limitation gifts to women with the exception of a widow must be presumed to convey an absolute estate. A Hindu woman is competent to alienate immoveable property for the purpose of discharging the debts incurred by her in carrying on a business which forms part of the estate in which she has the ordinary interests of a Hindu woman. JAGAT NATH PRASAD *v.* JAGDISHUN PD. 1 Pat L J 16

41 ———————— *In favour of testator's wife—Interpretation—What constitutes a gift with full ownership—gift over of remainder on death of legatee with full ownership—whether of any legal effect—Indian Succession Act X of 1865 section 111—Hindu Wills Act XXI of 1870.* One J D a Hindu made a will in which he bequeathed the house in suit to his wife Musst U D using words to the following effect—Is ki malik meri zauja Uttam Devi hogi—us ko ikhtiyar hai ke jis tarah chahe ba marzi khud us ko intikal ya sarif kare. Ba shart ke meri aurat bila intikal an us de jawe va intikal na kare to phir makan meri har do poton Niranjan Das aur Narsingh Das ka mushtarka hoga. After his death his widow Uttam Devi along with plaintiff Niranjan Das and Narsingh Das got possession of the house and when the widow died plaintiffs continued in possession. The defendant Mohan Lal another grandson of testator by his other son having dispossessed the plaintiff they brought the present suit claiming possession of the house under the terms of the will of their grandfather (the testator). The defendant resisted the suit principally on the ground that under clause 3 of the will the house in suit was given absolutely to Musst Uttam Devi with full powers of alienation that she had acquired full ownership therein on the death of the testator and that the provision in respect of gift over in favour of the plaintiffs being opposed to law was void and unenforceable. The first Court decreed the claim. The defendant appealed to the High Court. *Held* that a will by a Hindu in favour of a female must be interpreted in the same way as if it was in favour of a male and therefore under clause 3 of this will read as a whole the testator conferred an absolute and complete ownership on his wife Musst Uttam Devi. The use of the word malik implies absolute ownership unless there is anything in the context or surrounding circumstances to qualify such meaning. *Surajmani v. Rabi Nath Ojha* (I L R 30 All 84 P C) *Thakur Ishri Singh v. Baldeo Singh* (I L R 31 All ...) and *Musammat Wazir Devi v. Ram Chand* (I L R 1 Lah 415) followed. *Surendra Nath v. Kamal ... Dasi* (I L R ... Cal 563 P C) and *Lala Ramjiwan Lal v. Dal Koer* (I L R 24 Cal 406) referred to. *Held also* that the gift over of what might remain undisposed of by Musst Uttam Devi at her death was null and inoperative in law. *See Chaulan Lal v. Lala* ... (... Cal ...) ... *Sashirani Debya v. Behari Lal* (27 Indian Cases 239) *Salochana Devi v. Jagattarini Devi* (53 Indian Cases 60) and *Tripurani Pal v. Jagat Narain Das* (I L R 40 Cal 74 P C) followed. *Lallu v. Jagmohan* (I L R 22 Bom 409) *Ram Chand v. Diwan Chand* (6 P R 1912) and *Hara Kumari Dasi v. Mohim Chandra Sarkar* (12 Cal W N 412) distinguished. MOHAN LAL *v.* NIRANJAN DAS

I L R 2 Lah 175

42 ———————— *Testator, resident in Presidency town of Madras—Bequest to unborn persons, validity of—Rule of Hindu Law whether abrogated by Hindu Wills Act (XXI of 1870) or by Hindu Transfers and Bequests Act Madras (I of 1914)—Latter Act whether ultra vires of provincial legislature—Indian Councils Act 1861 ss 22 and 42—Indian High Courts Act 1861 s 11—Supreme Court Charter cl 8—Rule of perpetuity—Indian Succession Act—(X of 1865) ss 101 102 111 and 136—Bequest to daughters and on their death their shares to be taken by their children who shall attain 21 years—Indian Majority Act (IX of 1875) s 3—Bequest whether void for perpetuity—Absolute gift followed by settlement on children—Failure of settlement—Reversion to original donee as absolute estate.* A testator resident in the City of Madras executed at Madras a will in 1897 disposing of his properties situate mostly therein and died in 1901. By the will after directing the formation of a fund for the payment of a monthly sum to his widow during her life the testator provided that "the residuary trust funds are vested in trustees in trust to apportion the fund into as many equal shares as there may be daughters of mine living at the time of my decease or who having predeceased shall have left issues her or them and me surviving and to pay the income of each equal share to my said daughters respectively during their lives and thereafter to stand possessed of the share in trust for all the children of the deceased daughter who shall attain the age of twenty one in equal shares etc." Only some of the grandchildren were born before the testator died. On a suit being brought on the Original Side of the High Court by some of the grandsons after the death of testator's widow and his three daughters for a construction of the will and a declaration of the rights of the parties. *Held* that the rule of Hindu Law that gifts and bequests in favour of unborn persons are invalid had not been abrogated by the Hindu Wills Act (XXI of 1870) and that Madras Act (I of 1914) Hindu Transfers and Bequests Act (1914) which validates such dispositions was *ultra vires* of the legislative powers of the provincial Legislative Councils in so far as it purports to affect the law administered on the Original Side of the High Court having regard to the Indian Councils Act 1861 s 22 and 42 and the Indian High Courts Act 1861 s 11 and that therefore the bequests to the unborn persons in the will were void that the bequests were void under section 101 Indian Succession Act made applicable by the Hindu Wills Act to Hindu Wills executed in Presidency Towns because the vesting of the property under the will in the grandchildren might be delayed beyond the life time of the daughters and the minority of the grandchildren by whom the property was to be taken and the provisions of the Indian Majority Act (IX of 1875)

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extending minority to twenty one years *in certain events* did not affect the construction of section 101 of the former Act that the bequests in favour of some of the grandchildren failing under s. 101 of the Act the bequest in favour of the whole classes of the grandchildren including those born in the life-time of testator also failed under s 102 of the Act that the bequest to the grandchildren did not fall within the terms of section 111 of the Indian Succession Act and was not affected by its provision that under section 106 of the same Act which embodies the rule laid down in *Lassence v Tierney (1849) 1 Mac & G 551 ; 41 E R 1379* where there is an absolute gift to a legatee and the provisions that follow in the will are in the nature of a settlement of that gift then the settlement if it is effectual will have operation and reduce what appears to be an absolute gift into a life estate if however the settlement for any reason fail then in so far as it fails there is no intestacy but the person who was the object of the original gift takes the property absolutely that on the true construction of the provisions of the will there was a clear intention to confer an absolute estate *on each* of the daughters followed by a settlement in favour of her children within the meaning of the rule referred to and that consequently on the failure of the request to the grandchildren the original absolute gift in favour of each of the daughters remained good and the share of each of the daughters passed on her death to her heirs SOUNDARARAJAN v NATARAJAN (1921)

I L R 44 Mad 446

43 ———— Hindu Law—*Construction—Bequest to widows by Mithila Hindu—Interest given whether absolute or limited—* Malik Malkiyat *meaning and effect of—Danger of construing one Will by reference to another—Translation of vernacular documents challenged in the High Court—Proper procedure* The term malik when used in a Will or other document as descriptive of the position which a devisee or donee is intended to hold has been held apt to describe an owner possessed of full proprietary rights including a full right of alienation unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred But the meaning of every word in an Indian Will must always depend upon the setting in which it is placed the subject to which it related and the locality of the testator from which it may receive its true shade of meaning Where a Hindu governed by the Mithila School of Hindu Law purported by his Will to confer on his wive full power and all proprietary rights (*malkiyat*) over all his moveable and immoveable properties *Held* that the rights intended to be conferred included full rights of alienation It is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will which was adopted by another Court Proper procedure where translation challenged indicated MUSSAMMAT SASIMAN CHOWDHURANI v SHIB NARAYAN CHOWDHURY

26 C W N 425

44 ———— Malik —*If a term of art and imports full ownership—Trust if valid when subject matter uncertain* A Hindu testator gave the whole of his immoveable

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estate to his wife as malik and directed that she should leave the property to his two daughters in such manner as she might like *Held* that the word malik taken in conjunction with the context indicated a clear intention to pass an absolute estate and that even assuming it were intended to create a trust the subject matter of such trust was too uncertain The word malik is not a term of art it does not necessarily define the quality of estate taken but the ownership of whatever that estate may be but in the context of the present Will it imported that the estate was absolute If words are used in a Hindu s Will conferring absolute ownership upon the wife the wife enjoys the rights of ownership unless the circumstances or context show otherwise BHAIDAS SHIVDAS v BAI GULAB

26 C W N 12

HINDU LAW—WOMAN S ESTATE

See HINDU LAW—WILL 1 Pat L J 16

1 ———— *Alienation by Hindu mother—Property inherited from son—Legal necessity—Spiritual benefit—Installation of idol and endowment of temple—Bona fide dedication—Disproportion between property dedicated and cost of maintenance* A Hindu widow has at the highest only a very limited power of alienating property for religious purposes and that only when it would conduce to the spiritual welfare of her deceased husband The installation of an idol and the endowment of its temple do not come within the category of acts which conduce to the spiritual benefit of the deceased husband The mother s power of promoting the spiritual benefit of the son whose property she inherits being less than that of a widow to promote the spiritual welfare of her husband the power of the former to alienate property so inherited for the purpose of installing an idol and endowing its temple may be less but is certainly not greater than the power of the widow to alienate her husband s property for a similar purpose In the absence of authority from her husband dedication of property by a widow for religious purposes conduces to her own spiritual benefit only She cannot as heiress to her son alienate property inherited from him for her own spiritual benefit *Held* on the evidence that a deed of endowment in favour of family idols did not represent a *bona fide* dedication regard being had among other circumstances to the great disproportion between the costs of the maintenance of the endowment and the amount of money which was allocated to it under the settlement *Kartik Chand a v Gour Mohan 1 W P 48 Collector of Masulipatam v Cavally Venkata Narayanappa 8 Moo I A 500 Lukhi Narain v Kulali Borrada les Rep 61? Ram Kanai v Ram Kishore I L R ?? Calc 506* referred to HARNARAYAN NARAIN SINGH v RAM GOPAL ACHARI (1913)

17 C W N 728

2 ———— *Sale of portion with consent of presumptive reversioner if passes absolute title—Presumption of property* The mere assent of the immediate reversioner to a sale by a Hindu female of a portion of an estate inherited by her is not sufficient to confer an absolute title on the alienee. Such assent merely raises a presumption of the propriety of the transaction. *Debi Prosad v Golab Bhagut 1 C W N 701 17 C L J 499* followed *Nabo Kishore Sarma v*

HINDU LAW—WOMAN'S ESTATE—*contd*

Hari Nath Sarma I L R 10 Calc 1102 referred to *Pulin Chandra v Bolai Mundal I L R 35 Calc 939 12 C W N 837* overruled GOPESHWAR MISRA v DURGAMANI BAISHNABI (1913)

17 C W N 1062

3 ——————— *Female heir wrongful possession of immoveable property by—Mesne profits decree for if may be passed against reversionary heirs—Female heir nominal litigant one of reversionary heirs conducting defence effect of* Where a *darputni* in the possession of a Hindu woman as daughter and heir of a former *darputnidar* was annulled by an auction purchaser of the *putni* right by notification under s 167 Bengal Tenancy Act but she refused to vacate the land *Held* that this was a personal tortious act on her part and not an act done by her as representing the estate and for the benefit of that estate and a decree for mesne profits for the period she was in wrongful possession could be made only against her personal estate which passed on her death to her heirs and not against the estate in the hands of the reversionary heirs *Held* further that the fact that one of her sons who were the reversionary heirs carried on the litigation on her behalf and that she was merely a nominal defendant was not sufficient to convert the act into anything different from a tortious act for which she was personally liable *Katama Natchiar v The Raja of Shivagunga 9 Moo I A 539 Hari Nath Chatterjee v Muthur Mohan Goswami I L R 21 Calc 8 Grish Chunder Lahiri v Shoshi Sekhareshur Roy I L R 27 Calc 951 957* and *Harihar Pershad v Bholi Pershad 6 C L J 383 Lalji Sahaya Singh v Kurki Jha 11 C L J 90* and *Sadasi Koer v Ram Govind Singh 14 C L J 91* referred to NAFAR CHANDRA PAL CHOWDHRY v KAMINI KUMAR LAHIRI (1912)

18 C W N 542

4 ——————— *Woman's Estate—Hindu widow debts contracted by for costs of litigation—Binding effect on reversioner—Legal necessity—Facts necessary to be proved by lender—Rate of interest must be proved necessary even when legal necessity for loan exists* The plaintiff who was an assignee of a mortgage executed by a Hindu widow in respect of her husband's property of which she was in possession as a Hindu widow sued to enforce the mortgage against the property in the hands of the reversionary heir and it appeared that the money was borrowed for meeting the costs of litigation relating to certain suits brought by certain ex managers of the estate for salary and it appeared that at the time the money was borrowed a portion of the estate was sold in execution of a decree obtained by one of the ex managers and other properties were going to be sold in execution of another decree obtained by him and there was a heavy claim against the estate by another manager *Held* that the debts contracted by a Hindu widow for meeting the costs of litigation in defending her life estate in her husband's property or for protecting the estate are binding upon the estate in the hands of the reversioner That it was not necessary for the lender in the present case to show that the debt which was in litigation, for meeting the costs of which he lent the money to the widow was or was not her personal debt. It is sufficient if it is shewn that there was pressure upon the estate that there was necessity for borrowing money for the costs of the litigation or that the creditor made reasonable enquiries and was satisfied of the necessity for the loan. That although a loan by a widow may be necessary the rate of interest at which she borrowed must be proved to be necessary before interest at that rate can be allowed STEVENS v JANKI BALLABH (1913)

19 C W N 80

5 ——————— *Woman's Estate—Decree against Hindu widow and next reversioner in respect of obligation personal to widow if binds reversion—Mortgage by widow and next reversioner if binds reversion* A sale of property inherited by a Hindu woman in execution of a decree for costs obtained against her personally does not bind the reversioners *Jugal Kishore v Jotindra Mohan I L R 10 Calc 985 991* followed The fact that the decree was obtained against her and the next reversionary heir jointly does not give the purchaser anything more than the qualified interest of the woman A mortgage of a portion of the inheritance in the hands of a Hindu woman executed by her jointly with next reversioner does not necessarily bind the reversionary interest. It merely raises a presumption that the mortgage was entered into for legal necessity *Debi Prosad v Golap Bhagat, 27 C W N 701* referred to NABIN CHANDRA SAHA v HEM CHANDRA RAY (1913)

19 C W N 265

6 ——————— *Woman's estate—Hindu widow alienation by—Rent of superior landlord—Legal necessity—Suit against Hindu widow—Reversioner whether necessary party—What passes at a sale in execution of a decree against Hindu widow—Limitation Act (XV of 1877) Sch II Arts 141 120—Specific Relief Act (I of 1877) s 42* The powers of a Hindu widow in respect of alienation of the estate of her husband are similar to those of the guardian of an infant *Hanooman Pershad v Baboo e Moonraj 6 Moo I A 393, 18 W R 81 Kameswar v Run Bahadur L R 8 I A 8 s c I L R 6 Calc 843 Lala Amarnath v Achhan Kuer L R 19 I A 196 s c I L R 14 All 420* and *Bhagwat Dyal v Debi Dyal 12 C W N 393 s c L R 35 I A 48 I L R 35 Calc 420* followed The mere fact that money is raised for payment of rent and applied for that purpose is not sufficient to prove legal necessity The creditor to protect himself where he is not shown to have made a *bonâ fide* enquiry must prove that there was an actual pressure on the estate such as an outstanding decree or an impending sale which the widow is not capable of meeting *Lala Amarnath v Achhan Kuer L R 19 I A 196 s c I L R 14 All 420 Dharamchand v Bhawani Misrain L R 24 I A 183 s c I L R 25 Calc 189 1 C W N 697 Sreenath v Putunmala Beng S D A 491 (1859) Srimohun v Brij Behary I L R 36 Calc 753 Lala Bujnath v Bissen 19 W R 80 Mata Pershad v Bhageeruthee 2 All H C R 78 Ghanshyam v Badriyalal I L R 24 All 547* and *Lakshman v Radha Bai I L R 11 Bom 609* followed Where a Hindu widow obtains a loan she is at liberty to bind herself personally or when the purpose for which she borrows is a necessary one she is at liberty to bind her husband's estate and the intention must be gathered from the statement if any in the deed or from the surrounding circumstances *Damodar v Janki Bai 5 Bom L R 309* and *Prosunna v Umi Lall 17 C W N 331* referred to A decree for rent which has accrued due after the death of her husband

HINDU LAW—WOMAN S ESTATE—*contd*

prima facie a personal decree against the widow *Harkishen v I am il I I I 30 Calc 5o0* *c C W N 4 Kri o f olinl v Hem Chan Ira I I I 16 Calc 311 Mohammad Sadat Ali v Hara us tari 16 C W N 1010* and *Jiresvar v Kamal Kumar I C W N 33* followed The mere fact that the widow intended to create a liability on the estate is not enough The creditor has also to show that he intended to enforce such liability and the true test is to see whether the proceeding in which the sale was directed was brought against the widow personally or with a view to affect the whole inheritance *Jugal v Jotendra I P 31 I 1 66 c I L P 10 Calc 985 Court of Wards v Pranapit Singh 11 Moo I A 605 Srinath v Hari 3 C W N 63 Panlal v Alloy C W N 619 Pitha Kilen v Nauro tan Lal, 6 C L J 490 Braja v Joggesuar 9 C L J 346 Kalomoy v Pro in o 6 W P 301 Bisto Pcharee v Bijnath 16 W P 49 Brijun v Brij Phoolan L R 2 I A 2 5 s c I I P 1 Calc 133 Biresear v Kamal Kumari 17 C W N 237 Sadat Ali v Harasundari 16 C W N 1070* and *Trilochan v Bill swar 15 C L J 473* referred to It is not necessary that a reversioner should be joined as party to the suit, but if he is so joined the fact would afford clear indication that the creditor intended to make the inheritance liable. *Bhagirathi Das v Bale war Pagerti 19 C L J 155 s c 17 C W N 877 I L R 41 Calc 69 Mohima Chandra v Pamkishore 23 W I 174 15 B L R 142 Srinath Dass v Haripada 3 C W N 637 Nugendra v Kamini 11 Moo I A 241 267* and *Lloyd v Jones 9 Ves 37 57* referred to PAMESWAR MONDAL v PROVABATI DABI (1914) 19 C W N 313

7 ———————— *Woman s Estate—Sradh expenses of widow of last holder liability of reversioner to contribute* The reasonable expenses of *sradh* of a widow of a deceased Hindu should be paid out of the estate in the hands of the reversioners and the reversioners who inherit the estate should contribute rateably towards such expenses PAMDHARI SINGH v PERMANUND SINGH (1913) 19 C W N 1183

8 ———————— *Legal necessity—Marriage of daughter s daughter when son in law gharjamai if legal necessity—Construction—Mortgage of widow s right and interest if covers more than life interest* Where *A* a zemindar s widow married her only daughter *S* to a cultivator in order that the son in law may come and live in the mother in law s house and the issue of the marriage was a daughter *Held* that though *A* might be under a moral duty to see that the girl was properly married the expenses of the marriage could not be charged on her husband s estate as a legal necessity The fact that a Hindu widow says she is mortgaging her right and interest in her husband s estate does not necessarily indicate that she was mortgaging only a life interest NARAINDATI v PAMDHARI SINGH (1916) 20 C W N 734

9 ———————— *Alienation by limited owner—Property test of— Legal necessity if only test—Consent of reversioner—Attestation of deed followed by subsequent ratification—Retrospective operation—Compromise and family arrangement—Compromise by limited owner—Bona fides of claim—Admission in compromise of futility of claim if negatives bona fides—Conveyancing device not intended to express true state of executant s mind effect if to be given to—Compromise which affirms previous executed registered lease if requires registration* The test to be applied in determining the validity of an alienation by a limited owner is whether the purpose for which the alienation was made was in the circumstances of the case proper and legitimate and the existence of legal necessity in the narrow sense of actual pressure on the estate or the danger to be averted is not the only test *Held* that in this case a permanent *mokurari* lease granted by the daughter of a deceased Hindu of some properties belonging to his estate in settlement of a *bonâ fide* dispute was binding on the reversioner *Khunni Lal v Gobind Krishna Narain L R 38 I A 87 s c I L R 33 All 356 15 C W N 545* applied. Where it appeared that the permanent lease was not only attested by the reversioner but that he later on set up the lease in answer to a suit of the grantee claiming the entire estate by survivorship as the undivided co parcener of the last male owner and ultimately joined in a compromise by which the plaintiff in the suit admitted that he had no title to the estate and the reversioner affirmed the *mokurari potta* *Held* that if there was doubt as to the efficacy of consent as evidenced by the attestation there was no question as to his subsequent ratification of the lease which operated retrospectively That the compromise was not inadmissible in evidence for want of registration as it did not purport to convey release or otherwise deal with immoveable property *Per* MOOKERJEE J —It only recorded the approval of the transaction by the reversionary heir and (per *Curiam*) afforded cogent evidence of its propriety *Collector of Masulipatam v Cavaly Venkata Narainapah 8 Moo I A 503 551 Shamsundar v Achhan Koer L P 25 I A 183 s. c I L R 25 All 71 2 C W N 729* and *Bejoy Gopal Mukerjee v Girindranath I L R 41 Calc 793 805* s. c *18 C W N 673* referred to That the recitals in the *mokurari potta* depreciatory of the grantee s claim should not be regarded as a correct description of his mind being only a conveyancing device expressive of his abandonment of the claim for a consideration. *Hanooman Prosad v Babooee Moneraj Koeri 6 Moo I A 393* and *Lal Achal Ram v Raja Ka im Hossain L P 32 I A 113 s c I L P 27 All 2 1 J C W N 477* referred to Authorities dealing with the validity of compromises in settlement of disputed claims and of family arrangements with reference to the question of consideration examined by Mookerjee, J *Per* MOOKERJEE J — A qualified owner like a Hindu widow daughter or mother is not bound at her peril to pursue a litigation in respect of the estate in her hands unremittingly to the ultimate Court of Appeal. UPENDRA NATH BOSE v BINDESRI PROSAD (1915) 20 C W N 210

10 ———————— *Relinquishment—Abandonment of claim to Estate—Adoption—Authority to adopt—Will—Construction—Exclusion of presumption* Upon the death of a Hindu in 1872 his nephew obtained a certificate under Act XXVII of 1860 as sole survivor of his joint family the widow of the deceased opposed the application and alleged a partition in 1864 By agreements made in 1874 the widow accepted the decision recognized the nephew's title and was

HINDU LAW—WOMAN'S ESTATE—*contd*

granted by him a maintenance allowance which she continued to receive until her death in 1904 The nephew died in 1891 and the estate passed under his Will to the first appellant In 1907 the respondent sued to recover the estate as heir to the holder who died in 187- upon his widow s death and proved that a partition had taken place in 1864 *Held* that the widow s agreement of 1874 in conjunction with her acceptance of maintenance till 1904 amounted to a complete relinquishment of the estate to the nephew then the next reversioner and that the respondents claim accordingly failed RANGASWAMI GOUNDEN *v* NACHIAPPA GOUNDEN

L R 46 I A 72

11 ———————— A Hindu by his Will authorised his widow to adopt a son if no male or female child should be born to him He died without issue but had a posthumous daughter After the death of the posthumous daughter the testator s widow purported to adopt a son to him *Held*, that in construing the Will effect could not be given to a presumption that the testator desired that a son should be adopted to him since authority to adopt in the events which happened was clearly excluded by the language used BHAGWAT KOER *v* DHANUKH DHARI PRASHAD SINGH

L R 46 I A 259

12 ———————— *Widow alienation by when binds reversioner—Relinquishment for a consideration—Relinquishment of whole estate necessary—Widow retaining moveables and getting back some land to hold as life estate—Mithila law—Family arrangement* It may be taken as established without doubt that a Hindu widow may relinquish her estate and this will have the effect of accelerating the estate of the next reversioner Further an alienation by a Hindu widow will be valid where there was consent of the next heirs and the alienation is capable of being supported by reference to the theory of relinquishment and consequent acceleration of the interest of the consenting heirs But the alienation in such a case must be of the whole of the estate *Debi Prosad Choudhury v Gopal Bhagat I L R 40 Calc 721 s c 17 C W N 721* referred to The widow is not precluded from obtaining a benefit for relinquishing her estate *Nobokishore v Hari Nath I L R 10 Calc 110 1108* followed *Bajrangi v Manokarnika L R 35 I A 1 s c I L R 30 All 1 12 C W N 74* referred to Where under a compromise made between the mother the sisters and *M* the immediate male reversionary heir of a deceased Hindu infant governed by the Mithila school the whole of the immoveable property of the deceased was relinquished by the mother *M* and the mother herself was given the whole of the moveable property inclusive of certain mortgage bonds and *M* gave half of the immoveable properties to the deceased s sisters and the latter and *M* respectively gave 50 bighas of land to the deceased s mother with remainder to the respective donors and their heirs *Held* that under Mithila law the moveable properties (including the mortgage bonds) had passed by inheritance to the deceased s mother on his father s death That the life estate in 100 bighas which the deceased s mother got back was essentially different from the widow s estate which she formerly enjoyed and could in no way be regarded as a reservation or restoration of the widow s estate That under the terms of the compromise the lady had effectively relinquished and destroyed her estate as a Hindu widow and accelerated that of *M* *Semble* The compromise might be supported as a family arrangement between all the parties competent to deal with the whole of the property (the daughters having claimed under a will of their father which had been probated) SURJ SUP MISSER *v* MONESH RANI MESRAIN (1915) 20 C W N 142

———————— *A* died leaving a widow *O* a son *B* and two daughters *P* and *J* *O* became the heir and with *P* gifted property to defendants 1 to 4 sons of *J* after *O* s life *O* having died *P* filed a suit to recover the property from the donors *Held* that the gift was good as regards the life interest to *O* but bad as regards the transfer of *P* s chance of succession under s 6 of the Transfer of Property Act 1882 BAI PARVATI *v* DAYABHAI MANCHHAM

I L R. 44 Bom 488

———————— A Woman s estate can be obtained by a Hindu female not only by inheritance but also by contract grant or prescription VENKAMMA *v* CHELAMAYYA

I L R 26 Mad 485

HINDU SON

———— undivided, liability of for debt of bankrupt—

See BANKRUPTCY I L R 40 Mad 581

———— Hindu Testator

See HINDU LAW—WILL

See WILL.

———— Creation of Estates as known to Hindu Law

See WILL. I. L R 45 Bom 1038

HINDU TEMPLE

See HINDU LAW—TEMPLE

1 ———————— *Public temple—Manager of the temple—Right to remove the image and instal it in a new building—Worshippers objecting to the removal—Injunction* Under Hindu law the manager of a public temple has no right to remove the image from the old temple and instal it in another new building especially when the removal is objected to by a majority of the worshippers. HARI RAGHUNATH *v* ANTAJI BHIKAJI (1919) I L R 44 Bom 446

2 ———————— *Sanctuary of the temple—Admission of public to the sanctuary—Levy of fees for admission not permissible—Dakore temple—Gors rights of* Whilst the Shevaks were managing the affairs of the temple of Shri Panchhod Raiji at Dakore they issued in 1885 rules levying fees from devotees and Gors who entered the sanctuary of the temple known as the Nij Mandir In a litigation brought to test the validity of those rules the rules were declared invalid but they continued to subsist pending the framing of the scheme of management of the temple When the scheme came to be framed the rules regarding levying of fees for admission into the Nij Mandir were incorporated in the rules under the scheme The rules having been objected to as invalid *Held* that the rules

HINDU TEMPLE—*contd*

presen... on the p... ... ... al and ... ... in ... fa ... the ... ... in par ment f... th... ... the ... ... the temple at Dakore. ... THE MANAGER OF THE DAKORE TEMPLE COMMITTEE (1 19)
I L R 44 Bom 150

HINDU TRANSFERS AND BEQUESTS ACT (MAD I OF 1914)

See HINDU LAW—GIFT
I L R 40 Mad 818

See HINDU LAW—WILL
I L R 44 Mad 416

See WILL
I L R 40 Mad 540

HINDU WIDOW

See GUARDIAN I L R 38 Calc 802
I L R 42 Calc 953

See HINDU LAW—ALIENATION
I L R 36 All 187
I L R 41 All 120

See HINDU LAW—BOND
I L R 40 All 17

See HINDU LAW—DEBT
I L R 23 All 255

See HINDU LAW—GIFT
I L R 32 All 582
I L R 34 All 129

See HINDU LAW—REVERSIONER
I L R 33 All 15
I L R 40 All 487

See HINDU LAW—SUCCESSION
I L R 32 All 155

See HINDU LAW—WIDOW

See HINDU LAW—WOMAN'S ESTATE.

See HINDU WIDOWS REMARRIAGE ACT
14 C W N 346

See LAND ACQUISITION ACT (I OF 1894) s 32 14 C W N 1024

See LIMITATION I R 46 I A 187

See LIMITATION ACT (XV OF 1877) s 19 SCH II ARTS 120 AND 148
I L R 22 All 33

See LIMITATION ACT (IX OF 1908) SCH I ART 91 I L R 40 Bom 81

ARTS 125 AND 120
I L R 37 All 195

ARTS 132 75 I L R 29 Mad 981

See REGISTRATION ACT (XVI OF 1908) s 17 I L R 40 All 284

See SPECIFIC RELIEF ACT (I OF 1877) s 42
I L R 41 All 154
I L R 2? All 126

See SUCCESSION CERTIFICATE ACT (VII OF 1889) I L R 5 All 24?
I L R 4? All 1 0

of the provisions of the HINDU LAND REVENUE the property did not pass to the pla... s. 8 of the Succession Act, the d... 6 All 627 an absolute interest as there was no... All 148

HINDU WIDOW—*contd*

——— alienation by—

See HINDU LAW—ALIENATION
I L R 42 Calc 876

——— in possession of husband's estate will by—

See HINDU LAW—WILL
I L R 38 All 446

——— sale by of portion of property—

See HINDU LAW—WIDOW
14 C W N 226

——— surrender by of whole estate—

See HINDU LAW—(Adoption).
24 C W N 274

I ——— *Alienation—Setting aside alienation—Compensation to defendant for improvements—Evidence of relationship—Statement in will of widow—Conjectural suggestions as to will in argument in lieu of evidence—Suggestions never made in cross examination of writer of will* The respondent on the death of a Hindu widow brought a suit as the next heir of her husband to set aside an alienation made by the widow in favour of the appellant of property consisting of a house and compound at Delhi. The respondent who was the son of the daughter of the husband by a former wife (though this was denied by the appellant) produced a will made by the widow five years before the suit in which she stated I have no issue or any near relative. Mathu Mal (the respondent) is related to me as a daughter's son (*rishte men nawasa*) and Khairati Lal as my husband's younger brother These are my relatives on my husband's side. The oral evidence as to the respondent's title was found by their Lordships to be meagre and conflicting *Held* (affirming the decision of the Chief Court) that the statement in the will was under the circumstances, conclusive of the respondent's relationship The widow was the proper person to make such a statement of fact which was within the scope of her own knowledge she put forward the respondent in the will as the first person in the order of choice for the performance of the funeral ceremonies Her statement was corroborated by the other relative mentioned in the will who was a witness in the case and whose evidence on the matter was against his own interest and the statement was uncontradicted by any reliable evidence. Mere conjectural suggestions made in argument that the will had been executed for the purpose of supporting a future claim to be made by the respondent could not be entertained by their Lordships in lieu of evidence especially when the writer of the will was himself a witness in the case and no such conjectural considerations were suggested to him in cross-examination. In case the respondent succeeding the appellant claimed the value of improvements made by him to the property while he was in possession of it, which included a temple (Rs. 700) a well (Rs. 200) an upper storey to the house (Rs. 2,000) and repairs to the house (Rs. 4,000) the whole amounting to Rs. 7 000. *Held* (*affirming the decision of the Chief Court and for the reasons given by it*) that Rs. 1 400 which represented half the expenditure by the appellant on the well and the upper storey to the house should be allowed as compensation for the improvements. The real question was, had they en

HINDU WIDOW—*contd*

the market value of the property? It was doubtful whether the erection of the temple had done so and it had not been contended that it had KIDAR NATH v MATHU MAL (1913)
I L R 40 Calc 555

2 ———— *Decree for rent against, if can be executed against her husband's estate in the hands of the reversioner—Widow described in decree as administratrix* The mere fact that the judgment debtor is described in the decree as administratrix is not conclusive that it binds the estate A decree obtained against a Hindu widow for rent of a tenure held by her as her husband's heir is a personal decree and cannot be executed against the estate of her husband in the hands of the reversionary heir after her death *Kristo Gobindo v Hem Chandra I L R 16 Calc 511* and *Brojo Lal v Jibon Krishna I L R 26 Calc 285* followed. Although where a decree has been obtained upon a fair trial in a suit against a Hindu widow that decree is effectual and operative as against the reversionary heir unless the decree can be successfully impeached on some special ground such decree operates as *res judicata* only in respect of questions which could arise in the litigation and were tried by the Court. *Radha Kishen v Kourtan Lal 6 C L J 490 528* referred to BIRESHUR DAS DEY v KAMAL KUMAR DUTT (1912)
17 C W N 337

3 ———— *Alienation by widow without necessity—Acceleration of widow's interest in favour of one of the next reversioners—Consent of all reversioners necessary* A Hindu widow who had two daughters made a gift of the whole of her husband's property to one of them without the consent of the other Afterwards she adopted the plaintiff The plaintiff having sued to recover the property *Held* that the plaintiff was entitled to recover the property inasmuch as the surrender of the entire estate of the widow in favour of one of the two persons constituting the next reversion without the consent of the other was not valid. DODDABASAPPA RAMLINGAPPA v BASAWANEPPA (1918) I L R 42 Bom 719

4 ———— *Effect of Compromise by Hindu Widow with Limited Estate—Held* that a compromise entered into by a Hindu widow with a limited estate resulting in the alienation of property forming part of her husband's estate cannot bind the reversioners unless it is shewn that it was for such purpose as would justify a sale by a Hindu Widow NIADAR SINGH v GANGA DEI
I L R 38 All 679

5 ———— *Alienation by widow—Consent of the then nearest reversioner not sufficient to validate the alienation if there is no legal necessity* Where it is found as a fact upon the evidence that a transfer of her husband's property made by a Hindu widow is not a transfer for valid legal necessity the fact that the next reversioner has joined the widow in making the transfer does not render it valid and binding as against the remoter reversioners *Bajrangi Singh v Manokarnika Bakhsh Singh I L R 30 All 1* and *Rangasami Gounden v Nachiappa Gounden I L R 42 Mad 523* referred to GHISIAWAN PANDE v MUSAMMAT RAJ KUMARI I L R 43 All 531

HINDU WIDOWS' REMARRIAGE ACT (XV OF 1856)

———— *Widow remarrying according to custom whether forfeits husband's estate—Mortgage suit—Whether the mortgagor's widow after re marriage could represent the mortgagor's estate—Mortgage decree effect of when obtained against person wrongly sued as legal representative of mortgagor—Civil Procedure Code (Act XIV of 1882) ss 31 and 335—Order under made without investigation—Effect* One P executed a mortgage in favour of the plaintiff On P's death leaving him surviving his mother (*S*) and widow (*C*) the plaintiff brought a suit on the mortgage against the widow (*C*) after she had re married according to custom and he got a decree in execution of which the plaintiff purchased the mortgaged property and got symbolical possession The plaintiff subsequently brought an ejectment suit against the mother (*S*) *Held* that as at the time when the suit was instituted to enforce the mortgage the widow had ceased to be the widow of the deceased mortgagor she did not represent the estate of the mortgagor and the decree and sale in execution were not binding upon the mother of the deceased mortgagor who was his legal representative at that time *Khiarajmal v Daim 9 C W N 201 s c. L R 32 I A 23 Mallarjun v Narhari 5 C W N 10 s c L R 27 I A 216* referred to A Hindu widow after re marriage forfeits her deceased husband's estate even though there is a custom of re marriage in her caste *Rasul Jehan v Ram Saran I L R 22 Calc 589 Vithu v Govinda I L R 22 Bom 321* referred to COURT CHURN PATNI v SITA PATNI (1909) 14 C W N 346

———— *Hindu Widow Re marriage Act (XV of 1856)— Son dying after mother's re marriage—Right of mother to inherit—Hindu Law* Apart from any provisions of the Widow Re marriage Act a Hindu mother may inherit from her son by a former marriage the son having died after her re marriage HARKISHORE SEAL v THAKUR DHAN BAISHNUB
26 C W N 925

———— s 2—

See HINDU LAW—CONVERSION
I L R 41 Mad 1078

See HINDU LAW—WIDOW
I L R 35 All 466

———— *Hindu widow—Re marriage permitted by rules of caste—Widow not deprived of property of first husband* Where the rules of her caste recognise the right a Hindu widow to re marry a second marriage has not the result of divesting her of the property of her first husband MULA v PARTAB (1910) I L R 32 All 489

———— ss 2 and 5—

———— *Hindu Widow—Re marriage—Right of succession in the family of her first husband—Succession as a gotraja sapinda* A Hindu widow who has remarried is not entitled to succeed as a *gotraja sapinda* in the family of her first husband Under Hindu law the father's sister is entitled to succeed in preference to the re married widow of the [illegible] *Basappa v Rayava* [illegible] came to be framed guished PRA[illegible] levying of fees for admission [illegible] Mandir were incorporated in the [illegible] scheme The rules having been [illegible] is invalid *Held* that the rule

HINDU WILLS ACT (XXI OF 1870)

See HINDU LAW—WILL.
I L R 38 Bom 188, 369
I L R 44 Mad. 446
I L R 40 Calc 274

See RECEIVER I L R 37 Calc 754

See SUCCESSION ACT
s 18 I L R 34 Bom 506

———— ss 2 and 3 and 5—

See HINDU LAW—WILL
I L R 33 Calc 188

———— s 3—

See HINDU LAW—WILL.
I L R 39 Calc 87

1 ———————— *Indian Succession Act (X of 1865) s 187—Administrator General's Act (II of 1874) s 56—Will made in Bombay—Property worth less than Rs 1 000—Probate—Administrator General's certificate* A will made in Bombay is subject to the provisions of the Hindu Wills Act (XXI of 1870) and a person claiming as a legatee under the will is not entitled to sue without taking out probate as he would be bound by s. 187 of the Indian Succession Act (X of 1865) which is incorporated in the Hindu Wills Act (XXI of 1870) The provision of the Administrator General's Act (II of 1874) is not affected by the incorporation in the Hindu Wills Act (XXI of 1870) of s 187 of the Indian Succession Act (X of 1865) NARAYAN SHRIDHAR v. PANDURANG BALUJI (1910)
I L R 34 Bom 506

2 ———————— *Construction of will testator's intention—Succession Act (X of 1865) s 82 a bequest to my daughter on attaining majority whether creates an absolute or limited interest—S 111 gift over to brother in case daughter dies childless—Whether the gift can take effect if the daughter does not die childless before the estate is distributable—The period of distribution whether at the date of the daughter's attaining majority or of the death of the daughter childless—Meaning of the word santan whether limited to male descendants or means issue generally—Reversionary interest expectant on the happening of a specified uncertain event if can be sold in execution* Plaintiff had a brother *U* and a step brother and each had one-third share in ancestral property which was the subject matter of the suit *U* made a will bequeathing his share to his daughter and appointing plaintiff as executor who was to make over the estate to the daughter on her attaining majority There was a provision in the will that if the daughter died childless then the executor i e the plaintiff would get the properties in *U*'s share Before probate had been issued the whole property was sold in execution of a money decree under which plaintiff said he alone was liable Plaintiff brought the present suit to establish his title to one third of the property which he said he inherited under his brother *U*'s will. Plaintiff alleged that the original share which he inherited from his father alone passed under the sale but the reversionary interest in the one third share which he acquired under his brother's will could not pass by the sale *Held* that under the Hindu Wills Act, in which are incorporated some of the provisions of the Indian Succession Act the property did not pass to the plaintiff. Under s. 82 of the Succession Act, the daughter took an absolute interest as there was nothing in the

HOLDER

——— not a holder in due course—

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881) ss. 30 47 59 74 91
I L R 39 Mad 965

HOLDING

——— meaning of—

See BENGAL TENANCY ACT 1885 s 3
24 C W N 1022

——— sale of—

See MADRAS ESTATES LAND ACT (MAD I OF 1908 s 111, *et seq*
I L R 38 Mad 1042

——— splitting of—

See MUNICIPALITY
I L R 46 Calc 784

——— surrender or abandonment of—

See MADRAS ESTATES LAND ACT (I OF 1908) s 8 I L R 38 Mad 608

"HOLDING OUT"

——— *principle of*—

See PRINCIPAL AND AGENT
14 C W N 381

HOLDING OVER

See LANDOLRD AND TNEANT
I L R 35 Bom 333

HOLIDAYS

——— judgments pronounced on—

See APPEAL IN FORMA PAUPERIS
I L R, 40 Mad 687

——— *Gazetted trial of suit consent of parties—High Court Rules Ch I, r 2 (relating to practice and procedure in the District Courts)—Trial of suits on Gazetted holidays if vitiates the decree* With the consent of both par ties a Civil Court holiday was fixed for the exami nation of some of the Defendant s witnesses in a suit Owing to plaintiff s failure to bring any pleader to cross examine the witnesses on that date the Court adjourned the suit till the next day which too was a holiday On this date too the Plaintiff could not bring any pleader and two witnesses were examined but were not cross examined by the Plaintiff In the e circum stances the suit was ultimately dismissed *Held* that inasmuch as there was no consent by the parties to the adjournment of the case till the next day which was also a close holiday the pro ceedings of the trial Court were irregular and the irregularity prejudiced the Plaintiff The suit must be retried in accordance with law *Ram Das v Official Liquidator I L R 9 All 366 (1887) Sheoram v Thakur Prasad I L R 30 All 136 (1908) Bennett* v *Potter 2 Cr & J 622* (1832) and *Andrews* v *Elliott 5 El & Bl 502 (1855) 6 El & Bl 338 (1856)* referred to LAMBO NATH DATTA BARUA *v* SARUNATH DATTA BARUA
25 C W N 300

HOLOGRAPH WILL

See EVIDENCE ACT (I OF 1872) ss 38 45 I L R 41 All 248

HOME GUARANTEE

See CONTRACT I L R 43 Calc 77

HOMESTEAD LAND

See ADVERSE POSSESSION
I L R 40 Calc 173

See JURISDICTION OF CIVIL COURT
I L R 40 Calc 402

——— transferability of—

See LANDLORD AND TENANT
1 Pat L J 502

——— *Suit for rent—Juris diction—Protected unar tenure—Revenue Sale Act (XI of 1859) s 37 cl. (4)—Garden—Incum brances annulment of on sale of taluk for arrears of revenue—Provincial Small Cause Courts Act (IX of 1887) Sch. II Art 8—Second appeal—Civil Procedure Code (Act V of 1908) s 102* S 102 of the Civil Procedure Code is no bar to second appeals in suits for rent other than hou e rent although the value thereof does not exceed Rs. 500 *vide* Art 8 of Schedule II of the Provincial Small Cause Courts Act. *Soundaram Ayyar* v *Sennia Naickan I L R 23 Mad 547* distinguished. When land ceased to be garden land about a quarter of a century ago and tenants have been settled on the land since then the tenure is not protected and does not fall within the 4th exception to s. 37 of the Revenue Sale Act (XI of 1859) *and is liable to be annulled. The effect of a* sale is not *ipso facto* to avoid under tenures the purchaser has the option of avoiding them or keeping them intact. *Titu Bibi* v *Mohesh Chander Bagchi I L R 9 Calc 683* followed. It is neces sary therefore that the purchaser must by some unequivocal act indicate his intention to avoid under tenures if he desires to do so and the election of the purchaser to avoid must be brought to the knowledge of the under tenure holder A formal written notice is not essential. *Dursan Singh* v *Bhawani Koer 17 C W N 981* followed and explained. The facts that the *purchaser demanded rents from the tenants to* the knowledge of the under tenure holder sued the tenants for *rent* took out warrants of attach ment in execution of decrees and realized rents from the tenants in repudiation of the under tenure holder s title go to show that the under tenure holder had not only notice of unequivocal acts on the part of the purchaser indicating his election to avoid the *mokarrari* but the pur *chaser had in fact obtained pos session of the* estate *Mir Waziruddin* v *Deoki Nandan 6 C L J 474* distinguished. *Per* N R CHATTERJEA J The mere fact that a garden was made on a piece of land a quarter of a century before the sale would not make it land on which a garden has been made for all time to come *Per* BEACH CROFT J No particular method of expressing an intention to annul an under tenure is necessary *There must be established (i) a definite intention* to annul (ii) an indication of that intention to the under tenure holder To afford *protection the* work must *still be in existence* or the land be used for the purpose of the work. The perfect tense in leases of land whereon ——gardens *have* been made denotes a present state *Obiter* If the *busti* land is covered by the lease of the land on which the mill stands or if the *busti* is an *integral part of the mill,* and exists only for the purposes of the mill, it is possible that it might be protected. SAHADORA MUDIALI *v* NABIN CHAND BORAL (1914) I L R 42 Calc 638

HUNDI—*contd*

——————— *Suit on hundi—Hundi passed up country and not made payable in Bombay—Consideration of the hundi being the balance of account between the Bombay merchant and the up country merchant—Account settled up country—Jurisdiction of the High Court—Letters Patent cl 12—Leave of the Court to sue—Cause of action* The plaintiffs carrying on business in Bombay had dealings with the defendant residing and carrying on business at Bassum in Akola. The account between the parties was made up and settled at Bassum as a result of which the defendant passed at Bassum two *hundies* drawn on his own firm for Rs 900 and Rs 1 000 respectively, in favour of the plaintiffs. On the failure of the defendant to meet the said *hundies* at the due dates the plaintiffs brought a suit in the High Court at Bombay to recover the amount due on the same. The defendant pleaded that the Court had no jurisdiction to entertain the suit as the moneys were not payable in Bombay The plaintiffs contended that as the consideration of the *hundies* was the balance of the account due by the defendant to the plaintiffs in respect of the transactions effected in Bombay the moneys were virtually payable in Bombay and the material part of the cause of action arose in Bombay *Held* that the cause of action being founded upon the *hundies* and the *hundies* not being made payable in Bombay the Court had no jurisdiction to entertain the suit *Per* MACLEOD J —In giving leave under cl. 12 of the Letters Patent in suits on promissory notes or *hundies* I have always given leave when the money was payable in Bombay and in my opinion if there are transactions in Bombay which result in a credit in favour of the Bombay merchant against an up country merchant and if the Bombay merchant goes to settle his account up country and accepts a promissory note or *hundi* in satisfaction of his account then if he wants to sue on that note in Bombay he must take the precaution to see that the note is made payable in Bombay SEWARAM GOKALDAS *v* BAJRANGDAT HARDWAR (1916) I L R 40 Bom 473

——————— *Hundi drawn by second defendant without disclosing the name of any other person liable as principal—Evidence inadmissible either by claim or in defence to show that drawer was acting for an undisclosed principal—Principal must be disclosed by name on the document to make him liable—Negotiable Instruments Act 1881 ss 26 27 and 28—English Bills of Exchange Act 1882 s 23* The name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand. It is not sufficient that the name of the principal should be in some way disclosed it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable on the bill. Ss 26 27 and 28 of the Negotiable Instruments Act 1881 contain nothing inconsistent with the above principles and nothing to support the contention which is contrary to all established rules that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. In this case it was held that on the terms of the *hundis* sued on, it did not appear that the first defendant was a principal and that the second defendant who drew them was solely liable thereon SADASUK JANKI DAS *v* SIR KISHAN PERSHAD (1918) I L R 46 Calc 663

HUNDI SHAH JOG

——————— *Payment to the Shah—Fraudulent hundi—Duty of Shah to trace the drawer—Payment of hundi not as Shah but as indorsee for collection of the hundi—Custom of Marwari merchants—In case of fraud notice when to be given—Laches* On the 10th June 1912 the defendants presented to the plaintiff for payment a *hundi* for Rs 3 000 purporting to be drawn by one *R* in favour of *M* on the plaintiff payable at sight to a *Shah*. The plaintiff having had no advice regarding the said *hundi* refused to pay the said sum of Rs. 3 000 On the next day the plaintiff received a letter purporting to be written by *R* from Harpalpur enclosing a railway receipt for 300 bags of linseed stated to have been consigned by *R* from Rampur Station and asking the plaintiff to sell the goods and in the mean time to accept and pay on presentment two *hundis* each for Rs. 3 000 drawn by *R* in favour of *M* on the plaintiff payable at sight to a *Shah*. The same day the plaintiff handed over the said railway receipt to one *K* and received payment of Rs 5 600 The plaintiff thereupon paid Rs. 3 000 together with one day's interest to the defendants in respect of the *hundi* which had been presented by the defendants to the plaintiff on the previous day as aforesaid and which was one of the *hundies* mentioned in the letter The goods referred to in the railway receipt never arrived and *K* returned the said receipt to the plaintiff and was repaid the sum of Rs. 5 600 On inquiries being instituted it was found that no such person as *R* existed and that the *hundi* and the railway receipt were forged. The plaintiff sued to recover the money from the defendants relying on the custom prevailing among Marwari Merchants that the *Shah* who obtained payment of a Shah Jog *hundi* was, in the event of the *hundi* turning out to be a false fraudulent stolen or forged *hundi* bound to refund the amount of the *hundi* with interest unless he traced it to its source *i e* produced the actual drawer or the person who committed the fraud *Held* (i) that the defendants had been paid not as *Shah* but as indorsee for collection of a *hundi* purporting to be drawn against the security of a railway receipt (ii) Assuming that there might be a liability imposed on the defendants by reason of the payment to refund or to trace the *hundi* to its source, this would only be the case provided notice was given within *reasonable time* of the discovery of the forgery, that is provided the plaintiff lost no time in making this communication and claiming the refund (iii) That the *hundi* had been traced to its source within the meaning of the Marwari Association Rules before the defendants received information of the fraud. P D SETHNA *v* JWALAPRASAD GAYAPRASAD (1914) I L R 39 Bom 213

HUNTER'S STATISTICAL ACCOUNTS

——— *Admissibility in private litigation* Reference cannot legitimately be made to statements in Hunter s Statistical Accounts for the purpose of establishing the existence of Private right. AHMODI TROUM v TARAKNATH GHOSE (1913) 17 C W N 1173

HURT

See CHARGE I L R 40 Calc 168

See CUMULATIVE SENTENCES I L R 40 Calc 511

See PENAL CODE (ACT XLV OF 1860) ss 337 338 I L R 39 Bom 523

HUSBAND

——— complaint by—

See COMPLAINT I L R 41 Calc 1013

——— liability of—

See WIFE I L R 44 Calc 35

HUSBAND AND WIFE

See CONTRACT ACT (IX OF 1872) s 25 I L R 37 Bom 280

See DIVORCE

See DIVORCE ACT (IV OF 1869) s 14 I L R 41 Bom 36

See HINDU LAW—HUSBAND AND WIFE

See HINDU LAW—INHERITANCE I L R 36 Bom 138

See PRESIDENCY SMALL CAUSE COURT ACT 1882 I L R 45 Bom 318

See RESULTING TRUST I L R 48 Calc 260

——— Concealment of Pregnancy—

See MAHOMADAN LAW I L R 45 Bom 151

——— decree for Restitution of Conjugal Rights—

See CIVIL PROCEDURE CODE 1908 O XXI r 33 I L R 44 Bom 972

See MUHAMMADAN LAW I L R 1 Lah 597

——— [liabil]ity for Wife s Costs—

See DIVORCE I L R 41 Calc 963

1 ——— *Suit by husband [for] divorce on the ground of wife s fault—Allegation [of] her theft of jewellery belonging to husband—Wife s [ab]andonment of defence and submission to decree for [di]vorce—Decree not by mutual consent—Subse[que]nt suit for partition of property—Civil Procedure [Co]de (Act XIV of 1882) ss 42 43—Objection taken [for] first time on appeal.* For the purpose of dealing [wit]h and distributing in accordance with the [Bu]rmese Buddhist law property belonging to a [hu]sband and wife who have been divorced it was [nec]essary in a suit brought by the husband for [par]tition to determine whether the divorce was by [mu]tual con ent or was granted on the fault of the [wife] [illegible] from the husband s claim to a [illegible] the wife s offence that she [illegible] devices stolen certain [illegible]ty and he asked for a [illegible]e The wife in her [illegible] s to her misconduct [illegible] he suit with costs Witnesses were summoned but on the day fixed for hearing she abandoned her defence and although continuing to deny her guilt consented to a divorce and judgment was therefore given for a decree as prayed *Held* (upholding the decision of the District Judge) that the divorce was not made by mutual consent The proceedings disclosed not an agreement between husband and wife but a claim by the husband to which the wife submitted It was objected for the first time on appeal to the Chief Court that the hu band had no right to partition of the property unless he asked for it in the suit for divorce The Chief Court held that the matter being one of procedure must be determined by ss 42 and 43 of the Civil Procedure Code of 1882, and decided that having failed to include in his suit for divorce a claim for partition he must be taken to have relinquished it and his subsequent sui for that relief was barred *Held* that it was too late to raise the point for the first time in the Court of appeal *Held* also (reversing the decision of the Chief Court) that ss 42 and 43 were not applicable to a ca e like the present The cause of action for divorce was the misconduct of the wife and the cau e of action for the partition was the divorce of the wife founded on that misconduct The evidence needed in each ca e was also different and the ground of divorce must be first and separately proved as a distinct cause of action before any qu stion of partition could properly ari e If the Court found that the plaintiff had unnecessarily served his claim for a partition from that for a divorce it could punish him by the exercise of its discretion as to costs but such a severance did not come within the mischief aimed at by ss 42 and 43 of the Code so as to bar the claim to a partition which may be founded on the decree for divorce itself MAUNG PE v MA LON MAGALE (1911) I L R 38 Calc 629

[UNITED PROV]... [ACT] (III OF 1901)—

ss. 107 111 I L R [illegible]

ss 107 111 112 I L R 3[illegible]

2 ——— *Restitution of conjugal rights demanded and refused—Inaction for more than two years—Suit for restitution barred under Limitation Act (XV of 1877) Art 35—Limitation Act (IX of 1908)—General Clauses Act (X of 1897) s 6* On 11th July 1906 the plaintiff sent his wife (who had left him) a notice demanding restitution of conjugal rights The demand was refused on 19th July 1906 but the suit for restitution further on 20th July 1911 filed a suit for restitution tually on 20th July 1911 particular form of remedy had be[come barred] *Held* that this particular form of remedy had become barred under Article 35 of the old Limitation Act (XV of 1877) *Dhanjibhoy Bomanji v Hirabai I L R 25 Bom 644* followed *Held* further that having become so barred it could not be revived by the passing of the new Limitation Act (IX of 1908) The provisions of s 6 of the General Clauses Act (X of 1897) discussed MAHOMED MEHDI v SAKINA BAI (1912) I L R 37 Bom 393

HUSBAND'S DEBT

See HINDU LAW—WIDOW I L R 39 Mad 565

——— decree against widow for—

See HINDU LAW—WIDOW I L R 39 Mad 565

HUSBAND'S ESTATE

——— accumulations of income of—

See HINDU LAW—STRIDHAN I L R 41 Calc 87